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Governance in the Economic and Monetary Union':
Asymmetry or Dis-integration? (WP)**

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The New ‘Treaty on Stability, Coordination and Governance in the Economic and Monetary Union’: Asymmetry or Dis-integration?¹

*Giuseppe Martinico and Carlo Maria Cantore**

Summary

What will be the impact of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union on the classical constitutional narrative of European integration? Will it be a step back to intergovernmentalism and an evident loss in terms of supranationalism? This Working Paper aims to provide some answers to these questions and attempts to analyse the impact of the agreement’s contents on the European integration process.

(1) This Paper’s Aims

What will be the impact of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union on the classical constitutional narrative of European integration? Will it be a step back to intergovernmentalism and an evident loss in terms of supranationalism? This Working Paper aims to provide some answers to these questions and attempts to analyse the impact of the agreement’s contents on the European integration process.

The paper is structured as follows: after recalling the options devised or suggested by scholars in order to overcome the EU’s institutional crisis, it proceeds to analyse the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (TSCG), focusing on the use of enhanced cooperation techniques, as repeatedly advocated therein.

The paper’s main argument is as follows: enhanced cooperation is not *per se* a tool for either potential disintegration or unbearable asymmetry. On the contrary, it was drawn up as a means to further EU integration. Nevertheless, it remains to be seen whether its

¹ This paper is the result of joint reflections; nevertheless, parts 5 and 6 are by Carlo Maria Cantore and parts 1, 2, 3 and 4 by Giuseppe Martinico. The final remarks were written jointly by the two authors, who would also like to express their gratitude to M. Carrozza, Bruno de Witte and Miguel Poiaras Maduro for their comments.

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use, as advocated in the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (ie, in a document which is, from a formal point of view, alien to the wording of the fundamental EU Treaties: the Treaty of the European Union – TEU– and the Treaty on the Functioning of the European Union –TFEU–) might in theory be conducive to disintegration.

(2) What Should the EU do to Address the Eurozone Crisis?

What should the EU do to address the Eurozone crisis? This is a crucial question but to which this paper cannot give a final answer. Its more modest aim is to analyse the institutional options that have been taken into account in the past few months and to explore their impact on the EU's constitutional architecture.

Examining the recent debate, the following options seem to have been taken into account in the attempt to overcome the EU's institutional crisis:

- (1) Reform of the EU treaties.
- (2) Enhanced cooperation.
- (3) The conclusion of an international agreement (ie, the plan officially endorsed by 25 European leaders at the beginning of March 2012).

This section will focus on both the negative and positive aspects of these options, reading them in light of the EU's constitutional dynamics.

The first option (reform of the EU Treaties) would be very risky since it would imply another round of constitutional politics. Nonetheless, it should be considered an option and therefore needs to be analysed. It would be time-consuming and perhaps unworkable at present due to the UK veto, although the British Deputy Prime Minister, Nick Clegg, recently predicted that the UK would eventually drop its veto on EU fiscal reforms.²

However, the possibility of reforming the EU Treaties should not be underestimated. The EU's institutions might have an interest in bringing the discipline of Euro-governance back into the Treaties in the near future, and there are several think-tanks that are currently proposing something along these lines.³

Moreover, the revision of the EU Treaties would be 'consistent' with the recent rounds of constitutional politics in the Union. Indeed, the impact of the present economic crisis on

² 'British Deputy PM: EU Veto is "Temporary"', 10/I/2012, <http://euobserver.com/19/114817>.

³ For instance, see the 'Appeal to European Leaders for the Euro and European Stability and Development' launched by the Centre for Studies on Federalism, <http://csfederalismo.it/index.php/en/component/content/article/17-convegna/2317-appello-ai-leader-europei-per-un-euro-e-uneuropa-della-stabilita-e-dello-sviluppo>.

the EU's legal architecture can be analysed in the light of what has been called the 'the semi-permanent Treaty revision process' (De Witte, 2002) and the EU's uncompleted constitutionalisation (Snyder, 2003).

Accordingly, the semi-permanent revision of the Treaties would make it very difficult to attempt to transpose the idea of a Constitution to the supranational level: the Constitution, in fact, should be the fundamental charter, that is, a document characterised by a certain degree of resilience and continuity. Against this background, the European Treaties seem unable to lead Europe's social forces: they can only 'reflect historical movements', thus appearing to be mere snapshot constitutions. This is precisely what Besselink argues when he writes that 'a formal EU "constitution", if ever realized, would only be a momentary reflection, no more than a snap-shot', hence the comparison with a *Grundgesetz* (Besselink, 2008).⁴ In other words, the EU Constitution (partly written and partly not) would limit itself to 'codifying' the constitutional dynamics that emerged through changing circumstances.

While the conclusion of the Reform Treaty seemed, at first, to represent the final moment of the debate, recent attempts to address the consequences of the sovereign debt crisis show that another round of constitutional politics might be needed.

Regardless of the possible contents of a new EU Treaty,⁵ this would be the next link in the chain of reforms, confirm the nature of the EU Treaties as a mere snapshot constitution and provide a new boost to the EU constitutional odyssey (Martinico, 2011). This is confirmed by Art. 16 of the new Treaty, which seems to favour a future incorporation of this discipline into EU law.⁶ However, Treaty revision is actually just one of the possible solutions to the institutional impasse triggered by the European debt crisis. Potentially, other solutions could be found, namely through enhanced cooperation and by the signing of an international agreement outside the scope of the EU Treaties.

⁴ In fact, according to Besselink (2008), the notion of a Constitution itself as applied to the EU results in an ambiguous picture, with that of a fundamental law (*Grundgesetz* rather than *Verfassung*) being more suitable. This seems to imply a sceptical approach to the issue of the European Constitution's formalisation, conceived as a real constitutional moment. The author himself reached this conclusion after having distinguished between two categories of constitution: revolutionary and evolutionary. 'These revolutionary constitutions tend to have a blueprint character, wishing to invent the design for a future which is different from the past... Old-fashioned historic constitutions are, on the contrary, evolutionary in character'. When observing evolutionary/historical constitutions, one realises that 'Codification, consolidation and adaptation are more predominant motives than modification. The constitution reflects historical movements outside itself' (Besselink, 2008).

⁵ See the proposals made by Andrew Duff (ALDE, UK), 2011, http://www.europolitics.info/pdf/gratuit_en/304954-en.pdf.

