



Using International Law in the Euro Crisis ***Causes and Consequences***

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Abstract

At several moments during the sovereign debt crisis of 2010-2012, Member State governments of the European Union concluded international agreements between themselves: the European Financial Stability Facility (EFSF), the European Stability Mechanism (ESM) and the Fiscal Compact were all agreed in this manner. In each of those cases, a group of EU member states 'stepped outside' the EU legal order and the Union's institutional framework, and instead resorted to instruments of public international law for organising their cooperation. This paper examines the reasons why this turn to international law occurred, and also the legal and institutional consequences of these moves away from EU law. The paper argues that we are not witnessing, at least not for now, an 'intergovernmental plot' designed to exclude the supranational institutions of the EU, but rather argues that contingent and plausible reasons explain the use of international law in each case, and that the damage to the constitutional integrity of the European Union is rather limited.

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Introduction¹

This paper deals with the legal and institutional changes of European economic governance that have happened since the outbreak of the sovereign debt crisis in Europe, that is, since early 2010. It singles out for examination one particular type of legal instrument that was repeatedly used during this crisis, namely the conclusion of an international treaty between some, but not all, member states of the European Union. What has happened here is something that is unusual and rather shocking for some observers, namely the fact that the governments of EU member states discarded the EU institutional regime, which forms the normal framework of their cooperation, in favour of the traditional framework offered by public international law, in particular international treaty law.

The seemingly arbitrary nature of those actions by the governments is illustrated by what happened on Sunday 9 May 2010, on the day of the sixtieth anniversary of the Schuman Declaration. At a special urgent meeting of the Council, composed of ministers of Economy or Finance (the so-called Ecofin Council), a regulation was adopted to create the European Financial Stabilisation Mechanism, a new EU law instrument to confront the sovereign debt crisis. In the margin of that meeting, the members of the Council from the 17 euro area countries 'switched hats' and transformed themselves into representatives of their states at an intergovernmental conference; in that capacity, they adopted a decision by which they committed themselves to establish the European Financial Stability Facility (EFSF) outside the EU legal framework.² From the point of view of the EU institutional balance, one could say that the Council (or at least a large fraction of it) parted company with the Commission and the European Parliament in order to adopt separate measures in a purely intergovernmental context in which they were not 'hindered' by the presence of the supranational EU institutions and by the cumbersome decision-making procedures of EU law.

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² The Decision has the following baroque denomination: Decision of the Representatives of the Governments of the Euro Area Member States Meeting within the Council of the European Union. See Council document 9614/10 of 10 May 2010, accessible on the public register of Council documents. 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.

And yet, what happened then, and what happened later when the ESM Treaty and the Fiscal Compact were concluded by groups of Member States, seems less shocking when seen within a broader evolutionary perspective of European law. In fact, there are numerous earlier examples of international treaties concluded between groups of member states of the EU. They have concluded, ever since the 1950's, agreements in areas such as tax law, environmental protection, defence, culture and education. The most prominent example of an *inter se* agreement (that is: an agreement between some but not all the EU member states) was the Schengen cooperation regime, composed of a first Agreement signed in 1985, and an implementing Convention adopted in 1990. The Schengen instruments were expressly designed as interim arrangements in preparation of a final regime at the level of the European Community, rather than as a rival co-operation regime. The same was true for the Social Policy Agreement concluded, as a separate part of the Maastricht Final Act, between 11 of the then 12 member states; and for the Prüm Convention later on.

In the course of the evolution of European integration, the importance of international agreements between the EU member states has declined,³ and EU member states have increasingly decided to pool their cooperation projects within the European Union's institutional framework. This decline can be illustrated by two changes in primary EU law: the creation of the enhanced cooperation mechanism by the Treaty of Amsterdam (which was designed to make *inter se* agreements *outside* the EU legal framework unnecessary), and the deletion from the TEU and the TFEU of the provisions inviting the member states to conclude such *inter se* agreements in specific fields (former Articles 293 EC Treaty and 34(2)(d) EU Treaty, deleted by the Lisbon Treaty).

