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THE LEGAL AND CONSTITUTIONAL NATURE OF THE NEW INTERNATIONAL TREATIES ON ECONOMIC AND MONETARY UNION FROM THE PERSPECTIVE OF EU LAW

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Introduction

This article[1] discusses, in particular, two proposed Treaties of an "inter-governmental" nature (i.e. Treaties governed by International Law rather than European Union Law). The first is the Treaty on Stability, Co-ordination and Governance in the Economic and Monetary Union (hereinafter referred to as the "TSCG") and the second, the Treaty on the European Stability Mechanism ("TESM" or ESM Treaty). The analysis focuses inter alia on the issue of whether the creation of these instruments is, of itself, legal and constitutional within the framework of the EU Treaties, their future relationship with the existing EU legal framework and whether their objectives could or should, as a matter of law, have been achieved *within* the framework of the latter. It takes account of the texts of relevant legal instruments as they stood on February 2, 2012, though some limited reference to later events has been possible. In particular, the TSCG was formally signed on March 2, 2012. The most recent alterations to its text include a new focus on growth, but otherwise appear minor.

European politics in recent years and months has become increasingly focused on the economic, financial and sovereign debt crisis, created in part by the situation in Greece. During this period, there have been a number of schemes, rescue packages and/or "bail-outs"; in particular involving substantial payments to Greece and the writing down or adjustment of its debt. Under the (founding) European Treaties, these issues are largely governed by the rules of the European Monetary Union (EMU), originally set out in the Treaty of Maastricht which entered into force in 1993 (also known as the Treaty on European Union (TEU)), as well as the Stability and Growth Pact (SGP) which entered into force on January 1, 1999 and was intended to maintain fiscal discipline. The SGP legal framework is complex and outside the scope of this article. However, it includes a rules-based framework with both preventative and corrective elements, including the so-called "Six Pack" of five Regulations and one Directive proposed by the European Commission and approved by all

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27 Member States and the European Parliament, which entered into force on December 13, 2011.[2]

The European Union (EU) was originally founded on the "European Communities" (EC). As a result of the Treaty of Lisbon, the European Union now has the same legal personality, and has acquired the competences previously conferred on, the European Communities. The latter entity no longer exists and the term EU covers and replaces all aspects of the (former) EC. Although the EC Treaty itself has survived the amendments made by the Treaty of Lisbon, it has been renamed the Treaty on the Functioning of the European Union (TFEU).[3]

The economic and financial "rescue" activity of the EU Member States has naturally come under legal scrutiny and has provoked the criticism that it may be in breach of the substantive rules of the EMU. For instance, art.125 (1) TFEU provides that: "The Union shall *not* be liable for or assume the commitments of central Governments ... of any Member State ... A Member State shall *not* be liable for or assume the commitments of central Governments ... of another Member State ..." (author's emphasis).

Thus it has been argued by Ruffert,[4] that these mechanisms create conditions of "strict stability which *does not allow for emergency intervention* because the prospect of such intervention would otherwise jeopardize incentives to undertake solid budgetary and financial policy in the Member States." Article 122(2) TFEU does however, contain an "emergency clause" that may arguably serve as the legal basis for some of the emergency measures[5] in that it provides for situations where "a Member State is in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control."[6]

The impression of the writer is that, particularly during the present crisis, EU politicians and the EU institutions have been less concerned with strict compliance with the founding EU Treaties and its procedures and more intent on ensuring that the existing EU Treaty provisions do not prevent the execution of policy options perceived by them to be necessary to stabilize the situation and/or end the crisis. This is the case even when the correctness of their policy solutions (including so-called "austerity measures") may themselves be controversial in the eyes of the public and/or open to opposing economic and financial interpretations. If the EU Treaties require unanimity to make certain changes and this is not achievable between the Member States, this may be viewed either as a weakness of the EU Treaty regime itself, or a self-imposed restriction on further European integration, following the political settlement finally achieved in the Lisbon Treaty. The latter itself involved wide-ranging consultation and consensus and years of negotiation. The current approach, particularly the present decision to formulate significant economic and monetary policy *outside the scope of the EU Treaties* does not bode well for the current form of the European Union, which is clearly intended to be based on the rule of law, as laid out in its founding Treaties and which has been the key to its success after some 60 years of integration based on legal and judicial principles.

It is arguable that citizens and civil society in general may be primarily concerned with whether the relevant measures will actually work and their desire for the restoration of financial stability within Europe. Nevertheless, it is important that the relevant measures also satisfy the requirement of constitutionality and democratic legitimacy. Some European academic literature has been deeply critical, implying that the EU legal framework has, for practical purposes, been set aside in an "EU state of emergency".[7] There are some parallels in the recent past, in the context of the EU State aid rules.[8] For instance, when faced with the banking crisis of 2008, the European Commission justified the taking of sweeping emergency measures, which had the effect of permitting a drastic relaxation of these

[2] See further, Code of Conduct "Specifications on the implementation of the Stability and Growth Pact and Guidelines on the format and content of Stability and Convergence Programmes", *http://ec.europa.eu/economy_finance/economic_governance/sgp/legal_texts/index_en.htm* [Accessed March 16, 2012].

[3] See further, D'Sa, R.M., "The Legal Framework of the European Union", *European Union Encyclopaedia and Directory 2012*, 12th edn, 205-218, p.205.

[4] See further, Ruffert, Matthias, "The European Debt Crisis and European Union Law", 48, Common Market Law Review, 2011, pp. 1777-1806 at p.3. See also Editorial Comment, "The Greek sovereign debt tragedy: approaching the final act?" Vol. 48 *Common Law Market Review* , 2011, 1769-1776, p.1791.

[5] Ruffert, *op. cit.* , p.1787, referring to the EFSM Regulation 407/2010.

[6] See further, Louis, Jean-Victor, "Guest Editorial: The No-Bailout Clause and Rescue Packages", Vol. 47, Common Market Law Review, 2010, 971-986.

[7] Ruffert, op. cit., p. 1804.

