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EUROPEAN UNION: PROCESS OF SIMPLIFIED TREATY AMENDMENT AND FINANCIAL STABILITY MECHANISM

ABSTRACT

In response to the financial crisis that erupted in the spring of 2010 in Greece and threatened to overrun the other EU countries and whole euro area, since May 2010 to March 2011 the EU member states have adopted various legal instruments of public international law, European Union law and private law. The current complex regime of anti-crisis measures — the range of bilateral, intergovernmental and communitarian decisions and agreements, raised a number of issues of legal interpretation. Some of the resulting uncertainties related to the European financial stability mechanism are supposed to be overwhelmed by the simplified treaty amendment for adding the new paragraph to Article 136 of the Treaty on the Functioning of the European Union, the procedure which was initiated on 25 March 2011 by the European Council decision. This paper analyses the procedure of the simplified treaty amendment in context of the existing mix of legal instruments related to the European financial crisis.

Key words: eurozone, "no-bail-out clause", simplified treaty revision, Stability and Growth Pact (SGP), European Stability Mechanism (ESM), European Financial Stability Facility (EFSF), Euro Plus Pact.

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INTRODUCTORY REMARKS

The last general revision of the Treaties of the European Union, namely the Treaty of Lisbon, entered into force on 1 December 2009 after the long and disputed process of the ratification, and one of the consequences has been undeniable "institutional reform fatigue".[2] All seemed to agree that the epoch of large treaty revisions was over, and the text of the Treaties would be left untouched for a long time.[3] But very soon after Lisbon Treaty, nowadays the Treaty amendment was considered being necessary in response to sovereign debt crisis first emerged in Greece, later spread to Ireland and Portugal and generally affected the entire euro area. The first proposals for treaty amendments was mooted by the German chancellor Merkel in March 2010, but it had been greeted with much skepticism by the other EU governments, who were rather frightened by the prospect of engaging in a new Treaty revision process only a few months after the Lisbon Treaty had finally came into force. However, in the autumn of 2010 the German government managed to convince the French government, as emerged from a joint Franco-German declaration made in Deauville on 18 October 2010, in which the two countries considered that an amendment of the treaties is needed.

The proposal for the revision of the Treaty on the Functioning of the European Union (TfEU) was submitted to the European Council formally by the Belgian Government on 16 December 2010. The European Council adopted on 25 March 2011 a decision aiming at the amending the TfEU by the addition of a just one new paragraph to Article 136 of that Treaty, which provided that 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", and that the granting of any required financial assistance under the mechanism will be made subject to strict conditionality.[4]

At the European level further steps are not required, but the amendment will enter into force only if approved by the 27 member states of the EU according to their own constitutional requirements and procedures. The European Council indicates that it shall enter into force on 1 January 2013,

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[2] Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, *Official Journal of European Communities,* OJ C 306, 13 December 2007; (hereinafter Lisbon Treaty).

[3] Bruno de Witte, "The European Treaty Amendment for the Creation of a Financial Stability Mechanism", *European Policy Analysis*, Swedish Institute for European Policy Studies, Issue 2011, p. 2.

[4] European Council Decision of 25 March 2011 amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro, *Official Journal of the European Union*, OJ L 91/1, 6 April 2011, Article 1.

provided that all the national approval procedures have successfully been accomplished by that time.[5] This Treaty amendment constitutes the first use made of one of the two simplified Treaty revision procedures created by the Lisbon Treaty.

The simplified Treaty amendment which enables establishment of the permanent European stability mechanism was adopted as part of a comprehensive package of measures including in particular the "Euro Plus Pact" on stronger economic policy coordination agreed by the euro area heads of government in Spring 2011.[6] The Pact originated at the intergovernmental level and against the complex background of the measures taken since the spring of 2010: bilateral, intergovernmental and communitarian. Before these measures, all EU member states signed bilateral loan arrangements with Greece, coordinated by the Commission (May 2009).

Among the intergovernmental and communitarian measures, the Council adopted the Regulation establishing a European financial stability mechanism (EFSM), and the eurozone member states adopted the intergovernmental agreement for establishing of a European financial stability facility (EFSF) as a kind of *ad hoc* financial fund providing financial assistances.

This package has raised a number of unprecedented issues of legal interpretation. It was adopted at a very controversial legal basis, and there were potential "constitutional" problems with them.[7] It was not entirely certain whether the measures taken by the EU countries comply with the TfEU rule that prohibits EU states from giving financial support to each other — the so-called "no-bailout rule". Besides, it was disputed that a mechanism of lending money is not caught by the Treaty prohibition on giving (direct) financial support, and there are some remaining doubts.

It is supposed that the legal uncertainties would be resolved by the amendment of the TfEU by the addition of a new paragraph to Article 136 of that TfEU which allows the establishment of a permanent financial crisis mechanism. This paper deals with the legal reasons for and consequences of the decision on the simplified Treaty amendment in context of the emerging eurozone regime for financial stability.

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[5] *Ibidem*, arts. 2 and 3.

[6] Conclusions of the European Council 24/25 March 2011, Brussels, 20 April 2011, EUCO 10/1/11, 20/05/2011, pp. 13-20; Internet: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/120296.pdf. Also see: "Council economic governance reaches agreement on measures to strengthen economic governance", Council of the European Union, Brussels, 15 March 2011, 7691/11, Presse 63; Internet: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ecofin/119888.pdf, 20/03/2011.

[7] Bruno de Witte, "The European Treaty Amendment for the Creation of a Financial Stability Mechanism", op. cit., p. 5.