⁶ Art. 16: 'Within five years at most following the entry into force of this Treaty, on the basis of an assessment of the experience with its implementation, the necessary steps shall be taken, in compliance with the provisions of the Treaty on the European Union and the Treaty on the Functioning of the European Union, with the aim of incorporating the substance of this Treaty into the legal framework of the European Union'.



The two options noted above would be conducive to asymmetrical solutions: asymmetry is an option which has frequently been experimented with in federalising processes (Palermo, 2007; Watts, 2005), especially in federal or quasi-federal contexts characterised by the coexistence of different legal and cultural backgrounds (Canada, for instance). One should take this into account before conceiving, for instance, enhanced cooperation as a form of ‘constitutional evil’ conducive to a ‘disintegrative’ multi-speed Europe.

On the contrary, asymmetry might even serve as an instrument of constitutional integration, as comparative law shows. For instance, flexibility and asymmetry are two of the most important features of Canadian federalism, partly explained by taking into account the country’s cultural and economic diversity: ‘Federal symmetry refers to the uniformity among member states in the pattern of their relationships within a federal system. “Asymmetry” in a federal system, therefore, occurs where there is a differentiation in the degrees of autonomy and power among the constituent units’ (Watts, 2005). However, asymmetry does not refer to mere differences in geography, demography or resources between a federation’s components or to the variety of laws or public policies present in a given territory.⁷

Enhanced cooperation definitely belongs to the universe of the asymmetric option: it aims to ensure unity and diversity at the same time. In fact, it allows member states to experiment with different forms of integration without ‘shutting the door’ to those unwilling to take steps towards deeper integration in specific areas. It can be conceived as a sort of *extrema ratio* to be used when the Council realises that the goals of integration cannot be achieved by relying on the Treaties’ provisions and following the normal dynamics of the European integration process. All these elements serve as constitutional safeguards since they make the asymmetry produced by enhanced cooperation sustainable under EU law.

Moreover, enhanced cooperation could be an option *per se* but it could also be used together with another instrument, namely the *passerelle* clause, governed by Article 48 TEU. In fact, Article 333 TFEU expressly allows the use of the *passerelle* within enhanced cooperation.⁸

⁷ The word asymmetry has acquired a variety of meanings: when talking about asymmetries one can distinguish between financial and constitutional asymmetry, or between *de jure* and *de facto* asymmetry. *De jure* asymmetry ‘refers to asymmetry embedded in constitutional and legal processes, where constituent units are treated differently under the law. The latter, *de facto* asymmetry, refers to the actual practices or relationships arising from the impact of cultural, social and economic differences among constituent units within a federation, and, as Tarlton noted, is typical of relations within virtually all federations’ (Watts, 2005).

⁸ Art. 333 TFEU: ‘1. Where a provision of the Treaties which may be applied in the context of enhanced cooperation stipulates that the Council shall act unanimously, the Council, acting unanimously in accordance with the arrangements laid down in Article 330, may adopt a decision stipulating that it will act by a qualified majority.

‘2. Where a provision of the Treaties which may be applied in the context of enhanced cooperation stipulates that the Council shall adopt acts under a special legislative procedure, the Council, acting unanimously in

The advantage of enhanced cooperation was obvious: it could avoid a time-consuming reform of the Treaties. It could also demonstrate the maturity of the current constitutional architecture of the Treaties, since it is an instrument governed by the EU's current fundamental charter, without the need to find a solution to the European debt crisis out of the present system.

Finally, enhanced cooperation would not lead to an inevitable breach with the UK or with other member States, which could decide to join the enterprise at a later date, whereas such a reunion would be much more complicated in the case of a 'pure' international agreement.⁹ In the long run, indeed, the institutional implication of the choice for an international agreement will be managed without the guarantees provided by the regulatory framework on enhanced cooperation. It basically means that third parties wishing to access the pre-existent sub-union will not have the same rights as 'outsiders' in enhanced cooperation schemes. However, the issue will be addressed in more detail in sections 5 and 6.

Although this course of action might seem outdated in light of the recent political developments, taking a closer look at the draft of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union it is possible to see that the use of enhanced cooperation techniques is repeatedly advocated therein. Enhanced cooperation still remains a valid option, yet its use is encouraged in a text which is formally out of the Treaties' armoury.

(3) Treaty on Stability, Coordination and Governance in the Economic and Monetary Union

Twenty-five European leaders signed the new TSCG at the beginning of March 2012. What will change with the new Treaty's entry into force? The issue has been disputed among scholars, particularly as regards the innovative contents introduced in EU law by means of this international Treaty.

This section recalls the agreement's main contents, focusing on four issues: its structure, its relation with EU law, its nature (whether innovative or not) and, eventually, the role to be played in this context by the EU institutions.

accordance with the arrangements laid down in Article 330, may adopt a decision stipulating that it will act under the ordinary legislative procedure. The Council shall act after consulting the European Parliament.

'3. Paragraphs 1 and 2 shall not apply to decisions having military or defence implications.'

⁹ It is interesting to note the content of Art. 15 of the TSCG: 'This Treaty shall be open to accession by Member States of the European Union other than the Contracting Parties. Accession shall be effective upon the deposit of the instruments of accession with the Depository, who shall notify the other Contracting Parties thereof'.

Such openness differs from the model followed within the frame of an enhanced cooperation since it follows a pure public international law logic.

The Treaty is divided into six parts: Purpose and Scope (Art. 1), Consistency and Relationship with Law of the Union (Art. 2), Fiscal Compact (Art. 3-8), Economic Policy Coordination and Convergence (Art. 9-11), Governance of the Euro Area (Art. 12-13) and General and Final Provisions (Art. 14-16).

From the point of view of constitutional law, the most important clauses are: Art. 1, devoted to the Treaty's aim, namely 'to strengthen the economic pillar of the economic and monetary Union by adopting a set of rules intended to foster budgetary discipline through a fiscal compact, to strengthen the coordination of economic policies and to improve the governance of the euro area, thereby supporting the achievement of the European Union's objectives for sustainable growth, employment, competitiveness and social cohesion'; Art. 2, concerning the relationship with EU law and reaffirming the precedence of EU law over the Treaty, a point which is present in many other parts of it (for instance Art. 3);¹⁰ and Art. 3.2, providing for the need for States to codify the budget rule in national law 'through provisions of binding force and permanent character, preferably constitutional, or otherwise guaranteed to be fully respected and adhered to'. It is debatable whether this last provision (Art. 3.2) is inconsistent with Art. 4.2 of the TEU,¹¹ that states the need to respect the EU member states' national identities and constitutional structures.¹²

¹⁰ For instance, art. 3 reads that the fiscal compact is to be applied 'without prejudice to the obligations derived from European Union law'; Art. 7, concerning sanctions for states in excessive deficit procedure, is applicable 'while fully respecting the procedural requirements of the European Union Treaties'. A similar reference to EU law contained in art. 10 on enhanced cooperation applies 'In accordance with the requirements of the European Union Treaties'. In this respect one should take into account also Art. 5.2 TEU: 'the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein'; and art. 13.2 TEU: 'Each institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them'.