[8] D'Sa, R.M., "'Instant' State Aid Law in a Financial Crisis - A U-Turn?" Vol. 8, Issue No. 2, *European State Aid Law Quarterly* , 2009, pp.139-144.

rules, on the previously little-used discretionary exemption in art.87(3)(b)[9] of the (then) EC Treaty. No doubt exceptional circumstances call for unusual responses.[10] Nevertheless, the measures taken effectively amounted to a "U-turn" from previous State aid law and policy. This heightened the impression that the measures adopted were primarily the result of political considerations and pragmatic solutions rather than a resolve to apply the legal rules as they existed at that time (though the European Commission did create new legal frameworks to govern the relevant exemption measures).[11]

Similarly, the general justification being advanced in the current financial crisis by some politicians and representatives of the EU institutions is that the alternative is the collapse of the common currency i.e. the euro; perhaps even the future of the whole "European project".[12] Nevertheless, it is important to recall and underline the principle that the European Union is a union based on the rule of law[13], not of power (claimed by whomsoever), and it stands to reason that this principle, as a constant, must also apply in times of difficulty or distress.[14]

Treaty on Stability, Co-ordination and Governance in the Economic and Monetary Union (TSCG)

On December 9, 2011, the Heads of State or Government of the 17 eurozone Member States (sometimes referred to the "euro area" Member States)[15] agreed to create a new (additional) legal instrument relevant for the governance of Economic and Monetary Union under the European Union Treaties. This instrument is in the form of an inter-governmental (i.e. international law) Treaty. It is entitled the "Treaty on Stability, Co-ordination and Governance in the Economic and Monetary Union" (TSCG). The TSCG has been supported by some 25 of the 27 EU Member States. The door has been left open to two States, namely the United Kingdom and the Czech Republic that have initially indicated their *un*willingness to sign the Treaty, to accede at a later date.[16]

It is not the purpose of this article to discuss whether this Treaty can, or will, succeed in its objective, namely to arrest the current financial crisis and prevent it from recurring.[17] It is also not an in-depth analysis of all its provisions. This article seeks instead to analyse the mechanisms adopted to achieve this aim – and their legality and constitutionality within the framework of the founding EU Treaties. However, there remain doubts as to whether the eurozone will be able to bear the political, financial and socio-economic costs of "bridging the gap between a strong centre and a weak periphery which, ultimately, is undermining confidence in the future of the common currency"[18] (i.e. the euro) and whether the measures taken will ultimately calm the financial markets and/or rescue, in particular, the Greek economy.

Fiscal Compact

The TSCG includes certain rules of budgetary discipline known as the "fiscal compact". These are expressly *considered to be in addition to and without prejudice to the obligations derived from EU Law*. The fiscal compact contains the principle that the budgetary position of the general government shall be balanced, or in surplus (also referred to as the "balanced budget" rule). It also provides further detailed rules concerning the level of the annual structural deficit for each Member State, a

[9] Article 87(3)(b) of the EC Treaty (now art.107(3)(b) TFEU permits "aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State".

[10] The European Economic and Social Committee has described the Commission's measures in the State aid context referred to above, inter alia, as "deliberate, authorised distortions": see further, Opinion of the EESC, *2007 Report on Competition Policy* , Rapporteur: Barros Vale), CESE 612/09, adopted at its 452nd Plenary Session on March 25, 2009, at para.3.2.2.

[11] See e.g. *Communication from the Commission - the application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis*, O.J. C 270/8, October, 25, 2008.

[12] See further, Emmanouilidis, Janis, A., *"All roads lead to Frankfurt - the results of an enigmatic summit"*, *http://www.epc.eu*, [Accessed December, 12, 2011].

[13] See further the more detailed discussion below, in relation to the role of the European Court of Justice (ECJ).

[14] Ruffert, *op. cit.* , at p.1805.

[15] The (17) eurozone Member States are: Belgium, Germany, Estonia, Ireland, Greece, Spain, France, Italy, Cyprus, Luxembourg, Malta, the Netherlands, Austria, Portugal, Slovenia, Slovakia and Finland.

[16] See art.15,TSCG.

[17] Some analysts remain pessimistic in believing that the measures taken by the Member States will not be sufficient. See further Zuleeg, F., and Emmanouilidis, J.A., "Escaping Europe's Catch 22" European Policy Centre, Brussels, pp.1-2, *http://www.epc.eu* [Accessed January 1, 2012]. See also, Defraigne, P., "Un traité de circonstance, inutile et dangereux", OpinionEurope, *http://www.lalibre.be* [Accessed February 29, 2012].

[18] Zuleeg and Emmanouilidis, *op.cit.* at p.2.

methodology for achieving convergences in the medium term, and a correction mechanism in the event of significant observed deviations from the medium term objective or the adjustment path towards it.

Contracting parties are obliged to implement these fiscal compact rules throughout the national budgetary processes, in their national law, through provisions of binding force and permanent character, preferably of a constitutional or otherwise guaranteed nature. In Ireland, the decision has been taken to hold a referendum before proceeding to ratification. The corrective mechanism in the TSCG is to be created on the basis of common principles *to be proposed by the European Commission* in particular in relation to its nature, the size and the time-frame of the corrective action to be undertaken and the role and independence of the institutions responsible at national level for monitoring the observance of the rules, whilst respecting the prerogatives of national parliaments. It remains to be seen whether these rules themselves involve an actual or implied transfer or other dilution of sovereign powers of the State and hence their compliance and compatibility with the *national* constitutions of the signatory States. In the past, various such issues have been raised, in particular before the German Constitutional Court.[19]

Excessive deficit procedure

The TSCG also contains detailed rules for dealing with an "excessive deficit" in general government debt. These TSCG provisions purport to fully respect, for example, the procedural requirements of the EU Treaties and make frequent cross-references to equivalent or related Treaty rules and/or existing secondary legislation under EU Law. These include art.126 TFEU (which sets out a procedure for dealing with excessive deficits). Contracting parties within the eurozone also commit to supporting the proposals or recommendations of the European Commission where the latter considers that an EU Member State within the eurozone is in breach of the deficit criterion in the framework of an "excessive deficit" procedure. This is subject to an exemption when, by analogy with relevant provisions of the EU Treaties, a "qualified majority"[20] of the contracting parties whose currency is the euro is opposed to the decision proposed or recommended.

It should be observed that the EU Treaties already provide for a Protocol (No. 12) on the "excessive deficit procedure", which is annexed to the EU Treaties and is an integral part of them. The definitions set out in art. 2 of Protocol No. 12 are analogously to be applied within the TSCG.

It is relevant to consider whether the relevant changes proposed under the TSCG could have been achieved simply by amending Protocol No. 12. This was certainly one option considered at the time.[21] This would, however, have required a Treaty change utilising one of the available procedures[22] for "simplified revision" (discussed later below) in art.126 (14) 2nd subpara TFEU which enables the Council, by unanimity, to replace the whole Protocol on the excessive deficit procedure, based on a proposal from the Commission, after consulting the European Parliament and the European Central Bank, *but without requiring further ratification by all 27 Member States*. The practical and political difficulty of reaching unanimity on an amendment to the Treaties themselves was clearly an obstacle to this solution.

An alternative option to achieve the same objectives, but one that would also have been *within* the scope of the Treaties, would have been to amend the Treaties themselves, including arts 126 and 136 TFEU and/or a revision of Protocol No. 4 on the Euro Group. (The latter makes practical provision for informal meetings of the euro area Member States). This could arguably have been accomplished by using the procedures provided for in art.48 TFEU, namely the "ordinary revision procedure" or the "simplified revision procedure" (also discussed further below). However, the disadvantage of the former is that it requires the holding of both a "convention" (composed of representatives of the national parliaments, of the European Parliament, of the Heads of State or Government,

[19] See further, Ziller, J., "The German Constitutional Court's Friendliness towards European Law: On the Judgement of *Bundesverfasungsgericht* over the Ratification of the Treaty of Lisbon", No. 1, 16, European Public Law, 2010, 53-73.