The first part of the paper explains the relevant TfEU provisions regulating the multilateral surveillance in the European Economic and Monetary Union (EMU), "no-bail-out" rule and a contradiction vs. the provisions on the solidarity and assistance in the eurozone, and the other related provisions specific to member states whose currency is the euro. The second part of the paper reviews in detail the emerging financial stability package in response European sovereign debt crisis, from the European financial stabilization mechanism (EFSM) and European financial stabilization facility (EFSF) in May and June 2010, to the European Stability Mechanism (ESM) and simplified treaty amendment procedure launched in March 2011. The third part of the paper draws some conclusions on the emerging regime of simplified Treaty revision in context of the new financial stability package.

TREATY LEGAL BASE

The legal basis in the TfEU for the EMU and a subsequent legal regime, consisting of several groups of the provisions specific to member states whose currency is the euro: on the convergence criteria and multilateral surveillance in the EMU including the excessive deficits procedure; and on solidarity and assistance among the EU member states and on the ban of "bailing-out" in the EU.

Maastricht convergence criteria and multilateral surveillance

The completion of the EMU as a formal objective was provided by Treaty of Maastricht (1992), which also sets a number of economic convergence criteria concerning public finances, inflation, interest and exchange rates — so called *Maastricht convergence criteria*. The main criteria related to government finance are: a) the annual government deficit (the ratio of the annual government deficit to gross domestic product GDP must not exceed 3%); b) government debt (the ratio of gross government debt to GDP must not exceed 60%).[8]

[8] See Article 109j of the Treaty establishing the European Community, Treaty on European Union – Maastricht Treaty (1992); Protocol on the convergence criteria referred to in Article 109j of the Treaty establishing the European Community; Declaration on Article 109 of the Treaty establishing the European Community, http://eur-lex.europa.eu/en/treaties/dat/11992M/htm/11992M.html#0085000007 The other criteria are: *inflation rates* (no more than 1.5 percentage points higher than the average of the three best performing member states of the EU); *exchange rate* (applicant countries should have joined the exchange-rate mechanism – ERM II under the European Monetary System for two consecutive years and should not have devalued its currency during the period; *long-term interest rates* (the nominal long-term interest rate must not be more than 2 percentage points higher than in the three lowest inflation member states).

The Treaty provisions which are specific to member states whose currency is the euro provided that, in order to ensure the proper functioning of economic and monetary union, the Council shall adopt measures specific to those member states: (a) to strengthen the coordination and surveillance of their budgetary discipline; (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.

This is the referred Article 136 of the TfEU, which is in the current process of the revision by adding the new paragraph on the permanent eurozone stability fund. For those measures, only members of the Council representing member states whose currency is the euro shall take part in the vote (by way of a qualified majority).[9]

The related Treaty provisions also provided the measures of the *multilateral surveillance*.[10] Those provisions determine the surveillance of the eurozone member state's compliance with the referred financial stability criteria, and a general distribution of competences between the European Council, the Council, the Commission and the member states.

The tools for that surveillance are mostly monitoring, recommendations and warning — that means, ultimately, so called "naming and shaming" tactics.[11] In particular, the TfEU provided the provisions on the "*excessive deficits procedure*", for which the European Parliament and the Council adopted the detailed rules. In deciding on the launching the procedure the Council shall act without taking into account the vote of the member of the Council representing the Member State concerned. The President of the Council and the Commission shall report to the European Parliament on the results of multilateral surveillance.[12]

On the basis of the Maastricht convergence criteria and the provisions on the multilateral surveillance in EMU the *Stability and Growth Pact* (SGP) is grown as an agreement among the 17 Member states of the EU that take part in the eurozone, as a reform which is in the core of the current financial stability efforts. The SGP, adopted in 1997, is an essential part of the macroeconomic framework and financial discipline in the EMU. However, the convergence criteria were not met by the most eurozone countries, and were not automatically and routinely applied. Before all others, the largest countries showed the greatest resistance to sanctions and "naming and shaming" procedure.

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[9] A qualified majority is defined in accordance with Article 238(3)(a). See Article 136(2) of the TfEU.

[10] The Articles 122-126 of the TfEU. The group of provisions starts with the Article 119 of the TfEU (ex Article 4 of the TEC) proclaiming some general economic principle (of the internal market economy with free competition).

[11] See arts. 119-121 of the TfEU.

[12] Article 121 of the TfEU. For details on excessive deficits procedure: Article 126 of the TfEU (ex Article 104 TEC).

"No-bail-out clause" vs. solidarity provisions

Article 122 of the TfEU (ex Article 100 TEC) provided that the Council, on a proposal from the Commission, may decide, in a spirit of *solidarity* between Member States, upon the measures appropriate to the economic situation, in particular if severe difficulties arise in the supply of certain products, notably in the area of energy. And where a member state is in difficulties or seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control, the Council, on a proposal from the Commission, may grant, under certain conditions, financial assistance to the Member State concerned.[13]

Beyond referred circumstances of the natural disasters or exceptional occurrences "beyond the control", the several further Treaty provisions consider the ban of the financial "bail-out". The Article 123 of the TfEU (ex Article 101 TEC) provided that overdraft facilities or any other type of credit facility with the European Central Bank or with the central banks of the Member States ("national central banks") in favour of Union institutions, bodies, offices or agencies, central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of Member States — shall be prohibited, as shall the purchase directly from them by the European Central Bank or national central banks of debt instruments. There is one exception — this prohibition shall not be applied to publicly owned credit institutions which, in the context of the supply of reserves by central banks, shall be given the same treatment by national central banks and the European Central Bank as private credit institutions. Moreover, the further provision (Article 124, ex Article 102 TEC) provided that any measure not based on prudential considerations, establishing privileged access by Union institutions, bodies, offices or agencies, central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of member states to financial institutions — shall be prohibited. Finally, the Union as well as member state shall not be liable for or assume the commitments of central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of any member state.[14]

The relation between the "no-bail-out clause" and the solidarity provisions is not an uncontroversial one. An emergence of natural disasters mainly is not contested, but the formulation "exceptional occurrences beyond the control" is

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[13] The President of the Council shall inform the European Parliament of the decision taken. Article 122(2) of the TfEU.