¹¹ Art. 4 TEU: '1. In accordance with Article 5, competences not conferred upon the Union in the Treaties remain with the Member States. 2. The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State. 3. Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives'.

¹² 'The obligation in Art 3(2) has been significantly watered down. The early version was framed in terms of a mandatory obligation to have the correction mechanism enshrined in national binding provisions of a "constitutional or equivalent nature". The wording of Art 3(2) in version 3, of 10 Jan. 2012, was weaker: the rules in Article 3(1) were to be enforced through "provisions of binding force and permanent character, preferably constitutional, that are guaranteed to be respected throughout the national budgetary process". Article 3(2) has in this respect been further weakened by version 4 of 19 Jan... Second, obligations akin to those in Draft Art 3(2) already exist. Thus Directive 2011/85, Arts 5-7, contain obligations for all member States, except the UK, to have numerical rules in place in their national law to promote compliance with its

Furthermore, it is unclear what would happen in the event of countries which, formally, do not have a document officially called a Constitution (ie, Germany¹³ and the Netherlands). Things are even more complex in countries whose fundamental laws are written in more than one document (Sweden, for instance).

Another reference to EU law is included in Art. 5, which requires that ‘A Contracting Party that is subject to an excessive deficit procedure under the Treaties on which the European Union is founded shall put in place a budgetary and economic partnership programme including a detailed description of the structural reforms which must be put in place and implemented to ensure an effective and durable correction of its excessive deficit. The content and format of such programmes shall be defined in European Union law. Their submission to the Council of the European Union and to the European Commission for endorsement and their monitoring will take place within the context of the existing surveillance procedures under the Stability and Growth Pact’.¹⁴

Art. 5 also expressly refers to EU law, requiring that contracting parties subject to excessive deficit procedures put in place recovery programmes, whose content and format needs to be defined in EU law.

Another problematic provision is Art. 8,¹⁵ which gives the CJEU the jurisdiction to rule on the parties’ compliance with the requirements of the Treaty’s Art. 3.2.¹⁶

obligations deriving from the TFEU in the area of budgetary policy over a multiannual horizon. These rules should promote compliance inter alia with reference values on deficit and debt set in accordance with the TFEU. In addition one of the remaining Commission proposals, COM(2011) 821, will, when enacted, impose obligations on Member States to have national rules ‘preferably of a binding constitutional character’ designed to implement in their national budget process the EU rules on multilateral surveillance. This obligation is contained in Draft Art 4 of this proposal. If this becomes law then the obligation in this regulation will actually be stronger than that in Art 3(2) of the Draft Treaty’ (Craig, 2012).

13 One could argue that Germans have already carried out a financial reform in 2009 but this happened before the new TSCG. Will this reform be sufficient?

¹⁴ ‘2. The implementation of the budgetary and economic partnership programme, and the yearly budgetary plans consistent with it, will be monitored by the Council of the European Union and by the European Commission’.

¹⁵ Art. 8: ‘1. The European Commission is invited to present in due time to the Contracting Parties a report on the provisions adopted by each of them in compliance with Article 3(2). If the European Commission, after having given the Contracting Party concerned the opportunity to submit its observations, concludes in its report that a Contracting Party has failed to comply with Article 3(2), the matter will be brought to the Court of Justice of the European Union by one or more of the Contracting Parties. Where a Contracting Party considers, independently of the Commission’s report, that another Contracting Party has failed to comply with Article 3(2), it may also bring the matter to the Court of Justice. In both cases, the judgment of the Court of Justice shall be binding on the parties in the procedure, which shall take the necessary measures to comply with the judgment within a period to be decided by the Court.

‘2. If, on the basis of its own assessment or of an assessment by the European Commission, a Contracting Party considers that another Contracting Party has not taken the necessary measures to comply with the judgment of the Court of Justice referred to in paragraph 1, it may bring the case before the Court of Justice and request the imposition of financial sanctions following criteria established by the Commission in the

Is this provision compatible with the TFEU? The Preamble of the international agreement refers to Art. 273 TFEU¹⁷ and Art. 260 TFEU¹⁸, but Art. 273 TFEU seems to be very clear in anchoring the CJEU's jurisdiction to the EU Treaties.¹⁹

framework of Article 260 of the Treaty on the Functioning of the European Union. If the Court finds that the Contracting Party concerned has not complied with its judgment, it may impose on it a lump sum or a penalty payment appropriate in the circumstances and that shall not exceed 0,1 % of its gross domestic product. The amounts imposed on a Contracting Party whose currency is the euro shall be payable to the European Stability Mechanism. In other cases, payments shall be made to the general budget of the European Union.

'3. This Article constitutes a special agreement between the Contracting Parties within the meaning of Article 273 of the Treaty on the Functioning of the European Union'.

¹⁶ 'Considerable attention has been focused on Article 8, under which the EU Court of Justice may determine whether a party to the treaty has complied with Article 3(2). The first part of this Article requires transposition of the fiscal compact into national law "through provisions of binding force and permanent character, preferably constitutional", implying that the role of the Court would simply be to assess whether or not this had been done. The Article goes on to require the putting in place at a national level of an automatic correction mechanism to keep states on the right path towards meeting the goals of the compact. If a state has failed to comply with Article 3(2), the Court can specify the time period within which the state must take the necessary measure to comply. If the state then fails to comply with this ruling, the Court may impose a fine "that shall not exceed 0.1% of its gross domestic product". A case may only be brought by another party (state), but there is also a role for the Commission. If the Commission concludes in a report that a contracting party has failed to comply with Article 3(2), then "the matter will be brought to the Court of Justice" by one or more of the other parties. This appears to be a requirement, but it is not clear how it will be decided which state or states will commence proceedings' (House of Lords, 2012).

¹⁷ Art. 273 TFEU: 'The Court of Justice shall have jurisdiction in any dispute between Member States which relates to the subject matter of the Treaties if the dispute is submitted to it under a special agreement between the parties'.