[20] For further detail on the mechanism within the EU Treaties for determining a "qualified majority" see art.238(3)(a) of the Treaty on the Functioning of the European Union (TFEU) and art.3 of Protocol No. 36 to the EU Treaties on transitional provisions.

[21] Emmanouilidis, *op.cit.* , fn.13.

[22] There are 12 such procedures. See further the helpful tables provided by Piris, Jean-Claude, *The Lisbon Treaty*, Cambridge University Press, 2010 *op. cit.*, at Appendix 3, p.361 et seq.

and of the Commission) and/or an intergovernmental conference (IGC) to consider the proposals. This would have increased scrutiny and transparency, but it would also have taken a long time and would not necessarily have been conclusive, especially given that ratification by all Member States in accordance with their constitutional requirements would still have been required.[23]

Under the TSCG, contracting parties that are subject to an excessive deficit procedure under the EU Treaties are expected to formulate a budgetary and economic partnership programme, including a detailed description of their planned structural reforms designed to correct excessive deficits. However, the content and format of these programmes are to be defined in EU law, submitted to the European Commission and Council for endorsement and monitored within the context of the existing surveillance procedures of the SGP. *It is therefore clear that the creation and implementation of the detailed rules proposed by the TSCG Treaty depend, to a considerable extent, on the implementation of existing EU Law*. To the extent that this is so, it emphasises the legal complexity now caused by the creation of the TSCG which is itself *outside* the framework of EU Law but which relies on, and is interdependent with, various provisions that are *within* the scope of the latter.

Governance of the euro area

The TSCG provides for the creation of informal "Euro Summit" meetings which will be attended by the Heads of State or Government of the contracting parties whose currency is the euro, together with the President of the European Commission. The President of the European Central Bank shall also be invited to take part in the Euro Summit meetings. The Euro-Summits are intended to take place when necessary but at least twice a year.[24] The TSCG does not explain who or what institutions shall bear the cost of these Euro Summits, and upon whom the budgetary responsibility for funding the Summits may fall.[25]

The President of the Euro Summit, (currently Mr Herman Van Rompuy, who was also simultaneously reappointed as President of the European Council), is required to keep the contracting parties whose currency is *not* the euro and the other Member States of the European Union, closely informed of the preparation and outcome of the Euro Summit meetings. The President of the Euro Summit is also empowered to invite, when appropriate (but at least once a year), the Heads of State or Government of Contacting Parties other than those whose currency is the euro but who have ratified the TSCG, to a meeting of the Euro Summit, to discuss specific issues concerning its implementation.

The President of the European Parliament may be invited to be heard. The President of the Euro Summit will present a report to the European Parliament after each of the meetings of the Euro Summit. The TSCG also mentions and thereby reinforces the provisions of Title II[26] of Protocol (No. 1) on the role of national Parliaments in the European Union which is annexed to the EU Treaties. Though concluded *outside* the scope of the EU Treaties, the TSCG nevertheless confers powers on the European Parliament and national parliaments, namely the organisation and promotion of a conference of their respective representatives, in order to discuss budgetary policies and other issues covered by the TSCG.

In general, *the mechanism particularly of "Euro Summits" is likely to further blur and make far more complex, the legal distinction between measures taken within, and those that are properly outside, the scope of the EU Treaties*. It renders still more complex the constitutional and legal balance between those matters concerning either the euro area and/or Economic and Monetary Union that are governed partially or wholly by EU Law and those which as a result of incremental, inter-governmental agreement are binding only in international (rather than EU) Law. *The latter category may become, over a period of time, so closely connected with EU issues strictly so-defined, that it might no longer*

[23] It has been remarked that the so-called "ordinary" revision procedure appears so demanding that it might actually be quite 'extraordinary' to witness its future use: see further, Piris, *op.cit.* , at p.104.
[24] See art.12(2),TSCG.
[25] See, however, Protocol (No.14) on the Euro Group, annexed to the EU Treaties.
[26] This Title refers to "Inter Parliamentary Cooperation."

be possible effectively to distinguish one from the other.

Entry into force of the TSCG

The TSCG will enter into force provided that at least twelve contracting parties whose currency is the euro have ratified it, either on the first day of the month following the deposit of the twelfth instrument of ratification or on January 1, 2013, whichever is earlier. When it enters into force, its application will initially be limited to those contracting parties whose currency is the euro and who have themselves ratified it.

It will subsequently apply to the remaining contracting parties whose currency is the euro from the first day of the month following the deposit of *their* respective instrument of ratification.[27] However, by way of derogation, the provisions relating to the hosting of "Euro Summits"[28] applies to all contracting parties whose currency is the euro, from the date of entry into force of the Treaty. Presumably this is intended to facilitate the participation of as many contracting states, as quickly as possible, in the planned Summits, irrespective of whether they have individually ratified the Treaty. This will facilitate the political processes intended by the Treaty, even if legal ratification beyond 12 contracting states is delayed for any reason.

The Treaty leaves open the possibility that contracting parties that are outside the eurozone, (referred to under art.139(1) TFEU as "Member States with a derogation"), or Denmark, (which has an "exemption" from joining the euro, as defined under Protocol No.16 annexed to the EU Treaties) may be bound by the Treaty once they have ratified it, as from the day when the decision abrogating that derogation or exemption takes effect, unless the contracting party concerned declares its intention to be bound at an earlier date by all or part of the provisions relating to the fiscal compact and economic policy co-ordination and convergence.[29]

Relationship between the TSCG and the EU Treaties

The TSCG expresses the aspiration that within five years of its entry into force, the necessary steps may be taken, in compliance with the provisions of the TEU and the TFEU with the aim of incorporating the substance of this Treaty into the legal framework of the European Union.[30] This expresses the hope that whatever the political or legal impediments to such incorporation might be at present, they might be overcome after the passage of time. However, *the failure to provide any satisfactory reasoning for not using the available options within the EU Treaties to accomplish the same goals, or to clarify that all such possibilities required political unanimity (which was not forthcoming at the time), does not bode well for such a future incorporation*.

It is significant that though created outside the scope of the EU Treaties, the TSCG expressly intends to build on the founding Treaties of the European Union *and is also intended ultimately to be incorporated within them*. However, the mechanism for achieving this is not identified and it is arguably unclear whether these are limited to Treaty changes under art.48 TEU (referred to earlier). Meanwhile, the TSCG is *intended to be applied and interpreted in conformity with the EU Treaties*, in particular with art.4(3) of the Treaty on European Union (TEU)[31] and with EU law including procedural law and secondary legislation. Its provisions shall apply *insofar as they are compatible with* the EU Treaties and with EU Law. In particular, *they are not intended to encroach on the competences of the Union* to act in the area of the "economic union".

