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Implementation of the Lisbon Treaty Improving functioning of the EU: Economic and Monetary Policy

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DIRECTORATE GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT C: CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS

CONSTITUTIONAL AFFAIRS

Implementation of the Lisbon Treaty – Improving functioning of the EU: Economic and Monetary Policy

STUDY

Abstract

The Treaty chapter on Economic and Monetary Union became after the entry into force of the Lisbon Treaty one of the most disputed chapters of the Treaties. The economic and financial crisis revealed the shortcomings of the asymmetric EMU. The present study assesses the unused potential of the existing Treaty chapter in order to improve the functioning of the EU. In order to do so, the study suggests to switch the perspective on the Treaty potential from competences to compliance. By identifying the lack of mechanisms in the existing economic policy coordination framework aiming at addressing non-compliance because of a Member State's incapacity to comply, the study suggests the introduction of an incentive-based enforcement mechanism (for the short term) and of a fiscal capacity (for the medium term) within the existing Treaties. Furthermore, the establishment of the Eurozone budget, of a Redemption Fund or the adoption of a convergence code is discussed. By the same token, the legal inclusion of the Fiscal Compact and the ESM-Treaty is examined and concrete proposals are developed. Finally, the study addresses ways of increasing the accountability and legitimacy in EMU affairs.

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CONTENTS

LIST OF ABBREVIATIONS

EBA	European Banking Authority
ECB	European Central Bank
ECJ	European Court of Justice
EMU	Economic and Monetary Union
ESM	European Stability Mechanism
GC	General Court
SGP	Stability and Growth Pact
SRF	Single Resolution Fund
TEU	Treaty on European Union
TFEU	Treaty on the Funtioning of the European Union
TSCG	Treaty on Stability, Coordination and Governance in the Economic and Monetary Union

EXECUTIVE SUMMARY

The Economic and Monetary Union (EMU) became after the entry into force of the Lisbon Treaty the chapter that received the most attention of all Treaty chapters. The economic and financial crisis that broke out in 2008 revealed the shortcomings of the existing Treaty provisions and forced the Union legislator to adopt far-reaching secondary law in order to compensate for these shortcomings. Consequently, much attention is paid to the possibilities left within the Treaty boundaries to reform EMU and to proposals for a future Treaty change to make EMU workable.

The present study takes first a look at the state-of-art of EMU, the changes that the Lisbon Treaty introduced and the new economic governance that was created by the so-called 'six pack' and 'two pack' legislation. Based on an analysis of the state-of-art, this study assesses to which extent additional improvements of the economic governance can be achieved within the Treaty boundaries. By that, the study throws a light on the unused potential of the Lisbon Treaty. Furthermore, where the Treaty boundaries are reached, the present study will develop proposals for future Treaty amendments in order to realise improvements.

In order to bring out concrete proposals that can still be implemented within the existing Treaties, a change of perspective is presently proposed: From competences to compliance. The legal bases in the EMU chapter have only a limited scope. The well-known asymmetry of EMU does not allow for setting legally binding policy goals for Member States' national economic and fiscal policies. By that, a perspective based on competences will quickly reach the Treaty boundaries. Yet, if one takes a perspective based on compliance, one realises that legally binding rules are only one way of achieving compliance with policy goals set at Union level. If a Member State is breaching Union law, the latter takes precedence over the non-compliant national law and can be enforced by (national and European) courts. In the current system of economic policy coordination, this method of achieving compliance is excluded because of the intergovernmental nature of the economic policy coordination. A perspective based on competences must now come to the conclusion that the shortcomings of the current EMU require a Treaty change. A perspective based on compliance, however, unveils the unused potential of the Lisbon Treaty in the area of economic policy coordination. The perspective based on compliance looks from the policy goals set by 'soft law' instruments such as the broad guidelines to the result to be achieved, which is an adaption of national economic and fiscal policies to the policy goals set at EU level. If the Union may now introduce different kinds of mechanisms to achieve compliance than the ones in place within the Treaty boundaries, further deepening of the EMU without Treaty change may be achieved. Under the heading of strengthening compliance (Chapter 2), the present study discusses the introduction of a **convergence code** (section 2.3), an **incentive-based enforcement mechanism** of economic policy coordination and the idea of an EMU **fiscal capacity** (section 2.1). Inherently linked to the two latter is the idea of establishing a **Euro area budget** (section 2.2). At hand, it is proposed to take the capability of a Member State to be compliant more into consideration when improving the current legal framework, whilst it will be established that the current system to achieve compliance in economic policy coordination is primarily based on addressing a Member State's will not to comply. When focussing at a Member State's capability to comply, the question of how to deal with past excessive government debt of the Member States and, by that, the idea of a **European Redemption Fund** (section 2.4) and, by the same token, the question of how to avoid future excessive indebtedness and, by that, the **inclusion of the Fiscal Compact into EU law** (section 2.5) are to be addressed. The chapter demonstrates that significant elements of these ideas can already be implemented on the basis of the existing Treaties if designed in a certain manner.

Chapter 3 discusses proposals that seek to modify the institutional structure of EMU. In this context, the study examines the suggested **strengthening of the ECJ in the budgetary surveillance procedure** (section 3.1) and the introduction of an **EU Finance Minister** (section 3.2). Both institutional changes require, from a legal perspective, Treaty changes in order to be realised. From a political perspective, the present contribution raises several reservations. Finally, **the inclusion of the ESM-Treaty into the EU legal framework** (section 3.3) calls for significant institutional changes, whilst the substance could also be introduced into the current EU law without Treaty change. Seeing, however, the impact of the ESM on European as well as national policy and decision-making, it is presently suggested to only include the ESM into the EU law by a Treaty amendment.

Lastly, the issue of democratic accountability of the decision-making in EMU affairs and the legitimacy of decisions taken is addressed in chapter 4. Applying an analytical framework (section 4.1) that consists of two elements (foundations of accountability and instruments of accountability) to the state of affairs with regard to accountability in the area of EMU, one has to conclude that the European Parliament as the forum that holds the actors in EMU to account has no sufficient instruments of accountability. There is only the Economic Dialogue besides the standard accountability instruments of the European Parliament such as the set up a of temporary committee of inquiry, a motion of censure or the veto of the Union budget. Furthermore, even the foundations of accountability are precarious since there is only a comprehensive obligation to inform the European Parliament on EMU affairs on the parts of the European Commission and to a somewhat lesser extent on the parts of the Council. There are only minor information obligations on the parts of the European Council and the Eurogroup. Chapter 4 therefore examines ways to **enhance the accountability of the Eurogroup** (section 4.2), which includes the extension of the information obligations for the European Commission within the Economic and Dialogue to the Eurogroup, the inclusion of the Eurogroup into Regulation (EC) No 1049/2001 on public access to documents and the possibility to elect the Commissioner for Economic and Monetary Affairs as president of the Eurogroup. Furthermore, several proposals for **enhancing instruments of accountability for the European Parliament** are discussed (section 4.3) such as the extension of the ordinary legislative procedure to matters of economic and fiscal affairs, the potential of concluding interinstitutional agreements and of concluding an agreement with the ESM or the establishment of a new Parliamentary body in Eurozone matters. Covered by this discussion is also a proposal to use Union agencies as instruments to increase accountability and legitimacy of European decisions. This proposal refers to the increasing importance of uniform implementation of harmonised rules. The possibility for the Union legislator to confer executive powers upon Union agencies, as confirmed by the ECJ, gives the Union legislator the opportunity to intensify supervision of the Union's executive action.

In conclusion, Annex II presents a proposal for Treaty changes that are required in order to realise the policy options discussed by this study.

1. ANALYSIS OF THE STATE-OF-THE-ART

1.1. Economic Union

1.1.1. Changes in the Lisbon Treaty

The Lisbon Treaty did not change much in the chapter on Economic Union compared to the previous Treaty. It introduced the ordinary legislative procedure in Article 121(6) TFEU for adopting measures in relation to the multilateral surveillance procedure. It, furthermore, included chapter 4 on 'provisions specific to Member States whose currency is the euro' comprising Articles 136 to 138 TFEU. The budgetary surveillance procedure remained untouched, whereas in Article 121(4) TFEU the Commission got a new instrument in the multilateral surveillance procedure, which is the possibility to directly address a warning to the Member State concerned. Finally, the reference to the "spirit of solidarity between Member States" in Article 122(1) TFEU was introduced by the Lisbon Treaty.

1.1.2. New Economic Governance

The Treaty of Lisbon did not change the basic construction of the Economic and Monetary Union as it was introduced by the Treaty of Maastricht. The basic construction is characterised by its asymmetry. Whilst the Monetary Union is a supranational one, the Economic Union remains intergovernmental. This division is in line with the traditional rather technocratic EU policy approach: Disciplining national democracies by a common monetary policy instead of replacing their decisions by a common economic and fiscal policy. National economic and fiscal policies should be aligned with certain policy goals set at EU level but without any legally binding enforcement mechanism. They should be disciplined by the markets based on the assumption that, as long as the position of a Member State on the financial markets is the same as of any other private institution, markets will indicate in form of decreasing or increasing interest rates on government bonds whether a national economic and fiscal policy is convincing or not. Therefore the no-bail-out clause (Article 125 TFEU), therefore no purchase of government bonds on primary markets by central banks (Article 123 TFEU), therefore no privileged access by central governments to financial institutions (Article 124 TFEU). The coordination of Member States' economic and fiscal policies was depoliticised at EU level by definition.

The main institution in the Monetary Union is the European Central Bank (ECB) equipped with an independence vis-à-vis any other Union institution and vis-à-vis national governments and Parliaments when carrying out the tasks and duties conferred upon it by the Treaties. The main institution in the Economic Union is the Council. It coordinates, mostly upon recommendation of the Commission, the economic policies of the Member States and it exercises the budget control under the excessive deficit procedure. The European Parliament has no major role in the supranational Monetary Union because of the independence of the ECB. It has no major role in the Economic Union either because of its intergovernmental nature. National Parliaments have no role in the Monetary Union since conducting the monetary policy is an exclusive EU competence. In addition, with regard to matters concerning the Economic Union national Parliaments are in an 'international law modus' and, traditionally, control their governments *ex post*.

This basic construction of the EMU cannot be changed outside a formal Treaty change procedure. This sets the limits for secondary law such as the 'Six Pack'[1] or the 'Two Pack'[2] regulations as well as for international treaties concluded by a subset of Member States such as the Treaty on Stability, Coordination and Governance in Economic and Monetary Union (TSCG) and the Treaty establishing the European Stability Mechanism (ESM-Treaty). The European Court of Justice (ECJ) confirmed this view in its 'Pringle' decision on the compatibility of the ESM-Treaty with EU law when it concluded that the ESM-Treaty could enter into force even before the formal introduction of the third paragraph of Article 136 into the TFEU, which stated that the Eurozone Member States might establish a stability mechanism (ECJ 2012b: para. 185). Independently of this 'Treaty change', the ESM-Treaty had to comply with the EU Treaties in order to be lawful.

The unchanged asymmetry of the EMU at the level of the Treaties means that the Treaty boundaries are reached when the coordination of Member States' economic and fiscal policies is to be supranationalised. Such supranationalisation can be assumed if decisions taken at European level may substitute economic and fiscal policy decisions taken at national level. This does, however, not lead to the conclusion that a Treaty change is inevitable in order to strengthen the European dimension of the Economic Union. There is still a potential within the Treaty boundaries. In order to uncover this potential, one should change the perspective of analysis from competences to compliance.

1.1.3. Means to ensure compliance under the current rules of the Economic Governance

One can distinguish five means to ensure compliance: *First,* there can be private enforcement. Private action builds up pressure on the non-compliant Member State and pushes the latter to modify its economic and fiscal policy decisions. *Second,* there can be public enforcement. Within public enforcement, one may distinguish several degrees of intensity. The least intense means of enforcement is 'naming and shaming'. A publication of non-compliance creates public pressure on the non-compliant Member State to align its economic and fiscal policies with the commonly set policy goals. There can be, *third,* sanctions for non-compliance, and, *fourth,* incentives for compliance. *Fifth,* and this is the most intense means to ensure compliance, European policy decisions substitute national economic and fiscal policy decisions. Non-compliance is then 'sanctioned' by substitution.

Out of these means, only the latter is excluded by the non-supranational nature of the Economic Union. The current choice of the Treaties is a combination of private enforcement and 'naming and shaming'. As already mentioned, higher interest rates on government bonds should make Member States modify their national policy choices. Publicly naming wrong policy choices should then reinforce or even trigger such private reactions. A closer look at the

[1] The 'Six Pack' consists of five regulations and one directive: Regulation (EU) No 1173/2011 on the effective enforcement of budgetary surveillance in the euro area, OJ 2011 L 306/1; Regulation (EU) No 1174/2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area, OJ 2011 L 306/8; Regulation (EU) No 1175/2011 amending Council Regulation (EU) No 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies, OJ 2011 L 306/12; Regulation (EU) No 1176/2011 on the prevention and correction of macroeconomic imbalances, OJ 2011 L 306/25; Council Regulation (EU) No 1177/2011 amending Regulation (EC) No 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure, OJ 2011 L 306/33; Council Directive 2011/85/EU on requirements for budgetary frameworks of the Member States, OJ 2011 L 306/41.

[2] The 'Two Pack' consists of two regulations: Regulation (EU) No 472/2013 on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability, OJ 2013, L 140/1, and Regulation (EU) No 473/2013 on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area, OJ 2013, L 140/11.

evolution of sovereign bond yields for euro area countries in the period between the introduction of the euro in 1999 and today reveals that this mechanism did not function properly. Until the collapse of Lehman Brothers in 2008, the yield curves of all euro area Member States converged at the yield level of German government bonds independently of the sustainability of a Member State's fiscal and economic policies (Kilponen et al. 2015: 289). Afterwards the yield spreads between the several government bonds broadened dramatically with a peak in June 2012 of an interest rate of 27.82 % on Greek government bonds compared to 1.30 % percent on German government bonds.[3] This development, which does not reflect the state of national fiscal and economic policies, reveals the shortcomings of the predominant enforcement mechanism in EMU matters, which is private enforcement. Financial market operators did not take the sustainability of these policies into account when calculating their risk. They did not send any signals to governments to change their policies.

Financial sanctions for non-compliance are explicitly foreseen by Article 126(11) TFEU in case a Member State whose currency is the Euro fails to put into practice the Council recommendation on remedying an established excessive government deficit within a specified time limit. Outside of Article 126(11) TFEU, the Treaties do not provide for any sanctions except for cases of non-compliance with judgments of the European Court of Justice (Article 260(2) TFEU) and in case of a 'serious and persistent breach by a Member State of the values referred to in Article 2 [TEU]' (Article 7(3) TEU). Yet, financial sanctions were introduced by the 'Six Pack' for Eurozone Member States. Regulations based on Articles 121(6) and 136 TFEU provide for interest-bearing deposits in case of a violation of the preventive arm of the Stability and Growth Pact (Article 4 of Regulation (EU) No 1173/2011) or in case of a non-correction of excessive macroeconomic imbalances (Article 3(1) of Regulation (EU) No 1174/2011). The latter can even be topped up by fines (Article 3(2) of Regulation (EU) No 1174/2011). Finally, already at an earlier stage of the excessive deficit procedure, non-interest bearing deposits can be required from a Member State that already lodged an interest-bearing deposit because of the violation of the preventive arm of the SGP once an excessive government deficit is established in accordance with Article 126(6) TFEU (Article 4(1) of Regulation (EU) No 1173/2011). Furthermore, according to Article 23(9) of Regulation 1303/2013 on common provisions of the European Structural and Investment Funds, the Council may suspend part or all of the commitments or payments for programmes of a Member State concerned where the Council decides that the Member State has not taken effective action to correct its excessive deficit, has submitted an insufficient corrective action plan, has not taken recommended actions in order to remedy an excessive macroeconomic imbalance or did not comply with the macroeconomic adjustment programme under Regulation (EU) No 472/2013.

The legality of those sanctions is doubtful. This follows from the fact that Primary law provides explicitly in Article 126(11) TFEU for sanctions against non-compliant Member States within the corrective arm of the Stability Growth Pact. This means in turn that there cannot be sanctions for Member States where Primary law does not provide for it and, consequently, that they cannot be introduced by Secondary law. These limits set by Primary law can also not be overcome by Article 136 TFEU, as will be explained under section 1.1.4.2. In addition to this legal argument, one may question the meaningfulness of a financial sanction with a view to persuade a Member State in economic and financial troubles to modify its economic and fiscal policies.

Finally, the last remaining mechanism to ensure compliance, which are incentives, is not yet explored by the Union legislator. Instead of sanctioning non-compliance, one may reward

[3] Data from the ECB Statistical Data Warehouse.

compliance. Elements of an incentive-based compliance mechanism can be found in Article 14 of the ESM-Treaty, according to which the ESM board of governors may decide to grant precautionary financial assistance. This assistance 'aims at helping ESM Members whose economic conditions are still sound to maintain continuous access to market financing by reinforcing the credibility of their macroeconomic performance while ensuring an adequate safety net' (Article 1 of the ESM Guideline on Precautionary Financial Assistance). The possibility of introducing an incentive-based enforcement mechanism within the Treaty legal framework on EMU is further explored in the next chapter under 2.1.

1.1.4. The use of instruments of differentiated integration

Since the Economic Union is, in essence, an intergovernmental Union, its deepening without Treaty change requires unanimous decisions in the Council. The power of a single Member State to rise a veto for reasons whatsoever undermines any attempts of deepening the Economic Union. Therefore, the TSCG already made reference in its Article 10 to 'to make active use, whenever appropriate and necessary, of measures specific to those Member States whose currency is the euro as provided for in Article 136 [TFEU] and of enhanced cooperation as provided for in Article 20 [TEU] and in Articles 326 to 334 [TFEU] on matters that are essential for the smooth functioning of the euro area, without undermining the internal market.' Against this background, the current framework of means for differentiated integration shall be assessed with a view to their potential to deepen the Economic Union at least for a subset of Member States if another Member State blocks any further integration within the Treaty boundaries by raising its veto. The current legal framework provides for an enhanced cooperation of a subset of Member States (1.1.4.1), for measures specific to Euro area Member States under Article 136 TFEU (1.1.4.2) and, under International law, for international agreements amongst a subset of Member States (1.1.4.3).

