

INTERNATIONAL AGREEMENT ON A REIN- FORCED ECONOMIC UNION

LEGAL OPINION
of
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I. Introduction

The financial crisis is compelling the European Union to revise the structure and the functioning of the EMU so to regain confidence of the financial markets in the financial and budget discipline of the Member States and their capacity to pay back their sovereign debts. Important decisions have been taken at the EU Summit the 9th of December 2011 in Brussels, though it seems that the UK does not support the steps envisaged by the Euro-Group. The result is that the Euro-Group has concluded to go ahead the way explained in its State-

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ment of 9 December 2011 (Statement), without the UK. With a view to “move towards a stronger economic union” the Heads of State of Government of the Euro Area agreed to take action towards:

- a new fiscal compact and strengthened economic policy coordination
- the development of the stabilisation tools to face short term challenges.

Shortly later a “Draft International Agreement on a Reinforced Economic Union” (Draft) has been circulated. It covers a number of points made in the Statement and is open to all other EU Member States, nine of which have marked their intention to join, while the objective remains “to incorporate the provisions of this Agreement as soon as possible into the Treaties” (Preamble, para. 8). Not all the measures envisaged in the Statement are taken up in the Draft. Some remain to be implemented by other legal instruments.

The questions to be examined first relate to the adequate legal form of the measures envisaged (infra II.). The compliance of these measures with the Treaties will specifically be addressed (infra III.). The particular question of a possible infringement by the automatic correction mechanism upon the rights of the Commission and the European Parliament is the subject of a special chapter (infra IV.), before the Parliaments and the Commission’s possibilities for legal action at the European Court of Justice will be explored (infra V.). Some conclusions will, finally, be drawn as to the effectiveness and desirability of the Draft Agreement as an instrument to resolve the present crisis in the EU.

II. Legal Form for Measures Envisaged by the Draft Agreement

1) Which elements of a) the December euro summit and b) the draft intergovernmental Treaty can be done via regular Treaty procedures and which elements would need changes to the Treaties.

To assess the adequate legal instrument for the implementation of the diverse measures envisaged by the Statement and/or included in the Draft, it seems to be important to realise the asymmetric structure of the EMU, consisting of the exclusive competences at the European level for monetary policies (Article 3 § 1 lit. c) TFEU) and the competence of the Member States in the field of their economic policies which are subject to a common discipline and to be coordinated in a European framework (Article 5 § 1, 120-126 TFEU).

With a view to implementing certain measures there are basically four procedures or legal instruments:

- Treaty changes are required either where the measures envisaged would affect rules or powers of the European institutions as provided for in the TEU and TFEU, or for conferring new powers on EU institutions.

- As far as the Member States retain competences to act autonomously, agreements among them with the aim to act in common or to coordinate their policies beyond what they are bound to do under the rules of the Treaties are possible to the extent that the obligations and procedures for coordination and discipline are respected and effective.
- Where the EU has exclusive or shared competences it is for the institutions to take appropriate action according to the conditions and procedures laid down in the Treaties.
- This includes recourse to enhanced cooperation under Articles 20 TEU and 326 to 334 TFEU in the event that the objectives cannot be attained within a reasonable period by the Union as a whole.

The provisions of the Draft (infra 1.) as well as the measures envisaged in the Statement (infra 2.) will be examined separately with regard to their legal nature and the appropriate legal instrument for implementation.

1. Measures envisaged in the Draft Agreement

The Agreement is meant to establish obligations of the Contracting Parties under International law as a contribution to promoting „a reinforced architecture for Economic and Monetary Union... facilitating the implementation of measures taken on the basis of Articles 121, 126 and 136 of the Treaty on the Functioning of the European Union“ (Preamble, para. 7). It is not aiming at conferring powers to any supranational institution and, thus, has purely a character of international law binding exclusively the Contracting Parties.

a. Constitutional Debt Brake

Article 3 of the Draft requires all Contracting Parties to introduce provisions in their respective constitutions for obligatory balanced budgets, combined with an automatic correction mechanism including the obligation to present a programme to correct the deviations over a defined period of time. According to Article 8, third sentence, of the Draft, the implementation of these provisions shall be subject to internal judicial review in each Contracting Party.

These provisions are mentioning exclusively the Member States as Contracting Parties of the Agreement, they do not refer to EU institutions and refer to provisions of Protocol no. 12 only for definition purposes. In substance, they aim to make legally impossible what Article 126 § 1 TFEU requires Member States to avoid: excessive governmental deficits. And they aim at implanting into national legislation procedures by which in the event of serious deviations, correction is undertaken before even the Commission may find problems and take action according to Article 126 TFEU. The national correction mechanism sti-

stipulated in Article 3 § 2 of the Draft is to be defined at national level, and the „common agreed principles“ to be the basis for this definition are to be „commonly agreed“. The form of this agreement is left open. No powers are conferred to the EU institutions to do this by Regulation; instead, there will be further negotiation and agreement among the Contracting Parties.

The obligations established by Article 3 are limited to policies for which Member States have full discretion under EU law; they concretise and, thus, give effect to the Member States' general obligation under Article 126 TFEU regarding budgetary discipline. Should the internal control and correction mechanism not bring about the desired effect, the powers of the Commission and of the Council under the Treaties as well as under the new provisions of the „Six-Pack“¹ can be exercised fully and effectively. While the relationship of Article 3 § 1 lit. b) of the Draft referring to a „country-specific reference value“ which shall not exceed 0,5% of nominal GDP, to the „differentiated medium-term objective for its budgetary position“ stipulated in Article 2a of Regulation 1466/1997 as amended by Regulation 1175/2011 is not clear, obligations under the Agreement would not affect the full operation of the obligations of the Member States under the Regulation because of the primacy of European law as affirmed by Article 2 of the Draft. Avoiding confusion, however, would be desirable.