Despite this constitutional evolution, which seemed to have relegated *inter se* agreements to the footnotes of the European integration story, such agreements remained available in the toolbox of European cooperation for the simple reason that the member states of the European Union are states, and therefore retain their capacity to conclude international treaties not only with third countries (which is the most frequent case) but also among each other, even when the subject matter of their agreement is closely connected to European Union matters. In the case of the euro crisis treaties, that connection is particularly close but also somewhat paradoxical. Whereas in earlier cases, such as the Schengen treaties, the *inter se* treaty was an instrument used to

³ This contrasts with the ever more frequent conclusion of international agreements by the European Union with *third countries*. Indeed, international treaties are the main instrument in the legal toolbox of the EU's *external relations*.

push European integration *forward*, in the case of the euro crisis treaties the main purpose seems to have been to *repair* the damage caused by the failings of *existing* EU law. But why were international treaties seen as useful instruments for this purpose, and what are the legal and institutional consequences of that choice? Those are the two questions that I will address in the two parts of this paper.

Causes

As far as the causes are concerned, it could be tempting to use a broad brush approach, and to explain the conclusion of international treaties dealing with the euro crisis as the expression of a general return to intergovernmentalism in the European integration process. I would instead argue that the use of international treaties corresponds to a more complex series of reasons for which one needs to look closely at the particular circumstances in which each of those treaties was concluded. One needs to examine separately the reasons for the creation of the EFSF, the ESM Treaty and the Fiscal Compact,⁴ before trying to present a combined set of explanations for this apparent 'turn to international law'.

a) As mentioned above, the European Financial Stability Facility (EFSF) was created in May 2010, at the very same time as a new EU law instrument serving the same purpose of giving financial support to countries facing a severe sovereign debt crisis, namely the European Financial Stability Mechanism (EFSM) established by a Council Regulation based on Article 122(2) TFEU.⁵ In fact, both instruments have been used simultaneously and cumulatively with respect to Ireland and Portugal (Greece being dealt with at first by bilateral agreements and later by the EFSF).

Why was this strange bifurcated approach chosen in May 2010, leading to the combination of the EU-law instrument of the EFSM with the extra-EU law instrument of the EFSF in the rescue operations? The decisive reason seems to have been the perceived inability of the EU-law instrument (the EFSM) to deal conclusively with the crisis. In view of its limited and strongly earmarked

⁴ These are not the only inter se agreements that were used in the context of the euro area crisis. One should also add the coordinated bilateral agreements between Greece and all the euro states, signed in 2010, which constituted the first instrument of financial support for Greece before the EFSF entered the picture. I will not discuss those bundled bilateral agreements in this paper.

⁵ Council Regulation 407/2010 of 11 May 2010 establishing a European financial stabilization mechanism, OJ 2010, L 118/1.

budgetary resources, the European Union itself did not possess sufficient 'firepower' to deal with a massive sovereign debt crisis. The 60 billion euro earmarked for the EFSM was the upper limit available at that time;⁶ whereas the EFSF's financial capacity was made many times larger, since it could tap the national budgetary resources of the participating countries. Also, when the EU budget is used, non-euro countries are indirectly called to fund an operation which aims at ensuring the stability of the euro area. The United Kingdom, in particular, was less than keen to spend large amounts of EU money to support Greece or other euro countries (although it did participate in the Irish rescue operation on a bilateral basis). Hence, the decision to 'go outside' the institutional framework of the European Union, and to build a more powerful financial guarantee instrument by means of a separate agreement between the euro area countries themselves and, therefore, without requiring financial guarantees from the side of the non-euro countries.

It would not have been practical, though, to start negotiating a fully-fledged international agreement, in view of the perceived urgency of the policy response. Therefore, rather than concluding a formal treaty, the euro area states set in place a complex legal regime consisting of: first, an *executive agreement*, that is: an international agreement that is immediately operational upon signature by the representatives of the governments without the need to go through ratification by their national parliaments (this was the above-mentioned Decision of the Representatives); secondly, a *private company* established under Luxembourg law, of which the 17 euro states are the only shareholders (this company was called the EFSF);⁷ thirdly, a *Framework Agreement* between the EFSF and its 17 'high shareholders' setting out the decision-making rules of the Facility and substantive guidance for its operation (this is *not* a formal treaty under international law, because it was concluded between states and a private company).⁸ In this manner, the EFSF

⁶ See Article 2(2) of Council Regulation 407/2010, referring to an upper limit of the loans or credit lines constituted by "the margin available under the own resources ceiling for payment appropriations." What this sibylline phrase means is that only those 60 billion were available for serving as a loan guarantee, with all the rest of the EU budget being committed to other purposes. The Commission's original idea of making the euro area Member States guarantors of EFSM loans beyond those 60 billion appeared incompatible with the fact that the Member State contributions to the EU budget have a multiannual upper limit. See, for this explanation, T. Middleton, 'Not Bailing Out ... Legal Aspects of the 2010 Sovereign Debt Crisis', in *A Man for All Treaties - Liber Amicorum en l'honneur de Jean-Claude Piris* (Bruylant, 2012) 421- 439, at 436.