1.1.4.1. The use of Enhanced Cooperation in terms Article 20 TEU

The role model for a cooperation of a subset of Member States with a view to adopt legally binding rules is the Enhanced Cooperation in terms of Article 20 TEU. First, the procedural requirements for establishing an enhanced cooperation will be addressed before turning to the substantive ones.

1.1.4.1.1. Procedural requirements for establishing an enhanced cooperation

The procedure for establishing an enhanced cooperation is a three-step-procedure with, *first*, the authorisation procedure, *second*, the legislative procedure and, *third*, the participation procedure. In order to establish an enhanced cooperation between them, a subgroup of at least nine Member States has to submit a request to the European Commission, which may propose a decision authorising the enhanced cooperation to the Council. The decision whether or not the Commission will present such a proposal remains at the discretion of the Commission. The Council adopts, after obtaining the consent of the European Parliament, a decision with qualified majority amongst all EU Member States. The adoption of this decision is linked to two conditions: First, the objectives of the requested enhanced cooperation cannot be attained within a reasonable period by the Union as a whole and, second, this decision shall be adopted as a last resort.

In its recent decision on the legality of the enhanced cooperation concerning the creation of unitary patent protection (ECJ 2013) the European Court of Justice had the opportunity to specify both criteria. With regard to the impossibility to legislate with effect to the entire Union 'the impossibility referred to may [according to the ECJ] be due to various causes, for example, lack of interest on the part of one or more Member States or the inability of the

Member States, who have all shown themselves interested in the adoption of an arrangement at Union level, to reach agreement on the content of that arrangement.'

'The expression "as a last resort" highlights [for the European Court of Justice] the fact that only those situations in which it is impossible to adopt legislation in the foreseeable future may give rise to the adoption of a decision authorising enhanced cooperation.' However, not any 'fruitless negotiation could lead to one or more instances of enhanced cooperation, to the detriment of the search for a compromise enabling the adoption of legislation for the Union as a whole.' The authorising decision is therefore a 'balancing act' between the duty and need for negotiations with all EU Member States aimed at reaching a compromise, on the one hand, and the determination of a failure of these negotiations, on the other. The Council has a wide margin of political discretion for the determination whether or not to authorise the establishment of an enhanced cooperation.

On the basis on this authorising decision the participating Member States may proceed with the legislative procedure. Decision-making is modified, according to Article 330 TFEU, with regard to the Council, but explicitly not with regard to the European Parliament. All Member States may participate in the deliberations, but only the participating ones shall take part in the vote. The European Parliament, however, votes in its full composition.

Finally, once a non-participating Member State wishes to join an established enhanced cooperation, this Member State has to notify its intention to the Commission and the Council. The Commission either confirms the participation or indicates arrangements to be adopted in order to fulfil certain conditions for participation and sets a deadline. If after the expiry of this deadline the Commission still considers that the conditions are not yet met, the non-participating Member State may request a Council vote on the participation.

1.1.4.1.2. Substantive requirements for establishing an enhanced cooperation

With regard to the substantive requirements for establishing an enhanced cooperation, such cooperation shall not undermine the internal market and shall not constitute a discrimination based on grounds of nationality. It must therefore be in conformity with Primary as well as with existing Secondary law. This 'non-regression' with regard to the current state of Union law is furthermore combined with an obligation to only act in order to advance the Union. Enhanced cooperation is therefore only possible if it serves exclusively a better and quicker integration without harming the rights of non-participating Member States. Finally, an enhanced cooperation can only be established within the framework of the Union's non-exclusive competences. This means that all Union competences, which are not listed in Article 3(1) TFEU on the Union's exclusive competences, are suitable for the establishment of an enhanced cooperation, including Article 352(1) TFEU.

1.1.4.2. Article 136 TFEU

The European Parliament assigned a significant potential to Article 136 TFEU. In its resolution on the draft European Council decision amending Article 136 TFEU with regard to the ESM, the European Parliament considered that the ESM could have been established within the framework of the existing Treaties either on the basis of Article 136 TFEU or on the basis of Article 352 TFEU in conjunction with Articles 133 and 136 TFEU (cf. Point No. 9 of P7_TA (2011)0103).

A closer look at the wording of Article 136 TFEU, however, reveals that the potential of Article 136 TFEU is less significant than the European Parliament assumed. It states that 'in order to ensure the proper functioning of economic and monetary union […], the Council shall, in

accordance with the relevant procedure from among those referred to in Articles 121 and 126 […], adopt measures specific to those Member States whose currency is the euro to either strengthen the coordination and surveillance of their budgetary discipline or to set out economic policy guidelines for them, while ensuring that they […] are kept under surveillance.' This is an institutionalised form of an enhanced cooperation where the authorisation is given to the Euro area-Member States by means of Primary law and where the procedure for joining this enhanced cooperation is covered by Article 140 TFEU. As legal acts of any other enhanced cooperation, measures based on Article 136 TFEU have to comply with Primary law and may not modify it. This is confirmed by the wording of Article 136(1) TFEU, which requires act adopted on its basis to be 'in accordance with the relevant provisions of the Treaties'. This means that measures based on Article 136 TFEU may not modify Primary law (Häde 2011: 25).

The Primary law authorisation for the establishment of an enhanced cooperation in Article 136 TFEU is, furthermore, limited to the legal bases in Articles 121 and 126 TFEU. A closer look makes clear that only the legal base in Article 121(6) TFEU for the adoption of detailed rules for the multilateral surveillance procedure has a potential that was already used with the adoption of the 'six pack' and the 'two pack'-legislation. However, already the 'six pack'-legislation crossed in the limits set by Primary law. The so-called reversed qualified majority voting, according to which a Commission recommendation is deemed to be adopted unless the Council decides by qualified majority to reject it, modifies the majority voting in the Council as prescribed by Article 16(3) TEU. Since Primary law cannot be modified on the basis of Article 136 TFEU, the reversed qualified majority voting cannot be considered to be covered by this legal base. (Repasi 2013: 70) All in all the potential of Article 136 TFEU is little. It is linked to the reach of the multilateral surveillance procedure.

A second disadvantage is the fact that Article 136 TFEU is limited to Euro area Member States. The example of the banking union shows, however, that economic policy measures not only concern non-Euro area Member States but that they also want to participate in shaping those measures, which would be excluded by this Article.

1.1.4.3. International Agreements (*inter se*-agreements)

With the rise of the economic and financial crisis in 2008 international agreements were used more frequently in order to adopt binding rules for a subset of Member States. This intergovernmental method of law-making was used when concluding the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (TSCG, also known as 'Fiscal Compact') (25 Member States), the Treaty Establishing the European Stability Mechanism (ESM-Treaty) (19 Member States) and the Intergovernmental Agreement on the Single Resolution Fund (SRF Agreement) (26 Member States).

International agreements concluded by a subset of Member States (*inter se* agreements) remain subject to EU law (Repasi 2013: 45). Even though the conclusion of the EU Treaties does not limit the international Treaty-making capacity of the Member States in areas covered by the EU Treaties, the Treaties provide for rules pre-empting the use of this Treaty-making capacity. Firstly, international agreements concluded by a subset of Member States may not modify Primary law because their conclusion would violate Article 48 TEU. Secondly, international agreements have to be in compliance with existing primary and secondary EU law. They cannot modify existing rules. Thirdly, within the scope of Union competences, international agreements are pre-empted insofar as they concern subject matters covered by exclusive Union competences (Article 2(1), 3(1) TFEU). Insofar as they concern subject-matters covered by shared competences, international agreements are pre-empted to the extent

that the Union has exercised them (Article 2(2), 4 TFEU). In case of directives, the pre-emptive effect begins with the entry into force of the directive. As the only exception to these rules, Member States may conclude international agreements as 'trustees of the common interest' in the absence of appropriate action of the Council, when the adoption of measures is necessary (ECJ 1981). These must, however, be interim measures and to be suspended once Union measures are adopted.

Furthermore, the principle of sincere cooperation as enshrined in Article 4(3) TEU, the principle of institutional balance (Article 13 TEU), the principle of democracy (Article 10 TEU) and the rights of the Commission under Article 291(2) TFEU limit the use of the Treaty-making capacities of the Member States.

1.1.4.3.1. Principle of sincere cooperation (Article 4(3) TEU)

Pursuant to the principle of sincere cooperation, established in Article 4(3) TEU, Member States are required, inter alia, to refrain from any measure which could jeopardise the attainment of the Union's objectives and which could thwart the EU legal order. The system of checks and balances between the Member States, represented by the Council, and the EU, represented by the European Commission and the European Parliament, is part of the constitutional core of the EU legal order. If, therefore, the adoption of a Union legal act is legally possible on the basis of a Union competence which refers, in particular, to the ordinary legislative procedure, such an act shall be adopted on the basis of this competence.

If it were at Member States' discretion to choose between, on the one hand, the conclusion of an international agreement, which is drafted by the Member States, negotiated by the Member States without any kind of formal involvement of the Commission and the European Parliament and, on the other hand, the adoption of a legal act, in accordance with the ordinary legislative procedure, where the proposal is exclusively drafted by the European Commission and where the European Parliament has the right to amend and to block any kind of provision, the whole system of checks and balances would be rendered meaningless. Member States are therefore under a legal obligation to sincerely respect the Union legislative procedures foreseen by a Union competence if the conditions for the use of this competence are fulfilled and the legislative procedure is initiated by a Commission proposal.

1.1.4.3.2. Principle of institutional balance and the principle of democracy

The European Court of Justice, furthermore, consistently held that the Parliamentary participation rights in legislative procedures 'provided for by the Treaty constitutes an essential formal requirement breach of which renders the measure concerned void. Effective participation of the Parliament in the legislative process of the Community, in accordance with the procedures laid down by the Treaty, represents an essential factor in the institutional balance intended by the Treaty. This function reflects the fundamental democratic principle that the people should take part in the exercise of power through the intermediary of a representative assembly' (ECJ 1997: para. 14; ECJ 1995: para. 17).

1.1.4.3.3. Starting point of standstill obligations of Member States

Yet, Article 2(2) TFEU states that, in the case of shared competences, Member States remain free to act as long as the Union did not legislate and adopt legally binding acts in that area. Member States shall, however, also refrain from any measures, which may circumvent the legislative procedure under the 'Community method'. The important question is therefore from which moment on Member States are not free anymore to conclude an International agreement instead of adopting an EU legal act under the ordinary legislative procedure. This

problem is not yet decided by the ECJ. The European Court of Justice, however, decided already in cases of external action of the EU where the same conflict between concerted EU action on the one hand and Member States' freedom to conclude International Treaties on the other occurs. In a recent case, the ECJ decided that, first, the 'duty of genuine cooperation [Article 4(3) TEU] is of general application and does not depend either on whether the Community competence concerned is exclusive or on any right of the Member States to enter into obligations …'. Second, 'where it is apparent that the subject matter of an agreement or convention falls partly within the competence of the Community […], it is essential to ensure close cooperation between the Member States and the Community institutions, both in the process of negotiation and conclusion and in the fulfilment of the commitments entered into.' Third, 'the Court has held that Member States are subject to special duties of action and abstention in a situation in which the Commission has submitted to the Council proposals which, although they have not been adopted by the Council, represent the point of departure for concerted Community action' (ECJ 2010A: para. 71 to 74).

Therefore, standstill obligations of Member States with regard to an alternative conclusion of an international agreement start once the Commission presented the proposal for a legal act on the basis of a legal base, which provides for the ordinary legislative procedure.

1.1.4.3.4. Legal framework for the conclusion of intergovernmental *inter se* agreements in EMU matters and the existing Treaties

In sum, intergovernmental agreements amongst EU Member States in EMU matters are legally valid under the following conditions:

1. Intergovernmental *inter se* agreements may not modify Primary law if concluded outside of Article 48 TEU;
2. Intergovernmental *inter se* agreements have to be in compliance with existing Primary and Secondary law;
3. Intergovernmental *inter se* agreements are pre-empted within the scope of
   a) exclusive Union competences or of
   b) shared Union competences to the extent that the Union has exercised them; in case of directives the pre-emptive effect begins with the entry into force of the directive;
4. Intergovernmental *inter se* agreements of all Member States may only be concluded if a Union legislative procedure failed or is likely to fail;
5. Intergovernmental *inter se* agreements of a subset of Member States may only be concluded if an Enhanced Cooperation failed of is likely to fail;
6. Intergovernmental *inter se* agreements may not circumvent Union legislative procedures if there is a Commission proposal on the basis of a shared Union competence;
7. Intergovernmental *inter se* agreements may not affect the enjoyment by the other parties of their rights under the EU Treaties; therefore the use of Union procedures and Union institutions by the *inter se* cooperation is subject to the approval of all Member States.

1.1.5. The role of the Eurogroup

From a purely legal perspective, the role of the Eurogroup is a minor one. According to Protocol (No 14) of the Lisbon Treaty on the Eurogroup, the main task of the Eurogroup is merely 'to discuss questions related to the specific responsibilities they [the ministers of Eurozone Member States] share with regard to the single currency'. The Eurogroup is an informal body.

It is no Union institution. It cannot adopt legally binding decisions. This was recently confirmed by a series of orders by the General Court dismissing applications to annul a decision of the Eurogroup concerning Cypriot banks in March 2013 (GC 2014). The General Court clearly stated that decisions of the Eurogroup do not produce legal effects. The complete absence of the Eurogroup in the law making of the Union and its inability to adopt legally binding decisions explains why the Lisbon Treaty did not provide for a mechanism to hold the Eurogroup to account for its action. There is, under Primary law, no legal obligation of the Eurogroup to inform the public or other institutions about its activities and there are no transparency rules for the Eurogroup. There are no minutes of Eurogroup meetings. Only brief summaries are sent to the participants of these meetings. The president of the Eurogroup has not to be afraid of any consequences attached to a negative assessment of the performance of the Eurogroup.

Yet, such a lack of accountability can be tolerated, from a legal point of view, with regard to a purely informal gathering of ministers that exchange their views. This understanding of the Eurogroup can, however, not any longer be upheld for the Eurogroup as it stands today after the rise of the financial and economic crisis in 2008.

1.1.5.1. The new role of the Eurogroup in the anti-crisis legislation

Originally, the Treaties did not foresee any formal role in the EU economic governance for the Eurogroup. However, already the pre-crisis Eurogroup was called at the time of its establishment 'the sketch of a European Economic Government' (Strauss-Kahn 1998: 1). With the adoption of the so-called 'Six Pack' regulations, the Eurogroup got a formal role in the new economic governance framework that was established by these regulations. In the 'Macroeconomic Imbalances Procedure' (MIP), the European Commission has now to inform the Eurogroup about its measures. The Commission annual report is discussed by the Eurogroup and the Commission has to take due account of this discussion when undertaking an in-depth review of a Member State. In the 'Two Pack' regulations, two years later, the role of the Eurogroup was further strengthened. Eurozone Member States have now to submit their draft budgetary plans and their national debt issuance plans not only to the Commission but also to the Eurogroup for monitoring and assessment. The Commission presents its opinion on the draft budgetary plans to the Eurogroup, which afterwards discusses the budgetary situation in each Member State. The results of those discussions are to be made public where appropriate.

If one now detaches the perception of the Eurogroup from the legal texts and includes in the broader picture those fora in which the same persons take decisions that come together in the Eurogroup, one has to come to the conclusion that the Eurogroup today has as a forum that bundles different discussions a significant *de facto* role in the economic governance framework. Not only does the Eurogroup discuss draft budgetary plans and national debt issuance plans of Eurozone Member States, but the same persons forming the Eurogroup decide as 'ESM Board of Governors' on ESM financial assistance programmes and vote as 'ECOFIN Council' on decisions and recommendations to Eurozone Member States under the multilateral surveillance and the budgetary control procedure. Taking into account that the Eurogroup meets regularly the day before the official ECOFIN meeting, discussions and decisions on those subjects can be preponed to the informal Eurogroup meeting and be 'rubberstamped' by the subsequent ECOFIN Council meeting.

This *de facto* crucial role of the Eurogroup as a body is supplemented by the fact that not only the European Commission, represented by the Commissioner for Economic and Monetary Affairs, but also the European Central Bank (ECB), mostly represented by its president,

participates in Eurogroup meetings. The latter does not only create tensions with the ECB's independence in conducting the Union's monetary policy but raises also questions about the degree to which the ECB influences political decisions that are to be taken outside of its policy mandate – a problem that was pointed out recently by Advocate General *Cruz Villalón* in his opinion in the OMT case (Opinion of 14 January in Case C-62/14, OMT, No 144 et seqq.).

1.1.5.2. Legal Problems related to the strong *de facto* role of the Eurogroup

The strong position of the Eurogroup, which goes beyond a simple 'sketch of a European Economic Government', gives rise not only to significant accountability problems, which will be addressed under section 4.2. It also leads to legal problems. The European Court of Justice decided in case C-27/04, Commission v Council (ECJ 2004) that the economic governance procedures explicitly foreseen by the Treaties cannot be undermined: 'It follows from the wording and the broad logic of the system established by the Treaty that the Council cannot break free from the rules laid down by Article 104 EC [today's Article 126 TFEU] and those which it set for itself in Regulation No 1467/97. Thus, it cannot have recourse to an alternative procedure, for example in order to adopt a measure which would not be the very decision envisaged at a given stage or which would be adopted in conditions different from those required by the applicable provisions' (ECJ 2004: para. 81). This refers in particular to the exclusion of non-Eurozone Member States from deliberations concerning decisions under the multilateral surveillance and the budget control procedure. A simple 'rubberstamp function' of the ECOFIN Council for decisions that were prepared in the Eurogroup would infringe the Treaties. Primary law provides for a right of non-Eurozone Member States to also present their views on Eurozone matters in the Council and, by that, to control the Eurozone Member States, which have the exclusive voting rights in Eurozone matters.