¹⁸ Art. 260 TFEU: '1. If the Court of Justice of the European Union finds that a Member State has failed to fulfil an obligation under the Treaties, the State shall be required to take the necessary measures to comply with the judgment of the Court.

'2. If the Commission considers that the Member State concerned has not taken the necessary measures to comply with the judgment of the Court, it may bring the case before the Court after giving that State the opportunity to submit its observations. It shall specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances.

'If the Court finds that the Member State concerned has not complied with its judgment it may impose a lump sum or penalty payment on it.

'This procedure shall be without prejudice to Article 259.

'3. When the Commission brings a case before the Court pursuant to Article 258 on the grounds that the Member State concerned has failed to fulfil its obligation to notify measures transposing a directive adopted under a legislative procedure, it may, when it deems appropriate, specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances.

'If the Court finds that there is an infringement it may impose a lump sum or penalty payment on the Member State concerned not exceeding the amount specified by the Commission. The payment obligation shall take effect on the date set by the Court in its judgment'.

¹⁹ 'Professor Craig agreed that Article 273 was sufficient to give the Court jurisdiction, but that Article 8 of the proposed treaty caused difficulties because even though the Commission would not bring a case in name, the provisions meant that it might do so in effect, and there is no provision under the EU treaties for the Commission to bring such a case' (House of Lords, 2012). 'First, under the present version—what I am calling version 4, a copy of which came out on 19 January—the prospect of the Commission bringing an action in its

As the Court said, the extension of its competences is possible provided that the core of the Treaties²⁰ is respected. This point, again, led commentators to take into account the

own name has been dropped from Article 8. My own view is that that would not have been lawful; it would not have been a lawful reading of Article 273 of the TFEU. Article 273 is the article that is being used in order to give the Court jurisdiction. I do not believe that Article 273 could accommodate an action brought by the Commission. So that provision is not there any longer in the current version of Article 8 and I do not believe it would have been lawful to keep it in. That is the first point. The second point is that Article 273 is, I think, a lawful route for the Court to have jurisdiction over an interstate dispute of the kind envisaged in Article 8 and under this treaty. I think that in principle the ECJ would say that the subject matter of this treaty relates to the subject matter of the EU treaties and that therefore, if parties agree, the ECJ would be willing to adjudicate on an issue brought before it by one of the parties. However, while I think that Article 273 is a possible legal route, I have nonetheless the following reservations about it. I have two reservations, which I will explain very briefly given the exigencies of time. First, I think that it is very unlikely that one state will wish to sue another state under this treaty. One of the main avenues that is posited by Article 8 is the idea that one state sues another state that is not compliant with the balanced budget rules. I think that there are all sorts of political reasons why that is very unlikely to happen and why states would be very reluctant for it to happen. Experience under the analogous provisions of the main Lisbon Treaty, Articles 258 to 260, indicate that interstate actions are very rare.

‘The second point I want to make is this. Under Article 8 as presently formulated, although the Commission cannot bring an action in its own name under Article 273, it is the Commission that in effect mandates a legal action brought by the state. The present formulation of Article 8 is quite clever but quite problematic, I think. The way that Article 8 is now framed is as follows. The Commission is invited to report on whether a state is meeting the requirements under Article 3(2) to have a proper correction mechanism for balancing budgets and, if it concludes that the state does not have a proper correction mechanism, what Article 8 now says is that a state will bring an action against the recalcitrant state. I think that that is deeply problematic for two related reasons. One is that in substance this still seems to me to be that the Commission is really bringing the action. It is brought in the name of a state but in substance it is the Commission holding the gun, pulling the trigger and just putting a state before the court. Secondly, difficult issues will have to be worked out about how you choose the state that is going to bring the action. If you think about it, what are you going to do? You have to have a taxi cab rank rule, which is that state X will say, “I sued Greece last week, let somebody else sue Greece this week,” or something like that. Clearly, in order to avoid that kind of thing, an invidious choice for the Commission, you will just have to have a line as to which state should bring legal action. It seems to me deeply problematic. So, yes, 273 is a possible route, I do not see it as being very efficacious because states will not sue each voluntarily and if they are pushed into doing it by the Commission then in effect you have the Commission in substance really bringing the action’ (Craig, 2012).

‘The Court of Justice has in fact said that the EU’s institutions can be given a role outside the scope of EU law – see Case C-316/91 EP v Council and C-181/91 and C-248/91 EP v Council and Commission. These cases involved collective action by all Member States, but the Court did not limit its remarks to this circumstance. The Court has also said that it can be given extra jurisdiction not referred to in the Treaties as long as it does not affect its core nature (see, for instance, Opinion 1/00). The latter case-law concerns the EU’s external relations, but it is open to argue that it applies equally to measures adopted by a group of Member States. Certainly the Member States have assumed that it does, for example when they conferred jurisdiction on the Court of Justice to interpret the Rome Convention on conflict of law in contract.

‘Therefore the doubts about the legality of the use of the EU institutions outside the framework of EU law which are set out in my comments above assume that the Court of Justice would take a strict approach, and rule out all such use when only some, rather than all, Member States make use of the EU institutions. But it is quite possible that the Court would accept in principle that some Member States can make use of the EU institutions, although this would probably be subject to conditions, for example concerning the supremacy of EU law’ (Peers, 2012).

very finality of this new international agreement in order to assess its compatibility with the EU Treaties.

In order to do so, it would be necessary to clarify the exact 'scope' of the new international agreement and, again, this is where scholars are divided.

According to Peers (and to a certain extent Craig), the new international agreement would add 'very little to the measures already set out in EU law or which have been or could be proposed as part of EU law'.²¹

Confirmation of this can be found even in the words pronounced at the end of last year (December 2011) by Guy Verhofstadt: 'it is for political, symbolic reasons that they want to do this agreement'.²²

On the other hand, as the British Minister for Europe said: 'there is no provision in the European Union treaties to make a balanced budget rule binding in a Member State's national law or subject to the jurisdiction of the European Court of Justice. There is no provision in the existing treaties for an automatic correction mechanism where a Member State deviates from that balanced budget path' (as stated in the House of Lords in 2012).

Those who argue that the new treaty would bring about innovations also indicate that it would confer new powers on some EU institutions, particularly the Commission:

'Two points to make about this: First, there is room for disagreement as to whether particular provisions of this Draft Treaty confer "new" functions on the Commission. However, in my view there are aspects of, for example, Articles 7 and 8 that in substance confer new powers on the Commission.

