The Stability Treaty: Permanent Austerity or Gesture Politics?

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Treaty on Stability, Coordination and Governance – Economic governance – Stability Pact – The European Council – National constitutional law

Introduction

The 'Treaty on Stability, Coordination and Governance in the Economic and Monetary Union' (the 'stability treaty') was signed on 2 March 2012 by 25 European Union (EU) member states – all except the United Kingdom (UK) and the Czech Republic.[1] The stability treaty not only requires (in principle) constitutional changes in each of the signatory states, but also raises significant questions about its relationship with EU law and the extent of the discretion left to member states to make fundamental decisions about taxation and spending.

This paper focuses upon the relationship between the stability treaty and substantive EU law, examining also its impact upon member states' economic decision-making. The treaty also raises fundamental questions about its impact upon national constitutional law and the constitutional law of the EU, and in particular whether the provisions of the treaty concerning the EU institutions violate EU law. On this point, there are fundamental questions as to whether the EU's institutions can be involved at all in tasks outside the EU's legal framework, and if so, whether they can be involved in such tasks on behalf of only some member states, whether there are limits on their possible involvement, what those limits are and whether the draft treaty transgresses them. But for reasons of length, those issues are outside the scope of this paper.[2]

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[1] At time of writing (14 Sept. 2012), eight member states had formally ratified the treaty, including five states with the euro as their currency. As discussed below, the treaty needs to be ratified by twelve such states in order to enter into force. For the final text of the treaty, *see*: <www.european-council.europa.eu/media/639235/st00tscg26_en12.pdf>.

[2] On national constitutional law, *see* Editorial, 'The Fiscal Compact and the European Constitutions: 'Europe Speaking German', 8 *EUConst* (2012) p. 1. On EU constitutional law, *see*

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Background

A number of recent legal measures have aimed to address the continuing economic crisis in the EU, and in particular the impact upon all member states participating in Economic and Monetary Union (EMU) of the sovereign debt problems of some of the participating states (the 'eurozone member states'). First of all, the EU has adopted a number of EU secondary law measures, in particular the so-called 'six-pack' of legislation amending and supplementing the prior EU legislation (known as the 'Stability and Growth Pact'),[3] which gives effect to Articles 121 and 126 of the Treaty on the Functioning of the European Union (TFEU) as regards a multilateral surveillance procedure and an excessive deficit procedure.[4] A further so-called 'two-pack' of proposed Regulations, submitted by the Commission in November 2011, would set out further rules on economic governance specific to the eurozone member states only.[5] The Council agreed in principle on these proposals in February 2012,[6] the European Parliament (EP) adopted its position in June 2012,[7] and discussions between the Council and the EP on these texts are now underway.

P. Craig, 'The Stability, Coordination and Governance Treaty: Principle, Politics and Pragmatism', 37 *European Law Review* (2012) p. 231; and S. Peers, 'Constitutional Constraints on the Use of EU Institutions outside the EU Legal Framework', forthcoming.

[3] Reg. 1177/2011 (*OJ* [2011] L 306/33) amends Reg. 1467/97 on the excessive deficit procedure (*OJ* [1997] L 209/6), which was previously amended by Reg. 1056/2005 (*OJ* [2005] L 174/3). Reg. 1175/11 (*OJ* [2011] L 306/12) amends Reg. 1466/97 on the surveillance procedure (*OJ* [1997] L 209/1), which was previously amended by Reg. 1055/2005 (*OJ* [2005] L 174/1). Reg. 1173/2011 (*OJ* [2011] L 306/1) provides for further rules on both issues as regards eurozone member states. Directive 2011/85 (*OJ* [2011] L 306/41) sets out rules regarding the budgetary procedure in all member states. Reg. 1176/2011 (*OJ* [2011] L 306/25) establishes a new 'macroeconomic imbalance procedure', while Reg. 1174/2011 (*OJ* [2011] L 306/8) sets out further rules on this issue as regards eurozone member states. *See also* the Resolution of the European Council (*OJ* [1997] C 236/1) and the report on 'Improving the Implementation of the Stability and Growth Pact', approved by the European Council in March 2005. On the previous version of the Stability Pact, from a huge literature, *see*: M. Herdegen, 'Price Stability and Budgetary Restraints in the Economic and Monetary Union: The Law as Guardian of Economic Wisdom', 35 *Common Market Law Review* (1998) p. 25; H. Hahn, 'The Stability Pact for European Monetary Union: Compliance with Deficit Limits as a Constant Legal Duty', 35 *Common Market Law Review* (1998) p. 77; and M. Heipertz and A. Verdun, *Ruling Europe: The Politics of the Stability and Growth Pact* (CUP 2010).

[4] *See also* Protocol 12 attached to the TFEU and the Treaty on European Union (TEU).

[5] COM(2011)819 and 821, 23 Nov. 2011, concerning respectively the surveillance of member states with serious difficulties and the budgetary plans and excessive deficit control for all eurozone member states.

[6] Council docs. 6566/12, 20 Feb. 2012 and 6565/12, 16 Feb. 2012.

[7] *See* the texts approved by the EP plenary on 13 June 2012: P7_TA(2012)0242 and P7_TA(2012)0243.

In addition, international treaties were agreed between the eurozone member states only, namely: (a) a treaty creating a European Financial Stability Facility (EFSF), which entered into force in 2010, and was amended in 2011, to provide temporary financial assistance to those eurozone member states which needed it;[8] and (b) a treaty to create a European Stabilization Mechanism (ESM), in order to provide for permanent financial assistance to those states. The ESM treaty was initially signed in July 2011, but a revised version was then signed in February 2012.[9] In order to confirm the legality of the ESM treaty in light of the 'no bail-out' rule in the TFEU, all EU member states also agreed an amendment to the TFEU, in the form of a Decision of the European Council pursuant to one of the simplified amendment procedures set out in the Treaty on European Union (TEU).[10]

By the end of 2011, following pressure from Germany in particular, a large majority of member states were willing to make further amendments to the TFEU and/or the protocols attached to the treaties in order, in particular, to strengthen the control of member states' deficits.[11] However, discussions on a possible Treaty amendment foundered at a meeting of the European Council in December 2011, due to a lack of agreement between the United Kingdom (UK) and other member states on whether specific further rules relating to financial services issues should (as demanded by the UK) also be enshrined in the treaties as part of such a Treaty amendment. The other 26 member states therefore decided to sign an international treaty between themselves on these issues, and the eurozone member states agreed on the main content of such a treaty (the 'December 2011 statement').[12]

[8] For the text of the EFSF agreement and further information, *see*: <www.efsf.europa.eu/about/index.htm>.

[9] At time of writing, this treaty had been formally ratified by fourteen eurozone member states, and still required ratification by Germany and Italy to enter into force (the other state which has not yet ratified the treaty is Estonia). For the text of the 2012 version of this treaty, *see*: <www.european-council.europa.eu/media/582311/05-tesm2.en12.pdf>. The Irish Supreme Court has asked the Court of Justice to rule on whether this treaty is compatible with EU law: *see* Case C-370/12 *Pringle*, pending. On the treaty, *see* J.V. Louis, 'The Unexpected Revision of the Lisbon Treaty and the Establishment of a European Stability Mechanism', in D. Ashiagbor et al. (eds.), *The European Union after the Treaty of Lisbon* (CUP 2012) p. 284 at p. 297-314.

[10] *OJ* [2011] L 91/1. At time of writing, this decision had been ratified by twenty member states. It needs to be ratified by all 27 of them to enter into force. The question of the validity of this decision has been referred to the Court of Justice: *see Pringle*, *supra* n. 9. On the decision, *see* Louis, *supra* n. 9, p. 291-297.

[11] On the issues under discussion, *see* the Van Rompuy report of 6 Dec. 2011, *Towards a Stronger Economic Union: Interim Report to the European Council*.

[12] For the full text of the December 2011 statement, *see*: <www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/126658.pdf>. The nine participating non-eurozone member states 'indicated the possibility to take part in this process after consulting their Parliaments where appropriate'.

Negotiations on the text of this treaty soon got underway. In place of the procedures to amend the EU's primary law treaties set out in Article 48 TEU, the text of the treaty was negotiated by a 'forum' of delegates of all member states (including the UK, as an observer), which comprised three delegates from each member state as well as the European Parliament (EP) and the Commission.[13] All 26 participating member states except the Czech Republic agreed in principle on the treaty at the end of January 2012, and, as noted above, the treaty was then formally signed on 2 March 2012.

Analysis of the stability treaty

Title and preamble

The preamble to the treaty begins by defining the 25 signatory states as the 'Contracting Parties' to it. The preamble has thirty recitals, which (unlike EU legislation) are unfortunately not numbered. This is a fairly long preamble for an international treaty, but not that long compared to much EU legislation. It largely sets out the economic, legal and political context, without adding any detailed interpretation of the treaty text.

However, the preamble does include an important rule on the relationship between the stability treaty and the ESM treaty, specifying that the granting of financial assistance under the ESM will be conditional, from 1 March 2013, on the ratification of the stability treaty, and subsequently conditional on the timely adoption of the 'balanced budget' rule as required in the stability treaty.[14] The same rule appears, in a more elaborate form, in the preamble to the ESM treaty, which states that the two treaties:[15]

> … are complementary in fostering fiscal responsibility and solidarity within the economic and monetary union. It is acknowledged and agreed that the granting of financial assistance in the framework of new programmes under the ESM will be conditional, as of 1 March 2013, on the ratification of the [stability treaty] by the ESM Member concerned and, upon expiration of the transposition period referred to in Article 3(2) [of the stability treaty] on compliance with the requirements of that article.

[13] For the first draft of the treaty, *see*: <www.rte.ie/news/2011/1216/eudraftagreement.pdf>. The analysis in this paper compares the final text of the treaty to the first draft, and both of these texts to the December 2011 statement, in order to assess the changes made during the negotiating process.

[14] Recital 28 in the preamble. The 'balanced budget' rule must be applied within one year of the stability treaty's entry into force (*see* the discussion of Art. 3 below).

[15] Recital 5, ESM treaty (*supra* n. 9).

This rule does not appear in the main text of either treaty. While recitals to EU legislation are not binding as such,[16] they are highly influential in the interpretation of the relevant rules.[17] From the point of view of international law, which should govern interpretation of the stability treaty since it is not an act of the EU, the preamble to a treaty is part of the 'context' in which the 'ordinary meaning' of the terms of a treaty should be interpreted.[18] While no mandatory link is made between ratification and implementation of the stability treaty and financial assistance from other sources, such as the International Monetary Fund (IMF), there is nothing to prevent such other sources from also insisting upon ratification and implementation of the stability treaty as a condition of their assistance.

The preamble to the stability treaty also states that the treaty does not alter the policy conditions for existing financial assistance from the EU, the IMF or other member states.[19] Legally speaking, this is unproblematic, since there is no legal link made with prior assistance and it would be questionable to change the terms of such assistance retroactively. Presumably this means that ratification and implementation of the stability treaty cannot be a condition for receiving additional tranches of such prior assistance.

Title I: Purpose and scope

Title I of the stability treaty consists of a single provision (Article 1).

Article 1(1) sets out the purpose of the treaty. The contracting parties agree, as EU member states:

> to strengthen the economic pillar of the economic and monetary union by adopting a set of rules intended to foster budgetary discipline through a fiscal compact, to strengthen the coordination of their economic policies and to improve the governance of the euro area, thereby supporting the achievement of the European Union's objectives for sustainable growth, employment, competitiveness and social cohesion.

[16] *See*, for instance, Case C-162/97 *Nilsson* [1998] *ECR* I-7477, para. 54.

[17] For recent examples, *see* Cases C-571/10 *Kamberaj*, judgment of 24 April 2012, and C-508/10 *Commission* v. *Netherlands*, judgment of 26 April 2012 (neither yet reported).