The general obligation for the Member States to introduce a constitutional debt brake and to provide for appropriate control and correction mechanisms at the national level can well be included in an international agreement. The Treaties and, in particular, Article 136 § 1 TFEU, do not provide for the necessary powers to enact such obligations of the Member States by secondary legislation. Strengthening the coordination and surveillance of their budgetary policies, as may be pursued by measures taken under Article 136 § 1 lit. a) in combination with Article 121 § 6 TFEU, only relates to procedures at the European level, not to the introduction or harmonisation of internal (constitutional) arrangements of the Member States.²

While for introducing these obligations of the Member States a formal amendment of the Treaties is not needed, the question may be asked whether or not they could be incorporated in the Treaties. From a EU law perspective there is no real limit on what may be incorporated into the Treaties. Direct obligations to amend the national constitutions and to subject the implementation of the rules concerned to review by national courts, however, are unusual and do not form part of the Treaties so far. The Treaties, instead, generally leave it to the discretion of the Member States to choose the appropriate legal instruments for

¹ [OJ 2011 L 306](#).

² The application of this provision seems to be rather limited, see: U. Häde, in: Calliess/Ruffert, EUV.AEUV Kommentar, 4th ed. 2011, Art. 136 AEUV note 6.

the proper implementation of their respective obligations. To incorporate the obligations under Articles 3 and 8, last sentence, of the Draft into the Treaties – as envisaged in para. 8 of the Preamble – would, therefore, be an unusual step in the development of European law. It would also raise, in a specific way, the question of primacy of European law, should a Member State fail to comply with its obligations.

It should be asked, finally, under which conditions Member States may ratify the Agreement according to their national constitutions. As it involves amendments of national constitutions or new provisions of „equivalent nature“, procedural requirements for the amendment of constitutions may have to be respected. To ensure implementation of the obligation under the Agreement, Member States should even complete the amendments needed prior to ratification. It is questionable whether under these conditions the ratification processes could be completed within the period envisaged.

b. Excessive Government Debt Reduction Rule

Article 4 of the Draft requires all Contracting Parties to reduce their government debts exceeding the ratio of 60% of the gross domestic product by an average rate of one twentieth per year, so to adjust them to the requirements under Article 126 TFEU with the reference value laid down by Article 1 of Protocol no. 12.

Given the obligation of the Member States under Article 126 TFEU not to exceed the reference value of 60% and with a view to the responsibility of the Commission and the Council to surveil and take action in case of excessive government deficits in the Member States, Article 4 of the Draft may appear too benign and giving Contracting Parties more flexibility than that the Treaty offers itself. Article 126 § 7 and 9 give the Council some discretion regarding the adjustment efforts and timescale to be recommended. These provisions, however, only apply in cases where the Council has determined that an excessive deficit exists. Article 1 § 2 lit. b) of the Regulation 1177/2011 introduces into Regulation 1467/1997 a debt reduction rule as a general criterion:

„1a. When it exceeds the reference value, the ratio of the government debt to gross domestic product (GDP) shall be considered sufficiently diminishing and approaching the reference value at a satisfactory pace in accordance with point (b) of Article 126(2) TFEU if the differential with respect to the reference value has decreased over the previous three years at an average rate of one twentieth per year as a benchmark, based on changes over the last three years for which the data is available“.

Compared to the debt reduction rule in the Draft the criterion retained in the Regulation seems indeed to be much less restrictive. Only the „differential“ between the existing ratio (as 80% for Germany) and the reference value of

60% must be reduced by one twentieth, while under Article 4 of the Draft it is „the ratio of their government debt to gross domestic product“ to be reduced „at an average rate of one twentieth per year as a benchmark“. The net amount by which the debt has to be reduced, thus, is one twentieth of the complete debts per year under the Draft, while it is one twentieth of 20% of the debts under the Regulation.

The same objectives are pursued by provisions such as in the field of application of Article 121 TFEU Article 5 § 1 subpara. 2 of Regulation 1466/1997 as amended by Regulation 1175/2011. It includes an adjustment towards budget balance with an improvement of 0,5% yearly as a benchmark, and envisages even a higher improvement for Member States facing a debt level exceeding 60% of GDP. Deviations in the national stability programs from the adjustment path required are monitored under Article 6 § 2 and 3 of Regulation 1466/1997 as amended by Regulation 1175/2011, in conformity with Article 121 § 3 TFEU, with the possibility of a warning and finally a Council decision of non-compliance. In case of failure by the Member State to take action as required by this decision, the Council may impose this State to lodge with the Commission an interest-bearing deposit of 0,2% of GDP under the new provisions of Article 4 Regulation 1173/2011.

Article 4 of the Draft, thus, takes over the general debt reduction rule of the Regulations without further conditions and exceptions and seems to be far more demanding as the Regulations. It applies generally and without any decision of either the Commission or the Council and with no involvement of the European Parliament. It is an independent commitment, however, and in any event does not infringe the provisions of either the Treaties or the Regulations. It does not exclude for a Member State subject to an excessive deficit procedure under Article 126 TFEU, to be requested by a Council recommendation to adjust more rapidly to the reference value of 60%, nor does it exclude any sanctions to be imposed to a Member State under EU secondary legislation in the case of non-compliance.

The debt reduction rule contained in Article 4 of the Draft could be included into the Treaty itself by formal Treaty amendment. In this case some reservations should be included as to the modalities, procedures and sanction mechanisms detailed out in the Six-Pack.

The question is whether the rule of Article 4 could be introduced by secondary law as well. As it applies independently of an excessive deficit procedure under Article 126 TFEU this seems to be difficult on the basis of Article 126 § 14 TFEU which deals with the excessive deficit procedure only. In addition, it is questionable whether the power to „lay down detailed rules and definitions for the application of the provisions of said Protocol“ would cover such determina-

tion of Member State's obligations at all. The provisions of the Protocol, to be addressed, only set up the reference values and certain definitions. To lay down concrete adjustment obligations of Member States would go beyond the powers conferred to the Council by Article 126 § 14 TFEU.

Articles 121 § 6 and 136 TFEU, however, seem to cover this rule. Though it may be difficult to consider it a procedural rule so to be part of „rules for the multilateral surveillance procedure“ within the meaning of Article 121 § 6 TFEU, it certainly contributes to „strengthen the coordination and surveillance“ of the budgetary discipline of the Member States within the meaning of Article 136 § 1 lit a) TFEU. As far as a more modest requirement is already included in the Regulations of the Six-Pack regarding the coordination and surveillance of economic policies of the Euro-Group, to strengthen it would be in conformity with the Treaty.

c. Budgetary and Economic Partnership Programmes

The budgetary and economic partnership programmes provided for in Article 5 of the Draft are meant to include „structural reforms necessary to ensure an effectively durable correction of their excessive deficits“ and to be submitted to the Commission and to the Council.