This implies that EU law has precedence over the provisions of the TSCG. However, although the latter principle is not intended to create any perceived conflict with existing or future EU law, it does not answer the question as to whether this kind of legal instrument is either necessary or justified in the first place, if the existing EU Treaties already provided an alternative legal framework for the achievement of the same or similar objectives or which could have been amended to achieve the same (new) objectives (notwithstanding inconvenient or even cumbersome procedural obstacles). Indeed, one could argue that the (perceived) obstacles have been designed by the framers of the Treaties to be a further democratic "check and balance" to ensure that

[27] See arts 14 (1) to (3), TSCG.
[28] See discussion of art.12, TSCG, above.
[29] See Titles III and IV, TSCG.
[30] See art.16, TSCG.
[31] The last two sentences of art.4(3) TEU are identical to those previously found in art.10 of the EC Treaty, and was variously referred to in legal literature as the principle of co-operation, loyalty or fidelity.

significant amendments are not slipped in without proper scrutiny or "through the back door", so to speak.

The question as to whether the contracting Member States could (or should) have achieved *within* the EU Treaties what they are now seeking to accomplish outside them is a criticism alluded to by the European Parliament during the drafting of the TSCG, on the grounds that the latter is not compatible with the existing EU Treaties and fails to respect the "Community method" of decision-making. The term "Community (or Union) method" refers to a number of principles such as the emphasis on binding legal instruments, majority voting, the Commission's exclusive right to initiate legislation, a role for the European Parliament and comprehensive control by the Court of Justice. It has the advantage of producing common approaches, codified under EU law, on the basis of a well-defined decision-making process within a single legal and institutional (constitutional) framework. Thus, one further concern has been that the TSCG may not guarantee that any *subsequent* decision taken to implement it, would be taken via the normal procedures laid down in the EU treaties, thereby further weakening democratic scrutiny and accountability and the proper role of the EU institutions, as well as of the national parliaments.

The TSCG specifically notes the wish of the contracting parties inter alia to make more active use of "enhanced co-operation", as provided for in art.20 TEU and in arts 326 to 334 of the TFEU, on matters that are essential for the smooth functioning of the euro area, without undermining the internal market. *This begs the question as to whether the "enhanced co-operation" mechanism could have been utilized instead of concluding a separate inter-governmental Treaty i.e. the TSCG*. The process of "closer co-operation," whereby a group of Member States can develop policies separate from the other countries, whilst still using the facilities of the Union was retained in the Lisbon Treaty.[32] It was made easier to operate, so that regarding matters within the non-exclusive competence of the Union, (at least) nine EU Member States may, subject to procedural conditions, go ahead amongst themselves with a Commission proposal (if no agreement is ultimately reached with the rest), and with acts consequently adopted becoming binding only in the participating States. Other Member States can, in principle, join in at any stage, before or after enhanced co-operation has been launched. This procedure has rarely been used.[33]

However, another variation of this theme may be seen in the creation of the eurozone itself (between some but not all Member States), as well as the previous use of either "opt-outs", "opt-ins," or Protocols to the Treaties, in order to reflect the unwillingness to participate, or distinct views of individual Member States, on specific measures. It is also arguable that the relevant matters may have been concluded, without the need for unanimity, in the form of secondary legislation such as a Council Regulation or, alternatively, a Regulation of the Council and the European Parliament, or a Directive. Such instruments were used, for instance, in concluding various elements of the SGP, referred to earlier.

It seems that the principle reason advanced for proceeding down the inter-governmental route was the absence of political unanimity, namely absence of agreement by the United Kingdom Nevertheless, *it remains a matter of concern in terms of retaining the integrity and coherence of the EU legal framework that the legal options for proceeding without unanimity, within the Treaties, appears not to have been fully debated, nor publicised either by the European Council, the Council, or the Commission, before the inter-governmental route was chosen*. The situation was exacerbated by the negotiation of the Treaty "behind closed doors". This has been described by the European Trade Union Confederation (ETUC), for example, as "intensive and semi-secret negotiations"[34] that ignored the democratic scrutiny that should normally characterise any reform of the Union, in particular by not giving a full role to the European Parliament, though the latter has been involved subsequently, through its representatives, in the treaty drafting

[32] See art.20 TEU (as amended) and arts 326-334 TFEU.
[33] It is currently being considered in the area of divorce and legal separation and for the creation of unitary patent protection in the European Union.
[34] See ETUC Declaration on the "Treaty on stability, coordination and governance in the economic and monetary union", adopted by the ETUC Steering Committee on January 25, 2012.

working group.

Relationship between the TSCG and the European Court of Justice (ECJ)

It is intended that the European Commission will present to the contracting parties a report on their compliance with the fiscal compact rules.[35] Failure to comply may trigger an action *by one or more of the contracting parties*, before the Court of Justice of the European Union (ECJ) either as a result of, or independently from, the Commission's report. *Unlike the position within the EU Treaties, the Commission does not itself have the right to bring this action before the court*. This is presumably because it is an institution of the European Union and the founding Treaties clearly do not give it this jurisdiction. The contracting parties, however, are not so limited, and derive their legal authority to do so from the TSCG. The judgment of the ECJ is intended to be binding in the matter and the court may also take further necessary measures to ensure compliance with its rulings.[36]

The TSCG thereby purports to grant the ECJ, which is an institution of the European Union, jurisdiction to hear such cases, via the mechanism contained in art.273 TFEU.[37] The latter article 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." Although the TSCG expressly states that the rules relating to compliance are formally to be regarded as a "special agreement" between the contracting parties within the meaning of art.273 TFEU, it is nevertheless arguable that this purported agreement is insufficient of itself, to create the presumption that the issues contained therein relate, in a sufficiently direct sense, "to the subject matter of the Treaties" because the TSCG as a legal instrument, is notably itself *outside the scope of the EU Treaties*.

It might also be speculated that a contracting party may later, if it subsequently found itself the object of an action before the ECJ for breach of relevant provisions of the TSCG, raise by way of defence, the possibility that the court does *not* in fact have jurisdiction within the meaning of art.273 TFEU, notwithstanding the consent previously given by that State to a "special agreement," on the grounds that the question of whether or not the dispute relates to the subject matter of the Treaties is governed by EU Law (and not by the TSCG).

The right of challenge *by an individual* to bring an action before the ECJ based on such considerations is far more problematic, in part because the rights of individuals to bring actions before the ECJ are more limited in any event. The rights of individuals (i.e. natural persons or corporations) to challenge the legality of EU acts directly before the ECJ are facilitated by the Lisbon Treaty (in art.263 TFEU), so that a person will be able to institute proceedings against *a "regulatory"*[38] *act that does not entail implementing measures, which is of "direct concern" to him or her* (and not of "individual" concern to him or her, as previously, which was more difficult to satisfy). However, even at first glance, these limitations appear very difficult to overcome in relation to the kind of legal action posed above.