The Treaty considers the Council as the core decision-making institution in the economic governance of the Union. The Council covers all 28 EU Member States. The Treaty only restricts the voting rights to the Eurozone Member States. The non-Eurozone Member States are not excluded from taking part in the Council meetings on Eurozone affairs and from raising their voices therein. By both elements the Treaties make clear that the control of Eurozone activities is a task of the Union as a whole. Against this background, a genuine democratic accountability of whatsoever kind of 'European Economic Government' for the Eurozone requires a democratic control by a Parliamentary body of the entire Union, which is the European Parliament. The possibilities of adapting Union law to the strengthened *de facto* role of the Eurogroup are further explored in the chapter on enhancing democratic legitimacy of the Eurozone under 4.2.

1.2. Monetary Union

1.2.1. Changes in the Lisbon Treaty

Chapter 2 on the Monetary Policy is largely the same under the Lisbon Treaty as under the previous Treaty with two exceptions: First, the special legislative procedure in Article 123(4)(3) of the previous TEC was replaced by the ordinary legislative procedure in Article 133 TFEU. Second, the requirement to receive the assent of the European Parliament under Article 105(6) of the previous TEC was replaced by a simple obligation to consult the European Parliament when conferring specific tasks upon the ECB concerning policies relating to the prudential supervision of credit institutions and other financial institutions under Article 127(6) TFEU. It is worth mentioning that the latter was the only downgrade of Parliamentary rights in the Lisbon Treaty.

1.2.2. The role of the ECB

The role of the ECB is, under the Lisbon Treaty, the same as under the previous Treaty. The ECB conducts the monetary policy of the Union in accordance with Article 127(1) TFEU. It shall maintain price stability as its primary objective. To the extent that the objective of price stability is not undermined, the ECB shall also support the general economic policies in the Union as its secondary objective. When exercising the powers and carrying out the tasks and duties conferred upon the ECB by the Treaties and the Statute of the ESCB and of the ECB, it enjoys under Article 130 TFEU an independence guarantee, which shields it from political influence on its decision-making.

On the basis of Article 127(6) TFEU, the Union legislator entrusted the ECB with specific task relating to the prudential supervision of credit institutions by adopting Council Regulation (EU) No 1024/2013. Since these tasks were conferred upon the ECB by secondary law and not by the Treaties or the ESCB/ECB-Statute, its activities are not covered by the independence guarantee in Article 130 TFEU. The role of the ECB in banking supervision is ambiguous, since banking supervision is a task, which affects the entire internal market but the ECB is only responsible for Euro area Member States, and since Article 127(6) TFEU only allows the conferral of 'certain tasks' in relation to banking supervision but not the whole task. By that, the ECB is the head of a network of national authorities of Member States that fall under the regulation because their currency is the euro and of Member States that opted into the 'single supervisory mechanism' (SSM) voluntarily.

2. SUBJECTS OF IMPROVEMENT WITHIN THE TREATY BOUNDARIES

2.1. Strengthening compliance

It was explained under 1.1.3 that the current legal framework of the economic policy coordination lacks of efficient means to ensure compliance. Before one can turn to concrete proposals on how to strengthen compliance, one has to take a closer look at the reasons why a Member State is non-compliant (2.1.1). Based on an analysis and a critical assessment of the existing mechanisms addressing non-compliance, one may further examine whether the current Treaty rules allow for the creation of new mechanisms to address non-compliance, which are not yet foreseen by the existing Treaty framework (2.1.2).

2.1.1. Analysis and assessment of the existing mechanisms addressing non-compliance[4]

2.1.1.1. Analytical framework

Compliance can be defined as 'the state of conformity or identity between an actor's behaviour and a specified rule' (Raustalia and Slaughter 2002: 539). If there is non-compliance, there is hence non-conformity or a difference between an actor's behaviour and a specific rule. Efficient means to remedy non-compliance therefore have to look at an actor's behaviour and have to take into account the reasons for its behaviour in order to be effective. This perspective on non-compliance is in particular made by the international relations literature (Börzel et al. 2003). According to Börzel et al., one has to distinguish two subgroups of reasons for non-compliance: Voluntary non-compliance and involuntary non-compliance (Börzel et al. 2003: 19). Voluntary non-compliance is the result of a cost-benefit analysis in which, from the perspective of the non-compliant state, the benefits of non-compliance surmount its costs. In return, involuntary non-compliance is independent of any political will of the non-compliant state but due to its incapacity to comply.

Based on this classification of state behaviour Börzel et al. identify the following four categories of means to address non-compliance:

- **compliance through enforcement**: increasing the costs of non-compliance through monitoring of the behaviour and sanctioning of *voluntary non-compliance* by a state;
- **compliance through persuasion**: instead of sanctioning, this approach aims at 'increasing acceptance of the norm in question as a standard of appropriate behaviour' and at 'changing actor's preferences' in order to prevent/counter *voluntary non-compliance*;
- **compliance through management**: aiming at capacity-building of the state in order to address *involuntary non-compliance*;
- **compliance through internalization**: this approach seeks to address *non-compliance* through the 'internalization of international norms and rules into the domestic political and legal system'. Such internalization can be achieved by social, political, economic and legal internalization (Koh 1997, Amtenbrink and Repasi 2016). All processes aiming at internalization have in common to influence state behaviour from the inside, either through public legitimacy of an international norm, which leads to 'widespread general obedience to it' (social internalization), through political processes that make political elites to accept an international norm and include it in national government policy (polit-

[4] The following analysis follows Amtenbrink and Repasi 2016.

ical internalization), through transposition into national law, adjudication and dispute settlement (legal internalization) or through market actions push a government to accept and to apply the international rule as a standard for government policy (economic internalization).

Putting these categories in a table, which distinguishes between the two different kinds of state behaviour, one gets the following overview:

Table 1. Categories of mechanisms according to how to achieve compliance.

Voluntary non-compliance (lack of political will)	Involuntary non-compliance (lack of capacity)
Compliance though persuasion	Compliance through management
Compliance through enforcement	
Compliance through internalization	

If one wants to apply these categories to the economic governance framework, as it is established in the Treaty chapter on EMU, one has to include further distinctions. The economic governance framework distinguishes between several economic policy indicators, which are to be respected in order to assume that a Member States conduct reasonable economic and fiscal policies, and, within the rules relating to these indicators, the economic governance framework further distinguishes between mechanisms aiming at preventing an excess of those indicators, on the one hand, and mechanisms aiming at remedying an established excess of those indicators, on the other.

The aforementioned economic policy indicators are the following:

- Economic policy goals set by the 'broad guidelines' (Article 120 TFEU)
- Macroeconomic indicators (Regulation (EU) No 1176/2011)
- Medium-term objective for Member States' budgetary position (MTO) and the adjustment path towards it (Regulation (EC) No 1466/97 as amended by Regulation (EU) No 1175/2011)
- Government deficit of 3.0% of GDP and government debt of 60% of GDP (Article 126(2) TFEU in conjunction with Protocol (No 12))
- Serious difficulties with respect to the financial stability (Regulation (EU) No 472/2013)

Putting the existing compliance mechanisms in a table, which shows the several economic indicators in the columns and the distinction between 'ex ante'- and 'ex post'-mechanisms in the rows, one gets the following overview over the existing compliance mechanisms:

Table 2. Compliance mechanisms in the existing economic policy coordination framework

	Broad guidelines on economic policies	Macro-economic indicators	MTO and adjustment path	Government deficit	Serious difficulties with respect to financial stability
	European semester				
ex ante	NRP[5] Art. 121(3) TFEU	Alert mechanism[6]	SCP[7] Art. 121(3) TFEU	European semester	European semester + EDP
ex post	Art. 121(4) TFEU	Excessive Imbalances Procedure (EIP)[8]	Art. 121(4) TFEU	Excessive Deficit Procedure (EDP)	Enhanced surveillance
		Financial sanctions for Euro-MS[9]	Financial sanctions for Euro-MS[10]	Financial sanctions for Euro-MS	
IGT[11]			TSCG: Automatic correction mechanism in national law	TSCG: Automatic correction mechanism in national law	Financial assistance under the ESM-Treaty
Economic internali-zation	Articles 123 to 125 TFEU: Market-induced enforcement of EU rules following the idea that interest rates on government bonds reflect the degree of sustainability of a Member State's economic, fiscal and budgetary policies. This requires putting a Member State on the financial markets into the same position as any other private debtor, which is ensured by Articles 123 to 125 TFEU.				

Market-induced enforcement is the overarching compliance mechanism within the Economic Union. The development of interest rates on government bonds is supposed to push Member States to modify their sovereign economic, fiscal and budgetary policies. In theoretical terms, this mechanism is understood as 'compliance through (economic) internalization'. Its success was already assessed under section 1.1.3.

2.1.1.2. Assessment of the sufficiency of the existing compliance mechanisms in EMU

In order to assess whether the existing framework lacks of some compliance mechanisms, one has to assign, in a second step, the existing compliance mechanisms to the abovementioned four categories of means to address non-compliance and one has to identify whether after the assignment there are gaps in the table.

[5] National Reform Programmes
[6] Art. 3 of Regulation (EU) No (EU) No 1176/2011 based on to the scoreboard (Art. 4) (eventually) followed by an in-depth review 'for each Member State that it [the Commission] considers may be affected by, or may be at risk of being affected by, imbalances' (Art. 5).
[7] Stability or Convergence Programmes
[8] Articles 7 to 12 of Regulation (EU) No (EU) No 1176/2011: (1) Council recommendation setting out a set of policy recommendations for the Member State concerned; (2) Submission of a corrective action plan by the Member State concerned; (3) Monitoring of the implementation of the corrective action plan by the Commission.
[9] Interest-bearing deposits and, in case of recurring EIPs, an annual fine (Art. 3 of Regulation (EU) No (EU) No 1174/2011)
[10] Interest-bearing deposits (Art. 4 of Regulation (EU) No (EU) No 1173/2011.
[11] Intergovernmental Treaties amongst EU Member States under International law and outside the EU Treaties.

The 'ex ante'-mechanisms within the European semester aim at 'compliance through persuasion'. By submitting national policy reports to the Commission, by comparing those reports with each other and by discussing the outcomes of these reports in the Council, the European semester process aims at persuading Member States to conduct certain economic, fiscal and budgetary policies. None of these mechanisms provide for means for capacity-building so that they cannot be considered as 'compliance through management'.

The 'ex post'-mechanisms are all built on monitoring Member States' actions and, in case of persistent non-compliance, on imposing financial sanctions. Hence, the existing 'ex post'-mechanisms can therefore all be assigned to 'compliance through enforcement'. None of these mechanisms provide for means for capacity-building so that they cannot be considered as 'compliance through management'. The only exception is the possibility to receive technical assistance from the Commission under Article 7(8) of Regulation (EU) No 472/2013 if a Member State is subject to a macroeconomic adjustment programme in case of serious difficulties with respect to its financial stability. This technical assistance can be understood as achieving 'compliance through management'.

If one looks outside of the EU law framework, there are mechanisms aiming at achieving 'compliance through management' in the ESM-Treaty. Before serious difficulties with respect to the financial stability of a Member State occur, this Member State may ask for 'precautionary financial assistance' under Article 14 of the ESM-Treaty. This assistance 'aims at helping ESM Members whose economic conditions are still sound to maintain continuous access to market financing by reinforcing the credibility of their macroeconomic performance while ensuring an adequate safety-net.'[12] Once serious difficulties with respect to the financial stability of a Member State are established, the ESM may grant financial assistance subject to the conclusion of a Memorandum of Understanding (MoU), which links the payment of financial assistance to the implementation of concrete policy measures. Both mechanisms aim at capacity-building (and avoiding the deconstruction of existing capacity) and can, by that, be considered as mechanisms aiming at 'compliance through management'.

Finally, the 'automatic correction mechanisms' foreseen by Article 3(1)(e) TSCG, according to which a significant observed deviation from the redefined MTO under the TSCG (Article 3(1)(a) TSCG) or the adjustment path towards it triggers automatically a mechanism aiming at correcting the deviation over a defined period of time, can be classified as achieving 'compliance through internalization'. This correction mechanism has, namely, to be implemented in national law 'through provisions of binding force and permanent character, preferably constitutional'. By that, compliance is to be achieved through 'internalization of international norms and rules into the domestic legal system'. Its enforcement is to be ensured by national courts.

If one now replaces in table 2 the concrete mechanisms by the categories of mechanisms, the table will look as follows:

[12] Art. 1 of the ESM Guideline on Precautionary Financial Assistance (http://esm.europa.eu/pdf/ESM Guideline on precautionary financial assistance.pdf).

Table 3. Replacing the existing compliance mechanisms by categories of mechanisms according to how to achieve compliance (table 1).

	Broad guidelines on economic policies	Macro-economic indicators	MTO and adjustment path	Government deficit	Serious difficulties with respect to financial stability
	European semester				
ex ante	Persuasion	Persuasion	Persuasion	Persuasion	Persuasion
ex post	Enforcement	Enforcement	Enforcement	Enforcement	Management
		Enforcement	Enforcement	Enforcement	
IGT			Internalization	Internalization	Management

As a last step, one may now assign the concrete mechanisms ensuring compliance with certain indicators set by EU law to the kind of state behaviour that they are addressing. This is done via categories 'compliance through persuasion', 'compliance through enforcement', 'compliance through management' and 'compliance through internalization'. Table 4 gives now an overview of the existing compliance mechanisms in EU law in relation to the state behaviour, which leads to non-compliance. The table takes into account that 'compliance through persuasion' aims at preventing non-compliance ex ante and that 'compliance through enforcement' aims at remedying established non-compliance ex post.

Table 4. Existing compliance mechanisms in relation to state behaviour.

	Indicator	Voluntary non-compliance (lack of political will)			Involuntary non-compliance (lack of capacity)
		Persuasion	Enforcement	Internalization	Management
ex ante	Broad Guidelines	■		□[1]	(–)
	Macroeconomic	■		□[1]	(–)
	MTO	■		■	(–)
	Government deficit	■		■	(–)
	Financial stability	■		□[1]	■
ex post	Broad Guidelines		■	□[1]	(–)
	Macroeconomic		■	□[1]	(–)
	MTO		■	□[1]	(–)
	Government deficit		■	□[1]	(–)
	Financial stability		■	□[1]	■

[1]Market-induced enforcement (economic internalization): Articles 123-125 TFEU

A look at this table reveals that the existing reformed system of economic governance in the EU aims almost exclusively at voluntary non-compliance, which is based on a lack of political will to comply even though the Member State has the capacities to do so. Looking at involuntary non-compliance, where independently of the political will in the non-compliant Member State non-compliance can be explained by the lack of capacity to comply, the existing economic governance framework provides only for means if there is a serious threat for the financial stability of the Member State. At all stages before serious difficulties occur, the governance framework does not address involuntary non-compliance by means of management. This lack of mechanisms aiming at 'compliance through management' could be compensated by effective mechanisms aiming at 'compliance through internalization'. The insufficiency of the 'economic internalization' by the market-induced enforcement was already discussed under section 1.1.3. As regards the 'legal internalization' to be achieved with the introduction of 'automatic correction mechanisms' under Article 3(1)(e) TSCG, reference shall be made to the fact that the TSCG was to be implemented into the national law of the contracting states by 1 January 2014 (one year after the entry into force of the TSCG (Art. 3(2))) and that for the year 2015, according to the economic forecast of the European Commission,[13] only 4 of the contracting states (Cyprus, Estonia, Germany and Luxemburg) have a structural budget balance below -0.5 % of GDP.

Based on this observation, it appears indeed doubtful whether legal internalization in the EMU context will work. This becomes clear in cases of involuntary non-compliance. If, for economic reasons, a Member State is not capable of complying with the EU rules, this will not change merely because these rules have been implemented into national law. As regards voluntary non-compliance, an economically capable, but politically unwilling Member State will not adopt different corrective actions to remedy a significant deviation from its MTO merely because it is required to do so by national law. Lack of political will or the incapacity of a Member State to comply constitutes barriers to legal internalization, rather than that the latter is capable of overcoming these reasons for non-compliance. In short, the existing economic governance framework arguably reveals the limits of 'legal internalization' as means to address voluntary and involuntary non-compliance.

2.1.1.3. The call for an incentive-based compliance mechanism

All things considered, one identifies the blind spot of the existing governance framework. It is built on the belief that non-compliance is the result of a lack of political will within the non-compliant Member State. It does not take into account the necessity of external support in building up capacities to ensure compliance. Only the recent economic and financial crisis revealed the necessity for external assistance and led to the establishment of the ESM and the possibility to request technical assistance from the Commission in case serious difficulties with respect to the financial stability of the Member State occur. Yet, the necessity for external assistance already occurs before there are these serious difficulties.

This refers to the idea of an incentive-based compliance mechanism and to the idea of a fiscal capacity for the Euro area that was first proposed by the former president of the European Council, Herman van Rompuy, on 26 June 2012 (van Rompuy 2012: 6).

[13] European Commission, European Economic Forecast, Autumn 2015, p. 174.

2.1.2. Possible legal bases

Possible legal bases for the establishment of such a 'financial support mechanism' are either Article 121(6) TFEU (if only with regard to Member States whose currency is the euro in conjunction with Article 136 TFEU) or Article 352 TFEU.