⁷ http://www.efsf.europa.eu/attachments/efsf_articles_of_incorporation_en.pdf

⁸ To remove any doubt about this, one may turn to point 16 of the Agreement which makes it subject to English law (and therefore not to public international law). http://www.efsf.europa.eu/attachments/20111019_efsf_framework_agreement_en.pdf

could operate almost immediately without the need for ratifications which a formal international treaty would have triggered. It was then left to each state to 'sort out' the domestic legal conditions for their financial participation in the EFSF. What has been used, in this case, is a curious mixture of public international law (the original decision) and private law, supported by a 'creative' but largely uncontested use of the national constitutions of the participating states.⁹

In its actual operation, the EFSF functions as a 'private intergovernmental organization' and it avails itself of numerous public law bodies, most prominently the famous 'troika' composed of representatives of the European Commission, the European Central Bank and the IMF. Altogether, the 'EFSF arrangements', as one could call them, constitute an interesting example of legal craftsmanship inspired by the need to act speedily and informally, in which public international law played a discreet but fundamental role.

b) The European Stability Mechanism, the permanent successor of the temporary EFSF, was established by means of a fully-fledged treaty between the 17 euro states. Two versions of the treaty were signed: a first version, signed in July 2011, was not opened for ratification because the signatories had second thoughts about some of its content;¹⁰ a renegotiated version was signed in February 2012 and came into force in October 2012. Why a 'real' treaty this time, and not another fudged legal construct like the EFSF? And also, and above all, why not an EU legal instrument instead of an international treaty?

The path towards the conclusion of the ESM Treaty was laid out by the European Council Decision of 25 March 2011 by which it approved an amendment of Article 136 of the Treaty on the Functioning of the European Union (this was the first use of the simplified revision procedure allowing for Treaty amendments to happen on the basis of a unanimous European Council

⁹ Except for two constitutional challenges before the German Constitutional Court, which led the court, each time, to adjust the way in which the role of the *Bundestag* had been designed in the German laws that were adopted to implement the EFSF arrangements. Judgments of 7 September 2011 and of 28 February 2012 (2 BvE 8/11). See the comment by A. von Ungern-Sternberg on the former judgment, in *European Constitutional Law Review* (2012) 304-322.

¹⁰ This illustrates one of the resources of the international law of treaties. Even when states have signed a treaty, indicating thereby their agreement with its content, they can still have collective 'second thoughts' and transform it into a 'limping' treaty, that is: one that has been signed (and therefore exists) but will never into force. A famous example of a limping treaty is the Treaty establishing a Constitution for Europe, whose ratification was interrupted in 2005 but which was not formally repealed.

decision rather than a formal revision treaty). The choice of establishing the permanent stability mechanism by means of an international treaty followed logically from that TFEU amendment which stated 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.'* But why was this TFEU amendment itself considered necessary to pave the way for the creation of the ESM, and why did it authorise the creation of a separate international organization rather than action by the EU institutions?

The reason for the TFEU amendment was the existence of doubts, especially in German legal circles, about the legality of the rescue package that had been adopted previously, in May 2010. It was doubted whether the creation of the EFSF complied with the TFEU rule that prohibits EU states from becoming liable for each other's debts (the so-called 'no-bailout' rule of Article 125 TFEU). It could be argued that a mechanism of lending money subject to severe conditionality, as was put in place through the EFSF, is not caught by this prohibition of giving direct financial support, but there were some lingering doubts about that interpretation. Moreover, the creation of the EFSF on the basis of an executive agreement, rather than a formal treaty subject to parliamentary ratification, could seem dubious from a national constitutional law perspective. As for the EU Regulation creating the EFSM, there were doubts as to its legality under Article 122(2) TFEU. In particular, it could be argued that Ireland and Portugal (its first beneficiaries) were not facing exceptional occurrences *beyond their control* (as the text of Art 122 requires), since their governments had contributed to create the sovereign debt crises which they were facing. Those legal controversies worried the German government, since complaints had been lodged before the German Constitutional Court challenging the existing arrangements. Given the existing record of the court of Karlsruhe, the government did not feel entirely confident about the outcome of those complaints.¹¹ So, it is because of the legally controversial and shaky basis of the financial stability regime created in May 2010 that the member states, later in 2010, came to envisage a TFEU amendment that would provide a firm basis for a permanent crisis mechanism replacing the exceptional and legally uncertain EFSM and EFSF. Indeed, that treaty amendment could seem to solve both legal problems mentioned above. By inserting an explicit provision in the TFEU which authorizes the euro area member states to put in place a financial support mechanism for countries in budgetary and financial trouble, the effect of the bail-out prohibition of Article