It is of interest that earlier drafts of the TSCG specifically included a right of review by the national courts of the contracting parties (in the context of compliance with the excessive deficit procedure rules). These may have been removed precisely because they might have provided a legal basis for such actions by individuals, thereby implicitly encouraging such litigation and fostering further legal and political controversy. Nevertheless, *such national court actions still cannot be ruled out altogether, depending on the relevant constitutional and legal position in each of the EU Member States*.

Possibility of financial penalties for failure to implement the TSCG

Under the TSCG, the contracting parties (but not the Commission, as is the case under the EU Treaties) also have the power to bring an action before the ECJ for failure by a Contracting Party to comply with the judgment of the ECJ and request the imposition of financial sanctions (following criteria established by the Commission within the framework of art.260 TFEU), namely the imposition of a lump sum or a penalty payment appropriate to the circumstances. However, the TSCG (unlike the EU Treaties) imposes a

[35] See art.8, TSCG.
[36] Article 8(1), TSCG.
[37] Formerly art.239, EC Treaty.
[38] Acts intended to have legal effects are covered. The term "regulatory" is nevertheless unclear.

maximum penalty, namely that it must not exceed 0.1 per cent of the gross domestic product of the (defendant) contracting state. Furthermore, the amounts imposed are made payable to the European Stability Mechanism (ESM) discussed further below.

The possibility of imposing financial penalties, or sanctions, on a Member State for failure to implement a judgment of the ECJ establishing an infringement, was introduced specifically in order to combat the increasing incidence of Member State non-compliance with Treaty obligations under art.226 EC (art.258 TFEU).[39] The European Commission is required (in this second action) to specify the appropriate amount of lump sum or penalty payment it considers should be paid by the Member State. If the ECJ agrees that the Member State has failed to comply with its previous judgment, it may impose a lump sum or penalty payment on that Member State. (In practice, the court has imposed both). It is noteworthy that the court is not obliged to follow the proposal put forward by the Commission. Furthermore, recent case history relating to the SGP suggests that the outcome of any ECJ decision is unpredictable.[40]

The penalties imposed can be substantial. The provision therefore represents a significant deterrent to a Member State and is intended to ensure compliance with the court's judgments. It has been broadly welcomed as a "genuine" sanction and is generally seen to have improved enforcement of EU law by the Commission. However, this may not be the case when a Member State is itself in financial difficulty and may not be able to afford the fine![41]

Under the TSCG, the mechanism envisaged for one or more Member States to sue another Member State and request the imposition of fines could give rise to politically sensitive circumstances. For instance, during the present crisis, the BBC showed footage of violent protests in Athens which included scenes of the burning of a German flag in the streets of Athens. *The absence of any power of a "neutral" institution, such as the Commission to bring such cases, is a potential weakness of the implementation mechanisms within the TSCG*.

European Stability Mechanism

In early February 2012, the Member States of the eurozone also negotiated the final terms of a separate Treaty, establishing a new international financial institution to be based in Luxembourg, known as the "European Stability Mechanism" (ESM).[42] The ESM will assume the tasks previously fulfilled by the European Financial Stability Facility (EFSF, created in 2010 in the context of the first Greece "bailout") and the European Financial Stabilisation Mechanism (EFSM), in providing, where needed, financial assistance to euro area Member States. The EFSF and EFSM were created within the framework of EU Law, by a decision of the euro area Member States meeting within the Council[43] and are the subject of a Framework Agreement between the Member States of the euro area and the EFSF.

It is not the purpose of this article to analyse in detail, the efficacy,[44] objectives or functioning of the provisions of the TESM. Nevertheless, this instrument remains relevant to the above discussion of the exact constitutional and legal status of the actions of the Member States and the EU institutions in relation to the TSCG, because the two instruments (and the procedural mechanisms for their implementation) are inter-related.

The new ESM has an increased capitalization of €700 billion, of which €500 billion is intended as a safety net, designed to fund future "bailouts" to eurozone members, so long as they are essentially solvent. In other words, only €80 million will in fact be paid into the ESM stability fund; the balance of €620 million will be in the form of a "promise to pay" by participating members, as required.[45]

Assistance under the TESM is to be provided under strict economic policy conditionality. From March 2013, it is also inter alia, contingent on the Member States who wish to have financial assistance also ratifying the "fiscal compact" in the TSCG, as well as implementing

[39] Kilbey, Ian, "Financial Penalties under Article 228(2) EC: Excessive Complexity" Vol. 44, Issue 3, *Common Market Law Review*, June 2007, 743-760.

[40] See, for example *Commission v Council* (C-27/04) [2004] ECR I-6649 concerning the Commission's attempts to take enforcement action in the context of the Stability and Growth Pact. See further, Chalmers, et al, *EU Law*, OUP, 2006, p.413.

[41] For details of fines imposed on Greece in five recent cases, see Mosca, Sophie, "Court orders Athens to pay three million euro penalty", Europolitics/Sectoral policies, *http://www.europolitics.info* [Accessed February 29, 2012].

[42] The TESM was originally signed in July 2011 but has been modified to make the ESM more effective.

[43] See Council Doc. 9614/10 of May 10, 2010.

[44] See further, Zuleeg and Emmanouilidis, *op.cit.*

[45] See further Fogo, Paul, "Legal Eye: The European Stability Mechanism", *Warsaw Business Journal*, *http://www.wbj.pl*, [Accessed February 6, 2012].

the "balanced budget rule" specified in the latter Treaty, (both referred to above) within the agreed timeline (i.e. one year after its entry into force).[46]

All eurozone Member States will become ESM members.[47] Those states that may later join the eurozone shall, as a consequence of joining the euro area, become ESM Members with full rights and obligations, in line with those of the (original) contracting parties. EU Member States whose currency is not the euro (i.e. non euro area Member States) may participate on an ad hoc basis alongside the ESM in a stability support operation for euro area Member States, and will be invited to participate, as observers, in the ESM meetings when this stability support and its monitoring will be discussed. They will have access to all information in a timely manner and be properly consulted.[48] Provision is also made for such Member States to accede formally to the TESM.[49]

Amendment of the European Treaties (arts 48(1) and 48(6) TEU)

The initial mechanism for creating the ESM was by way of an amendment to the EU Treaties. It should be noted that the formal procedure for revising the EU Treaties was substantially altered by the Lisbon Treaty, by virtue of amendments to arts 48(1) and 48(6) TEU. Article 48(6) TEU now provides for a "Simplified Revision Procedure" which allows the European Council, acting by unanimity after consulting the European Parliament, the Commission, and in certain cases, the European Central Bank, to adopt a decision amending all or part of the provisions of Pt 3 of the TFEU (dealing with Union Policies and Internal Actions). This procedure avoids, in particular, the necessity to convene a conference of Member State Government representatives or of a "convention" (namely of representatives of national parliaments, heads of state or government of the Member States, European Parliament and of the Commission), as otherwise required by art.48(3) TEU.