2.1.2.1. An incentive-based compliance mechanism for the multilateral surveillance procedure

Article 121(6) TFEU can only serve as a legal base for a mechanism that reinforces the multilateral surveillance procedure. An incentive-based enforcement of recommendations issued under Article 121 TFEU is covered by it, although such an enforcement measure is not mentioned by this Article. The only explicit enforcement measure in Article 121(4) TFEU is a warning addressed to a Member State that can be made public. This means that Member States are, in principle, protected against any other sanctions under Article 121 TFEU than such a warning. An incentive-based mechanism, however, cannot be seen as a 'sanction'. A regulation based on Article 121(6) TFEU may provide for financial incentives for the adjustment of a Member State's economic and fiscal policies to policy goals set by Union guidelines or by recommendations adopted under Article 121(4) TFEU. Such a regulation would not infringe Primary law. In contrast to sanctions, refusing payment of financial incentives in case of non-compliance does not worsen the position of a Member State. Prior to a possible adoption of a regulation on financial incentives a Member State would have no right to claim financial assistance as it has no right to claim it after the adoption of such a regulation in case of non-compliance. Therefore, an incentive-based enforcement measure is covered by Article 121 TFEU. A legal act could therefore be based on Article 121(6) TFEU.

If this incentive-based mechanism should only be available for Member States whose currency is the euro, the legal act establishing this mechanism could be based on Articles 136, 121(6) TFEU.

2.1.2.2. Incentives beyond multilateral surveillance: Fiscal capacity

Article 352 TFEU may serve as a legal base as long as the establishment of an incentive-based enforcement mechanism is necessary in order to attain one of the objectives set out in the Treaties and goes beyond what is needed for the enforcement under the multilateral surveillance procedure in Article 121 TFEU. Legislating on the basis of Article 352(1) TFEU could include an agency, which implements the incentive-based enforcement mechanism. The functions of such broader mechanism serve to attain a 'sustainable development of Europe based on balanced economic growth' and to safeguard the 'economic and monetary union whose currency is the Euro'; objectives mentioned by Article 3 TEU.

It is worth noting that a fiscal capacity of the EU or of the Eurozone is, as a part of the Union, to be financed by the Union budget. If the financial possibilities of the existing Union budget are not sufficient for financing a fiscal capacity, additional payments from Member States have to be established in accordance with EU budget law, which raises with regard to a Eurozone fiscal capacity the question of a Euro area budget, which is to be addressed separately (cf. section 2.2).

Both legal bases, Article 121(6) TFEU and Article 352 TFEU, can be used under enhanced cooperation, as both are 'non-exclusive competences' in terms of Article 20 TEU. This follows from the fact that Article 3 TFEU enumerates all the exclusive competences of the EU in an exhaustive manner. Neither Article 121(6) TFEU nor Article 352 TFEU are mentioned by Article 3 TFEU wherefore they are non-exclusive competences. With regard to Article 121(6)

TFEU this finding is also supported by Article 136 TFEU as the Member States whose currency is the euro can be considered as a special form of an enhanced cooperation of a subgroup of Member States.

Besides an action based on Article 352 TFEU, participating Member States could also establish an incentive-based enforcement mechanism based on an international Treaty. The principle of sincere cooperation in Article 4(3) TEU requires, however, that Member States shall give a legal action under the Treaties and by using enhanced cooperation priority over the conclusion of an international Treaty outside of the EU framework.

2.1.3. Financing an incentive-based enforcement mechanism or a fiscal capacity through borrowing-and-lending operations entered into by the Union

In addition to the legal base, one may raise the question if a fund that will be installed in order to finance an incentive-based enforcement mechanism or a fiscal capacity may carry out borrowing-and-lending operations. According to Article 17(2) of Regulation (EU, Euratom) No 966/2012 on the financial rules state that 'the Union and [Union agencies], may not raise loans within the framework of the budget.' At the same time, the Union already raised such loans with regard to balancing of payment difficulties caused by the increase in prices of petroleum products (cf. Regulation (EEC) No 397/75), to assisting non-Eurozone Member States which are experiencing or are seriously threatened with difficulties in their balance of current payments (cf. Regulation (EC) No 332/2002) or to financing investment projects which contribute to greater convergence and integration of the economic policies of the Member States (cf. Council Decision 78/870/EEC). Revenue of these loans is, moreover, considered to be other revenue of the EU budget in terms of Article 311 TFEU.

The contradiction between the prohibition of raising loans, on the one hand, and the somehow different practice, on the other hand, can be explained by the fact that for predefined and specific purposes the Union is allowed to enter into borrowing-and-lending operations. The Union may, however, not do so in order to finance the general EU budget. The integration of a fund financing the incentive-based enforcement mechanism or a fiscal capacity into the general EU budget would not prevent to provide for an ability to borrow for it. This ability must be restricted to a specific purpose and the guarantees for its borrowing-and-lending operations must be mentioned in the general EU budget. Borrowing-and-lending operations as such are not part of the general budget.

2.2. Euro area budget

A Euro area budget can only be created within the existing EU Treaties if a differentiation can be made within EU budget law with regard to revenue and with regard to expenditure.

The Lisbon Treaty refers in Article 310 TFEU in this respect to the general principle of unity of the EU budget and its completeness. This means that *all* revenues and expenditures of the Union are part of *one* EU budget, which is complete and includes therefore *every* predictable revenue and expenditure of the Union. This appears, at first sight, to stand against an own budget for the Euro area within the general Union budget.

At second sight, one has to go into further detail in order to examine the possibility to create a Euro area budget within the existing Treaty boundaries. In order to do so, one has to, first look at revenue side and reply to the question whether a differentiation with regard to revenue is legally possible (2.2.2) and what this would mean for the multiannual financial framework (2.2.3). Before, however, examining the possibilities of differentiation, the important distinction between 'own resources' and 'other revenue' has to be looked at (2.2.1) since the

ways of how the one or the other could be increased by means of differentiated integration differ. Finally, the question is to be addressed whether a differentiation with regard to expenditure is legally possible (2.2.4).

2.2.1. Distinction between 'own resource' or 'other revenue'

Article 311(2) TFEU distinguishes with regard to the revenue of the Union between 'own resources' and 'other revenue'. This distinction is of importance for the required procedures establishing or amending the respective type of revenue. If contributions to the general budget of the Union are to be classified as an 'own resource', they have to be included into the Own Resources Decision under the legislative procedure foreseen by Article 311(3) TFEU: The Council adopts unanimously and after consulting the European Parliament the decision which has to be approved by the Member States in accordance with their respective constitutional requirements.

If contributions to the general budget of the Union are to be classified as 'other revenue', they can be established in a Union legal act outside of the Own Resources Decision. In this case, one has to find the correct legal base for this legal act. On the one hand, in principle, financial contributions paid by EU Member States, which are additional to the contributions paid by Member States under the Own Resources Decision (GNI contributions), cannot be created by another majority than the one foreseen by Article 311(3) TFEU. Additional contributions created on the basis of another majority (as foreseen, for example, by Article 352 TFEU which does not refer to an approval by Member States in accordance with their respective constitutional requirements) appear therefore to undermine the own resources legislative procedure. On the other hand, with regard to Union agencies, the EU legislator already created additional financial contributions by Member States in accordance with the ordinary legislative procedure. Article 62(1)(a) of the regulation on the European Banking Authority (Regulation (EU) No 1093/2010) provides for 'obligatory contributions from the national public authorities' to the budget of EBA. The legal base for the EBA regulation is Article 114 TFEU. This suggests that the creation of additional financial contributions of EU Member States does not require the same majority as the one foreseen by Article 311(3) TFEU and not even the consent of every EU Member State.

There are, however, good reasons to come to the conclusion that with regard to additional contributions of Member States to the general EU budget, at least unanimity is required and, by that, only Article 352 TFEU would be the right legal base. Contributions paid by competent national authorities to the budget of a Union authority that is separated from the EU budget (like the EBA budget) cannot be compared to contributions paid by Member States to the general EU budget. Allowing to create additional financial contributions without the possibility for a single Member State to raise its veto against a financial obligation would undermine the clear Treaty statement in Article 311(3) TFEU according to which no additional financial burden for the Member States' budget can be created by the European Union without the approval of all Member States. The application of a qualified majority voting as it is foreseen by other legal bases is, furthermore, highly questionable with regard to Member States budgetary sovereignty. Therefore, if the contributions are to be classified as 'other revenue', they can be included into a legal act based on Article 352(1) TFEU.

Whether the contributions to a fund financing an incentive-based enforcement mechanism or a fiscal capacity are to be classified as 'own resource' or 'other revenue' is very much linked to the legal design of the contributions. If the fund for an incentive-based enforcement mechanism or a fiscal capacity is exclusively financed by the general Union budget, additional financial contributions raised from Member State to finance the increased refinancing needs

of the general Union budget are 'own resources'. If the financial contributions are earmarked in such a way that the revenue generated by these contributions can only be used in order to finance expenditure of the incentive-based enforcement mechanism or fiscal capacity, they can be considered 'other revenue'. This follows from the distinction in Article 311(2) TFEU, according to which the general budget is wholly financed by own resources, whilst 'other revenue' may not replace revenue generated by 'own resources' in their capacity to balance the general Union budget.

This distinction is reflected by Article 21 of Regulation (EU, Euratom) No 966/2012 on the financial rules that introduces the category of 'assigned revenue', which, according to Recital No 8 of the Regulation (EU, Euratom) No 1311/2013 laying down the multiannual financial framework for the years 2014-2020, is not to be taken into account by the ceilings set by the multiannual financial framework. Assigned revenue is revenue that cannot be used by the general Union budget for the purposes defined by the Union legislator irrespective of the will of the contributors, but only and exclusively for the purposes as agreed by the contributors. Assigned revenue links the amount of the contributions to the expenditure it is assigned to. The amount of the assigned revenue equals the amount of the budget item that it finances. From the perspective of the general Union budget, assigned revenue and budget items financed by this assigned revenue are neutral.

If the Union legislator raised earmarked financial contributions from Member States in order to finance a fund for an incentive-based enforcement mechanism or the a fiscal capacity, the aforementioned clarifies that this can only be done on the basis of a legal base that provides for a unanimous voting in the Council. Only the possibility for a contributor to raise its veto allows for the conclusion that the contributors agreed on the use of the financial contributions. Based on these considerations, additional financial contributions that are earmarked for an exclusive use by an incentive-based enforcement mechanism or a fiscal capacity could be raised as 'other revenue' on the basis of Article 352(1) TFEU.

2.2.2. Differentiation with regard to revenue

EU budget law allows for differentiation with regard to revenue. This can be seen by Article 332 TFEU. According to this article, expenditure other than administrative costs entailed for the Union institutions shall be borne, in principle, by the participating Member States. The wording of this provision appears to allow a subset of Member States to establish a fund and even to require putting this fund outside of the general EU budget. The main idea of Article 332 TFEU, however, is rather that non-participating Member States should not bear costs of decisions on which they have no political influence. It is therefore not clear under Article 332 TFEU whether expenditure resulting from implementation of enhanced cooperation has to be borne outside of or within the EU budget. Article 326 TFEU states in this respect that any enhanced cooperation shall comply with the Treaties and Union law and, by that, does not allow any deviation from general EU law and principles of EU budget law. Hence, Article 332 TFEU is based on the assumption that differentiated revenue is allowed under EU budget law.

There is one example where a group of Member States finances a specific European project. It is the case of the 'High Flux reactor' which is financed by Belgium, France and the Netherlands (Council Decision 2012/709/Euratom on the adoption of the 2012-2015 High Flux Reactor supplementary re-search programme to be implemented by the Joint Research Centre for the European Atomic Energy Community ([2012] OJ L 321/59)). This decision was adopted on the basis of Article 7 Euratom Treaty. The contributions paid by Belgium, France and the Netherlands are financial contributions made to the general EU budget by way of assigned revenue. These contributions are classified as 'other revenue' in terms of Article

311 TFEU. A similar provision can be found in Article 184 TFEU on supplementary programmes for research and technological development. Article 184 TFEU was, however, not used until now.

2.2.3. Differentiated revenue and the Multiannual Financial Framework

According to Article 312(1) TFEU, the annual budget of the Union shall comply with the Multiannual Financial Framework (MFF). According to recital No. 8 of the Council Regulation (EU, Euratom) No 1311/2013 laying down the multiannual financial framework for the years 2014-2020 the 'MFF should not take account of budget items financed by assigned revenue within the meaning' of the Financial Regulation. This refers to specific items of expenditure for which a Union act explicitly defines the revenue that has to be used in order to finance this expenditure. In short, every revenue, which is earmarked by a Union legal act and explicitly assigned to certain expenditure, is not covered by the MFF ceilings. Such revenue has not, by definition, to be financed by all EU Member States.

2.2.4. Differentiation with regard to expenditure

As with regard to revenue, differentiation is also with regard to expenditure legally possible under the existing EU budget law. As explained above, Article 332 TFEU is based on the assumption that expenditure resulting from the implementation of an enhanced cooperation is borne by the general Union budget and does not set up a legal obligation for participating Member States to establish a separate budget for purpose of the enhanced cooperation. By that, Article 332 TFEU reflects the legal situation under EU budget law, which allows for differentiated expenditure.

A precedent for such a differentiation can be found in Article 10 of Regulation (EU) No 1173/2011 on the effective enforcement of budgetary surveillance in the Euro area. According to this article, 'the interest earned by the Commission shall constitute other revenue as referred to in Article 311 TFEU and shall be assigned to the European Financial Stability Facility.' This regulation defines payment obligations only for Euro area Member States and the EFSF to which the revenue is allocated is a body exclusively composed by Euro area Member States and which only provides for financial assistance for Euro area Member States.

2.2.5. Conclusion

In sum, the current Treaty framework allows the establishment of a Euro area budget outside of the ceilings of the MFF as long as financial contributions from Eurozone Member States are explicitly assigned to certain expenditure items for the benefit of Eurozone Member States. Depending on the overall amount of those financial contributions compared to the total amount of the general Union budget, those additional financial contributions would be new own resources wherefore the Own Resources Decision would have to be amended in accordance with the procedure foreseen by Article 311 TFEU.

2.3. Convergence Code

The European Parliament raised in its resolution of 12 December 2013 on constitutional problems of a multitier governance in the European Union (P7_TA(2013)0598) the idea of adopting a 'convergence code', which should cover today's 'Euro Plus Pact, the Europe 2020 strategy and the Compact for Growth and Jobs'. This convergence code should be 'adopted under the ordinary legislative procedure' (second contribution from the Sherpas to the Five Presidents' Report, p. 2). The exact content of the convergence code is unclear. There are several options how such a convergence code can be designed.

The European Parliament made reference to 'soft law' instruments, which are legally not binding. This reference can be understood in a way that the 'convergence code' only bundles the existing soft law-instruments into one soft law-instrument. Such a merger of different soft law instruments appears legally unproblematic. If, however, this merger is combined with an 'upgrade' of these soft law-instruments to an act of legally binding nature, such an 'upgrade' would require a Treaty change. Article 121(2) TFEU only allows the adoption of a recommendation if the EU wants to set policy goals for Member States' economic policies. Recommendations are, according to Article 288(4) TFEU legally non-binding. The adoption of an act, which is legally binding, instead of a recommendation based on Article 121(2) TFEU would therefore violate Primary law insofar as there are no other legal bases in the Treaties that provide for the adoption of legally binding acts. This is the case with regard to tax law (based on Article 113 concerning indirect taxes and of Article 115 TFEU concerning direct taxes) or social law (on the basis and within the limits of Article 153 TFEU). Yet, these provisions do not provide for an ordinary legislative procedure but for a special legislative procedure.

If the 'convergence code' remains a soft law-instrument, one may question its added value as compared to the existing instruments. The answer to this question depends on the concrete design of the code. Such a code could provide for an approximation of Member States' economic and fiscal policies by setting minimum and maximum levels for a set of economic indicators. Instead of setting fixed standards or vague policy goals, such a code could set a range with respect to certain policy objectives. This allows Member States to still conduct differing economic and fiscal policies but within a range that is defined by the code. Whilst such a code, from a legal perspective, raises the same questions with regard to its enforceability as the existing soft law-instruments such as the recommendations or the Euro-Plus-Pact, it may, however, increase the general acceptance of the policy goals set by the EU within Member States and increase, by that, compliance (such compliance is in this study understood as 'political internalization', cf. section 2.1.1.1).

2.4. Establishment of a Redemption Fund

In 2012, the German Council of Economic Experts (Sachverständigenrat) proposed in its annual report the establishment of a European Redemption Fund (ERF). The ERF, as proposed by the 'Sachverständigenrat' consists of several elements (Sachverständigenrat 2012: 107): Government debt, which amounts above the reference value of 60% of GDP, would be transferred to a common redemption fund subject to joint and several liability. During a 'roll in' phase of around five years the transferral of government debt is made by a purchase of bonds with a maturity of more than two years of participating Member States on the primary market (Schorkopf 2012: 9). The debts remain exclusively with the participating countries. A consolidation path has to be laid down for each Member State in a legally binding way, which would require from the Member State to autonomously redeem the transferred debt over a period of 20 to 25 years.

After the 'roll in' phase a Member State's outstanding debt level would comprise (1) debts for which it is individually liable amounting to 60% of GDP, and (2) debts that, at the time of the transfer, exceed the reference value of 60% of GDP, which are transferred to the ERF. The transferring Member States bears the primary liability and the ERF a secondary liability. The joint liability during the repayment phase means that bonds would be issued by the ERF with a high rating in order to stabilise the European financial system until the national bond markets regain sufficient functionality. Participation is subject to strict conditionality. If a Member State does not meet its political reform commitments, which are supposed to lead to consolidation and growth, the 'roll in' would be discontinued and the Member State in

question would be fully exposed once again to the international financial market. Finally, in order to cover the eventuality that an individual participating Member State is called on to pay up under its joint and several liability, its risk would have to be limited by agreeing a burden-sharing scheme among the participating Member States.