The powers and obligations under Article 126 TFEU seem to be limited to ensure the result to be reached, the correction of excessive deficits. There are no specific reporting requirements. With regard to the excessive deficit procedure, Article 126 § 9 TFEU does not empower the Council to specify which concrete measures are judged necessary in order to remedy the situation and to impose a specific structural reform. As a result, Member States retain discretion for the choice of the measures, even when the Council may give notice to a „Member State to take, within a specified period, measures for the deficit reduction...“.

The obligation under Article 5 of the Draft, therefore, is additional to what under the provisions, in particular, of Article 126 TFEU the institutions may order the Member States with a view to adjusting their national budgets. Yet, Article 3 § 2 lit. c) of Regulation 1466/1997 as amended by Regulation 1175/2011 already states in different terms what Article 5 of the Draft envisages. This provision requires the Member States to present in a „stability programme“, among other facts,

„c) a quantitative assessment of the budgetary and other economic policy measures being taken or proposed to achieve the objectives of the programme, comprising a cost-benefit analysis of major structural reforms which have direct long-term positive budgetary effects, including by raising potential sustainable growth“.

The Article 5 of the Draft referring to „structural reforms necessary to ensure an effectively durable correction of their excessive deficits“, however, seems to be more precise and does not exclude the assessments required in the stability programme nor does the „economic partnership programme“ replace the stability programme. Its application is, however, more limited, as it regards only Member States subject to an excessive deficit procedure. Insofar, it anticipates as a general rule what the Council could order a Member State to do and report, under Article 126 § 9 TFEU, in case of failure to put into practice its recommendations. It does not affect, on the other hand, any power of the Council to act according to its responsibilities under Article 126 TFEU and the Regulations, nor could it run counter any duties of the Member States to comply with such acts of the Council.

The obligation under Article 5 of the Draft, therefore, provides for an obligation, which could be among those contained, under Article 126 § 7 or 9 TFEU, in a recommendation. Specifying it by a general rule incorporated in an international agreement is not contrary to the Treaty.

While it could be integrated into the Treaty as a general rule by formal Treaty amendment, the question is whether it could be laid down by secondary legislation. As a corrective measure it is meant to be part of the excessive deficit procedure and not regarding the coordination and surveillance of the budgetary discipline. Article 121 § 6 and 136 § 1 lit. a) TFEU would, therefore, not be applicable. Instead, there seems to be room to apply Article 126 § 14, first alternative TFEU. The Council, thus, could adopt among any new provisions relating to the implementation of the procedure described in the former paragraphs of Article 126 TFEU also obligations such as provided in Article 5 of the Draft, and so replace Protocol no. 12. But this would require unanimity and a special legislative procedure.

Article 126 § 14, second alternative TFEU further empowers the Council to lay down rules and definitions for the application of the provisions of Protocol no. 12. However, as explained above (supra 1.b.), this power is limited to the reference values and certain definitions, and cannot be understood to allow laying down new obligations for the Member States.

d. Reporting of Deb Issuance

Article 6 of the Draft aims at more transparency and provides a basis for better surveillance by the European Commission and the Council on the fiscal policies of the Member States. Particularly the obligation to report ex-ante on their debt issuance plans is additional to and beyond the reporting obligations specified under Article 121 TFEU and the existing secondary law.

Member States, therefore, are free to undertake in an international agreement to report on these specific matters, as long as this does not affect their readiness to meet their obligations under the Treaties.

These reporting obligations could also be integrated in the Treaties by formal Treaty amendment. Articles 121 § 6 and 136 § 1 lit. a) TFEU allow the Council to include such obligations also in a Regulation with a view to strengthen the surveillance of the budgetary discipline of the Member States.

e. Dealing with Commission's Proposals and Recommendations

Under Article 7 of the Draft the Contracting Parties whose currency is the Euro „undertake to support“ what the Commission proposes or recommends with regard to a Member State recognised by the Commission to be in breach of the 3% ceiling in the framework of an excessive deficit procedure. It should be noted, first, that this provision only applies to the corrective arm of the SGP, not to Article 10 § 2, subpara. 5, of Regulation 1466/1997 as amended by Regulation 1175/2011 with the reversed decision-making mode). Furthermore, it is limited to the 3% ceiling; it does not apply to the 60% ceiling set for the public debt ratio, nor to decisions to be taken with regard to macroeconomic imbalances in the euro area (non-compliance: Article 10 § 4 of Regulation 1176/2011; fines: Article 3 § 3 of Regulation 1174/2011). This does not reflect the introduction, in Regulation 1467/1997 as amended by Regulation 1177/2011, of an equivalent reference to the deficit and the debt criteria (Art. 2 § 3, 4 and 5 of Regulation 1467/1997).³

The question is that of the legal meaning and impact of Article 7 of the Draft. Insofar, the words „undertake to support“ can have two different readings:

- The phrase could mean simply that in a situation where a decision to be taken under Article 126 TFEU shall be deemed, according to the reversed majority rules of Articles 5 § 2 and 6 § 2 of Regulation 1173/2011, to be adopted by the Council as recommended by the Commission, unless the Council decides by qualified majority to reject it, the Contracting Parties would not vote against the recommendation of the Commission, unless a qualified majority of them takes another view. It would be not more than a rule for the Contracting Parties how to vote in the decision-making of the Council under Article 126 § 6 and § 11 TFEU as specified in Articles 5 and 6 of Regulation 1173/2011, and well speed up the procedure. It might be questionable, here, whether all the relevant factors the Council would have to consider under Article 2 § 6 of Regulation 1467/1997 as amended by Regulation

³ Apparently changed in the revised Draft Agreement to include deficit and dept criterion.

1177/2011, and what would be the role of the Economic Dialogue established by the new Article 2a of this Regulation.

- The words „undertake to support“ can, however, also be understood as giving proposals and recommendations of the Commission to the Council legally binding force (under the Agreement). This could circumvent the (discretionary) powers of the Council under Article 126 § 6-13 TFEU and indirectly increase considerably the responsibilities of the Commission. Only where a qualified majority of the Contracting Parties (which may not even be all the Euro-Group, see Article 14 § 2 and 3 of the Draft) takes another view, the procedures of Article 126 TFEU, Regulation 1467/1997 as amended by Regulation 1177/2011 and Regulation 1173/2001 would be pursued.