[18] Art. 31(1) and (2) of the Vienna Convention of the Law of Treaties. This interpretation is also supported by the EU law requirement (in the future Art. 136(3) TFEU) that ESM assistance must be subject to 'strict conditionality'. From the perspective of international law, the European Council decision inserting Art. 136(3) into the TFEU might be regarded as an agreement between the parties to the ESM treaty made in connection with the conclusion of that treaty, and therefore part of the context of that treaty: *see* Art. 31(2)(a) of the Vienna Convention. *See* generally U. Linderfalk, *On the Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (Springer 2007), chs. 4 and 5.

[19] Recital 23.

This provision was amended significantly during negotiations.[20] The reference to the 'economic pillar' of EMU makes clear that the rules on the single currency as such are not amended by the treaty. The references to the fiscal compact, economic coordination and governance simply reprise the subtitles of Titles II to IV in turn. The four EU objectives listed at the end of Article 1(1) are all broad economic ends which would command wide support, although the critics of the stability treaty would surely argue that the austerity which might result by this treaty would not be an effective means to achieve such ends.

Article 1(2) defines the territorial scope of the treaty, namely the contracting parties which apply the single currency. However, as set out in the second sentence of Article 1(2), the treaty also has a limited application to those contracting parties which do not apply the euro; this is discussed further below in the commentary on Title VI.[21]

Title II: Consistency and relationship with the law of the Union

Again, this Title of the stability treaty consists of a single provision (Article 2). Article 2(1) requires the contracting parties to apply and interpret the treaty 'in conformity with' EU primary law, 'in particular' Article 4(3) TEU, which sets out the principle of 'loyalty' (or 'sincere cooperation'), and with (other) EU law (presumably EU secondary law), 'including procedural law' regarding the adoption of EU secondary legislation. Article 2(2) provides first of all that the stability treaty applies 'insofar as it is compatible' with EU primary law and (other) EU law (again, presumably EU secondary law), and secondly that the treaty 'shall not encroach upon' EU competence as regards 'economic union'. During the negotiation process,[22] the reference to compliance with the procedures for the adoption of secondary legislation was added to Article 2(1), and a sentence referring expressly to the 'precedence' of EU law was dropped from Article 2(2). However, it is doubtful whether the latter sentence added anything to the basic rule that the stability treaty only applies to the extent that it is compatible with EU law.

The first of these three rules, the requirement of interpretation and application in conformity with EU law, in effect sets out a rule of interpretation, which is similar (if not identical) to the principle of 'indirect effect' (or 'consistent interpretation') that applies to EU directives.[23] Due to the express reference to Article

[20] The first draft of Art. 1(1) stated simply that the contracting parties 'agree to strengthen their budgetary discipline and to reinforce their economic policy coordination and governance'.

[21] More precisely, the treaty applies to these states 'to the extent and under the conditions set out in Article 14'. At time of writing, two non-eurozone member states have ratified the treaty (Denmark and Latvia).

[22] *See* the first draft of Art. 1 (*supra* n. 13).

[23] *See* case-law starting with Case 14/83 *Von Colson* [1984] *ECR* 1891.

4(3) TEU, there can be no doubt that the principle of sincere cooperation fully applies to member states as regards the stability treaty.

The second rule, the requirement of compatibility, in effect gives priority to EU law in the event of any conflict. While the consequences of any such incompatibility are not spelled out, it must follow from the primacy of EU law that if such inconsistency cannot be resolved by means of the principle of consistent interpretation, the stability treaty must be disapplied to the extent of any inconsistency. Having said that, it might be argued that the stability treaty does not conflict with EU law to the extent that it sets out stricter requirements than those applicable in EU legislation addressing the same subject-matter, given the *sui generis* nature of the EU's competence to coordinate national economic policies (*see* Articles 2(3) and 5(1) TFEU).

Finally, the third rule protects the EU's competences to act in this area; this refers to the competence to coordinate member states' economic policies, as set out in Articles 2 and 5 TFEU. Furthermore, a number of the specific provisions of the stability treaty give precedence or make reference to EU law.[24]

Taking Article 2 as a whole, along with the relevant more specific provisions of the stability treaty, the contracting parties obviously intend not to impinge upon EU law in any way whatsoever, as regards the substance of EU law, the EU's decision-making procedures or the EU's competence. Despite this clear intention, a number of issues have arisen concerning the role of the EU's institutions in this treaty; but as noted already, these points are outside the scope of this paper.[25]

Title III: Fiscal compact – the balanced budget rule

Title III of the stability treaty is the longest and most important Title of the treaty, consisting of Articles 3-8. First of all, Article 3 sets out the most important rule in the entire treaty, the 'Balanced Budget Rule' (as the preamble to the treaty calls it).[26] Article 8 then addresses the enforceability of that rule. Due to the central prominence of these two provisions and the close relationship between them, they need to be examined together, separately from the other provisions of Title III of the treaty.

First of all, the 'chapeau' (opening words) of Article 3(1) require the member states to comply with that paragraph 'in addition and without prejudice to' the obligations imposed by EU law. Article 3(1)(a) specifies that each member state's general government budgetary position must be 'balanced or in surplus', and Article 3(1)(b) specifies that this rule is 'deemed to be respected' if a member state's

[24] *See* Arts. 3(1) and (3), 4, 5(1), 7, 8(2) and (3), 9, 10, 11, 13, 14(5) and 16 of the treaty.
[25] *See* Craig and Peers, *supra* n. 2.
[26] *See* recital 3 in the preamble.

general government 'annual structural balance' is 'at its country-specific medium-term objective, as defined in the revised Stability and Growth Pact, with a lower limit of a structural deficit of 0,5% of the gross domestic product at market prices'. But this is not an absolute rule, for Article 3(1)(b) goes on to state that member states must 'ensure rapid *convergence towards* their respective medium-term objective' (emphasis added). The Commission will propose the 'time-frame' for this convergence, 'taking into consideration country-specific sustainability risks', and the '[p]rogress towards' the objective will 'be evaluated on the basis of an overall assessment with the structural balance as a reference, including an analysis of expenditure net of discretionary revenue measures, in line with the revised Stability and Growth Pact'.

Furthermore, Article 3(1)(c) expressly states that member states 'may temporarily deviate' from their objective 'only in exceptional circumstances', which means, according to Article 3(3)(b):

> an unusual event outside the control of the Contracting Party concerned which has a major impact on the financial position of the general government or to periods of severe economic downturn as set out in the revised Stability and Growth Pact, provided that the temporary deviation of the Contracting Party concerned does not endanger fiscal sustainability in the medium-term.

Article 3(1)(d) provides for another exception: if the accumulated government debt is 'significantly below' 60% of gross domestic product (GDP), and there are low risks to the 'long-term sustainability of public finances', the lower limit of the medium-term objective can be 1% of GDP.

As for enforcement of these rules, Article 3(1)(e) specifies that 'a correction mechanism shall be triggered automatically' if there are 'significant observed deviations from the medium-term objective or the adjustment path towards it'. This mechanism must include an obligation for the member state concerned 'to implement measures to correct the deviations over a defined period of time'.

Article 3(2) sets out rules to ensure the implementation of Article 3(1). First of all, the rules in Article 3(1) must take effect in member states' national law at the latest one year after the stability treaty enters into force – so member states will likely have to comply with these rules by late 2013 or early 2014.[27] Furthermore, these rules must take effect by means of 'provisions of binding force and permanent character, preferably constitutional, or otherwise guaranteed to be fully respected and adhered to throughout the national budgetary processes'. More specifically, the national correction mechanism referred to in Article 3(1)(e) shall be put in place on the basis of 'common principles' which the Commission will

[27] *See* the discussion of Art. 14 of the treaty below.

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propose, which will concern 'in particular the nature, size and time-frame of the corrective action to be undertaken, also in the case of exceptional circumstances, and the role and independence of the institutions responsible at national level for monitoring compliance with the rules set out in paragraph 1'. Finally, this correction mechanism must 'fully respect the prerogatives of national Parliaments'. It must be noted that the application of Article 3(2) can be enforced by the Court of Justice, pursuant to Article 8 of the stability treaty, discussed further below.

Article 3(3) specifies that for the definitions set out in Protocol 12 to the EU treaties, concerning the excessive deficit procedure, will apply. Furthermore, it supplies definitions of 'exceptional circumstances' (see above) and 'annual structural balance of the general government'.

Examining Article 3 in more detail, most of Article 3(1) is based on the December 2011 statement (with amendments), but the exception to the balanced budget rule in Article 3(1)(c) was added during negotiations.[28] Furthermore, much of Article 3(1) was amended during negotiations.[29]

The basic concept set out in Article 3(1)(a) and (b) already appears in the EU legislation concerning economic surveillance,[30] as reflected in the express wording of Article 3(1)(b). However, the EU legislation refers to a medium-term objective of an annual deficit between 0% and 1%. The stability treaty therefore is more stringent, by providing instead for a rule of 0.5%. But this apparent strictness is qualified, because neither the stability treaty nor the EU legislation sets an *absolute rule* of a maximum annual deficit at a certain level. Even leaving aside the 'exceptional circumstances' exception in Article 3(1)(c) of the treaty, both the stability treaty and the EU legislation instead require member states to set a 'medium-term objective' which they should make 'rapid convergence' towards. The rules on assessment of this progress are also identical.[31] But one important difference between

[28] *See* the first and third indents of para. 4 of the statement, as well as the second and third sentences of the second indent of para. 4.

[29] In particular, references were added during negotiations to: the 'medium-term objective'; 'rapid' convergence; the Commission's role proposing time-frames (reflecting the Dec. 2011 statement); the criterion of low risks to long-term sustainability of public finance in Art. 3(1)(d); the precise 1.0% limit, also in Art. 3(1)(d); and the addition of the second sentence of Art. 3(1)(e). Also, Art. 3(1)(e) was originally part of Art. 3(2); its placement in Art. 3(1) means the Court has jurisdiction to enforce it only indirectly.

[30] Art. 2a of Reg. 1466/97, as amended by Reg. 1175/2011 (*supra* n. 3). Art. 5(1), final subparagraph, of that Reg. (as amended) includes the same exception as set out in Art. 3(1)(c) of the stability treaty.

[31] Compare the final sentence in Art. 3(1)(b) of the treaty to the *chapeau* of Art. 5(1), third paragraph, first sentence of Reg. 1466/97, as amended by Reg. 1175/2011 (*supra* n. 3). This paragraph goes on to elaborate greatly upon the evaluation of this progress, but the rules in the EU legislation must be considered to be incorporated into the stability treaty by means of the reference to that legislation in the final sentence in Art. 3(1)(b) of the treaty.

the two texts is that the EU legislation states that such rapid progress should be made 'while allowing room for budgetary manoeuvre, considering in particular the need for public investment', whereas the stability treaty does not hint at such flexibility, or refer directly to the relevant EU legislation.[32]

Similarly, the EU legislation does not require the Commission to propose a time-frame for such convergence. A failure to ensure convergence under the EU legislation could, however, be punished by fines against eurozone member states under certain conditions,[33] whereas it is not clear who would assess compliance with Article 3(1)(a) and (b) of the treaty.[34] The role of the Commission proposing such time-frames therefore does not conflict with substantive EU law, although arguably it breaches EU constitutional law by conferring a new role upon that institution by means of a treaty concluded outside the EU legal framework.[35]

The differences between the rules in the stability treaty and the EU legislation (as regards the deficit target, budgetary flexibility and the role of the Commission) could be addressed by the adoption of new EU legislation in this area, although to date none of the EU institutions have proposed equivalent rules during the discussion of the 'two-pack' legislation proposed in 2011.[36] If such amendments are not adopted before the deadline to apply Article 3(1) of the stability treaty, there is an apparent substantive conflict (as regards the deficit target and budgetary flexibility) between the treaty and EU legislation.[37] In accordance with Article 2 of the treaty, these provisions of the treaty must either (a) be considered acceptable to the extent that member states retain the power to adopt stricter standards on these issues; or (b) if member states do not retain such powers, must be interpreted consistently with EU legislation (to the extent that this is possible) or disapplied to the extent of the inconsistency.