The report of the Expert Group on Debt Redemption Fund and Eurobills considered the establishment of an ERF not to be possible under the existing Treaties (Expert Group on Debt Redemption Fund and Eurobills 2014: 57 et seqq.). This conclusion was based on two arguments. First, the ERF would violate Article 125 TFEU, even read in the light of the ECJ's decision in the 'Pringle' case (ECJ 2012b) (Expert Group on Debt Redemption Fund and Eurobills 2014: 58 et seq.). Second, Article 352(1) TFEU would not suffice as a legal base within the existing Treaties. A Treaty change is required (Expert Group on Debt Redemption Fund and Eurobills 2014: 64 at para. 250). Both arguments will be critically assessed in the following.

2.4.1. Violation of Article 125 TFEU

According to Article 125(1) TFEU, neither the Union nor a Member State is to 'be liable for […] the commitments' of another Member State or ''assume [those] commitments'. The wording of Article 125(1) TFEU suggests that any legal construction, which leads to an automatic payment of the full amount of financial commitments of one Member State by the other Member States or the Union, such as a guarantee structure based on joint and several liability, violates *per se* Article 125(1) TFEU.

Yet, in its 'Pringle' judgment, the European Court of Justice specified the content of this provision. According to the Court, Article 125 TFEU is not intended to prohibit either the Union or the Member States from granting *any* form of financial assistance whatsoever to another Member State. The Court relies on the purpose of Article 125 TFEU, which is to ensure that the Member States remain subject to the logic of the market when they enter into debt. Markets, so the idea, prompt them to maintain budgetary discipline. Compliance with such discipline contributes at Union level to the attainment of a higher objective, namely maintaining the financial stability of the monetary union. The Court therefore concludes that 'Article 125 TFEU […] prohibits the Union and the Member States from granting financial assistance as a result of which the incentive of the recipient Member State to conduct a sound budgetary policy is diminished. However, Article 125 TFEU does not prohibit the granting of financial assistance by one or more Member States to a Member State which remains responsible for its commitments to its creditors provided that the conditions attached to such assistance are such as to prompt that Member State to implement a sound budgetary policy' (ECJ 2012B: para 136 et seq.). This leads to the assumption that financial assistance, which meets the following two criteria, does not violate Article 125(1) TFEU: Financial assistance must be indispensable for the safeguarding of the financial stability of the euro area as a whole and subject to strict conditions.

When applying these two conditions to the establishment of a redemption fund, one comes to the conclusion that it would not violate Article 125(1) TFEU. The financial and economic crisis revealed that overindebted government budgets lead to significant crisis of the financial stability within a monetary union. Reducing debt to the level that can be tolerated under Maastricht criteria is therefore indispensable for the safeguarding of the financial stability of the euro area. Furthermore, participation in the redemption fund is, as shown above, subject to strict conditionality.

This strict application of the two conditions ignores, however, the purpose of Article 125(1) TFEU. If one reduces the legality test under Article 125(1) TFEU of financial assistance programmes to the fulfilment of these two criteria, any financial assistance programme could pass it. The purpose of Article 125(1) TFEU, which is to remain subject to the logic of the market which coordinates Member States' economic, fiscal and budgetary policies, would be completely ignored (Expert Group on Debt Redemption Fund and Eurobills 2014: 60). Therefore, the ECJ also required in the 'Pringle' judgment that the Member State, which receives financial assistance, 'will remain responsible to its creditors for its financial commitments' (ECJ 2012b: para. 138). It appears now that the legality test for a redemption fund fails to meet this understanding of the purpose of Article 125(1) TFEU, since government debt of more than 60% of the GDP of the participating Member State is taken over by the ERF, which is backed by a joint and several guarantee by the participating Member States. This was the main argument, on which the Expert Group on Debt Redemption Fund and Eurobills based its assumption that Article 125(1) TFEU would be violated by the establishment of an ERF.

Against this understanding, one may now refer to the concrete assessment of the ECJ in its 'Pringle' judgment of the several instruments of the ESM. Under Articles 17 and 18 of the ESM-Treaty, the ESM may purchase bonds issued by an ESM Member State on the primary market. The ECJ compared such purchases to the granting of a loan under Article 15 and 16 of the ESM-Treaty (ECJ 2012B: para. 140). Granting a loan does, according to the ECJ, not imply 'that the ESM will assume the debts of the recipient Member State. On the contrary, such assistance amounts to the creation of a new debt, owed to the ESM by that recipient Member State, which remains responsible for its commitments to its creditors in respect of its existing debts' (ECJ 2012B: para 139). The Court emphasised that 'any financial assistance granted on the basis of Articles 14 to 16 thereof must be repaid to the ESM by the recipient Member State' (ECJ 2012B: para 139). Based on these considerations by the Court, the purchase of government bonds covering the government debt above 60% of GDP by the ERF would not violate Article 125(1) TFEU. The Member State in question remains responsible for its commitments, only now not any more vis-à-vis a private financial market operator but vis-à-vis the ERF.

This leads to the final question whether the joint and several liability of the participating Member States for the ERF is to be considered a violation of Article 125(1) TFEU. The wording of Article 125(1) TFEU refers to 'the commitments of central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of any Member State' when defining, which commitments are covered by it. The wording does not refer to commitments of the EU or other international entities. Commitments of a European redemption fund therefore seem not to be covered by Article 125(1) TFEU and, thus, a joint and several liability of Member States participating in the ERF is not violating Article 125(1) TFEU (Nettesheim 2012: 607). Yet, one may argue, as the Expert Group on Debt Redemption Fund and Eurobills did, that such an understanding of Article 125(1) TFEU would undermine its effectiveness as Member States could escape their obligations under this article by simply establishing an international fund (Expert Group on Debt Redemption Fund and Eurobills 2014: 59). Even if Article 125(1) TFEU could be applied to commitments of the ERF, a joint and several liability would not conflict with it.

In the 'Pringle' judgement, the ECJ examined the legality of Article 25(2) ESM-Treaty, which dealt with a situation in which an ESM member fails to meet the required payment under a capital call under the ESM-Treaty. In such a situation, under Article 25(2) ESM-Treaty, 'a revised increased capital call shall be made to all ESM Members with a view to ensuring that the ESM receives the total amount of paid-in capital needed.' This situation can be understood as some sort of joint and several liability of the other ESM members in case of an inability to

pay by one of the ESM members. The ECJ upheld this provision by referring to the fact that 'under that same provision, the defaulting ESM Member State remains bound to pay its part of the capital. Accordingly, the other ESM Members do not act as guarantors of the debt of the defaulting ESM Member' (ECJ 2012B: para 145). This means that, as long as every Member State that participates in the ERF remains bound to its consolidation path, even in the event of a default, a temporary financial assistance of the other Member States participating in the ERF to the ERF would be in line with Article 125(1) TFEU. This shows that, according to the ECJ, a legally binding internal burden sharing between the participating Member States is sufficient in order to consider a liability of participating Member States, which goes beyond a predefined share that has to be covered by each Member State, to be a financial commitment, which is not violating Article 125(1) TFEU.

2.4.2. Legal base

The second line of arguments against a legally possible establishment of an ERF under the existing Treaties relates to legal base (Expert Group on Debt Redemption Fund and Eurobills 2014: 63). A possible legal base is Article 352(1) TFEU. According to this article, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, may adopt measures if Union action should prove necessary to attain one of the objectives set out in the Treaties provided that there are no specific competences in the Treaties. The objective can be found in Article 3(4) TEU, referring to the establishment of an economic and monetary union whose currency is the euro, which includes the safeguarding of the financial stability of the euro area as a necessary condition for the functioning of the EMU. This objective is met with regard to the ERF since it guarantees a reduction of government debt down to the Maastricht criterion of 60% of GDP and stabilizes, by that, Member States' national budgets. Based on these arguments, the ESM could have been established on the basis of Article 352(1) TFEU, which was not excluded by the ECJ in the 'Pringle' judgment (ECJ 2012b: para. 67).[14]

Yet, a legal act based on Article 352(1) TFEU may not modify the Primary law. Otherwise, it would undermine the Treaty change procedure foreseen by Article 48 TEU. Based on this observations, one may argue against the possibility to use Article 352(1) TFEU for the establishment of an ERF that it would undermine Member States' budgetary sovereignty, as protected by Article 311 TFEU (Expert Group on Debt Redemption Fund and Eurobills 2014: 63). One may, indeed, establish a principle, according to which Union legal acts may not request any payments from Member States' budgets outside their contributions to the Union budget. Whilst this is not completely true, since Article 311(2) allows for 'other revenue', which includes payments from Member States' budgets without being an own resource, it can be validly claimed that the amount covered by the ERF, which is surpassing the totality of the amount covered by the Union budget, cannot be considered anymore as 'other revenue' in terms of Article 311(2) TFEU. It may only be claimed from Member States if established as a new 'own resource'.

It is therefore true to argue that a legal act based om Article 352(1) TFEU may not circumvent Article 311(3) TFEU and its reference to an approval of the introduction of a new category of own resources by the Member States in accordance with their respective constitutional re-

[14] It should be noted that the ECJ examined the legality of the ESM before the entry into force of Decision 2011/199, which introduced Article 136(3) in the TFEU. Since this did not harm the legality of the ESM (EuGH 2012: para. 185), neither an international Treaty such as the ESM-Treaty nor a Union act based on Article 352(1) TFEU would have been in violation of the Treaties. The reasoning of the ECJ with regard to the ESM-Treaty would have to be applied in the same manner to a Union legal act.

quirements (Expert Group on Debt Redemption Fund and Eurobills 2014: 63). This is, however, no argument against the establishment of an ERF within the existing Treaties but in favour of it. The establishment of an ERF would only require two legal acts: (1) The establishing legal act on the basis of Article 352(1) TFEU and (2) the introduction of a new own resource covering the payments to the ERF on the basis of Article 311(3) TFEU.

2.4.3. Conclusion

The establishment of a European redemption fund, following the model proposed by the German Council of Economic Experts, can legally be done under the existing Treaties. It would require two legal act: One establishing the ERF, on the basis of Article 352(1) TFEU, and one introducing a new category of own resources covering the payments of the participating Member States to the ERF, on the basis of Article 311(3) TFEU. A redemption fund is not violating Article 125(1) TFEU if the following conditions are fulfilled:

1. Member States remain responsible for their commitments to their creditors: The redemption fund would purchase during the 'roll in' phase bonds issued by the participating Member States. This purchase is similar to the purchase of bonds under Article 17 of the ESM-Treaty. The purchase creates a new debt, owed to the redemption fund by the recipient Member State.

2. Participation in the redemption fund is subject to strict conditionality whose purpose is to prompt the implementation of a sound budgetary policy of participating Member States.

3. There has to be a legally binding burden sharing between the participating Member States, which is not conditional upon the ability of the Member States to pay.

2.5. Inclusion of the TSCG into the EU legal framework

The TSCG can in large parts already be included into the existing EU legal framework without Treaty change. This follows from the fact the TSCG, being an *inter se* agreement of a subset of Member States under International law, has to be in compliance with existing primary and secondary EU law and may not modify it (see in detail on the legal framework for *inter se* agreements section 1.1.4.3). The content of the TSCG is therefore either already covered by secondary Union law that was adopted in the meantime or could be included into secondary Union law on the basis of Article 121(6) TFEU or Article 126(14) TFEU.

The following table shows, which provisions of the TSCG can already be found in the existing secondary law, which provisions could be included in future secondary legislation and which provisions require a Treaty change in order to be transposed into the EU legal framework.

TSCG	Content	Existing EU law	Inclusion into future EU law
Art. 3(1)(a)	Balanced budget rule	Art. 2a(1) of Regulation (EC) No 1466/97	*not needed*
Art. 3(1)(b)	Definition of the country-specific medium-term objective for a structural deficit not to be more than 0.5% of GDP	Art. 2a(2) of Regulation (EC) No 1466/97:	*Amendment of Art. 2a(2) of Regulation (EC) No 1466/97*
		Definition of the country-specific medium-term objective not be more than 1.0% of GDP	*Reduction of the country-specific medium-term objective to 0.5% of GDP for Member States whose government debt is significantly below 60% of GDP*

TSCG	Content	Existing EU law	Inclusion into future EU law
Art. 3(1)(d)	Definition of the country-specific medium-term objective for a structural deficit of states with a government debt significantly below 60% of GDP not to be more than 1.0% of GDP	Art. 2a(2) of Regulation (EC) No 1466/97:	*Amendment of Art. 2a(2) of Regulation (EC) No 1466/97*
		Definition of the country-specific medium-term objective not be more than 1.0% of GDP	*Country-specific medium-term objective of 1.0 % of GDP is only allowed for Member States whose government debt is significantly below 60% of GDP*
Art. 3(1)(c), Art. 3(3)	Definition of the deviation possibility in case of exceptional circumstances	Art. 5(1)(10), Art. 6(3)(4), Art. 9(1)(10) and Art. 10(3)(4) of Regulation (EC) No 1466/97:	*not needed*
		Identical definition of the deviation possibility	
Art. 3(3)	Definition of 'annual structural balance of the general government'	Art. 2a(2) of Regulation (EC) No 1466/97:	*not needed*
		Definition in TSCG refers to the definition in Art. 2a(2)	
Art. 3(1)(e)	Automatic correction mechanism	Art. 5 of Directive 2011/85/EU	*Amendment of Art. 5 of Regulation (EU) No 473/2013*
		Definition of numerical fiscal rules	*(1) A medium-term objective and the adjustment path towards it are considered to be numerical fiscal rules. The requirement to enforce numerical fiscal rules by means of an automatic correction mechanism can be included into Art. 5 of Regulation (EU) No 473/2013 that deals with the enforcement of numerical fiscal rules.*
		Art. 5 of Regulation (EU) No 473/2013	
		Establishment of independent bodies monitoring compliance with numerical fiscal rules	*(2) Extension of Regulation (EU) No 473/2013 to all Member States*
Art. 3(2)	Implementation requirement: Provisions of binding force and permanent character, preferably constitutional	Art. 5 of Regulation (EU) No 473/2013	*Amendment of either Art. 5 of Directive 2011/85/EU or Art. 5 of Regulation (EU) No 473/2013*
		Establishment of independent bodies monitoring compliance with numerical fiscal rules	*(1) The implementation of EU law into national law always has to be made by provisions of binding force and permanent character. Only the constitutional level cannot be ordered. Art. 3(2) TSCG, however, requires only 'preferably constitutional' without setting up a legal obligation to include the automatic correction mechanism into the constitution. Such rule can be included into EU secondary law.*
			(2) If amendment of Art. 5 of Regulation (EU) No 473/2013: Extension of this regulation to all Member States
Art. 4	Debt brake rule: Reduction of debt at an average rate of 1/20 per year	Art. 2(1a) of Regulation (EC) No 1467/97	*not needed*
		An excess of the reference value for government debt is considered as sufficiently diminishing if the differential with respect to the reference value has	

TSCG	Content	Existing EU law	Inclusion into future EU law
		decreased over the previous three years at an average rate of one twentieth per year as a benchmark.	
Art. 5	Budgetary and economic partnership programmes	Art. 9 of Regulation (EU) No 473/2013 If the Council decided that an excessive deficit exists in a Member State, the Member State concerned shall present an economic partnership programme describing the policy measures and structural reforms that are needed to ensure an effective and lasting correction of the excessive deficit.	*(1) Content: not needed* *(2) Extension of Regulation (EU) No 473/2013 to all Member States*
Art. 6	Ex-ante reporting obligations for Member States on public debt issuance plans	Art. 8(1) of Regulation (EU) No 473/2013 Member States shall report to the Commission and the Eurogroup, *ex ante* and in a timely manner, on their national debt issuance plans.	*(1) Content: not needed* *(2) Extension of Regulation (EU) No 473/2013 to all Member States*
Art. 7	Reversed qualified majority voting concerning the Council decision under Article 126(6) TFEU	*None*	***Treaty change** (Art. 7 modifies, if considered to be legally binding, the voting modalities in the Council as defined by Article 16(3) TEU)*
Art. 8(1)	Infringement procedure at the ECJ	*None*	*not needed (if TSCG is included into the EU legal framework, the action for infringement under Articles 258 and 259 TFEU can applied)*
Art. 8(2)	Sanction in case of failure to implement the automatic correction mechanism after a ECJ judgment: Penalty payments are payable to the ESM for Euro area Member States and to the general budget of the Union for non-Euro area Member States	*None*	*not needed (if TSCG is included into the EU legal framework, the action for infringement under Articles 258 and 259 TFEU is to be applied with sanction for non-compliance with ECJ judgments in accordance with Article 260 TFEU. These sanctions are considered 'other revenue' of the general Union budget. A transfer to the ESM is excluded but also not necessary.)*
Art. 9	Commitment to work jointly towards a better economic policy through enhanced convergence and competitiveness	*None (no legal obligation, but a political commitment)*	*not needed (no legal obligation, but a political commitment)*
Art. 10	Declaration to make use of Article 136 TFEU and of enhanced cooperation, whenever appropriate and necessary	*None (no legal obligation, but a political commitment)*	*not needed (no legal obligation, but a political commitment)*
Art. 11	Commitment to discuss major economic policy reforms ex-ante	*None (no legal obligation, but a political commitment)*	*not needed (no legal obligation, but a political commitment)*

TSCG	Content	Existing EU law	Inclusion into future EU law
Art. 12	Establishment of the Euro Summit	*None*	***Treaty change*** *(either to be included before Article 137 TFEU on the Euro Group or as an own Protocol annexed to the Treaties)*
Art. 13	Establishment of an interparliamentary cooperation at committee level	Art. 9 of Protocol (No 1) on the Role of National Parliaments in the European Union and Rule 142(3) of the Rules of Procedure of the European Parliament	*not needed (except for clarification)*
		The European Parliament and national Parliaments shall together determine the interparliamentary cooperation. The RoP allows EP committees committee to directly engage in a dialogue with national parliaments at committee level	

In sum, only the reversed qualified majority voting rule has to be included into the EU legal framework by a formal Treaty amendment if the voting rule is supposed to be legally binding and not to be a mere political declaration of the governments of the EU Member States on how to use their voting powers in the Council. Furthermore, the Euro Summit would require an own protocol in order to be properly transposed into the existing Treaty framework. Finally, revenue from the financial sanctions of Euro area Member States for non-compliance with an ECJ judgment stating the failure to comply cannot be transferred to the ESM without significant legal changes. Penalty payments or lump sums under Article 260 TFEU are assigned to the Union budget, but the Union is no contributor to the ESM. Instead of including a financial contribution by the EU to the ESM, which equals the amount of penalty payments because of the non-compliance of an ECJ judgment stating the failure to implement an automatic correction mechanism into national law, one should simply delete the rule, according to which the penalty payment is to be paid to the ESM.