[14] The Council, on a proposal from the Commission and after consulting the European Parliament, may, as required, specify definitions for the application of the prohibitions referred to in arts. 123 and 124 and in this Article. Article 125(2) of the TfEU (ex Article 103 TEC).

rather much subject to interpretation. That problem was evident on the occasion of emergence of the recent financial stability crisis mechanism, regarding which there are two potential "constitutional" problems.[15] On the one hand, it is not entirely certain whether the related measures taken by the EU countries comply with the TfEU rule that prohibits EU states from giving financial support to each other – "no-bail-out rule". It is argued that a mechanism of lending money is not caught by the Treaty prohibition on giving (direct) financial support, but there are some remaining doubts. On the other hand, it is not entirely certain that the financial assistance mechanism was placed within the scope of the assistance provided in the TfEU.

In particular, it is not an uncontested question whether the endangered EU member states facing "exceptional occurrences beyond their control", required by the TfEU as a condition for the assistance, since their governments (Greece, etc.) have contributed to creation of the sovereign debt crises which they were facing. This latter controversy seemed to be the most worrying, at least from the perspective of the German government, since constitutional complaints had been lodged before the German Constitutional Court arguing that the financial arrangement with Greece and other countries and establishment of the financial stabilisation mechanism was made by an *ultra vires* action of the European Union which should be declared contrary to the German Constitution.[16]

Because of the legal uncertainties, the European Council launched the simplified Treaty revision by the adding of a new paragraph to Article 136 of that Treaty, which explicitly allows the establishment of a permanent European assistance fund (i.e. the European Stabilization Mechanism). At the European level further steps are not required, but the amendment will enter into force only if approved by the all member states of the EU "according to their own constitutional requirements and procedures". That is the reason why some analysts comment that "simplified revision procedures" is perhaps an "unduly optimistic way" for presenting alternatives to the ordinary procedure.[17]

FINANCIAL STABILITY PACKAGE

Since March 2010 to the end of the 2010 the EU member states agreed on a range of multilateral, intergovernmental and communitarian decisions and

[15] Bruno de Witte, "The European Treaty Amendment for the Creation of a Financial Stability Mechanism", op. cit., p. 6.

[16] See: Federal Constitutional Court Press office, Press release no. 30/2010 of 8 May 2010, Order of 7 May 2010 – 2 BvR 987/10 – Internet: http://www.bverfg.de/pressemitteilungen/bvg10-030en.html.

[17] Bruno de Witte, "The European Treaty Amendment for the Creation of a Financial Stability Mechanism", op. cit., p. 3.

agreements regarding the financial crisis. They include decisions on the financial stabilization mechanism (EFSM) and the financial stabilization facility (EFSF), some kind of *ad hoc* funds for financial assistance. Till the end of the 2011 they initiated yet another, now *permanent* fund to be established in 2013 (European Stability Mechanism, ESM) when the procedure of the simplified treaty revision was being completed. The ESM is just one part of the comprehensive package of measures including in particular the "Euro Plus Pact" adopted in spring 2011. Before these measures were adopted at intergovernmental and communitarian levels, all member states of the EU concluded with Greece a series of bilateral agreements at the very outset of the crisis.

A sovereign debt crisis itself is considered as a consequence, among other things, of the noncompliance with the financial discipline criteria provided by the Maastricht treaty, which were further confirmed throughout one older eurozone "pact", namely the Stability and Growth Pact.

Stability and Growth Pact – 1997

The *Stability and Growth Pact* (SGP) was adopted in 1997 as an agreement among the 17 Member states of the EU that take part in the eurozone. It was an essential part of the macroeconomic framework of the EMU and its aim was to avoid the occurrence of an excessive budgetary deficit in the euro zone after the start of the third stage of economic and monetary union (EMU) on 1 January 1999. Primarily based on the Maastricht convergence criteria and the Treaty provisions on the multilateral surveillance, the SGP included the two nominal criteria for debt and deficit (the 3% of GDP reference value for the deficit ratio, and the 60% of GDP reference value for the debt ratio) and the medium-term budgetary objectives.[18]

The Maastricht criteria and the SGP *de facto* reflected German economic model and its long maintained tradition of a low-inflation policy, which have been an important part of the German strong economy's performance since the 1950s.[19] But the pact was applied inconsistently and proved not to be enforceable against the larger countries, Germany and France, the biggest

[18] The Stability Pact consisted initially of the *Resolution of the European Council* of 17 June 1997 on the Stability and Growth Pact, the *Council Regulation* (EC) No 1466/97 of 7 July 1997 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies, and the *Council Regulation* (EC) No 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure and the *Resolution* of 17 June 1997 on the Stability and Growth Pact. The SGP fully entered into force on 1 January 1999.

[19] The German government had hoped to ensure the continuation of that policy through the SGP which would limit the ability of governments to exert inflationary pressures on the European economy. The SGP was initially proposed by German finance minister Theo Waigel in the mid 1990s.

promoters of it when it was created. Under the pact definition of the "excessive deficits", these countries have run it for some years, when on 2005 the Council of Ministers failed to apply sanctions against them. The main reason of that is the influence of the larger countries and large number of votes on the Council of Ministers which must approve sanctions. Under the pressure of France and Germany, in March 2005 the EU Council relaxed the rules of the SGP.[20] Despite the large countries have not been penalized, punitive proceedings being started in case of dealing with Portugal (2002) and Greece (2005), though fines were never applied in these cases either.[21] Generally, the convergence criteria were not automatically and routinely applied, and the larger countries showed greater resistance to sanctions.