On the other hand, there is no conflict between the stability treaty and EU law as regards the 'exceptional circumstances' exception, due to the cross-reference to EU legislation in the stability treaty as regards the definition of that exception.[38]

[32] Art. 3(1)(b) of the treaty only refers to the EU legislation as regards the definition of the objective and progress towards it.

[33] *See* Art. 4 of Reg. 1173/2011 (*supra* n. 3).

[34] The role of the Court of Justice in Art. 8 of the treaty is to enforce the obligation to adopt a quasi-constitutional rule ensuring that Art. 3(1) is applied, as distinct from the question of whether Art. 3(1) is actually applied in practice.

[35] *See* Craig and Peers, *supra* n. 2.

[36] *Supra* ns. 5-7. *See*, however, the EP amendment (new Art. 2(1)(5b)) to the proposed Reg. on budgetary plans, which is similar, not identical, to the 0.5% deficit limit, and the EP amendment (new Art. 1a(3)) to the proposed Reg. on surveillance of member states with serious difficulties (both *supra* n. 7), which is vaguely similar to Art. 3(1)(a) of the stability treaty.

[37] On the apparent institutional conflict as regards the Commission, *see supra* n. 35.

[38] *See* the comments on Art. 3(3) below.

The existence of this exception also significantly qualifies the apparent harshness of the 0.5% deficit requirement.

As for the other exception from that requirement in Article 3(1)(d), this also reflects current EU legislation, in that the 1% deficit rule set out for member states with low debt anyway repeats the 1% deficit rule in the Stability and Growth pact legislation.

Next, the automatic correction mechanism referred to in Article 3(1)(e) is not currently referred to in EU legislation, although there is an obligation to set out 'fiscal rules' aiming to 'promote compliance' with the deficit and debt rules, and the medium-term objectives, with 'consequences in the event of non-compliance' with those fiscal rules.[39] These obligations would be strengthened, for the eurozone member states, by the proposed 'two-pack' legislation.[40]

On an overall assessment, Article 3(1) is not as dramatic at it might first appear, as compared to existing EU legal obligations. The apparently absolute obligation to (nearly) balance the budget is subject to exceptions and is qualified to an obligation to 'ensure rapid convergence' with that rule, and the rule itself is only slightly more stringent than the rule that the EU has already set. The EU has also established a procedure and penalties to ensure compliance with its rules, whereas the stability treaty relies instead on the obligation to revise national law to this end pursuant to Article 3(2), and the enforcement of that provision by the Court of Justice.

Next, Article 3(2) is based on the December 2011 statement,[41] and was amended during negotiations: the obligation to establish 'constitutional or equivalent' rules (which also appeared in the December 2011 statement) was weakened; the requirement that such rules have 'binding force and permanent character' was added; the one-year delay was added; the Commission role proposing common principles on mechanisms was added;[42] some details regarding the common principles were added; and the reference to the role of national parliaments was added in the first draft and subsequently included in the final treaty.

The EU's existing legislation vaguely points towards obligations of this nature,[43] building upon the initial political commitment to a form of constitutional or equivalent fiscal rule on this issue in the 'Euro plus pact',[44] which is a political agreement among the eurozone member states and six of the ten non-eurozone

[39] Arts. 5-7, Directive 2011/85 (*supra* n. 3).

[40] *See* Art. 4 in the Commission's proposal for a Reg. on budgetary plans, as well as the amendments to Art. 4 of that proposal suggested by the Council and EP (*supra* ns. 5-7); the EP's version comes closest to the stability treaty, by referring expressly to a 'correction mechanism'.

[41] *See* the second indent of para. 4 of those conclusions.

[42] This point was in the Dec. 2011 statement, but not in the first draft of the treaty.

[43] *Supra* n. 39.

[44] For the text of this pact, *see* Annex I to the March 2011 conclusions of the European Council.

member states,[45] on the issues of competitiveness, public finance, employment and financial stability. However, the Euro plus pact refers on this point back to the obligations imposed by the EU's Stability Pact legislation as regards 'fiscal rules' generally, and provides for more flexibility as to what the rule should address (it could for example, be a 'debt brake', or a rule concerning the primary budget balance or expenditure rules). The Commission was to be 'consulted, in full respect of the prerogatives of national parliaments', on the draft national rule before its adoption.

Furthermore, the proposed 'two-pack' legislation is likely to impose obligations on member states rather more similar to those in the stability treaty.[46] But to the extent that the EU legislation (as it evolves) is not identical to the treaty, there is a substantive conflict between the treaty and the EU legislation. Arguably, there is also an institutional conflict as regards the role of the Commission in proposing common principles,[47] although the Commission's proposal for those principles is now already a *fait accompli*.[48]

The obligation to put in place a constitutional law, or at least a 'permanent' law which must arguably have a higher rank in the national legal hierarchy than annual budget legislation – to say nothing of the debts incurred at the sub-federal level or by autonomous regions or local government – raises some important questions as regards different member states' constitutions.[49] However, at least for those member states which have such a rule in place already, in principle there should be no need to amend it.[50]

As for the role of national parliaments, their position is not currently defined in EU legislation. Logically, national parliaments would be involved in enshrining the balanced budget rule in national law, but would not be able to rescind that rule without breaching the stability treaty or (to the extent relevant) EU law; any

[45] The non-participants are the UK, Sweden, Hungary and the Czech Republic.

[46] Art. 4 of the Commission proposal on budgetary plans (*supra* n. 5) states that the relevant national fiscal rules must be of a binding or preferably constitutional nature. The Council's text (*supra* n. 6) refers instead to the Commission making common principles public, while the EP's text (*supra* n. 7) states that the rules should be binding or otherwise guaranteed to be respected.

[47] *See* Craig and Peers, *supra* n. 2.

[48] COM(2012)342, 20 June 2012.

[49] *See* the *EU Const* editorial, *supra* n. 2. The German Federal Constitutional Court accepted the constitutionality of the treaty in a judgment of 12 Sept. 2012; *see*: <www.bverfg.de/entscheidungen/rs20120912_2bvr139012.html>. The French Conseil Constitutionnel ruled in favour of the constitutionality of the treaty on 9 Aug. 2012; *see*: <www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2012/2012-653-dc/decision-n-2012-653-dc-du-09-aout-2012.115444.html>.

[50] If such rules were adopted before the Commission's proposal for 'common principles' on correction mechanisms (*supra* n. 48), it would be excessively pedantic to require national constitutions to be amended again even if they were already in conformity with those common principles.

amendments which national parliaments might wish to make to such rules would also be subject to this treaty and EU law. National parliaments' role would also be limited by the automatic 'correction mechanism' referred to in this treaty, which includes an obligation of the member state to implement measures to correct budget deviations. member states would be in breach of this treaty, and (to some extent) EU law, if their national parliaments prevent the adoption of measures which are necessary to comply with it. But national parliaments will retain flexibility, pursuant to this treaty, to decide on exactly which (mix of) spending cuts or tax increases should be adopted to comply with Article 3(1). In the event that EU law prescribes in detail (as several EU measures do) exactly what measures should be taken to reduce an excessive deficit,[51] it would take priority, pursuant to Article 2 of the stability treaty, over the discretion left to national parliaments by Article 3(2) of that treaty; but this still leaves open the question of whether the EU is exceeding its competence by specifying in such great detail what budgetary decisions national parliaments should make, in particular on issues (like pay) where the EU in principle has no competence at all,[52] and whether such decisions breach the social rights in the Charter, since a Council decision setting out such obligations (assuming that the Council was competent to adopt it) clearly falls within the scope of EU law as an act of an EU institution, pursuant to Article 51 of the Charter.

On an overall assessment, Article 3(2) does not differ much in principle from existing and proposed EU legal obligations, but it is more precise and more binding (in terms of legal hierarchy) than those obligations.

As regards Article 3(3), which was not substantively changed during negotiations,[53] Protocol 12 attached to the EU treaties also includes definitions of 'government', 'deficit', 'investment' and 'debt'; there are more elaborate definitions of these concepts in a Regulation which implements the Protocol on excessive deficits.[54] The source of the definition of 'annual structural balance of the general government' is not known, but the definition of 'exceptional circumstances' is the same as the definition in the EU's 'Stability Pact' legislation, which Article 3(3)(b) refers to in any event.[55] The same legislation in turn defines a 'severe economic downturn' very broadly, specifying that a deficit may be considered 'excep-

[51] *See*, for instance, Art. 3(6) to (8) of the Council decision on aid to Ireland (*OJ* [2011] L 30/34).

[52] *See* Art. 153(5) TFEU.

[53] The second part of Art. 3(3)(b) of the final text appeared as part of Art. 3(1)(a) in the first draft.

[54] Reg. 479/2009, *OJ* [2009] L 145/1.

[55] Art. 2(1), first sub-paragraph, of Reg. 1467/97, as amended by Reg. 1177/2011 (*supra* n. 3). The qualification that temporary deviations must not endanger medium-term financial stability appears in Art. 5(2) of Reg. 1467/97, as amended by Reg. 1177/2011 (*idem*).

tional' on such grounds if it 'results from a negative annual GDP volume growth rate or from an accumulated loss of output during a protracted period of very low annual GDP volume growth relative to its potential'.[56] However, neither the treaty nor the EU legislation defines the key terms within this definition: 'an unusual event outside the control' of a member state; a 'major impact on the financial position of the general government'; or 'fiscal sustainability in the medium term'. Finally, it is odd that the definitions set out in, or referred to in, Article 3(3) only apply to Article 3, and not also to Articles 4 or 6, which also include the terms 'government' and 'debt'.[57]

Next, as noted already, the crucial question of the enforceability of the obligations set out in Article 3 is addressed in Article 8, which gives the Court of Justice special jurisdiction concerning this issue. First of all, according to Article 8(1), the Commission 'is invited' to report 'in due time' on the national provisions which each contracting party has adopted pursuant to Article 3(2). If the Commission concludes that a contracting party has not complied with Article 3(2), having given that contracting party 'the opportunity to submit its observations', then one or more contracting parties 'will' bring the matter to the Court of Justice. If a contracting party 'considers, independently of the Commission's report, that another contracting party has failed to comply with Article 3(2), it *may* also bring' [emphasis added] that matter to the Court. In either case, the Court's judgment will be binding on the parties, which will have to comply with the judgment within a period which the Court will fix.

Article 8(2) provides for the enforcement of that judgment. A contracting party *may*, on the basis of its own judgment or that of the Commission,[58] bring the case back to the Court of Justice if it believes that another contracting party has not complied with a judgment pursuant to Article 8(1), and request the Court to impose a fine the basis of the 'criteria established by the Commission' as regards Article 260 TFEU, which permits the Court to fine member states for failure to apply a previous judgment concerning the breach of EU law. If it finds a breach of a member state's obligations pursuant to Article 3(2), the Court may impose a fine of up to 0.1% of that state's gross domestic product.[59] A eurozone member

[56] Art. 2(2) of Reg. 1467/97, as amended by Reg. 1056/2005 (*supra* n. 3).

[57] Art. 4 refers to other EU rules (and so presumably incorporates the relevant definitions), but Art. 6 does not.

[58] There is no obligation in this case for the Commission to present a report.

[59] This compares to sanctions of deposits and fines of up to 0.2% of GDP which can be imposed upon eurozone member states by the Council for breach of obligations imposed by EU law as regards surveillance, excessive deficits and statistics: *see* Arts. 4-8 of Reg. 1173/2011 (*supra* n. 3); these can be raised to 0.5% of GDP as regards excessive deficits (*see* Art. 12 of Reg. 1467/97, as amended by Reg. 1177/2011 (*idem*)). Fines of up to 0.1% of GDP can be imposed on those member states for breaches of the macroeconomic imbalance procedure: Art. 3 of Reg. 1174/2011 (*idem*).

state will have to pay that fine to the ESM; otherwise the fine is payable to the EU's budget.