¹¹ The German Constitutional Court eventually rejected – in substance – the complaints in September 2011, but in the meantime the context had been changed precisely by the envisaged amendment of Article 136 TFEU.

125 TFEU would be neutralized by a complementary norm with the same treaty rank. At the same time, the intergovernmental nature of the future mechanism meant that the legally 'risky' EU Regulation could be discontinued after 2013, thus cutting short the possible constitutional challenges before the German Constitutional Court or elsewhere in Europe.

Given this background, there is a surprising element in the sequencing between the amendment of the TFEU and the adoption of the treaty setting up the ESM. Since, at least from the perspective of the German government, the TFEU amendment was meant to pave the way for the lawful creation of the permanent mechanism, one could have expected that the treaty establishing that mechanism (the ESM Treaty) would be adopted and signed only *after* the TFEU amendment had safely passed the national approval hurdles and was ready to enter into force. But a different scenario unfolded. The adoption and ratification of the ESM Treaty overlapped in time with the domestic approvals of the TFEU amendment. More surprisingly even, the ESM Treaty entered into force in October 2012 *before* the amendment of the TFEU which was held back by the delayed ratification by the 27th member state, the Czech Republic.¹²

This leaves the question why the authorization contained in the additional clause of Article 136 TFEU was addressed to the member states and not to the European Union itself. In other words, why did the ESM have to be established as a separate international organization rather than as an EU agency? There seems to have been a mix of reasons for this. One reason is that of path dependency, with the ESM being constructed as the 'natural successor', in its mode of operation, of the intergovernmental EFSF. A second very important reason is the continued insufficiency of EU budgetary resources in view of the vast amount of funds that was thought needed for the ESM; as well as the continued unwillingness of the non-euro member states of the EU to shoulder part of the financial contributions and associated risks. However, the closeness of the new organisation to the European Union is expressed in various ways: by means of references in the Preamble to the EU's economic governance rules and to the amendment of Art 136 TFEU, and by several provisions of the treaty entrusting supporting roles to three EU institutions, the Commission, the ECB and the Court of Justice. The governance system of the ESM thus forms a curious hybrid: all formal decision-making powers are entrusted to organs composed of representatives

¹² This was due to the refusal by the former Czech president, Vaclav Klaus, to sign the instrument of ratification after the Czech parliament had given its approval. Klaus has now been replaced as president and the Czech Republic has ratified. The TFEU amendment will consequently enter into force on 1 May 2013.

of the Members; but those representatives happen to be the same persons who represent their country in the EU's informal Eurogroup and Euro working group; and major tasks in preparing and implementing those decisions are entrusted to the supranational EU institutions, the Commission and the ECB.

c) Moving on now to the third of the international agreements concluded in the context of the sovereign debt crisis, namely the *Fiscal Compact*¹³, the reasons for concluding it outside the EU institutional framework are much less apparent. Most of what it contains in terms of economic governance at the European level could have been adopted through EU legislation or by means of a modification of Protocol No. 12 on the excessive deficit procedure. In particular, the obligation to introduce into national law (preferably at the constitutional level) the new budgetary limits defined in Article 3, para. 1, could have been achieved legally speaking by means of EU legislation, if necessary adopted by means of the 'enhanced cooperation' mode of decision-making in which not all EU states must participate. However, it was made very clear by the German government (that acted once more as the agenda-setter for this treaty), in the course of the Autumn of 2011, that the circumstances required nothing less than a treaty. The new commitment to budgetary stability seemed more solemn and more permanent if contained in a treaty which cannot be 'bent' later on, whereas EU legislation was more liable to be 'softened' through later amendments. Therefore, making a treaty seemed to be the appropriate symbolic message of strong resolve which the unruly financial markets required, in the Autumn of 2011.