May 2010 sovereign debt crisis

The Greek debt crisis exploded in 2009 when the country has reached what many consider to be unsustainable levels of government debt and deficit.[22] Greece was evidently unable to sustain the limit of the Maastricht criteria; the crisis threatened to spread to other states in the eurozone with similar performances; and since early 2010 the whole eurozone has been threatened with a major debt crisis. As a consequence of the difficult situation of Greece and the resulting volatility in the financial markets, the heads of state and government of the euro countries declared in March 2010 their fundamental willingness to support Greece with their own *bilateral* loans, in addition to financing by the International Monetary Fund (IMF).[23] On 2 May 2010, the states of the euro group decided to make available, in connection with a three-year IMF programme with estimated total financing requirements of 110 billion

[20] The two main criteria (of 3% for budget deficit and 60% for public debt) were maintained, but the decision to declare a country in excessive deficit can now rely on certain parameters: the level of debt, the behavior of the cyclically adjusted budget, the duration of the slow growth period and the possibility that the deficit is related to productivity-enhancing procedures. On the application of the convergence criteria and the SGP: Philipp Bagus, *The Tragedy of The Euro*, Ludwig von Mises Institute, 2010, pp. 14 ff. http://mises.org/books/bagus_tragedy_of_euro.pdf.

[21] On 20 March 2005 the Council adopted a report entitled "Improving the implementation of the Stability and Growth Pact". The report was endorsed by the European Council in its conclusions of 22 March 2005, which stated that the report updates and complements the Stability and Growth Pact, of which it is now an integral part. On 27 June 2005 the Pact was complemented by two additional Regulations amending the Regulations 1466/97 and 1467/97.

[22] The Greek 2009 budget deficit stood at 15.4% of GDP; the public debt to GDP ratio has reached to 12.7 percent. Goldman Sachs was accused of helping Greece to mask its government debt.

[23] Greece was intended to be supported only if support should actually prove necessary. The states participating in the aid package were to decide about the payments then. On 23 April 2010, Greece applied for financial aid of the states of the euro group and the IMF.

euros, up to 80 billion euros as financial aid to Greece in the shape of coordinated bilateral loans.[24] Without any instrument provided by the Treaty, it was necessary to establish a mechanism for bilateral loans coordinated by the Commission.[25] The European Union was not formally involved in the agreement, except that the Commission was charged by the euro countries to coordinate the lending operation. The EU Commission subsequently negotiated, with the participation of the European Central Bank (ECB), the details and conditions of an aid package with the IMF and Greece.[26]

At the national level, for example German one, this resulted in the German Bundestag adoption on (7 May) a law on the giving of guarantees to maintain the Greece ability to pay, which was authorised by the Federal Government. On the same day, the complaints lodged a constitutional complaint together with an application to issue a temporary injunction; they essentially apply for the Germany to be prohibited from giving financial aid to Greece, but the German Federal Constitutional Court decided not to issue a temporary injunction because "the general public would be under the threat of more serious disadvantage if the temporary injunction were issued and the assumption of the guarantees later proved permissible under constitutional law".[27]

Besides bilateral agreements with Greece, since May 2010 to the end 2010 member states of the EU have developed a range of multilateral — communitarian and intergovernmental decisions and agreements regarding further development of the financial crisis, including the establishment of some kind of *ad hoc* funds for an financial assistance to endangered countries of the eurozone, and to the end of the year it was considered instituting the procedure of simplified treaty revision in order to set up new permanent financial fund.

European Financial Stabilization Mechanism (EFSM) and European Financial Stabilization Facility (EFSF) – May/June 2010

At the same time with the agreements on bilateral loans with Greece, euro area heads of states and governments suggested, first of all, the proposal for a "European stabilization mechanism to preserve financial stability in Europe" (7 May 2010).[28] A few days latter, at the Council session of 9 May, the ministers of

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[24] Up to 30 billion euros of the aid have been provided in the first year.

[25] Comments by Herman Van Rompuy, President of the European Council, on Greece and solidarity in the Euro area, PCE 83/10, European Council The President, 5 May 2010, Internet: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/114223.pdf.

[26] The euro group's financial aid is intended to be provided in the context of a strict conditionality.

[27] See: Federal Constitutional Court Press office, Press release no. 30/2010 of 8 May 2010, op. cit.

[28] Statement of the Heads of state or Government of the Euro Area, 7 May 2010, Internet: http://ec.europa.eu/commission_2010-2014/president/news/speeches-statements/pdf/114295.pdf.

the euro area countries, wearing their *intergovernmental* hats, adopted a *Decision* in which they committed themselves to support a separate and additional loan and credit mechanism — *European Financial Stabilization Mechanism* (EFSM) which could be used in future situations similar to that of Greece.[29] There is a long standing practice of government representatives "switching hats" during a Council meeting and adopting decisions *qua* states (rather than *qua* Council members), but this phenomenon is quite unusual in a context of enhanced cooperation such as this one, namely limited to the euro area countries.[30]

The initial European stabilization mechanism was based on Article 122 of the TfEU (exceptional circumstances beyond member states' control) and an intergovernmental agreement of the euro area member states, with a volume of up to 60 billion euro foreseen and activation subjected to strong conditionality. In addition, euro area member states have expressed readiness to complement resources through a "Special Purpose Vehicle" (SPV) guaranteed on a *pro rata* basis by participating member states in a coordinated manner and that will expire after three years, respecting their national constitutional requirements, and up to a volume of 440 billion euro. Altogether, the financial assistance for eurozone states had a proposed total volume of up to 500 billion euros.[31]