Finally, Article 8(3) specifies that Article 8 is a 'special agreement' among member states pursuant to Article 273 TFEU, which provides that:

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

Article 8 reflects the December 2011 statement, but was considerably fleshed out during negotiations.[60] The first draft of the treaty made no mention of the role of the Commission, consisting only of an option for a member state to sue another one for an alleged breach of Article 3(2). Furthermore, the first draft did not provide for a possible follow-up judgment of the Court of Justice. The first draft did, however, specify that the Court's judgment would be binding, and referred to Article 273 TFEU, albeit only in the preamble.

It should be noted that there is a special side agreement setting out 'arrangements' between the contracting parties on the application of Article 8.[61] These arrangements provide that first of all, an application to the Court will be brought within three months of the Commission's report finding a breach of the obligation set out in Article 3(2). Next, the arrangements specify who will bring the proceedings: the member states holding the trio Council Presidency at the time of the report, if those states are bound by Articles 3 and 8 of the stability treaty, if they have not themselves breached Article 3(2) according to the report and are not the subject of proceedings pursuant to Article 8(1) or (2), unless they are 'unable to act on other justifiable grounds of an overarching nature, in accordance with the general principles of international law'. If none of these three member states meet these criteria, the applicants will be the three previous member states holding the Presidency. The applicants will receive support and share costs with the other member states in whose interest they are acting (i.e., all the member states bound by articles 3 and 8, except the state being sued). If a new Commission report concludes that Article 3(2) is no longer being breached by the states concerned, the applicants 'will' discontinue their case. Finally, if the Commission reports that a member state has not complied with a judgment pursuant to Article 8(1), the contracting states bound by Articles 3 and 8 'state their intention to make full use' of the procedure set out in Article 8(2), 'building upon' the arrangements set out as regards Article 8(1).

[60] *See* para. 4, second indent, final sentence of the statement, which simply recognizes the Court's jurisdiction to rule on the verification of the balanced budget rule at national level.

[61] The text of these arrangements has not been published officially. For the text, *see* the unofficial publication at: <www.europolitics.info/pdf/gratuit_en/310236-en.pdf>.

The scope of Article 8 is limited to Article 3(2) of the stability treaty (which obliges member states to adopt national law giving effect to the rules set out in Article 3(1), and to put in place the correction mechanism referred to in Article 3(1)(e)), which also means that Article 8 cannot apply until the obligations set out in Article 3 become applicable.[62] There is no provision for any enforcement of any of the other provisions of the stability treaty, although of course, to the extent that any provision of the stability treaty overlaps with obligations under EU law, the Court's normal jurisdiction pursuant to EU law will apply – subject to any special rules such as Article 126(10) TFEU, which disapplies Articles 258-260 TFEU, concerning infringements of EU law, in the context of the excessive deficit procedure. On this point, however, it should be noted that obligation in Article 3(2) is not identical to the obligations to avoid excessive deficits imposed by EU law.[63]

Article 8 of the treaty can be compared to the infringement procedures provided for in Articles 258-260 TFEU. Like the infringement procedure, the process in the stability treaty starts with the Commission giving a member state the opportunity to give its observations on the Commission's view that the relevant legal rules have been infringed. It remains to be seen whether the Commission will transpose to the stability treaty the practice of issuing letters to member states on the alleged breach.

Next, under the stability treaty, the Commission issues a report, rather than a reasoned opinion. Following that, a member state '*will*' (rather than the Commission '*may*') bring the matter to the Court of Justice. Alternatively, a member state *may* independently bring another member state to the Court; this is similar in principle to the process set out in Article 259 TFEU, except that there is no specific role for the Commission. The word 'will' (in contrast with the word 'may') clearly sets out an obligation for member states to act, and the side agreement relating to the application of Article 8(1) equally sets out an obligation due to its use of the same word.[64] However, there is no mechanism in the stability treaty to enforce member states' obligation to act pursuant to these rules.

The obligation to comply with the Court's judgment is very similar to Article 260(1) TFEU; the extra reference to the 'binding' nature of the Court's judgment is superfluous. The follow-up possibility of requesting the Court to impose fines for failure to implement the prior judgment is very similar to Article 260(2), except that only member states can bring such proceedings under the stability treaty,

[62] *See* the discussion of Art. 3(2) above.

[63] Ibid.

[64] *See* the analysis in the 62nd report (2010-12) of the House of Commons European Scrutiny Committee: *Treaty on Stability, Coordination and Governance: Impact on the Eurozone and the Rule of Law.*

whereas only the Commission can bring them pursuant to the TFEU. Moreover, the criteria regarding the application of the sanctions are expressly identical.[65] However, the total lump sum or penalty payment that may be imposed is limited under the stability treaty, and the stability treaty applies a different rule as regards paying fines to the ESM.[66]

Because Article 8 only sets out rules concerning the *enforcement* of the stability treaty, it does not raise any questions about the treaty's compatibility with EU substantive law in addition to those raised by Article 3(2). The obvious questions about the compatibility of Article 8 with the institutional law of the EU – whether the role of the Court is compatible with Article 273 TFEU, particularly in light of the limitation set out in Article 126(10) TFEU, and whether the role of the Commission exceeds the powers which member states may confer upon it outside the Treaty framework – is outside the scope of this paper.[67] It should be noted, though, that Article 8 gives the Court direct and explicit judicial control of a treaty rule that must take the form of national (quasi-) constitutional provision; this could well lead to tension with national constitutional courts.[68] But the Court could hardly be accused of judicial activism if it simply carries out the task which member states have expressly given it here. Finally, the failure to publish officially the arrangements relating to Article 8 constitutes quite an outrageous lack of transparency by member states – contrasting with the obligation to publish such measures set out in EU law.[69]

Title III: Fiscal compact – other provisions

The other provisions in the stability treaty concerning the 'fiscal compact' (Articles 4-7) address in turn the overall levels of debt (Article 4), partnership programmes for member states with excessive deficits (Article 5), coordinated debt issuance (Article 6) and decision-making relating to the EU's excessive deficit procedure (Article 7).

[65] On these criteria, *see* SEC (2005) 1658 and *OJ* [2011] C 12/1, with further discussion in P. Wenneras, 'Sanctions against Member States under Article 260 TFEU: Alive, But Not Kicking?', 49 *Common Market Law Review* (2012) p. 145 and S. Peers, 'Sanctions for Infringement of EU Law after the Treaty of Lisbon', 18 *European Public Law* (2012) p. 33.

[66] Paying fines to the general budget of the EU (the rule which will apply to non-eurozone member states which breach a judgment regarding Art. 3(2)) is the same rule as applicable pursuant to Art. 260 TFEU: *see* the Commission communications (ibid.) and Case T-33/09 *Portugal* v. *Commission*, judgment of 29 March 2011, not yet reported. Paying fines to the ESM matches the rules applicable to fines under the Stability and Growth Pact, pursuant to the relevant legislation (*see*, for instance, Art. 10 of Reg. 1173/2011, *supra* n. 3).

[67] *See* Craig and Peers (*supra* n. 2).

[68] *See* the *EuConst* editorial (ibid.).

[69] *See* the final paragraph of Art. 15 TFEU.

First of all, Article 4 specifies that if a member state has a debt of over 60% of its economy (as defined by EU law), it must reduce that debt by 1/20th per year 'as a benchmark, as provided for' in one of the six-pack measures. The existence of any deficit due to breach of this debt rule shall be decided in accordance with the EU rules also.

This provision reflects the December 2011 statement, which stated that this rule 'needs to be enshrined' in the planned treaty.[70] During negotiations, the rule was made binding, and a number of references to EU law were added.[71] Indeed, a form of this rule appears in the EU legislation expressly referred to in Article 4 of the stability treaty.[72] This legislation provides that a total debt is 'sufficiently diminishing' (a test set out in Article 126(2) TFEU) if it is reduced by 1/20th of the differential between the 60% debt ceiling and the actual level of debt, averaged over a three-year period (as further defined). There is also a transitional period to apply the new rule, and a requirement to take account of the economic cycle. More fundamentally, the EU legislation does not simply require member states to reduce the debt ratio, but rather takes the reduction of the debt ratio into account as a factor when assessing whether an excessive annual deficit exists. So there is a significant difference between a blunt obligation to reduce an excessive debt by 5% a year and the far more subtle rule set out in the EU legislation. But the express reference to this legislation in the stability treaty, which does not hint at any obligation beyond that already established by EU law, must necessarily mean that the rule in the stability treaty is no different from the rule in the legislation. There is therefore no conflict between Article 4 of the stability treaty and the substantive law of the EU.

Article 5(1) provides that any contracting party that, pursuant to EU law, 'is subject to an excessive deficit procedure' must 'put in place a budgetary and economic partnership programme including a detailed description of the structural reforms which must be put in place and implemented to ensure an effective and durable correction of its excessive deficit'. EU law will define '[t]he content and format of such programmes', and the existing surveillance procedures of the Stability and Growth Pact will apply to the 'submission' of the programmes to the

[70] *See* the last sentence of para. 5 of these conclusions.

[71] The first draft stated simply that the contracting parties 'undertake' to reduce their debt at a rate of 1/20th per year. On this wording, *see* the discussion of Art. 9 below. In the absence of a reference to EU law, the method of calculating the debt reduction obligation would have been open to different interpretations. Would a member state have had to reduce its *total* debt by 1/20th each year (i.e. a debt of 100% of GDP would have to be reduced by 5% of GDP), or would it only have had to reduce its debt *exceeding the 60% margin* by 1/20th each year (i.e., a debt of 100% of GDP would have to be reduced by 2% of GDP)? The EU legislation answers the question in favour of the latter interpretation.

[72] Art. 2(1a) of Reg. 1467/97, as amended by Reg. 1177/2011 (*supra* n. 3).

Commission and Council for 'endorsement' and 'monitoring'. Article 5(2) then specifies that the 'implementation' of the programme and the annual budgetary plans which are consistent with it will also be monitored by the Council and the Commission, but there is no express reference to EU law in this context.[73]

This provision reflects the December 2011 statement,[74] amended to add the express references to EU law, to 'monitoring' of the initial programmes by the Commission and the Council, and to strengthen member states' obligations (adding references to a 'detailed description' of the reforms and the requirement that they be 'put in place and implemented').

Article 5(1) is made subject to EU rules in three separate sentences. While the first and third sets of EU rules referred to (the excessive deficit procedure and surveillance procedures) already exist (and in the latter case, the stability treaty refers expressly to 'existing' procedures), the second set of rules (on the content and format of the budgetary programmes) does not, and the stability treaty refers to the development of such procedures in the future tense ('shall be defined'). The preamble to the stability treaty states that the Commission is intending to make proposals on this issue.[75] In fact, one of the 'two-pack' proposals regarding economic governance submitted by the Commission in November 2011 already provides for detailed rules governing the same issue as Article 5 of the stability treaty, albeit using different language to describe the process.[76] Moreover, the Council's and EP's preferred version of this legislation would align it even more closely with the stability treaty.[77] Depending on the outcome of the negotiations on this legislation, there would be no remaining substantive difference between EU measures and Article 5 of the stability treaty.

Article 6 of the treaty provides that the contracting parties 'shall report ex-ante on their public debt issuance plans to' the Commission and the Council, '[w]ith a view to better coordinating the planning of their national debt issuance'. This provision reflects the December 2011 statement,[78] except that the statement

[73] Arguably, however, the reference to 'monitoring' of the plans pursuant to EU law in Art. 5(1) covers also the monitoring referred to in Art. 5(2).

[74] *See* para. 4, indent 4, of those conclusions. The first draft of the treaty contained a briefer version of Art. 5, which neither referred to EU law nor to any role for the Commission and Council besides receiving submissions.

[75] Recital 8 of the preamble.

[76] Art. 7 of the proposed Reg. on budgetary plans and excessive deficits (COM(2011)821, *supra* n. 5).