The kind of treaty norm that the German government, and later also the French government, had in mind was a formal amendment of the TFEU like the one adopted in March 2011 on the financial stability mechanism (on which, see above). But this would have required the unanimous agreement of all EU member states and probably a prior debate at a Convention, in accordance with the EU's ordinary revision procedure.¹⁴ At the December 2011 summit, as we know, the UK government refused to agree on such a TFEU amendment given that the (unrelated) conditions which it had put forward had not been

¹³ I use, in this paper, the common informal denomination of an instrument which is formally called the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union. The text of this treaty can be found on www.european-council.europa.eu/eurozone-governance/treaty-on-stability.

¹⁴ Whereas the amendment of Art 136 TFEU happened by means of the *simplified* revision procedure (i.e. a unanimous European Council decision) because it created no new competences for the EU institutions, the content that was envisaged for what became the Fiscal Compact would clearly have involved new competences for the EU institutions, and hence the more cumbersome *ordinary* revision procedure would have had to be used.

accepted by the other governments. During the European Council meeting itself, the other governments, led by the French-German tandem, decided instantaneously to 'exit' from the EU institutional framework, and to go for a separate international agreement instead, so as to circumvent the British veto. They did not take time to consider whether, given the impossibility of a TFEU amendment, the wisest course might have been to adopt EU *legislation* through enhanced cooperation, rather than take the risk of engaging in this new and unpredictable treaty game.¹⁵ Indeed, negotiating an international treaty may be a quick process (25 EU states did rapidly agree on the text of this Fiscal Compact in the following months), but it does not benefit from the special qualities of EU law and its entry into force is fraught with difficulties (the question of the legal consequences following from the choice for international law will be considered in the next part of this paper).

To conclude on the question of the *causes* or *reasons* of the 'turn to international treaties', I would argue that there is no evidence of a deliberate strategy of the member state governments to assert 'total control' of the economic governance reform process and to sideline the European Union institutions or marginalize the 'Community method'. Indeed, alongside the instruments of public international law discussed in this paper, many other – and arguably as important – *instruments of EU law* were adopted to deal with the euro crisis. Basically, in the case of the EFSF and of the ESM, EU law did not offer any suitable instruments because of the insufficiency of the EU's financial resources, a problem that can be remedied only in the long run, but not in the immediate context of the unfolding euro crisis. As for the Fiscal Compact, one could say that the states *accidentally* stumbled into the conclusion of a separate international agreement, for a mix of reasons including the rigidity of the TFEU amendment process, the belief (especially on the German side) in the symbolic power of a treaty, and also – admittedly – the wish to avoid going through the cumbersome and lengthy procedures of EU legislation.

¹⁵ Various legal and policy options had been put on the table of the European Council by its President in his note of 6 December 2011, *Towards a Stronger Economic Union – Interim Report*, but the one option he did not mention was the conclusion of a separate international agreement outside the EU framework! For an evocation of the political circumstances of the December meeting of the European Council that eventually led to the choice for a separate treaty, see 'The European Union and the euro – Game, set and mismatch', *The Economist* 17 December 2011, 43-46.

Consequences

So far, we have seen the legal and political conditions that may explain why, on several occasions, groups of EU member states chose to use the international law toolbox to deal with aspects of the sovereign debt crisis in the euro area. International law appeared, in each case, to offer suitable *instruments* to implement their policy goals. But the decision to opt out of the EU institutional framework, and into that of general international law, also imposes a number of legal constraints and entails a number of political-institutional consequences, which I will now consider.

a) Opting into the International Treaty Law Regime

Leaving the EU legal order and entering the world of international treaty law opens entirely new perspectives for the participating states. One, possibly attractive, perspective is that the governments control the decision-making process, both in making the treaty and in implementing the treaty by means of a new organization (as is the case with the EFSF and ESM); they leave behind the complex institutional balance applying to the making of EU law, where important roles are given to the supranational institutions (even for the making of primary EU law which had hitherto been the member states' reserved power). Furthermore, participation in the treaty negotiations is not determined by membership of the EU: the 'willing and able' states can decide to conclude a treaty with each other without having to ask the permission of the others.

The immediate constraint the governments face is that international treaty obligations normally arise from a two-step legal process: they are first negotiated and *signed* by the Contracting Parties, but they must afterwards be *ratified* by each state in order for that state to be effectively bound by the treaty. This requirement allows for the text, which was negotiated by the government, to be approved by the national parliament or to be submitted to further legal checks (for example, by a constitutional court) before it becomes binding on any of the participating countries. This is to avoid that a government would undermine the parliament's legislative powers or affect national constitutional values 'through the backdoor' by agreeing legal obligations or transfers of sovereignty through the negotiation of an international treaty.