This simplified revision procedure to amend the EU Treaties (i.e. without necessitating the conclusion of a new (amending) Treaty to be concluded between the 27 Member States) was used on March 25, 2011, when the European Council adopted Decision 2011/199[50] amending art.136 of the TFEU by adding the following paragraph to art.136: "The Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole. The granting of any required financial assistance under the mechanism will be made subject to strict conditionality".

It has been argued that *the creation by the TESM of a wholly new institutional structure that operates outside the European Union's own institutional framework is of questionable legality and constitutionality in the context of EU Law*.[51] Although, in principle, the Member States are free to found new institutions, the manner and effect of their actions in this field have been to complicate the legal framework of the European Union itself. It has been argued that the TESM undermines the transparency and democratic accountability that are normally part of what is known as the "Community method", discussed earlier in the context of the TSCG, in particular, with regard to national parliamentary control[52] and political accountability in relation to the European Parliament. The negotiations that will take place within the European Council and the Council in this context will be "opaque".[53]

It appears that the TESM is a mechanism for overcoming the practical, political and/or legal obstacles that prevent the rescue mechanism it contains from functioning within the Treaties. Furthermore, it has been argued that the roles of both the Commission and of the ECB are reduced to that of observers, and the right of intervention of the ECJ reserved only to the framework of art.273 TFEU.[54] No doubt the framers of the TESM have intended to improve economic governance as well as deal with an emergency situation. Nevertheless, the methods employed lack legal constitutionality and the ends have arguably been used to

[46] See Recital 5, TESM.
[47] See Preamble, para. (7), TESM.
[48] See Preamble, para. (9), TESM.
[49] See art.44, TESM Treaty.
[50] O.J. L 91, 6.4.1022, p.1.
[51] Ruffert, *op.cit.* , at p.1789.
[52] See in general, art.12, TEU.
[53] See Ruffert, *op.cit.* , p. 1790
[54] Ibid. See further, discussion below in relation to art.273, TFEU.

justify the means.

Entry into force of the ESM Treaty

The TESM will enter into force on the date when appropriate instruments of ratification have been deposited by signatories whose initial subscription to the fund represent no less than 90 per cent of the total subscriptions required.[55] This is expected to happen by July 2012 (a year earlier than originally planned).[56] However, as explained above, *the ESM Treaty is itself dependent on an amendment made to art.136 TFEU*, which is subject to the completion of legal procedures set out in art.48(6) TEU. These require, in particular, that *relevant notifications have been received, as required under art.48(6) TEU, i.e. of subsequent approval of the Treaty revision by the Member States in accordance with their respective constitutional requirements*.

For instance, in the United Kingdom, the EU Act 2011 now governs the relevant requirements. The UK statute is complex and has been described as imposing "a regime of parliamentary and referendum "locks" on EU Treaty amendments and a range of other EU decisions."[57] It remains to be seen to what extent these "locks" also occur in other Member States and might later lead to an inhibition of their collective action. *It is also relevant to consider whether in one or more Member States, it might yet inhibit the entry into force of the Council Decision approving an amendment to art.136 TFEU and/or the subsequently agreed ESM Treaty*.

Relationship between the ESM Treaty and the EU Treaties

The ESM will be an institution of the Member States of the euro area but it also includes an opportunity for new members (i.e. other Member States of the EU) to join later.[58] However, *the necessity for the adoption of a separate Treaty to spell out the details of the ESM*, and the relationship between the ESM Treaty and the EU Treaties, is not explained, either in the above (amending) European Council Decision, or in the ESM Treaty itself. The ESM is, however, described in the Conclusions of the European Council "as an intergovernmental organization under public international law"[59] In relation to the involvement of EU institutions, the Preamble of the TESM simply states that: "On 20 June 2011, the representatives of the Governments of the Member States of the European Union authorised the Contracting Parties of this Treaty *to request the European Commission and the European Central Bank (ECB) to perform the tasks provided for in this Treaty*".[60] (Author's emphasis).

"Post-programme surveillance" is to be carried out by the European Commission and by the Council of the European Union within the framework laid down in arts 121 and 136 TFEU.[61] This appears tantamount to EU Member States (or a limited number of them i.e. within the eurozone) authorising themselves to *request* the involvement of EU institutions to carry out the ESM objectives, but *does not clarify the exact legal basis, or jurisdiction, for the latter to undertake these tasks*. The TESM does, however, require strict observance of the EU framework, in particular the SGP.[62]

It also asserts that the TESM and the TSCG are *complementary* in fostering fiscal responsibility and solidarity within the economic and monetary union of the European Union.[63] *However, it does not otherwise elaborate on the legal relationship between the two instruments*. It is acknowledged in the TESM that the granting of financial assistance under the ESM will be conditional, as of March 1, 2013, on the ratification of the TSCG by the ESM Member concerned, and upon the expiration of the transposition period (of one year at the latest) referred to in art.3(2) of the TSCG, which requires inter alia compliance with the requirements of art.3(1). This includes compliance with the "balanced budget" rule, referred to above, but more particularly involves compliance with a requirement that provisions of binding force and permanent character (preferably

[55] See art.48, TESM Treaty and Annex II thereof.
[56] Statement by the Euro Area Heads of State or Government, European Council, Brussels, December 9, 2011, para.12.
[57] See Craig, Paul, "*The European Union Act 2011: Locks, Limits and Legality*", 48 *Common Market Law Review*, 1915-1944, p. 1915.
[58] See art.2, TESM Treaty.
[59] See Conclusions of the European Council, of 24-25 March 2011, Doc. EUCO 10/1/11 Rev. 1, Annex II, p.22.
[60] See Preamble, para. (10), TESM.
[61] See Preamble, para (17), TESM.
[62] See Preamble, para (4), TESM.
[63] See Preamble para (5), TESM.

constitutional) be enacted in national law to give effect to these rules.[64] Suffice it to observe that *a number of legal pitfalls potentially lie ahead before the TSCG and the TESM may actually enter into force*.

In terms of retaining the integrity of EU Law, it is not necessarily a comfort to know that disputes concerning the interpretation and application of the TESM, arising between the contracting parties or between the contracting parties and the ESM, may be submitted to the jurisdiction of the ECJ, in accordance with art.273 TFEU (discussed earlier above in the context of the TSCG).[65] This is for the obvious reason that if the mechanism used to amend and/or to circumvent the EU Treaties via the creation of the ESM Treaty is itself of questionable legal or constitutional status, it may be assumed that the Parties thereto are unlikely to challenge each other on such an issue before the court.

Prüm Convention and its later incorporation into the European Treaties

Some of the issues raised earlier, namely the difficulties and complexities created within the EU legal order through the creation of inter-governmental treaties or instruments, have occurred previously. One such instance was the conclusion of the Prüm Convention[66] (also known as the Prüm Treaty), negotiated upon German initiative and signed at Prüm, Germany on May 27, 2005 by eight Member States.[67] It was designed to intensify cross-border police co-operation, especially in the fight against terrorism, cross-border crime and illegal migration. It allowed the police forces of these countries inter alia, to compare and exchange data (e.g. DNA profiles, fingerprint, vehicle registration data, etc.) more easily.