[77] *See* Art. 10 of Council Doc. 6565/12 (*supra* n. 6) and Art. 7 of the EP's position (*supra* n. 7); both proposed articles then elaborate further. Note that Art. 7(7) of the EP position is identical to Art. 5(2) of the stability treaty. *See also* Art. 6(1a) and (2a) of the EP's position on the proposed Reg. on surveillance of member states with serious difficulties (ibid.); although note that in this Reg., the relevant rules would apply only to member states receiving financial assistance.

[78] *See* para. 4, indent 5 of those conclusions.

did not specify any underlying objective of this reporting, or refer to any role for the EU institutions. It differs from the first draft of the treaty in that the final treaty has the objective of 'coordinating the planning' of debt issuance, whereas the first draft referred only to improving the reporting of it.

Article 6 could be described as at most a very tiny step towards the idea of jointly issued 'eurobonds', which some see as a potential major contribution towards solving the eurozone financial crisis, but which would raise significant legal, economic and political questions.[79] The role of the Council and Commission in this process is not currently addressed in any EU legislation, and in the absence of such legislation, it is not clear what the Commission and the Council will do with this information.

The preamble to the treaty indicates that the Commission intends to propose EU legislation on this issue,[80] although there is no reference to its plans in its 2012 work programme or its forward programming for the rest of 2012.[81] However, both the EP and the Council are keen to introduce provisions on this issue into the proposed 'two-pack' of new economic governance legislation.[82] So again, depending on the outcome of the negotiations on this legislation, there would be no substantive difference between EU measures and Article 6 of the stability treaty.

Article 7 addresses the issue of decision-making within the EU legal order. The first paragraph states the general rule that '[w]hile fully respecting the procedural requirements' set out in the EU treaties, eurozone member states 'commit to' supporting the Commission's proposals or recommendations, when the Commission considers that a eurozone member state has an excessive deficit pursuant to the excessive deficit procedure. Then the second paragraph states an exception: the 'obligation' will not apply where a qualified majority of eurozone member states 'calculated by analogy' with the rules in the EU treaties, and without considering the position of the relevant contracting party, oppose the Commission proposal.

[79] For details, *see* the Green Paper on the feasibility of introducing Stability Bonds (COM(2011)818, 23 Nov. 2011).

[80] Recital 8 in the preamble.

[81] *See respectively* COM(2011)777, 15 Nov. 2011 and <ec.europa.eu/atwork/pdf/forward_programming_2012.pdf>.

[82] *See* Art. 6bis of the Council's agreed text of the Reg. on budgetary plans and excessive deficits (*supra* n. 6), which also provides for the Commission to establish a harmonised framework on this issue. Similarly, the EP's proposed Art. 1a(1) of the Reg. on surveillance of member states with serious difficulties would simply transpose Art. 6 of the treaty into that Reg., as would the EP's proposed Art. 6c(1) of the Reg. on budgetary plans and excessive deficits (both *supra* n. 7). The EP's proposal for Art. 6a of the latter Reg. would elaborate on this issue somewhat, while its proposals for Arts. 6b, 6c(2) and (3) and 6d of the latter Reg. would take much more radical steps towards joint liability for debts.

This provision reflects the December 2011 statement,[83] with the addition of the references to the procedural requirements of EU law, a definition of qualified majority voting (QMV) by reference to the treaties, and a focus on the obligations of the member states rather than the outcome of the procedure.[84]

While the wording of the first paragraph of Article 7 only states that contracting parties 'commit' to this rule, suggesting a political commitment only, the second paragraph then refers to '[t]his *obligation*' (emphasis added), suggesting rather a legally binding rule. Then again, since there is no process set out in the stability treaty to enforce any obligation besides that set out in Article 3(2), the 'binding' nature of the other provisions of the treaty (where they set out obligations at all) is rather hypothetical – unless a particular obligation set out in the stability treaty overlaps with an obligation set out in EU law. The EU's 'six-pack' legislation does require 'reverse QMV' such as that set out in Article 7 of the stability treaty in a number of cases.[85]

Also, it should be noted that Article 7 only applies to the excessive deficit procedure, not to other aspects of EU economic governance (the surveillance procedure, the macroeconomic imbalances procedure or fines for dishonest statistics). In fact, due to the six-pack legislation, reverse QMV now also applies in other aspects of EU economic governance besides the excessive deficit procedure,[86] but the stability treaty will not further extend its use in such contexts.

Article 7 will therefore only be relevant to the extent that (a) the vote to be taken takes place in the framework of the excessive deficit procedure and (b) reverse QMV as regards the eurozone member states is not already provided for in EU legislation. For instance, reverse QMV will now apply as regards deciding on the existence of an excessive deficit in the first place.[87]

It should be noted that France and Germany constitute a blocking minority of eurozone member states – so if they support the Commission's view, then Article 7 automatically means that the other eurozone member states must do so also – unless France or Germany is itself the subject of the Commission's proposal or recommendation, in which case it cannot vote (see the second paragraph of Article 7). Since non-eurozone member states cannot vote on the position of eurozone

[83] *See* the first three sentences of para. 5 of the statement.

[84] The first draft of the treaty contained less binding wording as regards voting, stating only that member states would 'undertake' to apply the voting rule.

[85] *See*, for instance (as regards the excessive deficit procedure) Arts. 5(2) and 6(2) of Reg. 1173/2011 (*supra* n. 3), concerning the enforcement of the excessive deficit rules as regards the imposition of fines on eurozone member states.

[86] *See*, for instance (as regards the surveillance procedure), Art. 4(2) of Reg. 1173/2011 (ibid.), concerning the imposition of sanctions on eurozone member states.

[87] Art. 126(6) TFEU. This conflict between the decision-making rules in the TFEU and the stability treaty is discussed further in Peers, *supra* n. 2.

member states,[88] this will mean that such measures must be adopted. However, this depends on the strength of the alliance between France and Germany: while such an alliance was strong during the 'Merkozy' era (i.e., when French President Sarkozy was in office, and allied himself strongly with German Chancellor Merkel), it seems rather less strong after the change of government in France in spring 2012.

Finally, it is curious that the stability treaty refers to calculating votes 'by analogy' with the treaties, when the treaties provide for a precise rule to be applied to determine a blocking minority when not all member states vote.[89]

Title IV: Economic policy coordination and convergence[90]

Title IV of the stability treaty consists of three Articles, concerning in turn economic policy (Article 9), the adoption of EU law by only some member states (Article 10) and policy coordination (Article 11).

Article 9 states that:

> Building upon economic policy coordination, as defined in the Treaty on the Functioning of the European Union, the Contracting Parties undertake to work jointly towards an economic policy that fosters the proper functioning of the economic and monetary union and economic growth through enhanced convergence and competitiveness. To that end, the Contracting Parties shall take the necessary actions and measures in all the areas which are essential to the proper functioning of the euro area in pursuit of the objectives of fostering competitiveness, promoting employment, contributing further to the sustainability of public finances and reinforcing financial stability.

The first sentence of Article 9 reflects the December 2011 statement, which stated simply that the eurozone member states 'are committed to working towards a common economic policy', without further elaboration.[91] The more detailed reference to fostering growth via convergence and competitiveness reflects to some extent the 'Euro Plus Pact' (on this pact, see the comments on Article 3(2) above). However, in international treaties, an agreement to 'undertake' an act is not fully legally binding on the state parties, but rather constitutes a 'best endeavours' clause, i.e., a political commitment.

In contrast, the second sentence of Article 9 states that the contracting parties 'shall take the necessary actions' for the functioning of the euro area,[92] as regards

[88] *See* Art. 139(2)(d) and (4) TFEU.

[89] *See* Art. 238(3) TEU and, for now, the Protocol on transitional provisions.

[90] In the first draft of the treaty, Title IV was titled 'Economic Convergence'.

[91] Para. 9, first sentence, of that statement.

[92] It might be questioned whether there is a difference between 'the proper functioning of' EMU (referred to in the first sentence) and 'the proper functioning of the euro area' (referred to in the second sentence).

the objectives listed therein. This wording is undoubtedly binding, although the relevant obligations are not very precise. The first draft of the treaty referred specifically (but non-exhaustively) to the Euro Plus Pact in this regard, but this reference was removed during negotiations,[93] and replaced by a list of four specific objectives. But these objectives are in any event the same objectives set out in the Euro plus pact (see the discussion of Article 3(2) above).

The words 'building upon' in the first sentence suggest that Article 9 will not be implemented as part of an EU law process, but rather in addition to such a process.[94] Notably, as compared to a number of other Articles of the stability treaty, there is no reference to any role for EU institutions. Of course, to the extent that the EU does act in this area (as recognised by the opening words of the first sentence of Article 9), EU measures will take priority, in accordance with the general rule in Article 2.

Next, Article 10 of the stability treaty provides that '[i]n accordance with' EU primary law, the contracting parties 'stand ready to make active use, whenever appropriate and necessary,' of EU law measures which either apply only to eurozone member states, pursuant to Article 136 TFEU, or of enhanced cooperation, pursuant to the relevant provisions of the TEU and the TFEU,[95] 'on matters that are essential for the proper functioning of the euro area, without undermining the internal market'. It is not clear whether the final two provisos are intended to apply to both forms of differentiated integration, or only to the use of enhanced cooperation. It should be noted that the first proviso differs slightly from the wording of Article 136 TFEU,[96] while the second proviso is identical to a Treaty rule governing the authorisation of enhanced cooperation.[97]

Article 10 reflects paragraph 8 of the December 2011 statement, which stated that the euro-zone states 'agree to make more active use of enhanced cooperation on matters which are essential for the smooth functioning of the euro area, without undermining the internal market'. Compared to the statement, the final treaty has added references to: acting in accordance with Treaty requirements;[98]

[93] This might be because the stability treaty has more signatories than the euro plus pact, and therefore the signatories of the former which have not agreed to the latter (namely Sweden and Hungary) did not want to endorse the pact explicitly.

[94] The first draft of the treaty stated instead that this process was 'without prejudice' to EU law measures on the coordination of economic policy.

[95] Art. 10 refers (correctly) to Art. 20 TEU and Arts. 326-334 TFEU in this regard.

[96] Art. 136(1) TFEU provides for differentiated integration of eurozone member states only '[i]n order to ensure the proper functioning of economic and monetary union', while Art. 10 of the stability treaty refers instead to '*matters that are essential* for the proper functioning of *the euro area*' [emphases added].

[97] Art. 326 TFEU, second paragraph.

[98] The first draft of the treaty referred only to respecting the *procedural* requirements of the treaties, although the requirement not to undermine the internal market is one of the relevant

the possible use of the specific form of differentiated integration among eurozone member states; and the relevant EU primary law provisions.[99] Also, the word 'agree' has been replaced with the words 'stand ready',[100] and the words 'whenever appropriate and necessary' have been added.[101]

The words 'stand ready', like the word 'undertake' (see the analysis of Article 9 above), do not appear to express a legally binding obligation. Read literally, Article 10 is simply a statement of fact. In comparison with Article 7 of the stability treaty, Article 10 by *a contrario* interpretation does not commit the parties to vote in favour of approving such enhanced cooperation, or to participate in it. However, on the assumption that the contracting parties had some reason to include Article 10 within the main text of the treaty, it presumably indicates at least a political commitment by those parties to *consider the use* of enhanced cooperation in areas within the scope of Article 10.

What are the practical consequences of Article 10? First of all, as regards eurozone differentiated integration, Article 136 TFEU provides for the adoption of measures applying to all euro-zone member states (and euro-zone member states only) as regards 'strengthen[ing] the coordination and surveillance of their budgetary discipline' and 'set[ting] out economic policy guidelines for them, while ensuring that they are compatible with those adopted for the whole of the Union and are kept under surveillance'. These measures are adopted by the same procedures set out in Articles 121 or 126 TFEU, with only euro-zone member states voting in the Council. Given the limits on the scope of Article 136 TFEU, it does not constitute a general authorisation for the adoption of economic legislation for euro-zone member states only.