With the operation of Article 7 of the Draft in this second reading, the Council would not need any more to take its responsibilities under Article 126 TFEU the same way as currently. Contrary to what results from the reversed majority rule in Articles 4 § 2 and 5 § 2 and 6 § 2 of Regulation 1173/2001 the act of the Commission cannot „be deemed to be adopted by the Council“, since the binding force of the Commissions proposal or recommendation results from the non-action of the Contracting Parties of the Agreement, not from the Council acting under EU law. The right of a Member State to be heard and to make observations under Article 126 § 6 TFEU would not come into play. There is a risk that not all relevant factors, laid down in Article 2 of Regulation 1467/1997, as amended by Regulation 1177/2011 would be taken into consideration when the proposals and recommendations of the Commission are already taken as binding by the Member States including the Member State concerned. Also the Economic Dialogue with the European Parliament, introduced by Article 2a of Regulation 1467/1997 as amended by Regulation 1177/2011 would not come into play, as this Dialogue it is provided not for acts of the Commission but for discussing „Council decisions under Article 126 (6) TFEU, Council recommendations under Article 126 (7) TFEU, notices under Article 126 (9) TFEU, or Council decisions under Article 126 (11) TFEU“ only. If there is no such decision of the Council, thus, there will be no dialogue.

The procedure of Article 126 TFEU is following a step-by-step approach. Only if there is a recommendation, notice or other decision taken by the Council, and non-compliance with it by the Member State concerned, the next steps, including decisions on sanctions, may be taken by the Council. Thus, although Article 7 of the Draft may intend to strengthen and accelerate the procedures, with the confusion it creates regarding the implementation of the Commissions acts it may well have the reverse effect. It is doubtful, therefore, whether this provision will have the positive impact as it is intended to have.

An Agreement among the Member States whose currency is the Euro to treat acts of the Commission as binding, however, might not formally violate the Treaty. Any Member State may treat acts of the Commission as binding upon itself and Member States may agree to do this together. But they cannot substitute decisions of the Council.

On the other hand, by setting aside the Economic Dialogue introduced by Regulation 1177/2001 and with the practical difficulties it may create, the Agreement is likely not to meet the obligations of the Member States under Article 4 § 3 TEU to facilitate the achievement of the Union's tasks.

Introducing the provisions of Article 7 of the Draft into the Treaty by formal amendment would be possible, but imply reshuffling the system of Article 126 TFEU considerably. To introduce them by secondary law would run counter the prerogatives of the Council to exercise its powers as provided for in Article 126 TFEU and there seems to be no legal basis. Neither Article 126 § 14 nor Article 136 § 1 lit. a) in combination with Article 121 § 6 TFEU empower the Council to give binding force to proposals or recommendations of the Commission or otherwise to reverse the decision-making rules for the Council in Article 126 TFEU.

f. Judicial Review by the ECJ

Article 273 TFEU gives the Member States the right to submit, by a special agreement, disputes among them to the European Court of Justice if the dispute relates to the subject matter of the Treaties. This is what Article 8 of the Draft is providing for with its first two sentences.

The Draft Agreement with its Article 8 is a special agreement under the terms of Article 273 TFEU. Also the condition that the agreement must be one between Member States is met. There is no need for all the Member States to be parties of such an agreement. As it regards the budgetary discipline of the Contracting Parties and the better coordination and governance of their economic and fiscal policies, it also relates to one of the subject matters of the Treaties, namely the functioning of the European Economic and Monetary Union. Insofar, Article 8 of the Draft does what Article 273 TFEU expressly allows Member States to do.

The question could be, whether the Agreement can include statements upon the legally binding nature of the judgment of the Court and provide for details about the contents of such a judgment, e.g. to fix a period for a Contracting

Party of the Agreement to comply with the judgment.⁴ As to the binding nature of the judgment, this seems to be implied by the nature of legal proceedings and the establishment of the jurisdiction of a Court. It should be noted, however, that it is a binding character under the Agreement as an instrument of international law, and not under EU law.⁵ To ignore the judgment of the ECJ, thus, would not be a breach of EU law and could not be the subject of infringement procedures under Articles 258-260 TFEU. As to details regarding the contents of the judgment of the ECJ, the Agreements extends beyond what the judicial dispute settlement under Article 273 TFEU may comprise. It is even more than what the ECJ may state in an infringement case (see Article 260 § 1 TFEU).

Such questions would have no relevance if the rule of Article 8, sentences 1 and 2 of the Draft would be included in the primary law by formal amendment of the Treaties. With regard to the principle of conferral (Article 5 § 2 TEU) and the lack of a legal basis for establishing new competences of the ECJ under primary law, there is no way, on the other hand, to provide jurisdiction of the ECJ simply by secondary law.

g. Articles on Economic Convergence

Articles 9 to 12 of the Draft underline and aim at fostering the obligations they have already undertaken in Articles 120 and 121 TFEU. They give more precise orientation to the Contracting Parties for the exercise of the discretionary powers they retain under the Treaties. This includes in particular the improvement of the functioning of the EMU, among others by working jointly towards a (common?) economic policy and implementing the Euro Plus Pact (Article 9). It also includes making proactive use of the opportunities offered by the provisions on enhanced cooperation as well as by Article 136 TFEU⁶ (Article 10), discussion and coordinating their major economic policy reforms they plan to undertake (Article 11), as well as the invitation of representatives of their Parliaments to meet regularly to discuss the conduct of economic and budgetary policies in close association with their colleagues from the European Parliament (Article 12)⁷.

Member States are free to agree and organise themselves for implementing better their obligations under the Treaty with the aim to ensure that the common objectives are achieved. This includes the determination to use effectively

⁴ The German proposals for amendment of Article 8 would even go further in this direction, and meet even more serious reservations: Giving the ECJ the power to impose fines in analogy to Article 260 TFEU would not be covered by Article 273 TFEU.

⁵ See also Wolfgang Cremer, in: Callies/Ruffert, EUV.AEUV Kommentar, 4th ed. 2011, Article 273 note 4 with more references.

⁶ Included in the revised Draft Agreement, Article 10.

⁷ Article 13 of the revised Draft Agreement.

the procedures offered by the Treaties, such as enhanced cooperation. Yet, establishing parallel structures to the procedure of Article 121 TFEU providing for the discussion and coordination of economic and budgetary policies in the EU could raise problems for the proper and efficient functioning of the existing system. Furthermore, as the procedures of Article 121 TFEU include all the Member States, limits for the establishment of special arrangements among the Member States whose currency is the Euro must be respected.