Like the Schengen[68] agreements, the Prüm Convention was an inter-governmental form of co-operation which was later integrated into the EU legal framework. Hence it was initially created outside the framework of the (then) EC Treaty and therefore outside the jurisdiction of the ECJ. As such, questions were raised about its constitutionality, whether the prerogatives of the European Parliament had been infringed and generally about scrutiny and control by the latter institution (which had by then gained significant powers under the Treaties in the field of justice and home affairs), but which were arguably circumvented in the Prüm Convention. Commentators referred[69] to the fact that the inter-governmental option provided the opportunity to avoid the range and extent of consultation with relevant groups and with civil society that would otherwise be required had it been concluded *within* the framework of the European Treaties.[70] Reservations were expressed that it was inappropriate for individual Member States to take actions in areas covered by EU law and thus avoid EU decision-making procedures.

Like the TSCG Treaty, the Prüm Convention was clearly drafted with its later conversion into EU law in mind. For instance, it stated that "Such cooperation is without prejudice to European Union law and open for any Member State of the European Union to join, in accordance with this Convention."[71] It implied thereby that EU law would take precedence in applying relevant provisions of the Convention. It also provided that "Within three years at most following entry into force of this Convention, on the basis of an assessment of experience of its implementation, an initiative shall be submitted, in consultation with or on a proposal from the European Commission, in compliance with the provisions of the Treaty on European Union and the Treaty

[64] See Preamble, para(5), TESM.
[65] There is also a preliminary procedure for the resolution of internal disputes, involving a decision by the Board of Directors of the ESM, prior to the matter being submitted to the ECJ: see further arts 37 (1) to (3), TESM.
[66] Vasconcelos, M., "Brussels has used its usual legal tricks - the final draft of the so-called Treaty on Stability, Co-ordination and Governance in the Economic and Monetary Union" *http://www.europeanfoundation.org* [Accessed January 6, 2011].
[67] The original signatories of the Prüm Treaty are: Belgium, Germany, Spain, France, Luxembourg, The Netherlands and Austria.
[68] "Schengen" is the shorthand for measures originally agreed in 1985 by certain EU Member States, on the gradual elimination of border controls at their common frontiers and now incorporated into the legal framework of the Treaties, as part of the effort to realize the "area of freedom, security and justice."
[69] See further, Committee on Civil Liberties, Justice and Home Affairs (LIBE) of the European Parliament, Public Hearing "The Prüm Convention: Integration of fragmentation of European Justice and Home Affairs?" Brussels, 22 June 2006, Council of the European Union, Brussels, June 30, 2006, 11130/06, pp.3-5.
[70] See further, Ziller, Jacques, *"Le Traité de Prüm : Une Vraie-Fausse Coopération Renforcée dans L'Espace de Sécurité de Liberté et de Justice*)," European University Institute (Florence), Working Paper LAW No. 2006/32, December 2006.
[71] Article 1 (2), Prüm Convention.

establishing the European Community, with the aim of incorporating the provisions of this Convention into the legal framework of the European Union".[72]

These features therefore correspond closely to similar wording, sentiments and mechanisms, particularly in the TSCG, discussed further above. The Prüm Convention was later approved (more or less in its totality) by the Council of Ministers and adopted by the European Union as part of its own law.[73] As such, it applied to all the Member States, who were required to adopt very detailed legislation to implement the Treaty, on the basis of the Council Decision. This included the United Kingdom, which had previously resisted joining the Prüm Convention, though it later supported the Council Decision. The Council Decision was opposed by the European Data Protection Supervisor (EDPS) on privacy and data protection grounds. Similar concerns were expressed in the UK Parliament. The House of Lords Select Committee noted that the European Parliament did not have a legislative role to play in these kinds of agreements (i.e. the Prüm Treaty).[74]

The Prüm Treaty's subsequent successful incorporation into the EU Treaties may serve as a precedent. It is equally arguable that the legal difficulties and complexities posed by the TSCG and/or the ESM Treaties to the coherence of the EU legal framework are considerably greater and may not be so readily overcome.

The role of the ECJ in maintaining the "rule of law"

It is clear that the European Community , now the European Union, is an international organisation that is governed by the rule of law. In *"Les Verts" v European Parliament*, (C-294/83)[75] the court stated at [23]: "It must ... be emphasised ... that the European Economic Community is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty." Furthermore, it is the ECJ "... which under the Treaties has the task of ensuring that in the interpretation and application of the Treaties the law is observed" and it must also "be able to maintain the institutional balance."[76]

There have certainly been previous cases brought before the ECJ seeking to challenge alleged illegal actions by the Community (now Union) institutions.[77] For instance, in, *Parliament v Council and Commission*[78] (C-181/91) and (C-248/91) the European Parliament brought an application for the annulment of an act adopted by the Council, with a view to the grant of special aid to Bangladesh and of the means adopted by the Commission, for the implementation of that act. The context was that of a force majeure, namely a cyclone, which devastated parts of Bangladesh in April 1991. In essence the claim was brought because the Council had allegedly infringed the Parliament's prerogatives (rather than the latter's wish to invalidate the substantive grant of aid to Bangladesh).

An issue of inadmissibility was raised by the Council as part of its defence, to the effect that the contested act was adopted *not by the Council, but by the Member States*, and as such could not legitimately be the subject of such an action for annulment under art.173 EC Treaty (now art.263, TFEU). According to the Council, neither the Member States nor the Commission were acting within the confines of the Community legal order, *but rather on an ad hoc basis to ensure an effective and rapid response to a crisis*.[79] The Parliament was of the view that, despite the humanitarian context, when the Member States wish to give such aid within the framework of the Community, they can act only through the Council and only in accordance with the Community budget procedure.