Secondly, as regards enhanced cooperation, the procedural requirements are:[102] implicitly an initial proposal from the Commission and a block on that proposal in the Council, since enhanced cooperation must be a 'last resort'; a request from a group of member states to the Commission to begin enhanced cooperation; a proposal from the Commission to authorise enhanced cooperation; and authorisation by QMV in the Council on a vote of *all* member states;[103] and the consent

substantive rules (*see* ibid.). During negotiations, the text was amended to refer to observing the requirements of the Treaties more broadly, therefore obviously encompassing their substantive requirements and the participation rules of enhanced cooperation. Of course, the obligation to act in accordance with all relevant Treaty provisions in any event follows from Art. 2 of the stability treaty.

[99] The final version of the treaty also differs from the first draft on these two points.

[100] The first draft of the treaty used the words 'undertake to make recourse' instead of 'agree to make more active use' as set out in the December conclusions. If anything, the words 'stand ready' indicate a lower degree of political commitment.

[101] These words already appeared in the first draft of the treaty.

[102] *See* Art. 20 TEU and Art. 329(1) TFEU.

[103] The non-eurozone member states have a blocking minority in the Council, if most or all of them vote against or abstain in a vote together. While most non-eurozone member states (eight out

of the EP (all members of the EP can vote on this measure). The measure implementing enhanced cooperation would then be adopted by means of the usual decision-making procedure, but only the participating member states would vote in the Council.[104] The participating member states could decide, by unanimous vote among themselves, to abolish any national vetoes which apply to the adoption of the legislation concerned.[105] There are a number of additional substantive rules, besides the requirement not to undermine the internal market.[106]

Furthermore, the rules on participation in enhanced cooperation could be particularly relevant in practice.[107] These rules: require a minimum of nine participants; provide that only willing member states need to participate; specify that any member state can join; and waive any obligation for new member states to join. In principle, it seems that these rules would rule out the use of enhanced cooperation for *all* the eurozone member states and *only* the eurozone member states, unless it might possibly be argued that eurozone membership could be applied as a valid condition for participation in enhanced cooperation.[108] Even in that case, it is hard to see how all eurozone member states could be *required* to participate, given that the Treaty rules provide clearly for a 'coalition of the willing'.[109]

Legally, a member state which wishes to join the eurozone could not be required to participate in such legislation, since Art. 140 TFEU, which sets out the conditions for joining EMU, does not refer to such a requirement. However, in practice, the eurozone member states (which have a 'blocking minority' vote on any exten-

of ten) are contracting parties to the stability treaty, they will not be required to apply Art. 10 if they ratify the treaty, until they participate in EMU (*see* the discussion of Art. 14 below).

[104] *See* Art. 330 TFEU. On the other hand, all MEPs could vote.

[105] *See* Art. 333 TFEU.

[106] Art. 326 TFEU also requires, *inter alia*, that enhanced cooperation shall not undermine 'economic, social and territorial cohesion', or 'constitute a barrier to or discrimination in trade between Member States' or 'distort competition between them'. *See also* Art. 327 TFEU.

[107] *See* Art. 20 TEU and Arts. 329 and 331 TFEU.

[108] Art. 328(1) TFEU (*see also* Art. 20(1) TEU) states that enhanced cooperation 'shall be open to all member states, subject to compliance with any conditions of participation' in the decision authorising it. These conditions might also apply to member states joining later (*see* Art. 331(1) TFEU). Arguably, the relevant conditions of participation cannot include a condition which *prima facie* excludes any member state from participation at the time when enhanced cooperation was authorised, otherwise the requirement of being 'open to all Member States' would be breached. If that is correct, then participation in EMU could not be a condition for the authorisation of enhanced cooperation – although it would not be illegal if only the euro-zone member states wished to participate in an enhanced cooperation measure.

[109] *See* Art. 329(1): 'Member States which *wish* to establish enhanced cooperation' and Art. 331(1): 'Any Member State which *wishes* to participate in enhanced cooperation in progress' [emphases added].

sion of EMU to more member states) might demand participation in such measures before a member state joins EMU.[110]

To date, enhanced cooperation has been used as regards legislation relating to conflicts of law in divorce proceedings and the establishment of an EU patent.[111] Neither of these issues is relevant to the functioning of the euro area. In the near future, Article 10 may be relevant as regards the possible use of enhanced cooperation to adopt legislation on a financial transactions tax.[112] However, it seems very unlikely that all contracting parties, or even all eurozone member states, will participate in this legislation. Possibly, though, Article 10 will come into play for all eurozone member states as regards banking supervision legislation.[113]

Finally in Title IV, Article 11 specifies that:

> With a view to benchmarking best practices and working towards a more closely coordinated economic policy, the Contracting Parties ensure that all major economic policy reforms that they plan to undertake will be discussed ex-ante and, where appropriate, coordinated among themselves.

Furthermore, this coordination 'shall involve' EU institutions 'as required by' EU law. The first sentence of Article 11 reflects the December 2011 statement,[114] although it differs from those conclusions in that there is no express reference to establishing a procedure, the idea of working towards close coordination of eco-

[110] *See* further the analysis of Art. 14 below.

[111] *See* respectively *OJ* [2010] L 189/12, implemented by Reg. 1259/2010, *OJ* [2010] L 343/10 (divorce), and *OJ* [2011] L 76/53, which would be implemented by the proposals in COM(2011)215 and 216, 13 April 2011, once adopted (patents). The decision to authorize enhanced cooperation as regards patents has been challenged before the Court of Justice: Cases C-274/11 *Spain* v. *Council* and C-295/11 *Italy* v. *Council*, both pending. For a discussion of these measures, *see* S. Peers, 'Divorce, European Style: The First Authorization of Enhanced Cooperation', 6 *EuConst* (2010) p. 339-358 and S. Peers, 'The Constitutional Implications of the EU Patent', 7 *EuConst* (2011) p. 229-266.

[112] For the original proposal, *see* COM(2011)594, 28 Sept. 2011. The Ecofin Council of 22 June 2012 noted that there was no unanimity. On this basis the 'Compact for Growth and Jobs' adopted by the European Council in June 2012 noted that the proposal 'will not be adopted within a reasonable period' (reflecting one of the conditions for enhanced cooperation: *see* Art. 20(2) TEU) and that several member states would make a request for the use of enhanced cooperation in this area, with a view to adopting the legislation by the end of 2012 (point 3(j) of the fiscal compact). At time of writing, there has not yet been a formal request from a group of member states to the Commission to make a proposal to this end.

[113] However, the initial Commission proposal to give supervisory powers regarding only *euro area banks* to the European Central Bank, pursuant to Art. 127(6) TFEU (COM(2012)511, 12 Sept. 2012), does not foresee any requirement for a formal authorization of enhanced cooperation.

[114] *See* the second sentence of para. 9 of those conclusions, which stated that '[a] procedure will be established to ensure that all major economic policy reforms planned by euro area Member States will be discussed and coordinated at the level of the euro area, with a view to benchmarking best practices'.

nomic policy has been added,[115] the discussions will expressly take place 'ex-ante', and coordination will only take place 'where appropriate'.[116] The second sentence of Article 11 was added as from the first draft of the treaty, presumably to emphasize the role of the EU institutions. This sentence makes clear that Article 11 does not amend or even supplement EU law in this area, since it necessarily means that any activity of the EU institutions in this field will take place in accordance with EU law as it already exists (or will exist). According to the preamble to the stability treaty, the Commission plans to propose legislation on this issue,[117] although this is not mentioned in the Commission's 2012 work programme or in its communication on the 'roadmap to stability and growth'.[118] However, the EP's draft amendments to the 'two-pack' legislation address this point.[119] It is not clear whether or how the discussion and coordination would take place if no EU legislation is yet in place.[120]

Title V: Governance of the euro area

The 'governance' title of the stability treaty consists of two provisions, addressing in turn Euro summits (Article 12) and parliamentary meetings (Article 13).[121]

First of all, Article 12(1) states that the heads of state and government of the eurozone contracting parties 'shall meet informally in Euro Summit meetings', along with the President of the Commission. The President of the European Central Bank (ECB) will also be invited to take part.[122] The 'Euro Summit' will have a president, to be appointed by the heads of state and government of the eurozone

[115] However, the first sentence of para. 9 of those conclusions stated that the euro-zone states 'are committed to working towards a common economic policy'. This provision was added during negotiations.

[116] These provisions were added during negotiations.

[117] *See* point 8 in the preamble.

[118] *See* respectively COM(2011)777 (*supra* n. 81), and COM(2011)669, 12 Oct. 2011.

[119] *See* the proposed new 11a of the proposed Reg. on budgetary plans and excessive deficits (*supra* n. 7), which calls for the Commission to produce a report and possibly a proposal on this issue three months after the relevant regulation enters into force – which would be 20 days after its publication in the *OJ* (Art. 13 of the proposal, *supra* n. 5). Moreover, the EP's proposed Art. 1a(2) of the Reg. on surveillance of member states with serious difficulties would simply transpose the first sentence of Art. 11 of the treaty into the regulation.

[120] While the wording 'shall involve' is mandatory, the second sentence of Art. 11 could be interpreted to mean that the EU institutions need only be involved in this process if EU law requires it.

[121] The first draft of the treaty included only the provision on euro summits (then Art. 13) in Title V, which was then titled 'Euro Summit Meetings'. The provision on parliaments (then Art. 12), was part of Title IV.

[122] Compare to Art. 15(2) TEU, which defines the composition of the European Council. The main difference, apart from the reduced number of member states and role of the ECB President (instead of the foreign policy High Representative), is that the stability treaty makes no reference to the role of the President of the Euro Summit attending its meetings. There is also no express provi-

contracting parties 'by a simple majority, at the same time as the European Council elects its President and for the same term of office'.[123]

Next, Article 12(2) addresses the timing and scope of the Euro Summit meetings. The meetings will take place 'at least twice a year', and more often if 'necessary'.[124] They will discuss questions relating to the specific responsibilities which eurozone member states share as regards the single currency, as well as 'other issues concerning the governance of the euro area and the rules that apply to it, and strategic orientations for the conduct of economic policies to increase convergence in the euro area'.[125]

Article 12(3) sets out a role for the heads of state or government of non-eurozone contracting parties which have ratified the stability treaty.[126] They

> shall participate in discussions of Euro Summit meetings concerning competitiveness for the Contracting Parties, the modification of the global architecture of the euro area and the fundamental rules that will apply to it in the future, as well as, when appropriate and at least once a year, in discussions on specific issues of implementation of'

the stability treaty. Furthermore, Article 12(6) provides that the President of the Euro Summit will keep non-eurozone contracting parties and *other* EU member states (i.e., the UK, the Czech Republic and future member states) 'closely informed of the preparation and outcome of the Euro Summit meetings'.

The 'preparation and continuity of Euro summit meetings' must be ensured by the President of the Euro Summit, cooperating closely with the Commission President. Also, the 'preparation of and follow up to the Euro Summit meetings' will be carried out by the Euro Group (the informal meeting of eurozone member states' finance ministers), and its President may attend Euro Summit meetings to that end.[127] It is striking though, that the stability treaty does not expressly

sion for the heads of state and government to be accompanied by ministers, or the Commission President to be accompanied by a commissioner (compare to Art. 15(3) TEU, second sentence).

[123] Art. 15(5) TEU specifies that the President of the European Council has a two-and-a-half year term. Unlike the TEU, the stability treaty does not specify any limit on the renewability of the Euro Summit President's mandate, or provide for any grounds for or procedure for removing a President.

[124] *See also* recital 26 in the preamble to the treaty. In contrast, the European Council meets at least twice every six months: *see* Art. 15(3) TEU, first sentence.

[125] Compare to the role of the European Council, as described in Art. 15(1) TEU.

[126] There is no equivalent to Art. 14(3) and (6) of the stability treaty in Art. 15 TEU, for the obvious reason that the TEU foresees full participation of all member states in the European Council.