Articles 136 and 137 TFEU with Protocol no. 14 on the Euro Group seem to be an expression for what is accepted as a special arrangement for the Member States whose currency is the Euro. Articles 9 and 11 of the Draft relate to matters for the discussion and coordination of which the Euro Group may have special meetings at ministerial level under Article 1 of Protocol no. 14. The arrangement under Article 11 of the Draft would therefore be covered by the Protocol. Also the involvement of the institutions of the EU as required by EU law cannot be considered as contrary to the Treaties. The association of EU institutions, in particular of the ECB and the Commission, to the meetings of the Euro-Group are in accordance with Article 1 of Protocol no. 14. The question why the European Parliament should be kept out, however, remains open. While it is primarily a political question, it should be raised with a view to the fact that budgetary policies, at least, are a parliamentary prerogative. The solution of Article 12 of the Draft⁸ may not be sufficient in this respect.

It is important, finally, that Article 14 § 4 of the Draft makes sure that none of the Member States whose currency is the Euro is excluded from the special dialogue even if not all Members of the Euro-Group have ratified the Agreement.

The undertaking in Article 9 to work jointly towards an economic policy fostering growth through enhanced convergence and competitiveness can be understood, in accordance with point 9 of the Statement, as pointing to a common economic policy of the Contracting Parties. The obligation under Article 11 would be one of the instruments to achieve this goal. The policy so designed could be an element for the formulation of the broad policy guidelines to be drafted by the Council on a recommendation of the Commission and concluded upon by the European Council according to Article 121 § 2 TFEU. To bring the representatives of the parliamentary Committees in charge of economy and finance together for discussing these policies would support the agreed process and add to the legitimacy of the results. Nothing prevents Member States to „invite“ representatives of parliaments, including of the European Parliament to discuss certain policies.

⁸ Article 13 of the revised Draft Agreement.

Within the limits explained the obligations in Articles 9, 11 and 12 of the Draft can be established in the form of an international agreement without infringement to the Treaties. They could also be integrated in the Treaties by a formal amendment.

The remaining question is whether it would be possible to establish these obligations and procedures by EU secondary law. According to Article 136 § 1 lit. b) together with Article 121 § 6 TFEU the Council

„shall... adopt measures specific to those Member States whose currency is the Euro... (b) to set 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“.

To „work towards an economic policy fostering growth...“, as agreed in Article 9 of the Draft clearly is such a policy guideline, and „benchmarking best practices“ through discussing and coordinating economic policies, as agreed in Article 11 of the Draft does not exceed what may be necessary to ensure that the „work“ addressed in Article 9 of the Draft is proceeding effectively, kept under surveillance and ensuring, as required by Article 136 § 1 TFEU „the proper functioning of economic and monetary union“. Given the fundamental role of the Parliaments in economic and budgetary policies, the dialogue to be established under Article 12 of the Draft could form part of a Regulation to be adopted under Articles 136 § 1 and 121 § 6 TFEU.

h. Euro Summit Meetings

Under Article 13 of the Draft the Contracting Parties agree to arrange for informal „Euro Summit meetings“, with a President to be appointed by the euro area Heads of State and Government „at the same time the European Council elects its President and for the same term of office“. The result would be a new institution similar to the European Council with tasks corresponding to those of the Euro-Group, which is deemed to prepare the Summit meetings together with the President of the „Euro Summit“ and in close cooperation with the President of the Commission.

Heads of State and Government should be considered free to meet whenever and in whichever composition they find it opportune. This includes that they may agree to meet regularly. Accepted European practice from before the formal establishment of the European Council shows that such meetings were useful and perhaps even necessary for the development of the Union. The Member States whose currency is the Euro already meet as a Euro Summit in practice. Accordingly, the formal establishment of the „Euro Summit“ as a new institution of the Union through an amendment of the Treaties is a valid option.

More complicated seems to be its anticipative creation in parallel to the existing institutions of the Union by an international agreement. As in the case of the Euro-Group, the establishment of special institutions with limited membership may create problems of consistency and effectiveness of the existing procedures and institutions. Special provision, therefore, has been made under Article 137 TFEU and Protocol no. 14 to establish the Euro Group and to give it a formal status. A Euro-Summit or similar meetings at the top level are not mentioned.

Would conclusions of the Euro Summit, on which the other Member States as well as the European Parliament will be informed according to Article 13 § 4 of the Draft, affect in any way the work of the European Council implementing its responsibilities under Article 121 § 2 subpara. 2 TFEU – or of the Commission or the Council? It is not excluded that the political setting and balance of powers is changed if seventeen out of twenty-seven Members of the European Council have made up their mind in advance. With regard to their special responsibilities for the Euro exactly this may indeed be the purpose of Article 13 of the Draft. As economic and fiscal policies are one of the core areas for which, under Article 15 § 1 TEU the European Council is supposed to impetus, defining general political directions and priorities, and Article 121 § 2, subpara. 2, TFEU specifies this responsibility for the “broad economic guidelines of the economic policies of the Member States and of the Union”, there is a strong risk that the Euro Summit would largely substitute itself to the European Council or at least prejudice its independent work. Insofar, it is difficult to see why there was apparently a need for special explicit provisions for the establishment of the Euro-Group at the ministerial level, while the same reasons should not apply to the establishment of the Euro Summit at the level of Heads of State and Government.

Without special provision in the Treaties for establishing a new institution of the EU the Euro Summit could not be introduced by an act of secondary legislation either. A formal amendment of the Treaties would be necessary.

2. Actions Envisaged by the Statement of the Members of the Euro-Area

Some of the actions envisaged in the Statement of the Members of the Euro-Area of 9 December 2011 have fully or in part been taken up in the Draft Agreement, such as in particular the “new fiscal rule” (point 4) taken up in Articles 3 and 5 of the Draft, the reversed qualified majority rule and the debt reduction rule (point 5) taken up in Article 7 of the Draft (although “automatic consequences” are not provided for), and the commitment to work towards “a common economic policy”, by benchmarking best practices and holding regular meetings of an informal Euro Summit (points 9 and 10) by Articles 9, 11 and 13 of the Draft. As explained above (*supra* 1.) some of these measures

could be taken in the form of secondary legislation, others only by a formal amendment of the Treaties.