'Second, I reiterate the point that I made when I gave evidence: the mere fact that the Commission does have certain powers already under the Lisbon Treaty and legislation made thereunder does not in itself render lawful or legitimate the use of analogous powers outside the confines of the LT...

'Thus the fact that a power is recognized in the LT plus legislation made thereunder does not per se legitimise recognition and use of the same power in a different institutional context, viz under this Draft Treaty. Whether the same power can be used in a different institutional context must, as a matter of principle, depend on interpretation of the Lisbon Treaty. It would have to be argued that the proper interpretation of the relevant

²¹ 'There was general agreement with Professor Peers' view of the legal aspect, and our witnesses highlighted the ways in which provisions in the proposed Treaty were effectively mirrored in existing EU Treaty and legislative obligations. It is worth considering further whether there is any significant element of the treaty which is not or could not be achieved within the existing legal framework, not least for its relevance to the ease with which the proposed treaty might in due course be integrated into the EU legal framework, as proposed in Article 16' (House of Lords, 2012).

²² Reported by H. Mahony, 2011.

institutional provisions of the Lisbon Treaty was that the powers granted therein and in legislation made pursuant to the LT could also be used by the institutions in a different Treaty setting. It might be possible to reach this conclusion, but it is by no means straightforward and the justificatory exercise has not to my knowledge even been undertaken' (Craig, 2012).

(4) The New Treaty: Asymmetry or Disintegration?

As recalled at the beginning of this paper, asymmetry is an institutional solution envisaged by many constitutional and even international systems. The EU already has forms of asymmetry, and enhanced cooperation²³ is just one of them, along with the opting-out mechanism (Miles, 2005) and the open method of coordination (Scharpf, 2007).²⁴

Asymmetry is even well known in international law, an example being the World Trade Organisation (WTO), which allows members to sign Preferential Trade Agreements (PTAs) with one or more other members. An international law agreement between member states –and this is where the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union comes in– could be used to produce a similar effect to that pursued by enhanced cooperation but with a minor role being played by supranational actors, with a consequent move back in terms of supranationalism and a return to the logic of international law.

The actor that could be excluded from the possible dynamics of the agreement is the one that has traditionally acted as the European federator (Starr-Deelen & Deelen, 1996): the CJEU. Moreover, from a legal point of view, the agreement should be assessed in light of the principle of loyal cooperation (the former Art. 10 ECT, now partly substituted by Art.

²³ See the recent decision in the fields of divorce and unitary patent in Beneyto (2009) and Cantore (2011). See in general, de Burca & Scott (2000). From a slightly different perspective, see Bauböck (2001).

²⁴ 'Le Canada et l'Union européenne peuvent ainsi être vus comme des espaces politiques où, plus inintentionnellement qu'intentionnellement, une nouvelle forme d'organisation des pouvoirs publics et de la société internationale est en train d'être inventée. Y émergent en effet des formes similaires de fédéralisme multinational asymétrique mêlant supranationalisme et intergouvernementalisme, fédéralisme fondé non plus sur une hiérarchie de pouvoir entre l'État fédéral et les entités fédérées, mais sur une hiérarchie de valeur entre ordres de gouvernement égaux et en compétition pour l'allégeance des citoyens' (Theret, 2002). Theret also points out the differences between the two processes: 'Au Canada, un État-nation, le Québec, cherche à se constituer. L'État-nation est sans doute également en gestation chez les nations autochtones qui revendiquent leur reconnaissance institutionnelle et son émergence remet en cause un ordre politique fédéral constitué à l'origine sur un mode centralisateur. La question de la reconnaissance du caractère multinational de la fédération y est ainsi de plus en plus souvent posée. Dans l'UE, où l'État-nation est le point de départ, c'est l'inverse : le palier fédéral en devenir cherche à se faire une place en réorganisant l'ordre politique régional sans pour autant pouvoir en dépasser le caractère multinational. On peut alors considérer que, sauf accident de parcours, l'UE et le Canada se dirigent tous deux vers une reformulation similaire des principes du fédéralisme, reformulation par laquelle un compromis stable serait trouvé entre supranationalisme et intergouvernementalisme' (*Ibid.*).

4 EUT). Even the possibility of the member states concluding international agreements encounters limitations arising from the principle of loyal cooperation, as codified in Art. 351 TFEU.

In our view, an international agreement aimed at covering a sphere of competence that might not be covered by enhanced cooperation would be inconsistent with the principle of loyal cooperation. This conclusion brings us back to the need to assess the compatibility between the agreement and the EU's goals. The agreement in question is rich in references to the EU treaties (see Art. 2)²⁵ but there are certain clauses that are at the very least ambiguous in this respect such as, for instance, Art. 8,²⁶ which seems to limit the jurisdiction of the CJEU to its compliance with Art. 3.2 of the TSCG, leaving the CJEU at the margin of the 'life' of all the other provisions of this new instrument.

²⁵ '1. This Treaty shall be applied and interpreted by the Contracting Parties in conformity with the Treaties on which the European Union is founded, in particular Art. 4(3) of the Treaty on European Union, and with European Union law, including procedural law whenever the adoption of secondary legislation is required.
'2. The provisions of this Treaty shall apply insofar as they are compatible with the Treaties on which the Union is founded and with European Union law. They shall not encroach upon the competences of the Union to act in the area of the economic union'.

²⁶ See the first version of the agreement: 'Any Contracting Party which considers that another Contracting Party has failed to comply with Art. 3(2) may bring the matter before the Court of Justice of the European Union. The judgment of the Court of Justice of the European Union shall be binding on the parties in the procedure, which shall take the necessary measures to comply with the judgment within a period to be decided by said Court. The implementation of the rules put in place by the Contracting Parties to comply with Art. 3(2) will be subject to the review of the national Courts of the Contracting Parties'. The new version states: '1. The European Commission is invited to present in due time to the Contracting Parties a report on the provisions adopted by each of them in compliance with Art. 3(2). If the European Commission, after having given the Contracting Party concerned the opportunity to submit its observations, concludes in its report that a Contracting Party has failed to comply with Art. 3(2), the matter will be brought to the Court of Justice of the European Union by one or more of the Contracting Parties. Where a Contracting Party considers, independently of the Commission's report, that another Contracting Party has failed to comply with Art. 3(2), it may also bring the matter to the Court of Justice. In both cases, the judgment of the Court of Justice shall be binding on the parties in the procedure, which shall take the necessary measures to comply with the judgment within a period to be decided by the Court.