At the same time, the Council adopted *Regulation* establishing a European Financial Stabilization Mechanism (EFSM). The Regulation was also based on articles 122 of the TfEU, and it provides the conditions and procedures under which Union financial assistance may be granted to a member state which experiencing, or which was seriously threatened by a severe economic or financial disturbance caused by "exceptional occurrences beyond its control".[32]

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[29] The decision has the following denomination: "Decision of the Representatives of the Governments of the Euro Area Member States Meeting within the Council of the European Union". See Internet: http://register.consilium.europa.eu/pdf/en/10/st09/st09614.en10.pdf. See also: Council of the European Union, Extraordinary Council meeting, Economic and Financial Affairs, Brussels, Press Release 9596/10 (Presse 108), 9/10 May 2010, Internet: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ecofin/114324.pdf.

[30] Bruno de Witte, "The European Treaty Amendment for the Creation of a Financial Stability Mechanism", op. cit., p. 6.

[31] The other suggested measures were related to financial-market regulation and supervision in derivates markets, role of the rating agencies, and strengthening economic governance in general. Besides these proposals, the European Central Bank decided to buy bonds on the secondary market through its Securities Purchase Programme, first used for Greece, though extended in 2011 to Portugal, Ireland, Italy and Spain. See: Decision of the European Central Bank of 14 May 2010 establishing a securities markets programme *(ECB/2010/5)* (2010/281/EU), *Official Journal of the European Union*, L 124, 20.5.2010, pp. 8–9. See also: COM(2010) 367/2, *Enhancing economic policy coordination for stability, growth and jobs – Tools for stronger EU economic governance*, European Commission, Brussels, 30.6.2010. Internet: http://ec.europa.eu/economy_finance/articles/euro/documents/com_2010_367_en.pdf

[32] Council Regulation 407/2010 of 11 May 2010 establishing a European financial stabilization mechanism, *Official Journal of the European Union*, OJ 2010, L 118.

The Regulation provided that, given their particular financial implications, the decisions to grant Union financial assistance require the exercise of implementing powers, which should be conferred on the Council.[33]

Shortly after the Regulation, on 6 June 2010 member states of the eurozone adopted "EFSF Framework Agreement" for the establishment of the *European Financial Stability Facility* (EFSF) in the place of the previously planed fund named "Special Purpose Vehicle". The EFSF was conceived for providing temporary financial assistance to euro area member states in difficulty and, in terms of its lending and guarantee capacity with a total amount of 440 billion euro far outstrips the EFSM (only 60 billion euro). The Agreement was signed between the 16 eurozone member states and the EFSF as, in legal terms, a *private* company established in Luxembourg but jointly controlled by the euro area states.[34] The operation of the EFSF was limited by the founders to a period of three years, and afterwards the EFSF would be close down on June 30th 2013.[35] If there is a financial operation then the EFSF would exist until its last obligation has been fully repaid. The EFSF became fully operational after the EFSF has received 13 commitment confirmations from euro area Member States, which represent 94.9% of the total guarantee commitments (minimum necessary 90%). Therefore, according to the Framework Agreement, the obligation of euro area Member States to issue guarantees entered into force in August 2010.[36] Issues would be backed by guarantees given by euro area Member States (of up to € 440 billion on a pro rata basis), in accordance with their share in the paid-up capital of the European Central Bank (ECB).[37] The EFSF would provide loans by issuing bonds or other debt instruments guaranteed by euro area Member States, but the EFSF do not its own funding: the funding will be done by the German Debt Management Office

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[33] *Ibidem*, preamble, par. 6.

[34] *EFSF Framework Agreement* between Kingdom of Belgium, Federal Republic of Germany, Ireland, Kingdom of Spain, French Republic, Italian Republic, Republic of Cyprus, Grand Duchy of Luxembourg, Republic of Malta, Kingdom of the Netherlands, Republic of Austria, Portuguese Republic, Republic of Slovenia, Slovak Republic, Republic of Finland, Hellenic Republic - and European Financial Stability Facility, PARIS-1-1075295-v16, Execution Version, 7 June 2010; Internet: http://www.bundesfinanzministerium.de/nn_1270/DE/Wirtschaft__und__Verwaltung/Europa/20100609-Schutzschirm-Euro-Anlage-1-eng,templateId=raw, property=publicationFile.pdf, 25/06/2010.

[35] Whereas the EFSM had no fixed sunset clause, although its operation must be reviewed every six months so as to respect the exceptional character of the measure.

[36] "EFSF becomes fully operational", Luxembourg, 04 August 2010. The European Financial Stability Facility (EFSF) web site, http://www.efsf.europa.eu/mediacentre/news/2010/2010-002-efsf-becomes-fully-operational.htm.

[37] See table in Annex 2 of the Framework Agreement. The largest ECB capital subscription key percent belongs to Germany (18.9373%).

(*Bundesrepublik Deutschland – Finanzagentur GmbH*), although the EFSF is the issuer. The funding strategy is still under discussion.[38]

The main economic dilemma related to those funds is their volume, i.e. the question does they have enough resources to became a credible deterrent against a recurrence of the recent turbulence in the euro area sovereign debt markets.[39] Besides, that the referred funds have gone through several names (EFSM, SPV, EFSF) reflected their uncertain purposes. Also, there are several legal uncertainties related to these arrangements, which could be put before courts. For example, the potential complaints have not yet been announced before the German Constitutional Court, but there are some speculations about them. The constitutional complaints already had a various repercussions: Germany insisted on Treaty changes to make the legal base for a permanent anti-crisis mechanism legally waterproof.[40] In the autumn of 2010 the German government managed to convince the French government, as emerged from a joint Franco-German declaration made in Deauville on 18 October 2010, in which the two countries considered that an amendment of the treaties is needed. Formally, the proposal for revising Article 136 of the TfEU was submitted to the European Council by the Belgian Government on 16 December 2010.