Regarding the other actions envisaged by the Statement, the following points may be considered:

a. Deepening of Fiscal Integration

Point 7 of the Statement refers to the work towards further deepening fiscal integration „so as to better reflect our degree of interdependence“. If this refers to tax harmonisation, secondary legislation under Articles 113 and 115 TFEU would be the appropriate instrument. The aim to better reflect the interdependence of the Member States, however, implies more than that. What seems to be needed is not only the surveillance of national fiscal policies but some degree of Union competence for positively framing a European fiscal policy designed to establish a common control on the externalities of national policies.

This would not be possible by secondary legislation but require a formal amendment of the Treaties.

b. New Commission Proposals on Monitoring Draft Budgetary Plans

Point 6 of the Statement expresses the commitment of the Heads of State and Government to examine swiftly the Commission's proposal for new rules on the monitoring and assessment of draft budgetary plans as well as on the strengthening of economic and budgetary surveillance of Member States in financial difficulties.⁹ The Regulation may be adopted by the Council according to Articles 136 § 1 lit. a) and 121 § 6 TFEU.

c. Measures Regarding the EFSF and ESM

The EFSF and the ESM are instruments established or to be established by agreement among the Member States. Modifications of their operation, the entry into force of the ESM Treaty and their financial resources, as agreed upon by the Euro area Member States the 9th December 2011 (points 11-14), as well as adjustments to the ESM-Treaty regarding the involvement of the private sector and voting rules in case of an emergency (point 15) are outside the field of application of the Treaties and could not be implemented neither by secondary nor by primary legislation.

This does not mean that some new provisions regarding a financial institution like the ESM could not be established by formal amendment of the Treaties. It would be a necessary corollary to the surveillance and control systems of the

⁹ COM (2011) 821 final.

EMU and its establishment could build upon the existing structural funds or the EIB.

III. Conformity of the Draft with EU Law

2) Which elements of the draft intergovernmental Treaty are (potentially) incompatible with EU law?

1. Problems of Conformity with the EU Law Established under II.1.

As it has been established above (supra II.1.e.) Article 7 of the Draft interferes with the prerogatives of the Council and the European Parliament and meets serious doubts about its conformity with the Treaty, at least with the general obligation of the Member States to facilitate the achievement of the Union's tasks (Article 4 § 3 TEU). Doubts also exist with regard to Article 8 of the Draft insofar, as it implies that the ECJ would or could set, in its judgment, a time limit for the Member State in question to comply with the judgment (supra II.1.f.). Finally, it was established that the establishment of the Euro Summit as a new institution with regular, though informal, meetings is difficult to reconcile with the Treaty (supra II.1.h.).

2. The Involvement of EU Institutions

A more general question is whether Member States may, by a separate agreement, create obligations of information and reporting to the institutions of the EU, such as by Articles 5 and 6 of the Draft, or otherwise involve the institutions in their policies, like inviting the representatives of the relevant Committee of the European Parliament in the discussion of economic and budgetary policies under Article 12 or the Presidents of the European Commission and the ECB in the work of the Euro Summit under Article 13 of the Draft. Only Article 273 TFEU formally provides the Member States with the power to entrust new competences on a European institution.

Apart from this special provision, creating new tasks or competences for European institutions without an amendment of the Treaties would certainly exceed the rights of individual Member States, or a group of them. None of the provisions mentioned, however, imply such steps. The information provided to the Commission and the Council can be considered as a kind of input which is of general use for these institutions to fulfil their tasks under the Articles 121 and 126 TFEU. The invitation of representatives of the European Parliament to discussions of certain policies at the parliamentary level, as well as the inclusion of the Presidents of the institutions in the preparation and work of the Euro Summit can be understood as an offer for voluntary participation and an expression for openness, not as a legally binding duty. All these measures are within the scope of the objectives defined in Article 3 § 4 TEU and Article 120

TFEU and covered by the general provision of Article 121 § 1 TFEU defining the economic policies of the Member States „as a matter of common concern

Yet, amendments such as proposed recently may face fundamental problems as far as they provide for the Commission and the Council, under Article 5 § 2 of the revised Draft, to monitor the information provided by the Contracting Parties, the power for the Commission to bring cases to the ECJ for non-compliance under Article 8 of the Agreement. There is no basis, also, for a provision like: “The content and format of these programmes shall be defined in the law of the Union”. An international agreement cannot establish duties of the European institutions to legislate.

Giving the Commission such new powers and establishing a specialised infringement procedure would require a formal amendment of the Treaties under Article 48 TEU, even though the exclusion of the application of Articles 258 to 260 TFEU by Article 126 § 10 TFEU is not affected because of the limited scope of Article 8 of the Draft. This seems to be clear for the ECJ. With a view to Article 13 § 2 TEU („each institution shall act within the limits of the powers conferred to it in the Treaties...“) it seems at least to be difficult also with regard to the Commission to accept that such an specific extension of tasks to be implemented under the Agreement would be covered by the general task of the Commission, under Article 17 § 1 TFEU, „to promote the general interest of the Union“ or to „exercise coordinating, executive and management functions, as laid down in the Treaties“.

3. The General Clause of Compatibility and Precedence

With a view to Article 2 of the Draft, which clearly establishes the intention of the Contracting Parties to comply with the principles of loyalty and cooperation in Article 4 § 3 TEU, and underlines the precedence of European Union law over any of the provisions of the Agreement. Given the clear case-law of the ECJ, these provisions however are not more than of a declaratory nature. They would not have the effect to induce the Member States parties to the Agreement to omit applying its provisions once it has come into effect: The Euro Summit would meet, the acts of the Commission under Article 126 TFEU and the Regulations of the Six-Pack would get the agreed support or even be applied as binding law. If the ECJ would set a period for compliance with its judgment, or even impose fines for non-compliance the Member States would consider it as binding upon them. The ECJ may reject an application of the Commission in a procedure under Article 273 TFEU, however, finding that there is no valid provision in the Treaties for the Commission to bring this case to it. And the institutions might refuse to receive information and reports, their Presidents might choose not to participate at the Euro Summit etc. But they are held, or at least free to do so anyway.