'2. If, on the basis of its own assessment or of an assessment by the European Commission, a Contracting Party considers that another Contracting Party has not taken the necessary measures to comply with the judgment of the Court of Justice referred to in paragraph 1, it may bring the case before the Court of Justice and request the imposition of financial sanctions following criteria established by the Commission in the framework of Article 260 of the Treaty on the Functioning of the European Union. If the Court finds that the Contracting Party concerned has not complied with its judgment, it may impose on it a lump sum or a penalty payment appropriate in the circumstances and that shall not exceed 0.1 % of its gross domestic product. The amounts imposed on a Contracting Party whose currency is the euro shall be payable to the European Stability Mechanism. In other cases, payments shall be made to the general budget of the European Union.

'3. This Article constitutes a special agreement between the Contracting Parties within the meaning of Article 273 of the Treaty on the Functioning of the European Union'.

Notwithstanding the formalised connections between the agreement and Europe's fundamental Treaties (the TEU and the TFEU), it is difficult to envisage how to involve the European institutions in its functioning:

'I fail to see, though, how the European Commission [can] participate in the monitoring of fiscal stability in this case. Enhanced cooperation (Art. 20 TEU and art. 329 TFEU) seems more appropriate. The problem there is that only the European Commission can propose an enhanced cooperation to the Council, and the European Parliament must also approve it. This can lead to substantial delays of the procedure' (Georgiev, 2011).

We share these doubts and will now look at the specific issue of the use of enhanced cooperation as governed by the TSCG, by treating it as a specific case study to present some conclusions on the broader question of the new Treaty's compatibility with EU Law.

(5) The Mass Use of Enhanced Cooperation Advocated in the TSCG

Art. 10 of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union states that 'in accordance with the requirements of the European Union Treaties, the Contracting Parties stand ready to make active use, whenever appropriate and necessary, of measures specific to those Member States whose currency is the euro as provided for in Art. 136 of the Treaty on the Functioning of the European Union and of enhanced cooperation as provided for in Art. 20 of the Treaty on European Union and in Art. 326 to 334 of the Treaty on the Functioning of the European Union on matters that are essential for the smooth functioning of the euro area, without undermining the internal market'. 'Active use' is advocated even in the first lines of the Preamble of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union.

In our view, despite the references to the EU in the TSCG, the use of enhanced cooperation outside the scope of the EU might give rise to problematic consequences for EU integration.

In order to give an account of the issue of the consistency of this instrument outside the scope of the TFEU and TEU, it is first necessary to recall the discipline governing enhanced cooperation under the Lisbon Treaty. Our argument can be summarised as follows:

- (1) Under EU law enhanced cooperation has some constitutional safeguards: its openness, the necessity to respect the fundamental principles of the *acquis communautaire* and the limits of competences; all these elements are absent outside the scope of the EU Treaties.
- (2) The constitutional safeguards make the asymmetry produced by enhanced cooperation 'sustainable' and give enhanced cooperation an added value.

- (3) The constitutional safeguards stem from the spirit of the EU Treaties, not only from their wording.
- (4) The safeguards are generally absent outside the scope of EU law (ie, public international law and the law of international organisations, see the comparison with PTAs in WTO Law).
- (5) The constitutional safeguards have been only partially reflected in the wording of the new TSCG.

The new discipline for enhanced cooperation consists of a single Article of the TEU (Art. 20) and a special Title in the Treaty on the Functioning of the European Union (Arts. 326-335 TFEU). The TFEU –generally speaking– sets out uniform rules for the establishment of enhanced cooperation in all sectors that do not fall within the EU's exclusive competence.²⁷

The discipline sets out rules regarding the conditions to be met when some of the member states wish to integrate in particular policy areas. Some of them relate to the goals that enhanced cooperation schemes should necessarily pursue. Enhanced cooperation, in fact, was clearly created as a means to foster European integration first among those member states wishing to deepen political integration, leaving the door open to other members to join them at a later stage.²⁸

Other rules were drawn up in order to provide some caveats to the member states embarking on a new enhanced cooperation scheme. The rationales behind these rules are to preserve the unity of the EU legal order and to not harm EU members who decide to stay outside the sub-unions.²⁹

The pivotal provision in the architecture of enhanced cooperation is Art. 328 TFEU, whereby legislators have provided strong guarantees in order to ensure the unity and stability of the EU's legal system as a whole. First, it is clearly acknowledged that it should be open to all member states able to prove that they have met the requirements set up in the authorising decision. Moreover, enhanced cooperation should leave the door

²⁷ There are some important differences in the field of the EU Common Foreign and Security and Defence Policy (CFSDP), but since no enhanced cooperation in this field has been established so far, we decided not to dwell on the topic in this paper. For a detailed overview of this issue, see Cremona (2009).

²⁸ Art. 20, Para. 1, TEU, reads: '... Enhanced cooperation shall aim to further the objectives of the Union, protect its interests and reinforce its integration process...'.

²⁹ Enhanced cooperation 'shall comply with the Treaties and Union law' (Art. 326, para. 1 TFEU), 'shall not undermine the internal market or economic, social and territorial cohesion' nor 'shall [it]... constitute a barrier to or discrimination in trade between Member States, nor shall it distort competition between them' (Art. 326, Para. 2). 'Any enhanced cooperation shall respect the competences, rights and obligations of those Member States which do not participate in it. Those Member States shall not impede its implementation by the participating Member States'. Art. 327 TFEU.

open to third parties also at a later stage, provided that they have met all the conditions imposed by the Treaties and by the participating members in enhanced cooperation.³⁰

The Commission 'may'³¹ then decide to back the request of nine or more member states to foster their integration through enhanced cooperation, but the Treaty does not oblige the Commission, not even under special circumstances, to submit a proposal to the Council (Craig, 2010, p. 441). This provision is of crucial importance, since it was drawn up to safeguard the unity of the system and avoid the risk of a completely fragmented EU. Art. 329, Para. 1, TFEU goes on to affirm that after the Commission has submitted a proposal to the Council, the latter has the power to authorise proceeding with it by qualified majority voting (QMV), after obtaining the consent of the European Parliament. It is crucial to highlight that under the new rules set out in the Lisbon Treaty, the European Parliament has the power to give its consent to all enhanced cooperation proposals, except those in the field of foreign policy.

Transparency plays an important role in the architecture of the norms that are described here. Art. 330 TFEU authorises all members of the Council to participate in the deliberations on enhanced cooperation, irrespective of whether or not they are part of it. However, they cannot vote and they do not have to be counted on for decisions.