The other provisions of the TSCG either exist already in the current EU secondary law or could be transposed into the EU legal framework on the basis of amendments of existing EU secondary legal acts.

3. CHANGES TO THE EMU INSTITUTIONAL LAW

3.1. Role of the European Court of Justice

The role of the European Court of Justice is, within EMU, in particular within the economic coordination framework, a restricted one. This is because of the extensive use of recommendations as non-legally binding measures (Article 288(4) TFEU) in order to set policy goals for the Member States, non-compliance with which does not result into a breach of Union law. Furthermore, when adopting legally binding decisions within the budgetary surveillance procedure, according to Article 126(10) TFEU, the action for infringement under Articles 258 and 259 TFEU is excluded with regard to all decisions (based on Article 126(1) to (9) TFEU) except for decisions imposing sanctions. Having said this, it is worth mentioning that the action for annulment, the action for failure to act and the preliminary reference procedure are not excluded.

Any attempt to strengthen the role of the European Court of Justice by either replacing recommendations by legally binding decisions or by allowing the action for infringement within the budgetary surveillance procedure requires a formal Treaty change. This can also not be achieved only with respect to a subset of Member States (e.g. such as the Euro area Member States) since all means of an enhanced cooperation of a subset of Member States (either under Article 20 TEU, Article 136 TFEU or by concluding intergovernmental Treaties) may not violate Primary law and, by that, may not modify it.

Besides the limits set by the Treaties to extend the action for infringement under Articles 258, 259 TFEU to measures adopted under Article 126(1) to (9) TFEU, one may question the effectiveness of such an extension. It is true that the budgetary surveillance procedure under the existing Article 126 TFEU is a political procedure and not a judicial procedure. Non-compliant Member States are assessed by the Commission but have to justify themselves in front of the Council, which can always overrule the Commission. The Commission may then seek an annulment of the Council decision under Article 263 TFEU or prosecute the non-compliant Member States by initiating the action for infringement. The latter is excluded by Article 126(10) TFEU. The first will most likely fail because of the broad discretion conferred upon the Council. The Commission would therefore have to prove arbitrariness of the Council, which will be difficult in practice.

Against this background, a deletion of Article 126(10) TFEU means that the political discretion of the Council on establishing the existence of an excessive deficit and on deciding on whether necessary steps were taken by the Member State in order to remedy the excessive deficit would be replaced by the judicial discretion of the Court. Whether courts, however, are (better) equipped for assessing complex economic situations and for taking such decisions if requested by the Commission, remains doubtful (Adamski 2012: 1341). The Court itself is aware of its lack of expertise wherefore in cases relating to 'complex assessments'. With regard e.g. to the assessments by the European Commission in the area of state aid law, the ECJ stated that the 'review by the European Union judicature of the complex economic assessments made by the Commission is necessarily limited and confined to verifying whether the rules on procedure and on the statement of reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of assessment or misuse of powers' (ECJ 2010b: para. 66). The Court therefore only examines whether the Union institution or agency that has the necessary technical, economic or scientific expertise used its discretionary powers relating to the complex assessments properly and did not commit any manifest errors in its assessment or misused its powers. Applying this reasoning to matters relating to the budgetary surveillance procedure, the ECJ would not

make an own assessment as to whether there is an infringement by the non-compliant Member State but follow the Commission's assessment unless it find manifest errors in the Commission's assessment of the violation. By that, the deletion of Article 126(10) TFEU will, in the end, lead to a situation in which, in principle, the political discretion of the Council is replaced by the political discretion of the Commission.

Besides, this argument doubting whether the deletion of Article 126(10) TFEU will effectively change the existing political procedure under Article 126 TFEU into a judicial procedure, another issue has to be taken into account. The effect of a judgment of the ECJ in an action for infringement is only to establish that a Member State has failed to fulfil an obligation under the Treaties. According to Article 260(1) TFEU, 'the State shall be required to take the necessary measures to comply with the judgment of the Court.' Continuous non-compliance will only entitle the Commission to bring an action for failure to fulfil its obligations requested by a Court decision under Article 260(2) TFEU. If now 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. By that, the ECJ has, in case of persistent non-compliance, the same means of enforcement as the Council under Article 126(11) TFEU. The issues relating to the lacking means to address involuntary non-compliance raised under section 2.1.1.2 will not therefore be addressed by a deletion of Article 126(11) TFEU.

Hence, the last question to be addressed is whether an extension of the action of infringement to Article 126(1) to (9) TFEU could at least solve issues relating to voluntary non-compliance. The main difference between the current political procedure and a judicial procedure is the addressee of a decision. Whilst a Council decision is addressed to the government of a Member State, a judgment of the ECJ is mainly addressed to the national courts. Therefore, an extension of the Court's jurisdiction for actions for infringement to matters relating to budgetary surveillance can be understood as establishing a compliance mechanism aiming at 'legal internalization' in order to overcome the political will of a Member State not to comply by making use of national court decisions. Two reservations as to the effectiveness have to be made: First, the 'automatic correction mechanism' under Article 3(1)(e) TSCG, which has to be implemented into national law and which is considered as 'legal internalization', has not proven to be efficient to achieve compliance with the MTO set by the TSCG. This raises general doubts as to 'legal internalization' as a means to achieve compliance of politically, unwilling Member States (cf. section 2.1.1.2). Second, it appears furthermore doubtful whether the success of the European Court of Justice in achieving and guaranteeing compliance of internal market law (fundamental freedoms and internal market regulations and directives) can be repeated with regard to economic policy coordination. The most supportive argument for strengthening the role of the European Court of Justice in the economic governance framework is the high degree of compliance that can be observed in the context of internal market law, which is essentially attributed to the European Court of Justice and the cooperation of the European court with the national courts. The main reason for this success is, however, not directly linked to the Court and its case law but to the fact that internal market law provides for directly applicable individual rights, which an individual can invoke in front of national courts against a non-compliant Member State. In case of violation, under the doctrine of the supremacy of EU law, the conflicting national law has to be disapplied by the national judge and to be replaced by the EU provision. EU law in the area of economic policy coordination and of budgetary surveillance does not contain any individual rights. By that, in contrast to internal market law, there are no individuals that could enforce EU norms in front of national courts against a non-compliant Member State. Both reservations raise serious doubts whether the lack of compliance in affairs relating to the economic policy coordination framework can be effectively tackled by strengthening the role of the European Court of Justice.

3.2. EU Finance Minister

Recently, the proposal was put forward to install a 'European Finance Minister' (Enderlein and Haas 2015). The idea behind this proposal is to strengthen the Commission's role in economic governance and to bundle several instruments in one hand. The EU Finance Minister should be responsible for the economic policy coordination, the budgetary surveillance and financial assistance programmes. In order to do so, the EU Finance Minister should be President of the Eurogroup, Commissioner for Economic and Financial Affairs and Vice-President of the European Commission and preside the ECOFIN Council. This person should be politically responsible for the ESM and a future fiscal capacity for the EU.

As a first step, it will be analysed to which extent an EU Finance Minister can be introduced on the basis of the existing Treaties (3.2.1). Afterwards the necessity for installing an EU Finance Minister will be discussed (3.2.2) before, as a last step, Treaty amendments for the establishment of an EU Finance Minister will be proposed (3.2.3).

3.2.1. EU Finance Minister within the existing Treaty framework

From a legal perspective, a merger of the position of the Commissioner for Economic and Financial Affairs with the President of the Eurogroup is possible, taking into account that Article 2 of Protocol (No 14) on the Eurogroup does not provide for any specific criteria for the selection of the president (this idea is also discussed under section 4.2). A combination with the position of the Vice-President would, however, violate the discretionary powers of the President of the Commission under Article 17(6)(1)(c) TEU. It is exclusively within the powers of the president to appoint the Vice-President. The Treaty only requires that the High Representative of the Union for Foreign Affairs and Security Policy has also to be one of the Vice-Presidents (Article 17(4) TEU). Conversely, the President of the Commission cannot legally be bound to appoint the Commissioner for Economic and Financial Affairs as one of the Vice-Presidents. The same applies with regard to the presidency of the ECOFIN Council. Article 16(9) TEU clearly defines that the 'Presidency of Council configurations, other than that of Foreign Affairs, shall be held by Member State representatives in the Council'. Changing the rules of the presidency of Council configurations would therefore require a Treaty change.

More important than the possible mergers of existing positions in the institutional framework of economic governance are, however, the competences for the EU Finance Minister. Under the current legal framework, the Council has the core role in economic governance. It decides on a proposal or a recommendation by the Commission. The Commission may only address warnings under Article 121(4) TFEU or opinions under Article 126(5) TFEU. It may also make use of its strengthened political influence on the Council decisions or recommendations when the reversed qualified majority voting rule is applicable. Shifting the decision-making power in economic governance issues from the Council to the Commission would therefore also require a Treaty change.

Furthermore, the EU Finance Minister should not only enforce economic policy coordination measures, but s/he shall also be responsible for the fiscal capacity and for the European Stability Mechanism (ESM). Independently of how both could be implemented into EU law (on the fiscal capacity see section 2.1.2, on the inclusion of the ESM-Treaty see section 3.3), the financial capacity of both instruments, once they are part of EU law, would equal together much more than half of the total EU budget. Such a huge political personal responsibility requires a mechanism, based on which the person acting as Finance Minister can be held to account in person. Article 234 TFEU, however, makes clear that only the college of Commissioners can be held to account by the European Parliament for the misbehaviour of one or more Commissioners. This mechanism is intended to raise the political costs for a motion of

censure on the activities of the Commission. The underlying rationale can, however, not anymore be upheld for a Commission, to which a Commissioner belongs who also presides the Eurogroup and who is politically responsible for the use of more than half of the EU budget. Yet, the current legal framework provides in Article 17(6) TEU for a right of the President of the European Commission to request the resignation of a single Commissioner, who then is obliged to resign. Point No 5 of the Framework Agreement on relations between the European Parliament and the European Commission ([2010] OJ 304, p. 47-62) connects this right of the President of the European Commission with a possibility of the European Parliament to demand from the President to make use of this right. According to this point, the President of the Commission will following such a request from the Parliament 'seriously consider whether to request that Member to resign, in accordance with Article 17(6) TEU. The President shall either require the resignation of that Member or explain his/her refusal to do so before Parliament in the following part-session'. By that, this instrument can hardly be understood as a proper instrument to hold a single Commissioner to account by the European Parliament. There is no legal obligation for the President of the Commission to make use of this right upon a request of the European Parliament. As long as, at least with regard to the EU Finance Minister, the European Parliament cannot legally claim from the President of the Commission to request a single Commissioner to resign, the introduction of such a Minister is from the perspective of accountability highly questionable.

3.2.2. Necessity to introduce an EU Finance Minister under the existing legal framework

From a political perspective, it is hardly recommendable under the existing legal framework to introduce an EU Finance Minister. The common understanding of the role of a Finance Minister is to raise taxes, to manage the budget and to finance projects of the entity that he belongs to. As long as there is no fiscal capacity or European Monetary Fund/European Stability Mechanism under his/her control, the 'EU Finance Minister' will only be the executor of austerity measures. This will most likely harm the reputation of the 'EU Finance Minister' in a way that this position will be no more a credible position in the eyes of non-compliant Member States once s/he will be competent to control and to make use of the fiscal capacity and/or the European Monetary Fund/European Stability Mechanism.

3.2.3. Proposed Treaty amendments

If an EU Finance Minister is to be installed on the occasion of the next Treaty reform, it could be modelled after the High Representative of the Union for Foreign and Security Affairs. This requires the inclusion of a new article in the TEU establishing this position, which includes (1) an appointment procedure, according to the which the EU Finance Minister is proposed by the Council in agreement with the President of the European Commission by qualified majority and confirmed by the European Parliament, (2) his automatic appointment as one of the Vice-Presidents of the Commission, (3) his role as president of the ECOFIN Council and (4) a mechanism for the European Parliament to table a motion of no-confidence. The articles on the European Commission (Article 17 TEU, Articles 246, and 248 TFEU) and on the Council (Article 16(9) TEU) have to be adapted accordingly. Furthermore, the Protocol on the Eurogroup should be amended in order to introduce the EU Finance Minister as president of the Eurogroup.

3.3. Inclusion of the ESM into the EU legal framework

The ESM-Treaty can be included into the existing EU legal framework on the basis of a Union legal act based on Article 352(1) TFEU. This follows from the 'Pringle' judgement (ECJ 2012b). Although the Court left it open in the decision whether the ESM could have been established on this legal base (ECJ 2012b: para. 67), it stated clearly that the ESM could be established

without violating the EU Treaties before the entry into force of the new Article 136(3) TFEU (ECJ 2012b: para. 185). Article 136(3) TFEU, according to which 'Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole', is merely clarifying the law as it stands. Against this background, one may only reject Article 352(1) TFEU as an appropriate legal base for converting the ESM-Treaty into a Union legal act if the Treaties prevent the Union from establishing a stability mechanism, which is allowed for its Member States.

Such an understanding could be derived from Article 122(2) TFEU, which allows the Council to grant Union financial assistance to Member States 'in difficulties or […] seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control'. One may now conclude that the Union is not allowed to grant financial assistance outside the scope of Article 122(2) TFEU, which is narrower than the scope of the ESM-Treaty. The ESM may grant financial assistance to its Members 'which are experiencing, or are threatened by, severe financing problems if indispensable to safeguard the financial stability of the euro area as a whole and of its Member States'. Since not all 'severe financing problems' of a Member State can be traced back to 'severe difficulties caused by […] exceptional occurrences beyond [the] control' of the Member State concerned, the Union may not grant financial assistance under Article 122(2) TFEU in all situation, which would be covered by the ESM.

The ECJ, however, rejected in its 'Pringle' judgment the argument that Article 122(2) TFEU is the only legal base, on which the Union may grant financial assistance to Member States (ECJ 2012b: para. 131). It concluded with a view to Article 125(1) TFEU that '[i]f Article 125 TFEU prohibited any financial assistance whatever by the Union or the Member States to another Member State, Article 122 TFEU would have had to state that it derogated from Article 125 TFEU.' In other words, the Court rejected an understanding of the EU Treaties, according to which financial assistance by the Union is forbidden (on the basis of Article 125(1) TFEU) except for cases, where there is an express Union competence to grant such assistance. The Court rather assumes that the Union may grant financial assistance also on the basis of other legal bases provided that the financial assistance complies with the conditions set by Article 125(1) TFEU. On the basis of this reasoning, the Union may also grant financial assistance to Member States based on Article 352(1) TFU in cases beyond the scope of Article 122(2) TFEU as long as they comply with Article 125(1) TFEU. Since, in the eyes of the ECJ, the ESM-Treaty is in compliance with Article 125(1) TFEU, the same provisions could also be adopted on the basis of Article 352(1) TFEU.

Whilst against this background there is a legal basis to include the payment side of the ESM into the EU legal framework without a Treaty change, one has to take a closer look at the financing side of the ESM after a possible integration of the ESM into the EU legal framework. Once the ESM is part of EU law, its expenditure and its revenues is part of the general Union budget. This follows from Article 310 TFEU, which embodies the general principle of unity of the EU budget and its completeness. This means that *all* revenues and expenditures of the Union are part of *one* EU budget, which is complete and includes therefore *every* predictable revenue and expenditure of the Union. Since the ESM is an instrument only for the Euro area Member States, reference for the main implications of EU budget law on the inclusion of the ESM into the EU legal framework shall be made to section 2.2. on the Euro area budget. Very briefly, it should be noted at this point that the financial contributions of the ESM Member States are earmarked for the exclusive use by the ESM. Such earmarking makes out of these financial contributions 'external assigned revenue' in terms of Article 21(2)(d) of Regulation (EU, Euratom) No 966/2012 on the financial rules. Such 'external assigned revenue' is considered to be 'other revenue' in terms of Article 311(2) TFEU so that the Own Resources Decision would not have to be modified when including the ESM into the EU legal framework.

The 'external assigned revenue' is exclusively used for the purpose of financing the ESM but not to balance the general Union budget. It is therefore of no relevance for the general Union budget. Furthermore, expenditure financed by such 'external assigned revenue' is, according to Recital No 8 of the Regulation (EU, Euratom) No 1311/2013 laying down the multiannual financial framework for the years 2014-2020 (MFF) not to be taken into account by the ceilings set by the multiannual financial framework. This exclusion from the MFF ceilings makes sense since expenditure, which is financed by assigned revenue, does not affect the revenue arising from 'own resources', which finances the general Union budget.

This reasoning shows that the expenditure side and the financing side of the ESM could be included into the existing EU legal framework without a Treaty change. The main challenges for the integration of the ESM into the EU legal framework are the governance side. Currently, the ESM Board of Governors is the central decision-making body of the ESM, which not accountable to any other institution. Only each member of the ESM Board of Governors, the national finance ministers, is responsible towards their national Parliaments. If included into the current EU legal framework, the ESM turns into a Union agency, which is to be controlled by the European Commission and the Union legislator. It is, however, doubtful whether the governance structure of a Union agency is suitable for the size of the budget and for the political impact of the decisions of the ESM on Member States. It appears therefore necessary to include the ESM as a proper institution in the EU Treaties, which would allow for tailor-made governance structures. Such governance structures must take the interest of national Parliaments into consideration to have an influence on the decision of how a significant share of their national budgets is used. The European Parliament and the Council as budgetary authorities of the Union must get supervisory rights over the ESM's decisions and activists. The ECJ should get jurisdiction over the ESM. The 'Memorandum of Understanding', which outlines the policy reforms of a Member State in return for financial assistance from the ESM, must be converted into a legal act, which can be reviewed by the European Court of Justice.