The clause of Article 2 of the Draft, therefore, would not repair or correct any violation of the Treaties but merely demonstrate the wish of the Contracting Parties to be in conformity with their obligations.

IV. The European Parliament and Commission's Rights

4) Do, and if so in how far, the introduction of a "golden rule" and/ or other measures related to the automatic correction mechanism as described in article 3 (1) and 3(2) of the draft Treaty infringe upon the rights of the Commission and the Parliament (initiative rights, co-decision right, especially in view of the limits of this agreement as described in article 2 of the draft Treaty)?

The rules contained in Article 3 § 1 and, in particular, the automatic correction mechanisms described in Article 3 § 2 of the Draft focus on and are limited to national provisions at the constitutional and legislative levels for the respect of the principle of balanced budgets only. There are no rights of either the Commission or the European Parliament regarding these issues. Should these provisions at the national level not bring about the desired effects and should a Member State party to the Agreement, consequently, risk to come at odds with the requirements of budgetary discipline and stability under the provisions of European Union law, nothing prevents the institutions to proceed as they have to do under that law, and the provisions neither of the Agreement nor measures taken for their implementation would prevent the Member States concerned to comply with any recommendation, notice or decision of the EU institutions.

When such constitutional provisions and correction mechanisms are instituted in the Member States parties to the Agreement, initiatives of the Commission or – indirectly – of the European Parliament under Article 225 TEU for legislative acts pointing to another system or approach could be less successful than without the Agreement and its implementation. Such constraints, however, are not of a legal nature and rather hypothetical. It seems to be difficult to establish that they infringe upon rights or prerogatives of the Commission or the Parliament which remain free to initiate or submit any proposals they consider appropriate to improve the functioning of the EMU.

It is, therefore, difficult to establish that the rights of the Commission and the Parliament be violated under the terms of Article 3 of the Draft.

V. Legal Action for the Parliament and the Commission

3) What scope for legal action may the Parliament and/ or Commission have against this Treaty (analysis of case law)

Under European Union law legal action against the Member States for violating European law is possible only under Articles 258 to 260 TFEU. The procedure may be launched by the Commission (Article 258) or by one of the Mem-

ber States (259 TFEU). As a consequence, there is no direct legal action possible for the European Parliament against Member States, even if their acting might infringe upon parliamentary rights or prerogatives.

The European Commission, in contrast, has the task to surveil the respect by the Member States of their duties under the Treaty and to ensure the application of the Treaties and of measures adopted by the institutions, on its own initiative or on the initiative of a Member State (Articles 15 § 1, first sentence, TEU, 258 and 259 TFEU). Though the launch of an infringement procedure under Article 258 TFEU is a discretionary power of the Commission, in practice many of the procedures result from complaints of individuals or from notices submitted to it by individual Members of the European Parliament.

Thus, in order to protect the rights and prerogatives of the European Parliament the European Commission could well launch an infringement procedure against the Member States parties to the Agreement. The European Parliament is free to invite the Commission to launch an infringement procedure and to put pressure on it politically. Yet, it remains the responsibility of the Commission to take such steps or to refuse it.

Case law of the ECJ exists where no action of the Parliament was provided for in the Treaty against acts of other EU institutions thus making impossible for it to defend its rights and prerogatives. With a view to protect the institutional balance the Court has accepted as admissible applications of the European Parliament against other institutions nevertheless.¹⁰ It seems to be difficult, however, to extend this jurisprudence to the case of infringements by Member States, even if rights and prerogatives of the European Parliament are at stake. Such cases do not relate to the institutional balance but to the distribution of competences between Member States and the Union, and under the Treaty system it is the responsibility of the Commission only, apart from applications of other Member States under Article 259 TFEU, to ensure the compliance of the Member States with EU law.

IV. Conclusions and Perspectives

In the attempt to strengthen financial discipline and stability in the Euro-zone beyond the Six-Pack, the Draft International Agreement takes the right direction. But it seems to be insufficient with regard to the structural problems of the EMU to be solved in order to bring the crisis to an end and to setting up a sustainable framework for the functioning of the Euro, for stability and growth and economic and social cohesion in the Union (infra 1.). The Agreement seems to be superfluous, on the other hand, with regard to some measures,

¹⁰ Case C-70/88 – European Parliament v. Council (Tschernobyl), para 21 to 27.

which could be taken by secondary law (infra 2.). Some of the measures meet serious doubts as to their compliance with the Treaties (infra 3.). With a view to enhancing the effectiveness and democratic legitimacy of the measures envisaged in the Draft, certain questions should be considered (infra. 4.).

1. An Important Step Towards a Functioning EMU

Among the most important steps towards discipline and stability in the euro-area in the Draft seem to be the obligations under Article 3 (debt brake). They would limit national budgetary autonomy considerably, but must be seen as a powerful device for ensuring in a long term perspective that excessive deficits at the national level are effectively excluded.

Another very important obligation in the Draft are Articles 9, 11 and 12, to strengthen coordination with the aim to come to a common economic policy. This aim should be seen in the context of the commitment in para. 7 of the Statement to „further deepen fiscal integration so as to better reflect our degree of interdependence“.

These modest words are the expression of the insight that, given the conditions and benefits for all of the internal market and, in particular the common currency, it would be mistaken to still believe that the EU Member States and their respective parliaments are autonomous with regard to their economic and fiscal policies. The external effects of „autonomous“ economic and fiscal policies of Member States, like Greece, Italy or Germany have led to disruptions of the Euro area as a whole. And it is clear, that the decisions of the German parliament to agree with the Greek umbrella, the EFSF and the ESM were far from being an autonomous but taken under the threat of an imminent breakdown of the EMU and of the global financial system.

A minimum of responsibility and solidarity required to keep the EMU functioning would mean that parliaments take into account in their policies the effects they might have for the situation and policies of other Member States. This is what the provisions in the Treaties on coordination of economic and fiscal policies are about, and this is – as we are experiencing – what does not function properly. With the illusion of independence and autonomy Member States each are striving to draw the maximum individual benefit from the Union, one way or the other, driving the Euro and the Union to catastrophe.

Some governments have understood that the approach which has made European integration successful: to confer supranational powers to common institutions in so far as isolated action or intergovernmental cooperation are insufficient to attain certain objectives of common public interest – that this approach is necessary also for economic and fiscal policies. Overcoming the asymmetry

between „autonomous“ or insufficiently coordinated economic/fiscal policies of Member States and centralised monetary policy at the Union level.