[127] Art. 12(4). Compare to Art. 15(6)(b) TEU, which differs only in that the preparation for European Councils takes place 'on the basis of the work of' the General Affairs Council, not the Eurogroup. The specific reference to the role of the Eurogroup President enhances his or her profile as compared to the Presidency of the Council (*see* Art. 16(9) TEU and Art. 236 TFEU), which is not referred to in Art. 15 TEU. *See*, however, Arts. 2(3) and 3(1) of the European Council's rules of procedure (*OJ* [2009] L 315/51).

specify that the President chairs or convenes Euro Summits, should 'drive forward' the Euro Summit's work and try to achieve 'cohesion and consensus', or award any external relations role to the President.[128] The former two roles are surely self-evident, but the external relations issue is highly contentious and unresolved, and is moreover the subject of a specific provision of the treaties.[129] If the stability treaty had provided for a specific external relations role for the Euro Summit President, it would clearly have encroached upon the treaties, but such a conflict was avoided. Of course, in light of the formalisation of the Euro Summits and the role of their President in the stability treaty, it is perhaps more likely that he or she would be given at least some external relations role, pursuant to future EU measures.[130]

Finally, as for parliamentary accountability, the President of the EP may be invited to be heard, and the President of the Euro Summit must report to the EP on each meeting of the Euro Summit.[131]

During the drafting process, the provision concerning the participation of non-eurozone heads of state or government in the Euro Summit was inserted,[132] a specific reference was added to the President of the Euro Group, and the role of the EP was strengthened.[133]

While the stability treaty would for the first time provide for the existence of the Euro Summit in a legal text, the heads of state and government of the eurozone member states have of course been meeting frequently since 2010,[134] and in practice have taken the main political decisions relating to the eurozone's financial crisis. The specific features of the Euro Summit set out in Article 12 are based on the agreement on reinforcing the governance of the euro-zone reached by the heads of state or government of the countries concerned in October 2011.[135] However,

[128] Compare to Art. 15(3) and (6)(a) and (c) TEU.

[129] *See* Art. 138 TFEU.

[130] This would be consistent with the external relations role for the President of the European Council set out in Art. 15(6) TEU. However, the logic of providing for such parallel powers may be less compelling if, in future, the posts of European Council President and President of the Euro Summits are not held by the same person.

[131] Art. 12(5). The former point is essentially identical to Art. 235(2) TFEU, while the latter point is essentially identical to Art. 15(6)(d) TEU.

[132] The original draft of Art. 12(2) specified that the Euro Summits would discuss issues of 'competitiveness', but this issue is referred to only in Art. 12(3) of the final text, perhaps to avoid any possibility that internal market issues might be agreed by eurozone member states only. Note also that the first draft of Art. 14(5) (*see* discussion below) made no reference to the role of non-eurozone member states as regards Title V of the treaty.

[133] The first draft of the treaty only referred to informing the EP of the outcome of the Euro Summit meetings.

[134] *See* the statements, communications and conclusions of these meetings, online at: <www.european-council.europa.eu/council-meetings/conclusions?lang=en>.

[135] This reflects para. 10 of the Dec. 2011 statement. *See* points 1-3 and the final sentence of point 4 of Annex 1 to the 26 Oct. 2011 conclusions of the 'Euro Summit'. The term 'Euro Summit'

Article 12 differs as regards the role of non-eurozone member states and the EP,[136] as well as the scope of competence of Euro Summits;[137] it also clarifies that the President of the Euro Summit is appointed by simple majority, provides for the participation of the President of the European Central Bank and contains less detail about the timing of Euro Summit meetings.[138]

In practice, the Eurozone heads of state and government appointed Herman van Rompuy, who is already the President of the European Council, as the interim President of the Euro Summit in October 2011,[139] and then appointed him to that post for a full term in March 2012.[140] This took account of the practice that had already developed since his appointment as the President of the European Council in 2009, and is not objectionable as such, in the absence of any provision on the incompatibility of the two posts.[141]

Conversely, though, there is no legal requirement that the two posts must be held by the same person. In fact, this particular form of double-hatting is problematic in principle, because in practice it may mean that only nationals of eurozone member states could be considered eligible to be the President of the European Council.[142] The same objection could be made if the President of the Euro Summit was also the President of the European Commission (*a fortiori*, if the same person were President of all three bodies).

was first used officially at this point. Points 5-10 and the first sentence of point 4 of that Annex, which concerned the preparation of the various Eurozone meetings, are not reproduced in the stability treaty.

[136] The changes on these points were clearly the result of the drafting process, as Art. 13(4) of the first draft of the treaty was identical to point 3 of Annex 1 to the Oct. 2011 conclusions.

[137] Point 1 of Annex 1 to the Oct. 2011 conclusions stated that the Euro Summit would address issues of 'improved competitiveness' in the euro-zone, but made no reference to addressing shared responsibilities for the single currency or the governance of the euro area. The final stability treaty, in contrast, focusses the Euro Summit more clearly on issues specifically related to EMU, and as noted above, gives the Euro Summit a role as regards 'competitiveness' only when all contracting parties participate in the Euro Summit.

[138] Point 1 of the Oct. 2011 conclusions stated that the Euro Summit would meet 'at key moments of the annual economic governance circle' (*sic*), and 'if possible … after European Council meetings', and specified that the President of the Euro Summit could call 'additional meetings … if necessary'.

[139] Point 2 of Annex 1 of the Oct. 2011 conclusions.

[140] *See* the March 2012 statement of the Euro area heads of state and government.

[141] Art. 15(6) TEU only precludes the President of the European Council from holding a national office, but there is no equivalent rule as regards the President of the Euro Summit.

[142] While there is no nationality requirement for either Presidency – indeed, in theory, both posts could be held by (a) third-country national(s)! – it is obvious that in practice only an EU citizen will be considered eligible to hold the Presidency of the European Council, and only the citizen of a eurozone member state will be considered eligible to hold the presidency of the Euro Summit. On these issues, *see* H. de Waele and H. Broeksteeg, 'The Semi-Permanent European Council Presidency: Some Reflections on the Law and Early Practice', 49 *Common Market Law Review* (2012) p. 1039 at p. 1047-9.

Broadly speaking, the development of the Euro Summit can be compared to the development of the Eurogroup, which was formalised in a declaration of the European Council before it began operations,[143] and was not referred to in EU primary law until the entry into force of the Treaty of Lisbon.[144] Given the informal nature of Euro Summits, and their established pre-existing role, it was obviously not necessary to agree a Treaty amendment or a separate treaty between member states to formalise them. If their role is to be entrenched into the treaties in future, it would be logical to amend the existing protocol on the Eurogroup to this end.[145]

Article 13 of the stability treaty specifies that, '[a]s provided for' in the relevant Protocol to the EU treaties,[146] the EP and national parliaments of contracting parties will jointly decide on a conference of representatives of the relevant committees of the EP and those national parliaments 'in order to discuss budgetary policies and other issues covered by this Treaty'. This provision on the 'parliamentary dimension' of the stability treaty does not reflect any provision in the December 2011 statement, but perhaps aimed to take account of aspects of the EP's resolution of December 2011 on the development of the 'European semester'.[147] During the drafting process, the reference to EU primary law was added, the EP was placed on an equal footing with national parliaments,[148] a specific reference to discussion of 'economic' matters was removed,[149] and the autonomy of the parliaments was reinforced.[150]

Article 13 clearly applies to the national parliaments of *all* of the contracting parties, as is clear from the wording of the Article and its placement in Title V of

[143] *See* the Dec. 1997 conclusions of the European Council, annex 1, point 6.

[144] *See* Protocol 14 to the treaties. Of course, the same could be said of the European Council itself, which was created by EU leaders in the 1970s and not referred to in any treaty text until the Single European Act.

[145] As suggested by the Van Rompuy report (*supra* n. 11), para. 14.

[146] The treaty provision refers to Title II of Protocol 1 to the EU Treaties, namely Arts. 9 and 10 of the Protocol on national parliaments. Art. 9 of this protocol states that '[t]he European Parliament and national Parliaments shall together determine the organisation and promotion of effective and regular interparliamentary cooperation within the Union', and Art. 10 of the Protocol refers to a conference of committees of national parliaments (known in practice as COSAC).

[147] *See* particularly paras. 45-47 of the EP's resolution. On the 'European semester' (the annual cycle of EU economic policy coordination, *see*: <ec.europa.eu/europe2020/making-it-happen/index_en.htm>.

[148] The first draft had referred to meetings of representatives of national parliamentary committees, 'in close association' with representatives of the relevant EP committee, instead of the different parliaments acting 'together'.

[149] However, the scope of the relevant discussions is clearly non-exhaustive ('and other issues covered by this Treaty').

[150] The first draft stated that the representatives would be 'invited to meet', rather than providing for them to 'determine' the organisation and promotion of a conference.

the treaty.[151] The wording of the final draft of the Article also makes clear that the planned interparliamentary cooperation should take place within the relevant legal framework already established by EU primary law. This means that the stability treaty integrates aspects of two different provisions in the relevant protocol to the treaties, bringing together the general rule in the latter on the organisation and promotion of interparliamentary cooperation,[152] and the organisation of interparliamentary conferences to discuss specific issues.[153] There is, however, no specific mention in the stability treaty of any role for the conference of national parliamentary committees (known in practice as 'COSAC') provided for in the parliamentary protocol to the treaties.

On the whole, then, neither the EP nor national parliaments are given any new role by the stability treaty, so the treaty does not conflict with substantive (or institutional) EU law. Although it could not have been argued that there were any constraints (as a matter of EU law) on the stability treaty giving national parliaments (as distinct from the EP) a new role besides that provided for in the EU treaties, it would not have made sense to create an elaborate new system for interparliamentary cooperation, given the great degree of overlap between the stability treaty and EU law. Even taking that consideration into account, the stability treaty could have given a specific role to COSAC, at least referring to its role in submitting contributions to the EU institutions and exchanging information and best practice between national parliaments and the EP.

Overall, while a specific provision on parliamentary involvement in the context of the stability treaty is of course welcome, Article 13 falls far short of the measures necessary to increase parliamentary control of EU economic governance,[154] although many such measures could only be implemented by means of amendments to EU primary law.

Title VI: General and final provisions

Article 14 contains the rules on the entry into force of this treaty. First of all, Article 14(1) provides that the treaty shall be ratified by the contracting parties 'in accordance with their respective constitutional requirements', with the EU Coun-

[151] As noted already (*supra* n. 121), in the first draft of the treaty, Art. 13 was Art. 12 and was placed in Title IV of the treaty. Art. 14(4) of the treaty (*see* discussion below) specifies that Title V will apply to all contracting parties as soon as the treaty enters into force.

[152] *See* Art. 9 of Protocol 1 to the Treaties.

[153] *See* Art. 10 of Protocol 1 to the Treaties.

[154] *See* the recommendations on the democratic control of the eurozone in 'Statewatch analysis: Future EU Treaty Reform? Economic Governance and Democratic Accountability', online at: <www.statewatch.org/analyses/no-155-econ-governance.pdf>.

cil General Secretariat as the depositary for ratifications. This is a standard rule for the ratification of treaties linked to EU law.

Secondly, Article 14(2) provides for flexibility regarding the entry into force of the treaty. It will enter into force on 1 January 2013, if twelve eurozone member states have ratified it by that date, or on the first day of the month following its ratification by the same number of eurozone member states, whichever is earlier.

The treaty does not expressly provide for the possibility that the threshold of ratifications by twelve eurozone member states might only be satisfied *after* 1 January 2013. Since it hardly seems plausible that the Treaty drafters intended that the treaty could not possibly enter into force after that point, the best interpretation of the treaty is that it will enter into force as soon as twelve eurozone member states have ratified it, even if that does not occur until after 1 January 2013. Another interpretation is that the treaty will enter into force retroactively as of 1 January 2013, even if fewer than twelve eurozone member states have ratified it as of that date, as soon as the twelfth eurozone member state ratifies it.[155]

The threshold of twelve eurozone member states is a compromise, since some member states were not willing to accept the proposal in the first draft for a a threshold of only nine eurozone member states for the treaty to enter into force.[156] A threshold of nine eurozone member states would have been more logical in principle, since nine member states is also the threshold for launching enhanced cooperation within the EU legal framework.[157] It also amounts to the majority of eurozone member states, whereas twelve amounts to two-thirds of those states. Presumably a higher figure was chosen because of concerns that signing the treaty might not reassure financial markets sufficiently about the survival of EMU unless the intention were for a significant number of eurozone member states to ratify it. It is notable that the ESM treaty also has a flexible rule on this point, providing for its entry into force once eurozone member states with 90% of the capital have ratified it.[158]

Thirdly, Article 14(3) sets the date of application of the stability treaty.[159] The treaty will apply immediately to the eurozone member states that ratify it, as of the date of its entry into force. Eurozone member states which ratify the treaty

[155] Note that Art. 14(2) does not expressly require the twelfth ratification to take place *before* 1 Jan. 2013, although the words 'provided that' suggest that it has to.