These sensitive governance questions require that an inclusion of the ESM should only be envisaged when changing the Treaties.

4. ENHANCING DEMOCRATIC LEGITIMACY OF EMU DECISION-MAKING

4.1. State of accountability in EMU affairs

4.1.1. Analytical framework for accountability

Accountability can be described as a mechanism by which those in charge of the exercise of public power or public policy making are subject to continuous control and, moreover, can be sanctioned in case of bad performance or undesired behaviour (Amtenbrink 2012, 344, building on Amtenbrink 1999). Put differently, accountability describes 'a relationship between an actor and a forum, in which the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pass judgment, and the actor may face consequences' (Bovens 2007, 107).

Based on this definition, the analytical framework regarding the existence and the quality of accountability first assesses the foundations of accountability. This refers to transparency and access to information, which enable the controlling body to effectively supervise the activities of the controlled body. Second, the controlling body must have instruments at hand that allow it to assign consequences to a judgment on the activities of the controlled body. Such instruments must include means for the controlling body to remedy shortcomings and to sanction undesired behaviour (Amtenbrink 2012, 349). Means in this respect can be dismissal and reappointment procedures, override mechanisms, budget appropriation and judicial review (following Amtenbrink 1999).

4.1.2. Application of the analytical framework

When applying this analytical framework to the accountability of the acting institutions in EMU, one comes to the conclusion that accountability is precarious. The acting institutions in EMU, the European Council, the ECB, the Council, the Commission and the Eurogroup, are in principle, by being European institutions or de-facto bodies, accountable to the European Parliament as the Parliament of the EU. The Treaty provides for an exception with regard to the ECB in Article 130 TFEU 'when exercising the powers and carrying out the tasks and duties conferred upon [the ECB] by the Treaties and the Statute' (which excludes tasks conferred upon the ECB by secondary law).

4.1.2.1. Foundations of accountability

In order to properly exercise the function of political control, as required by Article 14(1) TEU, the European Parliament has to have proper access to information as regards Union's action in EMU affairs. According to Article 121(5) TFEU, the President of the Council and the Commission shall report to the European Parliament on the results of multilateral surveillance and the President of the Council may be invited to appear before the competent committee of the European Parliament. This covers the economic policy coordination, the MIP and the preventive arm of the SGP. As regards the corrective arm of the SGP, Article 126(11)(3) TFEU states that the President of the Council is only under the obligation to inform the European Parliament about the decision imposing sanctions. Furthermore, the European Parliament may, under Article 226 TFEU, set up a temporary Committee of Inquiry to investigate alleged contraventions or maladministration of Union institutions or bodies in EMU matters in order to gather necessary information.

The introduction of the 'Economic Dialogue' in the 'Six Pack'[15] and in the 'Two Pack'[16] extended the obligation to inform and to appear before the competent committee of the European Parliament to all stages of the reformed economic governance and included, 'where appropriate', the President of the European Council and the President of the Eurogroup. Furthermore, Regulation (EU) No 472/2013 included certain information obligations with regard to the enhanced surveillance of Member States facing serious difficulties with respect to their financial stability. Finally, under Article 7(1)(5) and 7(4)(3) of Regulation (EU) No 472/2013, the Commission has to orally inform the chair and the vice-chairs of the competent committee about the state of negotiations and drafting of macroeconomic adjustment programmes and about the conclusions drawn from the monitoring of the implementation of the macroeconomic adjustment programme. Since MoU under the ESM-Treaty shall, according to Article 7(2)(2) of Regulation (EU) No 472/2013 be 'fully consistent' with these macroeconomic adjustment programmes, the European Parliament is even recipient of information in ESM affairs.

At first sight, the 'Economic Dialogue' appears to provide for sufficient access to information for the European Parliament. At second sight, one has to notice that, in principle, only the Commission and the President of the Council are legally obliged to inform the European Parliament. The President of the European Council and the President of the Eurogroup are only under an obligation to appear in front of the competent committee but are not obliged to inform the European Parliament about their activities. The only exception can be found with regard to the European semester, where, under Article 2-a(4)(2) of Regulation (EC) No 1466/97, the President of Eurogroup shall report annually to the European Parliament on the results of the multilateral surveillance. This lack of continuous information obligations is in case of the Eurogroup notably critical, since there is only little transparency as regards the discussions and deliberations of the Eurogroup. In principle, there are no minutes of Eurogroup meetings, only brief summaries are sent to the participants of these meetings. Only when discussing opinions of the Commission on the draft budgetary plans and on the budgetary situation and prospect in the euro area, the results of those discussions of the Eurogroup shall be made public 'where appropriate' (Article 7(5) of Regulation (EU) No 473/2013). This means that it is hard for the European Parliament to get the information, which enables it to effectively control the European Council and the Eurogroup by asking the right questions to their presidents when they appear in front of the competent committee.

In sum, the European Parliament has sufficient access to information from the core institutions in economic policy coordination such as the Commission and the Council. As regards information relating to macroeconomic adjustment programmes, the information obligations of the European Commission under Regulation (EU) No 472/2013 cannot be considered as forming foundations of accountability. Both provisions in the regulation require from the chair and the vice-chairs of the competent committee to treat the information received 'as confidential', which means that the European Commission cannot be held accountable on the basis of this information.

The access to information from the European Council and from the Eurogroup is too limited in order to enable the European Parliament to properly control the activities of both. This limited access to information combined with a lack of transparency does not reflect in the case of the Eurogroup its growing role in the economic governance of the Eurozone. Hence, already on the basis of the required foundations of accountability, the European Council and

[15] Article 2-ab of Regulation (EU) No (EC) No 1466/97 (as regards the preventive arm of the SGP), Article 2a of Regulation (EU) No (EC) No 1467/97 (as regards the corrective arm of the SGP), Article 14 of Regulation (EU) No (EU) No 1176/2011 and Article 6 of Regulation (EU) No (EU) No 1174/2011 (as regards macroeconomic imbalances).
[16] Article 15 of Regulation (EU) No (EU) No 473/2013 (as regards assessing draft budgetary plans).

the Eurogroup cannot be considered to be properly held to account for their activities within EMU by the European Parliament.

4.1.2.2. Instruments of accountability

Information forming the foundations of accountability put the controlling body in a position to form a judgment about the outcome of the activities of the controlled bodies, their performance and their behaviour. Proper accountability now requires that the controlling body has effective instruments at its disposal in order to assign consequences to its judgment. Otherwise, the accountability framework is incomplete.

When it comes to the possibilities for the European Parliament to assign consequences to a judgment about the activities of the Union in EMU matters, the European Parliament has some instruments, mainly vis-à-vis the European Commission. The main instrument is the Parliament's *ex post* influence on shaping and modifying the legal base and the procedures, based on which in particular the European Commission and the Council act. This refers to the secondary law, which is adopted on the basis of Article 121(6) TFEU. This instrument is, however, dependent on a legislative initiative by the European Commission, which the European Parliament can only request on the basis of a legislative own initiative report under Article 225 TFEU without any obligation for the Commission to follow this request. Powers and procedures foreseen by Primary law (Article 121(2)-(5) TFEU, Article 126 TFEU) are excluded from this instrument. The European Parliament can therefore not override decisions and policy choices made within the economic policy coordination. It is formally not included in the adoption of the 'broad guidelines', of the annual growth survey, which forms the benchmark for the European semester, and of the country-specific recommendations. By that, the possibility to influence the procedures on the basis of Article 121(6) TFEU is only of minor significance.

Furthermore, the European Parliament may table a motion of censure on the activities of the Commission, in accordance with Article 234 TFEU, if it considers misbehaviour of the Commission in EMU matters of such a gravity that it justifies such a motion. Besides, the European Parliament may also raise its veto against the Union's annual budget, in accordance with the procedure laid down in Article 314 TFEU, or adopt amendments of the Union's annual budget concerning budget lines relating to EMU. Those instruments, even though they are at the disposal of the European Parliament, appear not to be suitable to be considered as proper instruments of accountability. This is because of the high political costs that are in reality attached to the use of those instruments. The veto against the Union's annual budget as well as a motion of censure on the activities of the Commission requires severe violations of Union objectives and aims in order to be used.

In sum, the European Parliament has little instruments of accountability. The Presidents of the Council, the European Council and the Eurogroup have not be afraid of any negative consequences with regard to their person. The only inconvenience for them is the obligation to appear in front of the competent committee and to stand questions asked by MEPs. Policy choices and individual decisions with regard to specific Member States cannot be overruled by the European Parliament. The approval of the European Parliament for financial assistance measures is not required.

4.1.2.3. Conclusion

The Economic Dialogue is the only forum of accountability besides the standard accountability instruments of the European Parliament such as the set up a of temporary committee of inquiry, a motion of censure or the veto of the Union budget. There is only a comprehensive

obligation to inform the European Parliament on the parts of the European Commission and to a somewhat lesser extent on the parts of the Council. There are only minor information obligations on the parts of the European Council and the Eurogroup. The lack of transparency of the activities of the latter leads to conclusion that with regard to the European Council and the Eurogroup a proper accountability lacks already at the level of foundations of accountability. With regard to the Commission and the Council, the European Parliament has enough of information for a judgment about their performance, but no effective instruments to assign consequences to its judgment. Based on these considerations, one must conclude that the accountability of the Union in EMU matters has to be considered precarious.

4.2. Enhancing the accountability of the Eurogroup

In view of the strong *de facto* role of the Eurogroup, which goes beyond the original idea behind the Treaty and Protocol rules that were drafted for it, (cf. section 1.1.5) especially the accountability of the Eurogroup has to be enhanced in terms of foundations of accountability as in terms of instruments of accountability.

As regards foundations of accountability, the 'Six Pack' and the 'Two Pack' regulations could be amended in order to extend the obligation to regularly inform the European Parliament to the Eurogroup. Furthermore, in order to increase transparency of the Eurogroup, it could be included into Regulation (EC) No 1049/2001 regard public access to documents. In order to overcome the exception to public access laid down in Article 4 of this regulation, an agreement between the European Parliament and the Eurogroup could be concluded outlining access to documents and information for the European Parliament.

Since the Eurogroup is legally an informal body, most of the instruments of accountability cannot be applied to it without changing it into a formal body, which would require a Treaty change. Below the threshold of a Treaty change would be a merger of an existing position, which can already be held to account by the European Parliament, with the position of the president of the Eurogroup. Article 2 of Protocol (No 14) on the Eurogroup states that only the ministers of the Member States shall elect a president and that the president is to be elected by a majority of Member States. It does, however, not provide for any specific criteria for the selection of the president. The president is therefore not limited to ministers of Member States. Otherwise, the wording of Article 2 should contain a formulation such as 'amongst them'. By that, also the Commissioner responsible EMU affairs could be elected as president of the Eurogroup without a Treaty change. The commissioner can then as a part of the college of commissioners be held accountable by the European Parliament.

Beyond the threshold of a Treaty change, the Eurogroup should be formalised with a president that has to be elected by the European Parliament. Such an elected president could be, following the model of the High Representative of the Union for Foreign Affairs and Security Policy, member of the Commission and, within the Commission, be responsible for EMU affairs and preside the ECOFIN council. Such a concentration of power would, however, require that this person can be held responsible for his/her action (including a motion of censure) outside of the collective responsibility of the European Commission as a college under Article 234 TFEU. Furthermore, a formalisation of the Eurogroup would lead to an own budget of the Eurogroup, which would be financed by the Union budget and which would, by that, open up the possibility to the European Parliament to control the activities of the Eurogroup via its budget control.

4.3. Enhancing instruments of accountability for the European Parliament

4.3.1. Inclusion of the Parliament into the decision of policy choices: Extension of the ordinary legislative procedure to matters of economic and fiscal affairs

A coordination of national economic and fiscal policies can not only be achieved by means of the European semester without formal involvement of the European Parliament in the adoption of policy choices but also by the harmonisation of important areas of economic and fiscal policies such as tax law (on the basis of Article 113 concerning indirect taxes and of Article 115 TFEU concerning direct taxes) and social law (on the basis of Article 153 TFEU). Yet all those legal bases only provide for a consultation of the European Parliament. The ordinary legislative procedure can, however, be extended to these legal bases either by the simplified treaty amendment procedure (Article 48(7)(2) TEU) or by making use of Article 333(2) TFEU which enables the Council to switch for the purpose of an enhanced cooperation to the ordinary legislative procedure.

4.3.2. Making use of interinstitutional agreements

Participation rights of the European Parliament can be strengthened by introducing a 'de-facto co-decision' in EMU matters via interinstitutional agreements under Article 295 TFEU. The exclusion of the European Parliament only covers all procedural steps after the adoption of the proposal for a decision or the recommendation for a recommendation by the European Commission. The Treaty is, however, silent as regards Parliamentary involvement before the vote in the college of Commissioners. Against this background, the Commission could inform the European Parliament about its draft proposals or draft recommendations to the Council before their adoption by the Commission. The European Parliament could then draft amendments to this draft, which the European Commission could include into its proposals or recommendations before it submits them to the Council. Such a procedure could be established on the basis of an interinstitutional agreement between the European Parliament and the Commission. An example for a comparable extension of Parliamentary participation rights can be found in paragraph 16 of the interinstitutional agreement between the Parliament and the Commission ([2010] OJ L 304, 47) on the de facto initiative right of the European Parliament.

4.3.3. Conclusion of an agreement with the ESM

The ESM is currently considered as being a body outside of the EU accountability framework, wherefore there is no obligation for the ESM to inform the European Parliament or to appear in front of the competent committee. The ESM is only supervised by the European Parliament indirectly by controlling the European Commission in executing tasks mandated by the ESM. In order to enhance direct accountability of the ESM vis-à-vis the European Parliament, on the basis of Article 38 of the ESM-Treaty, the ESM could formalise its cooperation with the European Parliament and grant it the status of a permanent observer in the ESM Board of Governors and the Board of Directors.

4.3.4. The democratic potential of Union agencies

Dealing with the consequences of the recent financial and economic crisis and drawing the conclusions from its reasons and its development in order to prevent a reoccurrence of such a crisis revealed the limits of the mere European harmonisation of Member States' laws. In areas where even before the crisis harmonised rules existed, uneven application of these rules by national authorities lead to weaknesses in the economic and financial supervisory

system and undermined the purpose of the harmonisation measures. Based on this observation, the Union legislator realised a growing necessity not only to harmonise Member States' rules but also Member States' executive action, as can be seen with the conferral of implementing powers on the European Securities and Markets Authority (ESMA) by Article 28 of Regulation (EU) No 236/2012 (prohibition of 'short selling').

This harmonisation of implementing powers raised accountability questions. In principle, as repeated by Article 291(1) TFEU, Member States have to implement harmonised rules within their territory. Implementing authorities are then subject to the accountability, mechanisms foreseen by national law and are accountable to the national Parliament. Where, however, uniform conditions for implementing legally binding Union acts are needed, those acts may confer implementing powers on the Commission or on the Council. (Article 291(2) TFEU). In those situations, Article 291(3) TFEU makes clear that the Member States control the Commission's exercise of implementing powers. The European Parliament and the Council may only lay down general principles for this control, but they are not entrusted with this control. Furthermore, as shown above, the European Parliament has only instruments for the control of the European Commission at its disposal that have high political costs (such as the motion of censure or the veto against the Union budget). Such instruments are not suitable for the control of implementing powers. In this context, veto powers against certain decisions and inquiry rights with regard to certain decisions are more effective instruments.

The conferral of implementing powers on Union agencies, as confirmed by the ECJ in case C-270/12, United Kingdom v European Parliament and Council ('short selling case'), gives the opportunity to the European Parliament to strengthen its democratic control in EMU matters. In the 'short selling case' the ECJ modified its so-called 'Meroni doctrine' (established in ECJ 1957 and 1958) on the conferral of implementing powers on Union agencies. Whilst the original Meroni doctrine wanted to prevent the conferral of executive powers delegated by Primary law to the European Commission on bodies that are not subject to any kind of legal control, the Meroni doctrine, as modified by the ECJ in the 'short selling case', addresses the issue of conferral of executive powers delegated by the Union legislator to Union agencies by means of secondary law. As under the original Meroni doctrine, the modified Meroni doctrine seeks to prevent the conferral of executive powers outside of the scope of control. Whilst the conditions and the limits of the executive powers have to be defined (and thus controlled) by the Union legislator, the use of these powers is subject to judicial review by the European courts. The latter is realised by the Lisbon Treaty subjecting the acts of Union agencies to the action of annulment (Article 263 TFEU) and to the action for failure to act (Article 265 TFEU). The first is addressed by the judgment. It requires 'clearly defined executive powers' (para. 41) in the delegating act, which are to be set by the Union legislator. Such clear definitions may include discretion. The limits for the conferral of discretion are, however, crossed when the legislator delegates 'political choices falling within the responsibilities of the European Union legislature' (ECJ 2012a: para 65). This shows that, when conferring implementing powers on Union agencies, the Union legislator may not renounce its political responsibility. On the contrary, it has to provide for effective means to control the use of the conferred powers. The more discretionary the conferred powers are, the more intense the supervision of the Union legislator has to be in order to meet the criterion set by the ECJ that the Union legislator may not delegate political choices to Union agencies. In sum, the Meroni doctrine has to be read as to prohibit any kind of transfer of implementing powers into an area without effective legal and political control of the use of these implementing powers. Political control has to be defined by the legal act conferring these powers upon the Union agency.