The Statement as well as the Draft already include some elements of this important insight, but they lack the courage to undertake what Member States have understood indispensable for achieving stability and prosperity in a real European Economic and Monetary Union. Yet, they are stuck half way with the Draft Agreement, and it is doubtful whether reinforcing cooperation by an international treaty which does not contain provisions or allow centralised decision-making and judicial control for matters where coordination risks to fail again and again, could help to regain the confidence of the markets and to overcome the crisis.

2. Measures Susceptible to be Taken by EU Legislation

Some of the measures envisaged by the Draft, as has been shown above, could be implemented by secondary legislation and made binding European law right away:

- a. The debt reduction rule (Article 4 of the Draft) could be adopted by a Regulation under Article 121 § 6 in combination with Article 136 § 1 lit a) TFEU (supra II.1.b.).
- b. The obligation to put into place and submit to the European Commission and the Council „budgetary and economic partnership programme“ including a detailed description of the structural reforms (Article 5 of the Draft) could be adopted by a Regulation under Article 126 § 14, first alternative TFEU, the Council acting unanimously (supra II.1 c).
- c. Reporting of debt issuance to the Commission (Article 6 of the Draft) could be made mandatory for the euro area Member States by Regulation under Articles 121 § 6 and 136 § 1 lit. a) TFEU (supra II.1 d).
- d. To „work towards an economic policy fostering growth...“, as agreed in Article 9 of the Draft and to discuss and coordinate all major policy reforms of the Member States, as stipulated in Article 11 of the Draft, could be imposed upon them by secondary legislation under Articles 121 § 6 and 136 § 1 lit. b) TFEU (supra, II.1.g).
- e. Deepening fiscal integration, as stipulated in para. 5 of the Statement could be completed by legislation under Article 113 and Article 115 TFEU for indirect and direct taxation respectively. These provisions, however, require unanimous decision by the Council.

- f. New provisions regarding the monitoring of draft budgetary plans of the Member States, as stipulated by the proposal of the Commission of 23th November 2011 and referred to in para. 6 of the Statement, may be adopted by the Council according to Articles 136 § 1 lit. a) and 121 § 6 TFEU.

3. Conflicts of the Agreement with the EU Treaties

Some of the measures or obligations provided for in the Draft, however, risk to be at odds with the Treaties or existing secondary EU legislation:

- a. The agreement of the Contracting Parties in Article 7 of the Draft to „undertake to support proposals or recommendations put forward by the European Commission“ (Article 7 of the Draft), in both possible readings, risks to bypass the Economic Dialogue provided for in, and is therefore contrary to, Article 2a of Regulation 1467/1997 as amended by Regulation 1177/2011 (supra II.1.e).
- b. The jurisdiction of the ECJ to judge upon non-compliance with Article 3 (2) of the Draft is both, very limited and likely to be ineffective given that Member States only – and not the Commission – can bring a case before the ECJ. But the Draft is going beyond the scope of Article 273 TFEU insofar as it provides for the Court, when stating that there is non-compliance, to set a time limit for the defendant to comply with the judgment (supra II.1.f). It would go even further beyond what is possible under Article 273 TFEU as well as under the principle of conferral both, to empower the Commission to bring cases of non-compliance with the Agreement before the ECJ and to empower the ECJ to impose fines upon a Member State. This would be possible only by a formal Treaty amendment (supra, II.1.f and II.2.).
- c. New obligations and responsibilities of the European institutions, such as under Article 5 § 2 of the revised Draft to define the content and format of programmes to be established and communicated by the Contracting Parties, or to monitor information provided by them to the Commission and the Council, cannot be established without formal amendment of the Treaties (supra, III.2.)
- d. Article 13 of the Draft establishing the Euro Summit with limited membership, as an institution parallel to the European Council risks to affect the responsibilities of the European Council and its proper and independent functioning. Like for the establishment of the Euro-Group a formal amendment of the Treaties would be required (supra II.1.h).

4. Amendments of the Draft and Perspectives

The Draft Agreement, as has been explained, is not sufficient for resolving the problems the European Union is actually faced. Considerations of national sovereignty do not stop blocking necessary progress through courageous amendments of the Treaties, in particular with regard to the existing asymmetry of the EMU. As long as the necessary consensus on important steps, however, is not in sight, the Draft Agreement being one first step towards the reform should, therefore, be accepted by as many Member States as possible. Apart from what seems actually to be discussed, some questions, however, should be considered before the negotiations are concluded:

- a. There is no time scale set for the implementation of the duties of the Contracting Parties under Article 3 of the Draft. How could, under these conditions, the provisions for judicial review of the implementation by the ECJ become operational? As a consequence, Article 3 of the Draft should include a date by which the national reform shall be completed.
- b. Why should failures of Contracting Parties to comply with other provisions of the Agreement than the implementation of Article 3 not be subject to judicial review?¹¹ The problem would be solved insofar as obligations can be established under secondary law. Still, there is room and need for extending the scope of the procedures introduced according to Article 283 TFEU.
- c. In order to ensure adequate democratic legitimacy of the policies to be adopted through the involvement of the budgetary authorities of the Member States and the EU, an so to make the reinforced system of coordination and surveillance acceptable to the national parliaments, it seems to be indispensable to revise Articles 9 and 12 of the Draft in order to include the parliaments into the relevant processes.
- d. In a longer term perspective a comprehensive reform of the Treaties will be needed with a view to confer powers to the EU for framing a common economic and fiscal policies, giving the parliaments a decisive role in the formulation and implementation of these policies and establishing effective mechanisms to ensure growth as well as economic and social cohesion throughout the Union.
- e. With regard to the United Kingdom and other Member States which might be reluctant to support the amendments to the Treaties necessary to establish the fundament for a sustainable EMU, it should be stressed

¹¹ Apparently changed in the revised Draft Agreement, Article 8.

that the general obligations and objectives of the Treaties, namely those laid down in Articles 3 § 4 TEU and 120-144 TFEU, with the exceptions provided therein, are binding for all the Member States who, thus, are bound, according to the principles of loyalty and cooperation set out in Article 4 § 3 TEU, to contribute to the achievement of these goals and, in particular promote the development of the EMU and actively work to avoid its breakdown.

(completed Sunday, the 8th of January 2012, 14.30 h)