European stability mechanism (ESM) and simplified treaty amendment — 2011

The fund with an effective lending capacity of 500 billion euro — *European Stability Mechanism* (ESM) — will replace the EFSM and the EFSF which remain in force until June 2013. The general agreement on the need for Member States to establish a permanent crisis mechanism to safeguard the financial "stability of the euro area as a whole" was found at the European Council meeting of 28-29 October 2010. The European Council agreed that, as this mechanism is designed to safeguard the financial stability of "the euro area as whole", Article 122 of the TfEU (Union financial assistance to the Member State in case of "natural disasters or exceptional occurrences beyond its control") will no longer

[38] Initially, the EFSF has received the best possible credit rating off all major rating agencies (Standard & Poor's "AAA"; Moody's "Aaa"; Fitch Ratings "AAA"). See more: "The European Financial Stability Facility (EFSF) – FAQ", The European Financial Stability Facility (EFSF) web site, http://www.efsf.europa.eu/attachments/faq_en.pdf.

[39] See: Daniel Gros and Alessandro Giovannini, "The EFSF as a European Monetary Fund: Does it have enough resources?", *Centre for European Policy Studies,* 2011, Internet: www.ceps.eu/ceps/download/5944.

[40] Nicolaus Heinen, "Constitutional complaints: German rejection of rescue packages unlikely", *Deutsche Bank Research,* March 17, 2011, Internet: http://www.dbresearch.de/PROD/DBR_INTERNET_EN-PROD/PROD0000000000271154.PDF.

be needed for such purposes.[41] The President of the European Council was invited to undertake consultations on a limited treaty change required to that effect, not modifying article 125 TFEU ("no bail-out clause").[42] This resulted from the discussions among the EU governments, and meant that the Treaty amendment rather than deleting the "no-bail out clause" would take the form of a *lex specialis regime* put alongside that clause. This paved the way for the use of the simplified revision procedure, first introduced by Lisbon Treaty for immediate revisions which do not increase the competences of the Union.

Following the previous political agreement, a draft text of the amending decision was prepared for adoption by the next European Council meeting on 16-17 December 2010.[43] This draft decision then formed the basis for the consultation of the European Parliament, the Commission and the European Central Bank. The European Parliament proposed some changes which aimed at inscribing a complementary role for the European Union institutions, in particular by stating that the principles and rules for the conditionality of financial assistance under the mechanism should be determined by an EU regulation adopted under co-decision. This, however, would have implied that the Treaty amendment would have conferred new competences on the European Union and, hence, the simplified revision procedure would no longer have been available.[44]

The next March 2011 European Council meeting decided not to modify a word of the draft decision which it had adopted in December 2010 and not to mention the EU institutions at all.[45] Instead, the European Council adopted "further particulars" relating to the future ESM which provides for a close involvement of the Commission in the ESM's eventual operation.[46] The Commission would be called to act once again (as in the current Greek and EFSF regimes) as an "agent" of an intergovernmental cooperation system. The ESM will be established by a treaty among the euro-area member states as an *intergovernmental organization under public international law* and located in

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[41] Conclusions of the European Council of 28–29 October 2010, EUCO 25/10, Brussels, 30 November 2010, p. 1; Internet: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/117496.pdf.

[42] *Ibidem,* p. 2.

[43] European Council 16-17 december 2010 Conclusions, EUCO 30/1/10, Annex 1, Brussels, 25 January 2011; Internet: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/118578.pdf, 20/03/2011.

[44] Bruno de Witte, "The European Treaty Amendment for the Creation of a Financial Stability Mechanism", op. cit., p. 7.

[45] Conclusions of the European Council 24/25 March 2011, EUCO 10/11, op. cit., pp. 13-20.

[46] Those "further particulars" are called the "Term sheet on the ESM" and are published in Annex II of the European Council Conclusions of 24-25 March 2011.

Luxemburg. It seems that "once again, international law is being used as a tool for the development of the European integration process", and the implication of this is that the future operation of the ESM will not be subject to the normal constraints of the EU legal order, as regards for example decision-making procedures, subsidiarity control and judicial review.[47]

The European Council *decision* aiming at the amending the TfEU by the addition of a just one new paragraph to Article 136 of that Treaty (provisions specific to member states whose currency is the euro) which consisting of two short sentences runs as follows: "3. 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."[48] Further steps at the European level are not required, but the amendment will enter into force only if approved by the 27 member states of the EU, even though the stability mechanism itself will be operated by the euro area states only. This "approval" must be given according to member states own constitutional requirements and procedures. This will be the first use of the simplified Treaty revision procedures created by the Lisbon Treaty, the perspective of which will be analyzed in the next part of the paper.

The establishment of the ESM and the required Treaty revision were conceived as parts of a comprehensive package of measures agreed at the March 2011 European Council by the euro area heads of government joined by six non-euro member states (Denmark, Latvia, Lithuania, Poland, Romania, Bulgaria), including in particular the "Euro Plus Pact" on stronger economic policy coordination.[49] Therefore, the "Euro Plus Pact", although approved during a European Council meeting, is not a decision of the European Council but an instrument of enhanced cooperation grouping the euro area countries and some, not all, other member states of the EU for which it stay opened (out are: the UK, Sweden, Hungary, Check Republic).

EMERGING REGIME OF SIMPLIFIED TREATY REVISION

The procedure of simplified treaty revision itself was introduced by the Lisbon Treaty. One of the central innovations of the Treaty of Lisbon concerns

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[47] Bruno de Witte, "The European Treaty Amendment for the Creation of a Financial Stability Mechanism", op. cit., p. 8.