Art. 333 TFEU allows members of enhanced cooperation schemes to unanimously agree to modify the decision-making processes, except for measures having military or defence implications. Indeed, the Council³² may decide that in cases where the Treaties would normally require unanimity, decisions can be adopted by QMV instead. Moreover, the Council can also decide to move from a special to ordinary legislative procedure if it deems that it is appropriate.

The last provision of the Title of the TFEU devoted to enhanced cooperation provides another 'assurance' for the system's unity. The Treaty refers to the Commission and the Council as the institutions with the responsibility of ensuring that activities undertaken in the context of enhanced cooperation are not in contradiction with the EU's policies and objectives.

(6) The Pros and Cons of Enhanced Cooperation and the Difficult Balance between Asymmetry and Unity

³⁰ The openness mechanism must respect the decision taken by the members of enhanced cooperation to impose some 'objective' requirements for later accessions to the pre-existing group, like the Euro-group and the Schengen area. It cannot be excluded at this stage that some member states will decide to integrate particularly delicate policy areas and this will obviously require stricter conditions for third parties wishing to join in later.

³¹ Art. 329, Para. 1 TFEU, first subparagraph: 'The Commission may submit a proposal to the Council to that effect'.

³² Art. 333 TFEU makes an explicit renvoi to Art. 330, so the Council must be considered as being in the composition described in the latter provision.

The approval of two enhanced cooperation schemes so far, in a period of disillusion with European integration, demonstrates the huge potential of this powerful tool. Therefore, the question arises of what level of asymmetry is sustainable. In order to answer this, it is worth highlighting the pros and cons of enhanced cooperation when striking a balance between asymmetry and unity.

European public opinion and academic circles have been involved in an intense debate over the possibility of accepting a multi-speed Europe even in policy areas that are different from those covered by the Euro and Schengen Areas. Some have considered enhanced cooperation to be the second-best option in cases where decisions at the central level are not likely to be taken, as long there are guarantees for non-participating member states (Baldwin *et al.*, 2001). Others, while not taking a position specifically against mechanisms of asymmetric integration, have expressed concerns over the drawbacks of a multi-speed Europe (Philippart *et al.*, 1999).

It would be useful to compare this debate with the long-standing discussion within World Trade scholarship regarding 'regionalism vs multilateralism' in order to understand the level of asymmetry a system can tolerate and how important safeguards for third parties to sub-unions are within legal orders. The WTO allows its members to sign Preferential Trade Agreements (PTAs) with one or more other members, provided that certain requirements are met. Therefore, it is an international *forum* which permits asymmetric integration between its members, making it a useful comparison for the issues discussed so far in this paper. It is interesting to see how the WTO strikes a balance between unity and asymmetry, compared to what happens at the EU level according to the general rules for the establishment of enhanced cooperation schemes.

Given the impressive proliferation of PTAs at the WTO level, scholars have investigated the issue of whether this phenomenon is a threat to unity or an opportunity and what the welfare implications are for third parties (WTO members not participating in PTAs). On the one hand, some scholars consider that PTAs undermine the WTO's architecture and compromise free trade (Bhagwati, 2002), while on the other, some consider PTAs to be the building blocks of future integration at the multilateral level (Baldwin, 2006), envisaging a sort of 'domino effect'.

Going into further detail, we can assume that the rules on enhanced cooperation as they were modified by the Lisbon Treaty, given the 'no veto–no exclusion' structure of the regulatory scheme (Bordignon *et al.*, 2006: third parties cannot impede the establishment of enhanced cooperation and have the right to join in at a later stage), may potentially represent an effective way of fostering European integration. This is undoubtedly true if we look at the guarantees for third parties provided by the rules on enhanced cooperation and compare them with what happens in the WTO. There are four considerations that must be made:

- (1) Common agents (control): in the case of enhanced cooperation, the Commission and the European Parliament play a fundamental role. This means that the remaining member states, by means of their representatives in the Commission and the European Parliament, can influence relevant decisions regarding whether or not to authorise the establishment of enhanced cooperation or can at least participate in all the stages of the procedures, thus avoiding a lack of information. Furthermore, the Commission (along with the Council as a whole) is in charge of overseeing the implementation of enhanced cooperation schemes, thus ensuring that they respect the unity of the EU system. This does not happen at the WTO level, since members wishing to sign a PTA only need to notify the Secretariat, without the approval of a common agent.
- (2) Transparency: asymmetry of information can be a serious threat in cases of sub-unions, because it can give rise to problems for third parties as they try to meet the necessary requirements for joining enhanced cooperation schemes. Contrary to what has been laid down under Art. XXIV GATT and Art. V GATS, EU member states can participate in the Council meetings in the case of enhanced cooperation even if they are not parties to it (obviously, they do not have the right to vote). Lack of information regarding what is being decided at the regional level is one of the main concerns regarding the proliferation of PTAs among WTO members. Indeed, this is why some scholars have argued in favour of solutions that give interested WTO members 'the right to participate in the activities of PTAs to which they are not parties' (Davey, 2011, p. 248).
- (3) Sector specificity: in order to comply with the rules of WTO Treaties (Art. XXIV GATT for trade in goods and Art. V GATS for trade in services), PTAs among members must commit to liberalising 'substantially all trade' (for trade in goods) or must have 'substantial sectoral coverage' (as regards trade in services). This is exactly the opposite of what the EU rules require for the establishment of enhanced cooperation, since it can only be established in specific and detailed policy areas. This is a guarantee not only for those member states without the political will to join an enhanced cooperation scheme from the beginning, but also for those which do not meet the objective requirements for joining it. Indeed, allowing for very specific enhanced cooperation is the only way for member states that are not yet ready to commit to further supranational integration nor to lose too much ground *vis-à-vis* other European partners.
- (4) Openness: WTO rules do not regulate the possibility of third parties joining already existing PTAs. However, since there is no common agent comparable to the EU Commission at the WTO level, the decision on later accessions is completely at the discretion of the original PTA members. This is what best legitimises the concerns related to fragmentation and asymmetry in the WTO context. To this extent, enhanced

cooperation rules in the EU Treaties provide again for third-party-friendly rules. Member states that wish to join a pre-existing enhanced cooperation scheme at a later stage have to submit their request to the Commission. Moreover, in the event that the Commission rejects their request, they can even 'appeal' to the Council for a final decision.