This shows that the conferral of implementing powers on Union agencies allows the Union legislator to establish an accountability mechanism in relation to these Union agencies where the Union body is accountable to the Union legislator, in contrast to Article 291(2) TFEU where the European Commission is to be held to account by the Member States. Defining an accountability mechanism in secondary law also gives the opportunity to include customised instruments of accountability. The political costs for using such instruments may, by that, be lower compared to the instruments of accountability that the European Parliament has vis-à-vis the European Commission. Such instruments may cover the appointment and the dismissal of the managing staff of the agency, participation in the supervisory board of the agency, veto rights in relation to certain agency decisions, information obligations and transparency rules, budgetary rights in relation to the agency's budget.

These means for a proper foundation of accountability and these instruments for accountability can be included in the legal act conferring the powers on the Union agency and, by that, on the basis of existing Treaty competences. Furthermore, it may be considered to adopt a framework regulation applicable to all agencies, which are equipped with implementing powers, following the model of Regulation (EC) No 58/2003, based on Article 352(1) TFEU. This framework regulation could then include a general accountability mechanism based on the just outlined principles and ideas. Such a framework regulation could then lead to an increase of accountability and democratic legitimacy of the use of implementing powers at EU level.

4.3.5. Proposals for establishing a new parliamentary body in Eurozone matters

As a reaction to the lack of legitimacy and accountability of decisions taken within EMU, the establishment of a new parliamentary body in Eurozone matters were out forward. These proposals are based on the assumption that Eurozone matters do not concern the entire EU at first sight, but only those Member States whose currency is the Euro. Therefore, for those who put forward these proposals, the question arose whether the entire European Parliament can be the right institution to legitimise measures in Eurozone matters. Instead of vesting the European Parliament with additional instruments of accountability and to strengthen its information gathering rights, it was proposed to establish a new parliamentary body for the Eurozone, which is composed by members of national parliaments: the Euro-Chamber.

4.3.5.1. Establishment of a new parliamentary body for the Eurozone (partly) composed of members of national parliaments from Eurozone Member States

Such a chamber would establish a third decision-making body next to the European Parliament and the Council. It appears comparable to the European Parliament before its first direct election in 1979. It can therefore be considered as a step back in the parliamentarisation of the EU. Furthermore, national parliamentarians act in the national interest. If we try to integrate the Euro-Chamber into the system of Union institutions, it rather belongs next to the Council representing the Member States than next to the European Parliament representing the Union citizens. A Euro-Chamber could therefore maybe decide instead of the Council, in the composition of the Eurozone Member States, but not instead of the entire European Parliament.

4.3.5.2. Limiting voting rights within the European Parliament to Eurozone MEPs

Furthermore, it was suggested to limit voting rights within the European Parliament to Eurozone MEPs (Future of Europe Group, Final Report, 5). The treaties do not provide for such a limitation of voting rights. Whilst in an enhanced cooperation the voting rights in the Council are limited to the participating Member States (Article 330 TFEU), no such limitation can be found with regard to the European Parliament. The same applies to Article 136 TFEU on

provisions specific to Eurozone Member States. This suggestion, furthermore, ignores the fact that the Euro is the currency of the Union and not of a subgroup of Member States. Decisions concerning the currency of the Union should be taken in the Union's interest, which is represented by the entire European Parliament. Finally, the limitation of voting rights in relation to the origin of a MEP runs counter to the fundamental EU principle of prohibition of discrimination on grounds of nationality.

4.3.5.3. Establishment of an EP Committee on Eurozone affairs with decision-making rights on behalf of the European Parliament

Rather than obliging the European Parliament to limit the voting rights of its members, it may also establish a Committee on Eurozone affairs with decision-making rights on behalf of the European Parliament.[17] This idea copies Article 45 of the German Fundamental Law at EU level. Whilst it does not cut back any rights of the European Parliament and leaves it at the Parliament's discretion on how to establish such a committee, the idea ignores the need for a better inclusion of national parliaments in Eurozone matters.

[17] Sarrazin, 'The case for democratic economic governance in the EU-27'.

ANNEX 1: LIST OF LEGAL BASES

Legal base	Secondary law based on it
Art. 121(6) TFEU	Regulation (EU) No 472/2013 of the European Parliament and of the Council of 21 May 2013 on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability
	Regulation (EU) No 473/2013 of the European Parliament and of the Council of 21 May 2013 on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area
	Regulation (EU) No 1173/2011 of the European Parliament and of the Council of 16 November 2011 on the effective enforcement of budgetary surveillance in the euro area
	Regulation (EU) No 1176/2011 of the European Parliament and of the Council of 16 November 2011 on the prevention and correction of macroeconomic imbalances
	Regulation (EU) No 1174/2011 of the European Parliament and of the Council of 16 November 2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area
	Council Regulation (EC) No 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies
	Regulation (EU) No 1175/2011 of the European Parliament and of the Council of 16 November 2011 amending Council Regulation (EC) No 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies
	Council Regulation (EC) No 1055/2005 of 27 June 2005 amending Regulation (EC) No 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies
Art. 122(2) TFEU	Regulation (EU) No 407/2010 establishing a European financial stabilisation mechanism
	Council Regulation (EU) 2015/1360 of 4 August 2015 amending Regulation (EU) No 407/2010 establishing a European financial stabilisation mechanism
Art. 125(2) TFEU	Council Regulation (EC) No 3604/93 of 13 December 1993 specifying definitions for the application of the prohibition of privileged access referred to in Article 104a of the Treaty

Legal base	Secondary law based on it
	Council Regulation (EC) No 3603/93 of 13 December 1993 specifying definitions for the application of the prohibitions referred to in Articles 104 and 104b (1) of the Treaty
Art. 126(14)(2) TFEU	Regulation (EC) No 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure
	Council Regulation (EU) No 1177/2011 of 8 November 2011 amending Regulation (EC) No 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure
	Council Regulation (EC) No 1056/2005 of 27 June 2005 amending Regulation (EC) No 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure
Art. 126(14)(3) TFEU	Council Directive 2011/85/EU of 8 November 2011 on requirements for budgetary frameworks of the Member States
	Council Regulation (EU) No 679/2010 of 26 July 2010 amending Regulation (EC) No 479/2009 as regards the quality of statistical data in the context of the excessive deficit procedure
	Council Regulation (EC) No 479/2009 of 25 May 2009 on the application of the Protocol on the excessive deficit procedure annexed to the Treaty establishing the European Community
	Council Regulation (EC) No 1222/2004 of 28 June 2004 concerning the compilation and transmission of data on the quarterly government debt
	Council Regulation (EC) No 3605/93 of 22 November 1993 on the application of the Protocol on the excessive deficit procedure annexed to the Treaty establishing the European Community
	Council Regulation (EC) No 2103/2005 of 12 December 2005 amending Regulation (EC) No 3605/93 as regards the quality of statistical data in the context of the excessive deficit procedure
	Council Regulation (EC) No 475/2000 of 28 February 2000 amending Regulation (EC) No 3605/93 on the application of the Protocol on the excessive deficit procedure annexed to the Treaty establishing the European Community
Art. 127(6) TFEU	Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions
	Council Regulation (EU) No 1096/2010 of 17 November 2010 conferring specific tasks upon the European Central Bank concerning the functioning of the European Systemic Risk Board

Legal base	Secondary law based on it
Art. 128(2) TFEU	Council Regulation (EU) No 729/2014 of 24 June 2014 on denominations and technical specifications of euro coins intended for circulation
Art. 129(3) TFEU	(not used)
Art. 129(4) TFEU	Council Regulation (EC) No 2533/98 of 23 November 1998 concerning the collection of statistical information by the European Central Bank
	Council Regulation (EC) No 2532/98 of 23 November 1998 concerning the powers of the European Central Bank to impose sanctions
	Council Regulation (EC) No 2531/98 of 23 November 1998 concerning the application of minimum reserves by the European Central Bank
	Council Regulation (EC) No 134/2002 of 22 January 2002 amending Regulation (EC) No 2531/98 concerning the application of minimum reserves by the European Central Bank
Art. 133 TFEU	Regulation (EU) No 651/2012 of the European Parliament and of the Council of 4 July 2012 on the issuance of euro coins
	Regulation (EU) No 1214/2011 of the European Parliament and of the Council of 16 November 2011 on the professional cross-border transport of euro cash by road between euro-area Member States
	Regulation (EU) No 1210/2010 of the European Parliament and of the Council of 15 December 2010 concerning authentication of euro coins and handling of euro coins unfit for circulation
	Council Regulation (EC) No 2169/2005 of 21 December 2005 amending Regulation (EC) No 974/98 on the introduction of the euro
	Council Regulation (EC) No 2182/2004 of 6 December 2004 concerning medals and tokens similar to euro coins
	Council Regulation (EC) No 46/2009 of 18 December 2008 amending Regulation (EC) No 2182/2004 concerning medals and tokens similar to euro coins
	Council Regulation (EC) No 1338/2001 of 28 June 2001 laying down measures necessary for the protection of the euro against counterfeiting
Art. 136(1) TFEU	Regulation (EU) No 472/2013 of the European Parliament and of the Council of 21 May 2013 on the strengthening of economic and budgetary surveillance of Member States in the euro area

Legal base	Secondary law based on it
	experiencing or threatened with serious difficulties with respect to their financial stability
	Regulation (EU) No 473/2013 of the European Parliament and of the Council of 21 May 2013 on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area
	Regulation (EU) No 1173/2011 of the European Parliament and of the Council of 16 November 2011 on the effective enforcement of budgetary surveillance in the euro area
	Regulation (EU) No 1174/2011 of the European Parliament and of the Council of 16 November 2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area
Art. 138(1) TFEU	(not used)
Art. 143(2) TFEU	Council Regulation (EC) No 332/2002 of 18 February 2002 establishing a facility providing medium-term financial assistance for Member States' balances of payments

ANNEX 2: PROPOSAL FOR TREATY CHANGES

Provision	Proposed Treaty change
Article 13 TEU	Inclusion of the ESM/EMF as an own institution into the list of Union institutions
	Motivation: As explained in section 3.3, the inclusion of the ESM into the EU legal framework require a governance structure, which goes beyond the legal possibilities under the existing Treaties. It is therefore recommendable to include the ESM/EMF as an own institution into the Treaties.
new Article 18a TEU	Inclusion of an own provision for the Commissioner for Economic and Monetary Affairs with a description of the tasks and the election procedure in the EP
	Motivation: A Commissioner for Economic and Monetary Affairs, who presides the ECOFIN and the Eurogroup, who is responsible for the fiscal capacity is a strong commissioner that should be elected separately from the college of Commissioners and should be held to account as a person
Article 16(9) TEU	Adaptation of this provision to the Commissioner for Economic and Monetary Affairs comparable to the High Representative for Foreign Affairs and Security Policy
	Motivation: Necessary adaptation if a new Commissioner for Economic and Monetary Affairs, who presides the ECOFIN and the Eurogroup, who is responsible for the fiscal capacity, should be introduced. Article 16(9) TEU refers to the presidencies of the Council configurations.
Article 17 TEU	Adaptation of this provision to the Commissioner for Economic and Monetary Affairs comparable to the High Representative for Foreign Affairs and Security Policy
	Motivation: Necessary adaptation if a new Commissioner for Economic and Monetary Affairs, who presides the ECOFIN and the Eurogroup, who is responsible for the fiscal capacity, should be introduced
Article 21(3) TFEU	Replacing the special legislative procedure by the ordinary legislative procedure
	Motivation: in order to allow for harmonisation of social laws
Article 113 TFEU	Replacing the special legislative procedure by the ordinary legislative procedure
	Motivation: in order to allow for harmonisation of indirect taxes

Provision	Proposed Treaty change
Article 115 TFEU	Replacing the special legislative procedure by the ordinary legislative procedure and replacing 'directives' by 'measures'
	Motivation: in order to allow for harmonisation of direct tax laws and in order to enable the Union legislator to make use of all possible measures foreseen by Article 288 TFEU
Article 121(2)(3) TFEU	Replacing the decision-making procedure of the 'broad guidelines' by the ordinary legislative procedure
	Motivation: the European Parliament and the Council should adopt, in accordance with the ordinary legislative procedure, the policy goals for the economic policy coordination
new Article 121(5) TFEU	Including a new decision-making procedure for the measures adopted under the multilateral surveillance procedure: The Commission proposal shall be communicated to the European Parliament; the European Parliament may propose amendments to the Commission proposal; the European Parliament's amendments shall be deemed accepted by the European Commission if it does not deliver a negative opinion; in case of a negative Commission opinion, the Council may reject the European Parliament's amendments when adopting the Commission proposal.
	Motivation: This proposal follows Article 220(5) of the Fundamental Law of the European Union by the Spinelli Group. It includes the European Parliament in the decision-making procedure without thwarting a quick and efficient decision-making. The proposed procedure guarantees full involvement of the European Parliament.
new Article 121(6) TFEU	Inclusion of sanctions in case of non-compliance with EU 2020 targets
	Motivation: Legal base for sanctions has to be explicitly provided by the Treaties
new Article 121(7) TFEU	Introduction of the reverse majority rule into the decision making process which includes an intervention right the EP
	Motivation: A change of the voting modalities in the Council, set by Article 16(3) TEU, requires a Treaty change
Article 121(5) TFEU	Including the Presidents of the Eurogroup and the President of the European Council as addressees of the information obligation

Provision	Proposed Treaty change
	Motivation: Enhancing the foundations of accountability with regard to the European Council and the Eurogroup
Article 125(1) TFEU	Inclusion of common debts with joint and several liability and of the European Redemption Fund as an exception within Article 125(1) TFEU
	Motivation: Legal certainty with regard to common debt and the establishment of a European Redemption Fund
Article 125(2) TFEU	Replacing the special legislative procedure by the ordinary legislative procedure
Article 126(10) TFEU	Deletion of the exclusion of jurisdiction of the ECJ
	Motivation: Giving the European Commission together with the ECJ a stronger role to supervise Member States
new Article 126(11a) TFEU	Inclusion of the debt brake (integration of the TSCG)
Article 126(12) TFEU	Inclusion of the reverse qualified majority-voting rule for all decisions taken within Art. 126 TFEU (integration of the TSCG)
	Motivation: A change of the voting modalities in the Council, set by Article 16(3) TEU, requires a Treaty change
Article 126(14)(2) TFEU	Replacing the special legislative procedure by the ordinary legislative procedure
Article 126(14)(3) TFEU	Replacing the special legislative procedure by the ordinary legislative procedure
Article 127(6) TFEU	Replacing the special legislative procedure by the ordinary legislative procedure
Article 129(4) TFEU	Replacing the special legislative procedure by the ordinary legislative procedure
Article 136(1) TFEU	Deleting the formulations 'in accordance with the relevant provisions' and 'in accordance with the relevant procedure from among those referred to Articles 121 and 126, with the exception of the procedure set out in Article 126(14)'.
	Motivation: Article 136(1) TFEU currently refers to the framework set by Articles 121 and 126 TFEU. The adoption of legal acts of the euro area Member States outside of the scope of application of these two Articles is not allowed under Article 136(1) TFEU. If Article 136(1) TFEU should be used in order to adopt far-reaching special rules for the euro area, the limitations set by this article should be deleted.

Provision	Proposed Treaty change
Article 136(3) TFEU	Inclusion of the Union into the derogation norm and reference to a new protocol on the ESM/EMF (integration of the ESM-Treaty)
new Article 136(4) TFEU	Inclusion of a new legal base to establish a fiscal capacity of the Member States whose currency is the euro
new Article 137a TFEU	Inclusion of the Euro Summit (integration of the TSCG) including the mandatory participation of the president of the European Parliament
new Article 148(5) TFEU	Inclusion of sanctions in case of non-compliance with EU 2020 targets
	Motivation: Legal base for sanctions has to be explicitly provided by the Treaties
new Article 148(6) TFEU	Introduction of the reverse majority rule into the decision making process which includes an intervention right the EP
	Motivation: A change of the voting modalities in the Council, set by Article 16(3) TEU, requires a Treaty change
Article 153(2)(b) TFEU	Extension of the possibility to set minimum requirements to all fields covered by 153(1) (deletion of the restriction to para. 1(a) to (i))
	Motivation: in order to allow for harmonisation of social laws
Article 153(2)(b) TFEU	Inclusion of the possibility to set minimum requirements by means of regulation
	Motivation: in order to allow for harmonisation of social laws
Article 153(2)(3) TFEU	Deletion of the special legislative procedure and of the restrictions for the ordinary legislative procedure
Article 246 TFEU	Adaptation of this provision to the new Commissioner comparably to the High Representative for Foreign Affairs and Security Policy
	Motivation: Necessary adaptation if a new Commissioner for Economic and Monetary Affairs, who presides the ECOFIN and the Eurogroup, who is responsible for the fiscal capacity, should be introduced
Article 248 TFEU	Adaptation of this provision to the new Commissioner comparably to the High Representative for Foreign Affairs and Security Policy
	Motivation: Necessary adaptation if a new Commissioner for Economic and Monetary Affairs, who presides the ECOFIN

Provision	Proposed Treaty change
	and the Eurogroup, who is responsible for the fiscal capacity, should be introduced
Article 311(3) TFEU	Replacing the special legislative procedure by the ordinary legislative procedure
Article 311(4) TFEU	Replacing the special legislative procedure by the ordinary legislative procedure
new Article 311a TFEU	Inclusion of a legal base for establishing new categories of own resources with respect to Member States whose currency is the euro; revenue from these own resources shall be earmarked for expenditure with respect to the euro area (such as the fiscal capacity).
	Motivation: special rules for euro area Member States should lead to the creation of a euro area budget within the Union budget.
Protocol on the Eurogroup	Inclusion of the Commissioner for Economic and Monetary Affairs who acts as the president of the Eurogroup

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