[48] European Council Decision of 25 March 2011 amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro, *Official Journal of the European Union*, OJ L 91/1, 6 April 2011, Article 1.

[49] The package also includes legislative proposals on economic governance, fiscal discipline, reform of the SGP, financial surveillance, banking sector, etc.

the introduction of alternatives to the ordinary revision procedure in form of two new modes of amendment. In principle, the Treaty now provides three types of procedure according to which the Treaties may be amended: the ordinary revision procedure (Article 48.2 to 48.5 of the TEU), the simplified revision procedure (Article 48.6 of the TEU), and what is known as the bridging procedure or *passerelle* (Article 48.7 of the TEU).[50]

Amendments in the *ordinary revision procedure*, which may serve either to increase or to reduce the European Union's competences, shall as before be agreed by a conference of representatives of the governments of the Member States, possibly after involving a Convention composed of representatives of the national parliaments, of the heads of state or government of the member states, of the European Parliament and of the Commission. The amendments shall enter into force after being ratified by all the Member States in accordance with their respective constitutional requirements.

Amendments according to the *simplified revision procedure* require a unanimous decision by the European Council, which enters into force after being approved by the Member States in accordance with their respective constitutional requirements.[51] Thus, a further deepening of integration will be possible without calling an intergovernmental Conference and a Convention, but simply by means of a unanimous decision of the European Council adopted with the consent of the European Parliament and after national ratifications. The broad scope of amendments of primary law which may be amended with the simplified revision procedure is restricted to Part Three of the TfEU related to the internal policies and action of the EU (including the Single Market and the EMU, a total of 172 Articles). The only restriction is the prohibition of extending competences already conferred on the European Union in these fields of policies.

Amendments in the *general bridging procedure* (or so called *passerelle*) are also based on a unanimous decision of the European Council, which however, can only be adopted after obtaining the consent of the European Parliament and also requires that no national Parliament makes known its opposition to the proposal within six months. The difference with the ordinary revision mechanism is that national parliaments, instead of being required to give their positive approval to proposed amendments, will have the option of expressing their negative opinion by vetoing a proposed amendment. Unlike the ordinary and the simplified revision procedures, the general bridging procedure

[50] For detailed analysis of the revision procedures see the decision of the German *Bundesverfassunggerich* in the "Lisbon Case": Bundesverfassunggerich, BVerfG 2 BvE/08 vom 30.6.2009, Absatz-Nr. (1–421), paras 51-53, 306-329, http://www.bverfg.de/entscheidungen/es20090630_2bve000208.html

[51] Article 48.6(2) sentence 3 of the TEU.

concerns *selective* amendments, which refer to voting in the Council or the legislative procedure. Where the TfEU provides for the Council to act by unanimity in a given area or case, the European Council may adopt a decision authorising the Council to act by a qualified majority in that area or in that case.[52] Furthermore, the European Council may adopt a decision allowing for the adoption of legislative acts within the scope of application of the TfEU in accordance with the ordinary legislative procedure instead of the special legislative procedure.[53]

The legal base of the proposed Treaty revision procedure regarding the establishment of the *European Stability Mechanism* (ESM) is referred paragraph 48.6 of the TEU on simplified Treaty amendment. The differentiation in the Treaty amendment procedure between an "ordinary" rigid treaty revision procedure, and two separate "simplified" revision procedures is based on the difference between "fundamental" and "less fundamental" parts of the Treaties, where national ratification procedures are required only for the basic treaty provisions usually.

Upon a closer examination of the prescribed the simplified treaty revision procedure (Art. 48.6 of the TEU), it soon appears that this is not really a simplified procedure at all. As in the paragraph on bridging procedure (Art. 48.7 of the TEU), there will be no need for a Convention or a Conference; the amendment will rather be adopted directly by the European Council acting by unanimity of its members. But that decision will be subject to "approval" by each member state under its own constitutional requirements, and that is the crucial difference (with paragraph of the Article 48.7 of the TEU). One may expect these constitutional requirements to involve, in most if not all member states, a consultation of the national parliament and probably also a positive vote of approval by the parliament, but nothing prevents the states from also calling a referendum on the proposed treaty change.[54] In that case, whether the simplified procedure is really any simpler than the ordinary revision procedure? Optimistic expectations that considerable rigidity of the simplified procedures may be overcome in the case of the adding the new paragraph to Article 136 TfEU, are based on the circumstance that countries such as the United Kingdom, Denmark and Sweden will not be part of the ESM and, therefore, they have no particular reason to object to this Treaty amendment.[55] However, main doubts remain regarding the positions of the United Kingdom.

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[52] This applies also to Title V of the TEU; decisions with military implications or those in the area of defense are excluded (Article 48.7(1) sentence 2 TEU).

[53] Article 48.7(2) of the TEU.

[54] Bruno de Witte, "The European Treaty Amendment for the Creation of a Financial Stability Mechanism", op. cit., p. 4.

[55] *Ibidem*, p. 8.

Probably most contentious and more general question is that it might not always be clear whether a proposed amendment will increase the Union's competences. The implications of the authorisation to amend provisions of Part Three of the TfEU can only be determined to a limited extent; as regards substance, they are hardly predictable.[56] So there might be some contestation in the future on the question whether the use of the simplified procedure is appropriate.