Enhanced cooperation rules are based on three main principles: transparency, openness and control. The combination of these principles along with the absence of the power of veto for member states lacking the will (or the possibility) of joining the enhanced cooperation make the system apparently well balanced and respectful of all member states' needs. Contrary to what occurs in the WTO, the EU seems to have provided the necessary guarantees to third parties, thus preserving unity. Although it is too early to make forecasts or to learn lessons from the enhanced cooperation experience, the pros and cons of the regulatory scheme can be outlined.

The pros of the possibility of agreeing on enhanced cooperation schemes are that policy innovation can be faster and the schemes can lead to new experiences in terms of policies and agency design. Conversely, the cons are that the repeated use of enhanced cooperation or the malfunctioning of openness and transparency mechanisms might progressively undermine the unity of the integration process. Such a situation would be highly detrimental for third parties, since transaction costs might rise. Moreover, a classic concern regarding enhanced cooperation –the increase in centrifugal tendencies– remains in the background.

After the various enlargements, the EU experienced a long period of institutional *impasse* and failed in its reform attempts because of the constant tension between integration and sovereignty. The Lisbon Treaty made it easier to integrate policies, at least for the member states that willing to do so, without obliging them to wait for all the other EU members to agree. All the safeguards provided by the Treaties and the nature of the 'last resort option' make enhanced cooperation a powerful tool to promote integration at the broader EU level.

Craig (2010, p. 449) has written that 'The idea that acts adopted in pursuance of enhanced cooperation only bind the parties thereto, and do not form part of the more general *acquis*, has always been central to the conceptualization of this area and remains so... The idea that acts adopted pursuant to enhanced cooperation and the judicial interpretation thereof by the EU courts can be hermetically sealed from the remainder of EU law may well prove considerably more difficult in practice than in theory'. This is a serious concern and it should be verified in practice. However, one of the ideas behind the regulatory scheme on enhanced cooperation is that it can be established only in very specific policy areas. Therefore, it will probably not be so hard for courts to separate the wheat from the chaff when issuing judgements on particular policy areas. Furthermore, enhanced

cooperation was devised as a tool for the progressive integration of the EU as a whole. The two-speed situation it leads to should only be considered temporary, and this is probably why the issue of the different laws that must be applied by the EU courts was not addressed extensively by the framers.

A legal analysis of the provisions shows that, in theory, enhanced cooperation was devised as a balanced tool to foster European integration. However, only time will tell how the legitimate concerns expressed by some scholars regarding the alleged threats to the unity of the system will be addressed.

(7) Final Remarks

Scholars have recently stressed that, despite the intergovernmental nature of this agreement, its conclusion does not imply an alteration of the supranational character of the EU enterprise:

‘This is a tempting, but I think, misleading, conclusion. Whereas it would seem that national governments have had the upper hand in maintaining ownership and control of the process of integration at the expense of the Union’s institutions, particularly in the Euro-crisis, it is important to remember that the current political drama unfolding in the crisis is completely unscripted from the EU’s viewpoint. To a large extent, there is simply no law available to empower supranational institutions to act when a Eurozone member goes bust and the currency itself is threatened and such legal provision, where it does exist, is by way of an express prohibition of the EU institutions (notably the ECB) taking much of the palliative measures touted in the media (eg, Art. 123 & 125 TFEU).. As the ECJ never tires of telling us, the EU is a community based on the rule of law which, in essence, means the principle of conferral, such that unlike in state constitutional systems, Union institutions have no residual power to govern in the public interest given that their powers are “legalized” to within an inch of their lives. Even the residual powers clause in the treaties, Article 352 of the TFEU, lacks the requisite flexibility to deal with crisis comparable to the prerogative or emergency powers enjoyed by national administrations... However, even if it seems that the position has inverted from when Weiler was writing in the early 80s, the proposals being put forward for a new Treaty as the last ditch attempt to save the currency, with a rigid implementation of the rules of the currency enforced by inter alia the ECJ, may mark a return to the relevance of supranational law in pushing forward the integration process, promoting the role of the other EU institutions in its wake’ (Mac Amhlaigh, 2011).

We do not agree with this conclusion, since one of the reasons for amending the Treaties is the fact that the current Treaties have actually shown their inadequacy, as Ruffert pointed out: ‘From the beginning, the Member States’ rescuing activity has been under close legal scrutiny by European legal scholars, and rightly so. There are good reasons to

submit that this policy is in breach of important provisions of the TFEU' (Ruffert, 2011, p. 1785).³³

Should we consider such a return to the intergovernmental method irreversible? The Treaty of which we have written so far is certainly peculiar in many aspects. The most tricky aspect, however, is that it intervenes in a situation already dominated by asymmetry, adding another pattern of differentiation. In fact, besides the already existing asymmetry between Euro and non-Euro members, the latter will also be differentiated, from now on, between those who signed the new Treaty and those who did not. This situation will certainly increase the degree of asymmetry of the EU's economic governance. It remains to be seen whether this will be an intermediate stage in the road towards integration at the general EU level or, less optimistically, a pattern for disintegration.

Anyway, the increasing level of interdependence between the EU member states' economies required a prompt and as common as possible institutional response. Failures in budgetary policies at the national level led to negative externalities for the EU as a whole. This new Treaty cannot be considered other than the initial step towards a more integrated economic governance of the EU. Given the difficulties in pursuing other more time-consuming routes, an international treaty between the parties that agreed to do so at the first stage was probably the more feasible solution, as explained above.

Of course, quick solutions usually lead to situations dominated by imperfection and ambiguity. Given the international law character of this new Treaty, the CJEU, which has played a fundamental role in clarifying the scope and boundaries of many unclear provisions of the EU's fundamental treaties over the years, will stand a few steps back and solutions will be agreed between the parties themselves on a case-by-case basis.

The impression gained from the current scenario, however, is that of a Union which is currently struggling with its own constitutional limits, putting pressure on national institutions and actors (the Greek and Italian cases are highly representative from this point of view): are we sure that this increases the EU's legitimacy? Events will tell whether constitutional pluralism will be the best constitutional theory possible for the EU.

³³ 'To begin with, Article 125(1) TFEU is rather explicit: "The Union shall not be liable for or assume the commitments of central Governments... of any Member State... A Member State shall not be liable for or assume the commitments of central Governments... of another Member State..." In the present legal situation, a bailout by the Union (first sentence) or by one or more Member States (second sentence) is forbidden. As a result, the decision of the Eurogroup of 2 May 2010 concerning Greece, the establishment of the EFSF, the extension of both in 2011 and the Eurogroup's support for Ireland and Portugal are in breach of European Union law' (Ruffert, 2011, p. 1785).



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