[156] Also, the first draft did not include any target date for ratification.

[157] *See* Art. 20(2) TEU.

[158] Art. 48(1) of the ESM treaty (*supra* n. 9). This means that the four biggest eurozone member states have a veto on its entry into force, as they will each hold over 10% of the capital. This explains why German and Italian ratification is essential for its entry into force (ibid.). In contrast, no individual state has a veto on the entry into force of the stability treaty.

[159] It should not be forgotten that contracting parties need not apply Art. 3(1) until one year after this date.

after its entry into force will be subject to it on the first day of the month following that ratification. If some eurozone member states do not ratify the stability treaty, there is no provision in the main text of this treaty or in EU law for any sanctions against them,[160] but as noted above, pursuant to the preamble to this treaty, they will not be eligible for ESM assistance. As a consequence, there may be further economic consequences for non-ratification; in particular, such member states might have to pay a higher interest rate to sell their government bonds on financial markets.

The position of non-eurozone member states is regulated by Article 14(5), which refers expressly to EU primary law to define the status of member states with a derogation or exemption from applying the euro. While the eight contracting parties which do not participate in the single currency may ratify this treaty, their ratification (or non-ratification) is irrelevant as regards its entry into force, pursuant to Article 14(2). If they do ratify it, it will not in principle apply to them until they join the euro, unless they declare that all or part of Titles III and IV (which concern respectively the fiscal compact and economic policy coordination and convergence) will apply earlier to them.[161] Of the two non-eurozone member states which have ratified the treaty, Denmark has made such a declaration:

> … Denmark declares that it will be bound by all the provisions of Titles III and IV thereof the content of which is applicable, wholly or partly, to those Contracting Parties which do not have the euro as currency, from the time of Danish ratification but not before the entry into force of the Treaty. As a consequence of its obligations with regard to the Treaty, Denmark will not be bound by any EU legislative rules which result from subsequent implementation of Titles III and IV of the Treaty and are adopted on the basis of provisions of the Treaties on the European Union which are applicable only to those Member States which have the euro as their currency.

Legally, ratification of this treaty cannot be a requirement for admission to monetary union, since the criteria for admission are set out in Article 140 TFEU, which has not been amended. However, in practice, the eurozone member states would likely be unwilling to accept a new eurozone member state which had not ratified this treaty (all member states vote by QMV on enlargement of the eurozone, but the eurozone member states, between them, have a blocking minority).[162] Similarly, a member state wishing to join the single currency which has already ratified this treaty might even be expected to opt to apply some or all of Titles II and III

[160] This is distinct, of course, from the sanctions which may be applied for violation of the overlapping economic governance obligations established by EU law.

[161] In that case, the treaty does not specify when the relevant provisions will apply, or when the treaty enters into force as regards such states.

[162] The eurozone member states also issue a 'recommendation' on whether a new member state should join (Art. 140(2) TFEU).

in advance, although again this is not a formal legal requirement for full participation in EMU. Arguably, however, from a strictly legal point of view there is an obligation for the Council to admit into EMU any member state which meets the conditions for participation in the single currency set out in Article 140 TFEU, without imposing any other conditions. Of course, gaining admission to EMU over the objections of some other member states and only as a result of actual or threatened litigation would be awkward, to say the least. In any event, an applicant to join the single currency would have to take into account the express legal requirement to ratify and apply the stability treaty in order to receive support from the ESM – although, at the time of applying to join the single currency, this would only be a hypothetical issue, since a candidate needing such financial assistance would obviously not qualify to join EMU.

Conversely, the treaty understandably not does address the awkward legal questions that would arise if a eurozone member state that had ratified the treaty reintroduced a national currency. On the assumption that such a member state would then be considered a member state with a derogation from adopting the euro, Article 14(5) would then apply to it.

While the ratification of the stability treaty by non-eurozone member states is not legally important as regards the entry into force of the treaty, or as regards substantive legal obligations for them, their ratification may have political importance in that it expresses broader support for the treaty going beyond the eurozone member states. Furthermore, it is possible that financial markets will encourage non-eurozone member states to sign up to some or all of the obligations set out in Titles II and III of the treaty, or punish them if they do not.

Finally, as a derogation from Article 14(3) and (5), Article 14(4) specifies that Title V (the provisions on Euro Summit meetings and parliamentary meetings) will apply to all contracting parties (both eurozone member states and non-eurozone member states) when this treaty enters into force. Arguably this wording suggests that Title V will even apply to contracting parties which have not ratified this treaty. Since this would conflict with international law, Article 14(1) presumably instead means that non-eurozone member states which ratify the treaty have no option as to whether Title V applies to them or not, and that eurozone member states which ratify the treaty after its entry into force are bound by Title V up to thirty days before they are bound by the rest of the treaty.[163]

Reading Article 14(4) and (5) together, it appears that it is not possible for non-eurozone contracting parties to apply Titles I, II or VI of the treaty (concerning respectively the purpose and scope of the treaty, the relationship to EU law

[163] This derogation was widened during negotiations: the first draft of the treaty applied this rule to eurozone member states only, and the rule would only have applied to euro summits, not to parliamentary meetings, since the relevant clause was then within Title IV, not Title V.

and general and final provisions) before they participate in the single currency. This is illogical to the extent that the rules on the relationship with EU law are linked to the substance of Titles III and IV of the treaty, and to the extent that Title VI of the treaty regulates its application to non-eurozone contracting parties in the first place. Obviously the accession of other member states to the treaty, and the possible integration of the treaty into the EU legal framework, are also relevant to non-eurozone contracting parties.

There is no provision on denunciation of the treaty. According to the relevant provisions of the Vienna Convention on the law of treaties, the absence of a provision on denunciation means that a treaty can only be denounced with the consent of all contracting parties to it, unless it can be established that the parties intended for the possibility of denunciation, or such a possibility can be deduced from the nature of the treaty.[164] Since the stability treaty is (a) only open to member states of the EU, and (b) closely linked to the EU legal order, which contains a particular provision on leaving the EU (Article 50 TEU), it follows that, to ensure compatibility with the EU legal system, a contracting party which chooses to leave the EU must denounce the treaty – but that this is the only possibility for denouncing it.[165]

Next, Article 15 provides that the treaty is open to EU member states other than the contracting parties. Accession would take effect as soon as the member state concerned deposits its official ratification. This provision, which was added during negotiations, leaves it open to the UK and the Czech Republic to join in future.[166] It would also be the route to accession for future member states, most imminently Croatia, which is due to become a member state on 1 July 2013.[167] This openness to further member states joining as contracting parties entrenches the stability treaty's compatibility with EU law.

Finally, Article 16, which was also added during negotiations, provides that '[w]ithin five years at most' after the entry into force of the treaty, 'the necessary steps shall be taken', in accordance with the EU treaties, 'with the aim of incorporating the substance of this Treaty into the legal framework of the European

[164] Arts. 54 and 56 of the Vienna Convention. *See* O. Dorr and K. Schmalenbach (eds.), *The Vienna Convention on the Law of Treaties: A Commentary* (Springer 2012) p. 945-962 and 967-987.

[165] The judgment of the German Federal Constitutional Court reaches the same conclusion by considering that leaving the EU would constitute a 'fundamental change of circumstances' pursuant to Art. 62 of the Vienna Convention or customary international law (para. 319 of the judgment, *supra* n. 49). That Court also rightly points out that a member state which ended its participation in EMU would no longer be obliged to apply Art. 3 of the stability treaty, pursuant to Art. 14(5) of that treaty.

[166] While Art. 14(5) only refers to the specific protocol exempting Denmark from applying the euro, it must be assumed in light of Art. 15 that Art. 14(5) would also extend to the UK by analogy, in light of its own exemption protocol, if that state wished to ratify this treaty.

[167] *See* the accession treaty (*OJ* [2012] L 112).

Union'. Again, this intention to integrate the treaty into the EU's legal framework supports its compatibility with EU law. Assuming that the treaty enters into force late in 2012 or early in 2013, this obligation will apply as from late in 2017 or early in 2018, although it is expressly stated that such incorporation may be contemplated earlier. Presumably the timing of this process will be affected by the results of the next British election, due in May 2015 at the latest.

Since Article 16 does not expressly specify that the treaty would be integrated into the EU's primary law, it could also mean that it could be integrated into the EU's secondary law instead; this is a viable possibility given the degree of current (and as discussed above future) overlap between the treaty and EU secondary law. But in light of the circumstances which led to the drafting of this treaty in the first place, it seems more likely that Article 16 envisages an amendment to the primary law of the EU. This would entail a further attempt at Treaty amendment; this is suggested by the reference to acting 'in accordance with' the treaties. Obviously, such an amendment will require the agreement of and ratification by all member states pursuant to Article 48 TEU, and Article 16 cannot bind member states which are not contracting parties to this treaty, or which are contracting parties but which fail to ratify it. In fact, strictly speaking Article 16 does not even bind those contracting parties which have not adopted (or retained) the euro, in light of the wording of Article 14(4) and (5) and the absence of any indication that Article 16 is addressed to all contracting parties. Of course there might be more (or fewer) member states participating in the single currency, and therefore bound by Article 16, by the time that this Article is applied.

It would remain to be seen which Treaty amendment procedure would be used to integrate this treaty into the EU's primary law. Either the ordinary revision procedure, a simplified revision procedure or a 'special revision procedure' could apply.[168] For those member states (likely to be a large majority) which have already ratified the treaty at that point, the further step of integrating it fully into the EU's legal order would arguably not be problematic by then, since it would simply replicate obligations which already bind such member states. On the other hand, though, this integration process might become an opportunity for critics of the treaty to demand its renegotiation. Alternatively (or additionally) the integration of this treaty into EU primary law might become part of a process of broader Treaty amendments, consisting at least of 'trade-offs' offered to the United Kingdom in order to induce it to sign up to the relevant amendments.

Finally, there is no special provision for amendment of this treaty, which must mean that any amendments which might be made would be subject to the gen-

[168] *See* Art. 48 TEU and the special rule for amendment of Protocol 12 TEU. For an indication of the Treaty amendments which might be made, *see* the Van Rompuy report (*supra* n. 11).

eral rules of the law of treaties, which permit amendment of any treaty with the consent of its parties.[169]

Conclusion

The stability treaty is not necessary in any legal sense, given that it largely restates obligations that already apply pursuant to EU law or which could more easily have been adopted pursuant to further amendments of that law. Indeed, some of those amendments are likely to be adopted in the near future. Its relevance is instead political (and therefore economic), as the flamboyant gesture which signing and ratifying this treaty represents makes it easier for states contributing to the ESM and EFSF to justify these actions to their parliaments and publics – and possibly also their constitutional courts. Nor does the treaty impose anything like the austerity which its fiercest critics accuse it of, given the lack of any absolute obligation to reduce the deficit to the level of 0.5% and the possible exception even from the obligation to *move toward* such a deficit level. The broader and longer-term constitutional significance of the stability treaty is likely to be its significant contribution toward the development of a 'two-speed' European Union, and the impact of the (quasi-)constitutional changes that must be made to implement it at national level.

[169] Art. 39 of the Vienna Convention of the law on treaties; *see* Dorr and Schmalenbach, *supra* n. 164, p. 699-707.

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