At least as far as Germany is concerned, the Constitutional Court narrowly interpreted Lisbon's clauses for simplified modification procedures, including the bridging or flexibility clauses. The Court has put an early end to that flexibility by insisting on full bicameral ratification (two thirds of *Bundestag* and of the *Bundesrat*) for each decision regarding the use of the *passerelle* type procedures and other flexibility clauses. The Court rejects the idea of future treaty amendment by *tacit consent* that would undermine the prerogatives of the national legislature and, essentially, German sovereign statehood.[57] The Court declared that abbreviated procedure in Germany always require a law, as a *lex specialis*.[58]

The question on a distribution of competences is closely connected with democratic legitimisation of the European Union bodies and institutions. Actions of the EU are only democratically legitimised as long as they remain within the framework of the competences which the member states have transferred and conferred to the Union. Democratic legitimation requires "an actual uninterrupted link to the people of a member state". Activities which are not covered by the tasks that have been transferred are not thus "co-legitimated"; in this sense, the competences given to the Union by the member states convey and limit the (objective) context of legitimation in which each body which exercises sovereign power must stand.[59]

The general principle permitting the member states to transfer individual competences onto the European Union, and protecting them against a

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[56] BVerfG 2 BvE/08 from 30 June 2009, op. cit., par. 311.

[57] The Germany is not the only example. Prior consultation of the national parliaments is also foreseen in the United Kingdom under the EU (Amendment) Act of 2008. Besides, The French Constitutional Council demanded that the French Constitution be amended so as to accommodate those provisions of the Treaty of Lisbon that (potentially) confer new powers on the EU, including the various *passerelles*; but this was with a view to a single ratification of the clauses in question, not for the authorization of their application in each individual case in the future. See more: Philipp Kiiver, "German Participation in EU Decision-Making after the *Lisbon* Case: A Comparative View on Domestic Parliamentary Clearance Procedures", *German Law Journal*, Vol. 10, 2009, pp. 1287–96.

[58] See: BVerfG 2 BvE/08 from 30 June 2009, op. cit., paras 312, 306-328.

[59] Leitsätze zum Beschluss des Zweiten Senats vom 6. Juli 2010 – 2 BvR 2661/06, Absatz-Nr. (1 –116), par. 96. Internet, http://www.bverfg.de/entscheidungen/rs20100706_2bvr266106.html.

European competence to decide on its own competence (*Kompetenz – Kompetenz*) is the *principle of conferral*, which provides the strongest support for the critical evaluation of EU law on the institutional level.[60] In that process, it must be always kept in mind that the specific dangers to the safeguarding of the competences, and hence the democratic legitimation in the case of the European Union, emerge less from grievous — and as such recognisable — assumptions of competences in individual cases than from gradual developments in the course of which minor transgressions of competences, which per se might be slight, accumulate to have significant consequences. In many cases, it will only be possible to properly evaluate the suitability of an individual act to bring about structural shifts in the structure of competences in retrospect. This risk presumably inherent in all federal systems of "political self-amplification" of the higher level exists to a particular degree in the case of the European Union, given that the distribution of competences here – unlike in federal states – is not objective, but takes place at a final level.[61]

CONCLUDING REMARKS

When the last general revision of the Treaties of the European Union — Treaty of Lisbon, entered into force, it seemed there was undeniable "institutional reform fatigue". But nowadays the Treaty amendment was considered being necessary, as one of the tools in responding to European sovereign debt crisis. The simplified Treaty amendment has been launched for an establishment of the permanent European stability mechanism as a part of a comprehensive package of measures on stronger economic policy coordination in the euro area.

Previously, since May 2010 to March 2011 the EU member states have adopted various legal instruments of public international law, European Union law and private law. That complex regime of anti-crisis measures — the range of bilateral, intergovernmental and communitarian decisions and agreements, raised a number of issues of legal interpretation. It was adopted at a very controversial legal basis, and there were potential "constitutional" problems. It was not entirely certain whether the measures taken by the EU countries comply with the TfEU rule that prohibits EU states from giving financial

[60] See more: Frank Schorkopf, "The European Union as An Association of Sovereign States: Karlsruhe's Ruling on the Treaty of Lisbon", German Law Journal, Vol. 10, 2009, pp. 1219-1240.

[61] 2 BvR 2661/06 vom 6.7.2010, par. 103. On the decision of the German Federal Constitutional Court (FCC) regarding *ultra vires* acts of the EU institutions in this highly controversial case, see: Žaklina Novičić, „Preispitivanje *ultra vires* akta Evropskog suda pravde—slučaj Mangold/Honeywell (2010) pred nemačkim Saveznim ustavnim sudom", *Evropsko zakonodavstvo,* br. 33-34/10, str. 234-245.

support to each other — the so-called "no-bailout rule". Besides, it was disputed that a mechanism of lending money is not caught by the Treaty prohibition on giving (direct) financial support, and there are some remaining doubts.

Because of the legal uncertainties, the European Council launched the simplified Treaty revision by the adding of a new paragraph to Article 136 of that Treaty, which explicitly allows the establishment of a permanent European assistance fund (ESM). If this amendment is adopted, the Treaty amendment rather than deleting the "no-bail out clause" would take the form of a *lex specialis regime* put alongside that clause. The amendment will enter into force only if approved by the 27 member states of the EU according to their own constitutional requirements and procedures. Whether it will enter into force remains an open question.

The fund will continue to exist in parallel with the provisions on "no-bail out", and it will have the legal treaty base, but it will be established as an intergovernmental organization under public international law. The funding strategy is still under discussion, as well as a detailed institutional arrangement and competences of EU institutions within it. This raises the question of the specific dangers to the safeguarding of the member states competences, and hence the democratic legitimation of the arrangement. Minor transgressions of competences, which per se might be slight, when accumulated may have significant consequences.

The main economic dilemma related to those fund is their volume, i.e. the question does it have enough resources to became a credible deterrent against a recurrence of the recent turbulence in the euro area sovereign debt markets.

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