The Advocate General drew a (rather fine) distinction under the then applicable EC Treaty, namely between decisions of the Council (which consists of representatives of

[72] Article 1 (4), Prüm Convention.
[73] See Council Decision 2008/615 June 23, 2008 on the stepping up of cross-border co-operation, particularly in combating terrorism and cross-border crime, O.J. L 210/1, August 6, 2008.
[74] Pounder, C., *Legal news and guidance from Pinsent Masons*, online at *http://www.out-law.com/page-8148* [Accessed February 9, 2012].
[75] *"Les Verts" v European Parliament*, Case 294/83 [1986] ECR 1339.
[76] See further, *European Parliament v Council* , (C-70/88) [1990] I-2041, [23].
[77] Vasconcelos, *op. cit.*
[78] *Parliament v Council and Commission* (C-181/91) and (C-248/91) [1993] ECR I-3685. The court decided to join the two applications brought against the Council and the Commission.
[79] See Case (C-181/91) and (C-248/91), supra, Opinion of Advocate General Jacobs, delivered on December 16, 1992, para. 14.

the Member States) and on the other hand, decisions of the Member States meeting in Council. According to him, the latter i.e. decisions of the Member States meeting in Council, *do not form part of the Community legal order in the strict sense, but are nevertheless part of the acquis communautaire; as their very title suggests, they have a hybrid character.*[80] He also asserts that in adopting such acts, "the Representatives of the Member States *do not act in their capacity as members of the Council but in their capacity as representatives of their governments*, exercising collectively the competences of the member States. It follows that, in principle, *such acts are not acts of the Community institutions*."[81]

The Advocate General accepted however, that if the Member States adopted a collective decision *in breach* of (Community) law, it would be open to the Commission to initiate enforcement proceedings against the Member States under art.169 of the EC Treaty, (now art.258, TFEU). However, he recognised that that would not be done in the present case, where the Commission was in agreement with the Member States.

More particularly, the Advocate General concluded that: "In cases where the Member States decide to act individually or collectively in a field within their competence, *there is nothing in principle to prevent them from conferring on the Commission the task of ensuring coordination of such action. It is for the Commission to decide whether or not to accept such a mission, provided of course that it does so in a way which is compatible with its duties under the Community Treaties* ... Subject to that proviso, *there can be no objection to the Commission, which is itself a political institution, accepting tasks outside the framework of the Community Treaties, commensurate with the political responsibilities of the Community.*"[82] (Author's emphasis). The Advocate General accepted that in the performance of such tasks, the Commission's actions will be subject to review by the court if they are challenged as being unlawful under the Treaties.

The judgment of the court followed closely the conclusions of the Advocate General in rejecting the action against the Council as inadmissible. The court declared that "acts adopted by representatives of the Member States acting, not in their capacity as members of the Council, but as representatives of their governments, and thus collectively exercising the powers of the Member States, are not subject to judicial review by the Court". In the course of its examination, the court also concluded that "... the Treaty *does not prevent the Member States from entrusting the Commission with the task of coordinating a collective action* undertaken by them on the basis of an act of their representatives meeting in the Council".[83] It has been commented that the distinction drawn by the Advocate General and accepted by the court, was "an almost metaphysical distinction between a reviewable act of the Council and an unreviewable act of the Member States meeting in Council."[84]

Conclusions

The case law of the European Court of Justice provides some support for the argument that the Member States may have some capacity and flexibility to meet within Union institutions, notably the Council, to discuss and conclude arrangements and mechanisms that may strictly be outside the scope of the EU Treaties and to instruct Union institutions, such as the Commission, to undertake tasks of an inter-governmental nature. It is also clear that this flexibility must conform to the overall tasks, objectives and responsibilities of the European Union and of its institutions.

However, the Treaty on Stability, Co-ordination and Governance in the Economic and Monetary Union (TSCG) and the Treaty on the European Stability Mechanism (TESM) have substantially complicated the legal framework of the European Union, partly because of the complex interactions between them. The failure of the main EU institutions, other than the European Parliament, to emphasise the importance and relevance of the related legal and constitutional issues has given the "green light" to the Member States to continue to work by way of inter-governmental Treaties in this field (i.e. the TSCG and the TESM), rather than wholly within the legal framework of the European

[80] Ibid. para.18. Author's emphasis.
[81] Ibid., para.19. Author's emphasis.
[82] Ibid., para.26.
[83] (C-181/91) and (C-248/91), supra., at [20]. Author's emphasis.
[84] Neville Brown, L., "Case Law, Court of Justice, Joined Cases C-181/91 and C-248/91, *European Parliament v. Council and Commission* , Judgment of June 30, [1993] ECR I-3685", Vol. 31 *Common Market Law Review*, 1994, 1347-1355, p.1351.

Union. The perceived requirement for unanimity among the Member States in relation to the TSCG (which was not achieved) is not a sufficient excuse for this, since this situation was entirely foreseeable and already enshrined and therefore legitimised in the Treaties.

The outcomes of the approach that has been taken have simply served to postpone to a later date, the thorny issue of possible incompatibility with the EU legal order, in order to pursue what are regarded as more currently pressing political objectives, albeit in the context of a crisis. In particular, it is not clear whether, notwithstanding the lack of unanimity, the objectives of the TSCG could, or should, have been pursued through alternative mechanisms already in existence within the scope of the EU Treaties, such as the "enhanced co-operation" procedure, or even the use of new or amended existing secondary legislation, for example in relation to the Stability and Growth Pact. There also remain a number of legal pitfalls in terms of the requirement for subsequent approval in the national law of Member States, before the TSCG and the TESM Treaty can actually enter into force.

In the context of the TESM, the development of a wholly new institutional structure, which although originally based on an amendment to art.136 of the TFEU, substantially operates as an inter-governmental Treaty outside the European Union's own institutional framework, seems to be an extraordinary usage of the "simplified revision procedure" that was not foreseen or envisaged, when the Lisbon Treaty was concluded. These mechanisms have led to an absence or weakening of national parliamentary control as well as of political accountability in relation to the European Parliament, particularly in connection with the conclusion of the inter-governmental Treaties themselves.

In general, the failure by EU institutions to examine thoroughly and openly, in public, such constitutional questions bodes ill for the future development of the legal order of the EU Treaties. It seems to illustrate that the political elites within the European Union do not necessarily regard the founding Treaties as a brake or restriction on their perceived collective political priorities of the moment. Thus the limits currently imposed by the Lisbon Treaty, particularly in the field of Economic and Monetary Union appear to have been avoided and evaded.

Any legal action before the ECJ based on these issues will ultimately be difficult both to formulate and also to defend. Furthermore, the role of the ECJ and its ability to resolve these issues is dependent firstly, on a challenge being brought successfully within its jurisdiction, which is problematic. This might also necessitate one or more Member States suing another, which may be politically unrealistic. For instance, the Commission is not given relevant powers by the TSCG to bring such a case and it appears unlikely that it, or any other EU institution, possibly other than the European Parliament, might seek to bring such a challenge.

Even if litigation were to take place in the future, the level of complexity and interaction between EU Law and International Law is now arguably so great that judges, whether within the ECJ or national (constitutional) courts, may well be inclined towards pragmatism, rather than conclusions based strictly on interpretation of EU Law. In particular, on the evidence of previous case-law, if the ECJ were forced to decide between two such opposing views, it might well, in the context of the scale of the economic and financial crisis, make a pragmatic decision to accept the actions and wishes as expressed by a majority of the Member States, rather than risk further undermining the political fabric of the European Union.

Regardless of the future status of the euro as a currency, it remains to be seen whether the legal framework of the European Union which has hitherto survived decades of development and reinvention, will itself remain sufficiently coherent to guarantee the degree of legal order and legal certainty that is usually the hallmark of any successful and enduring system of law.