The downside of the ratification requirement is that it hampers rapid legal change, particularly when – as is the case with the euro crisis treaties – many states must ratify. In a situation of real urgency, therefore, adopting legal measures by means of an international treaty is not practical. But then, as the creation of the EFSF in May 2010 shows, there are 'ways around' this problem.

Entry into force of the ESM Treaty was less urgent since the EFSF was already in place; indeed, the Contracting Parties took about a whole year to negotiate the various versions of that treaty. The Fiscal Compact, from its side, is intended to deal with crisis prevention rather than crisis management; one could even argue, in this case, that being seen to negotiate and sign the treaty was more important, for the governments concerned, than having seeing this Treaty actually come into force (which duly happened on 1 January 2013).

The requirement of ratification weakens the effectiveness of the treaty instrument not only because its effects are delayed in time, but also because of the uncertainty as to whether the original agreement that led to the signature of the treaty will stick, or whether one or more of the key signatories will be unable to honour their pledge by failing to ratify the treaty. The reason for the failure to ratify might be the refusal by the national parliament to approve the treaty, but there can be other reasons as well. The content of the treaty may require a constitutional amendment in one or other country, which may entail the mandatory organisation of a popular referendum; this happened in Ireland with the Fiscal Compact: its ratification was considered to require an amendment of the Irish constitution and hence the organisation of a referendum which took place on 31 May 2012. Ratification of the treaty may also be stopped or delayed by a change of government after the date of signature, as was the case in France, where the election of a new president led to a postponement of the ratification of the Fiscal Compact. Or there might be a court challenge to try to derail the ratification process. This happened with the ESM Treaty in a number of countries: Estonia, Germany, Ireland, Belgium and Austria. In the former three countries, the conclusion of the ESM Treaty was approved by the courts; the latter two cases are still pending, but a negative outcome is very unlikely and, moreover, a hypothetical withdrawal of one or both of those countries after an unfavourable court judgment would not (legally) affect the existence of the ESM.

The hazardous nature of the national ratification process was well known to the national governments from earlier revisions of the EU Treaties.¹⁶ The ratification of the Treaty of Maastricht, the Treaty of Nice, the Constitutional Treaty and the Lisbon Treaty were all very laborious; three of them required a repetition of a popular referendum in one country, and the Constitutional Treaty never came into being because of ratification problems. The same difficulty arose for the current amendment of Article 136 TFEU: even though it was enacted by means of the so-called simplified revision procedure, which took the form of a Council

¹⁶ See now, for an overall perspective, C. Closa, *The Politics of Ratification of EU Treaties* (Routledge, 2013).

decision rather than a formal treaty, the separate approval by each of the 27 member states was still required, so that this Treaty change was at the mercy of an incident in one or other member state. The United Kingdom has made European Treaty revisions even more fragile than before after the adoption of the European Union Act 2011 which makes any Treaty revision subject to a popular referendum except if that revision has no major consequences for the country. In fact, the amendment of Article 136 TFEU, since it refers to future action undertaken by the euro area countries alone, has no immediate consequences for the UK, and therefore the UK government decided that it could be ratified without the organisation of a referendum.

Separate international agreements, which do not involve an amendment of the TEU and TFEU, can define *alternative requirements for their entry into force*. Not only can such agreements be concluded between less than all the EU states, but they can also provide for their entry into force even if not all the signatories are able to ratify. The Fiscal Compact offers a spectacular example of this flexibility in that it provided that the treaty would enter into force if ratified by merely 12 of the 25 signatory states, provided that those 12 are all part of the euro area. The fact that the authors of the Fiscal Compact moved decidedly away from the condition of universal ratification for its entry into force has created a 'ratification game' which is very different from that applying to amendment of the European treaties, where the rule of unanimous ratification gives a strong veto position to each individual country.¹⁷ Here, instead, the cost of a negative decision cannot be 'externalized' to the other countries, and would moreover mean that the country cannot benefit from the potential support of the European Stability Mechanism.¹⁸ The ESM Treaty, as well, had removed the veto power at least of the smaller euro states by providing that it would enter into force if ratified by states that, together, contribute 90% of the funds for the Mechanism. In this way, the four largest countries (who contribute more than 10% each) still had a 'ratification veto', but the smaller euro states did not.

I have only looked here at the conditions for the entry into force of inter se treaties between EU member states. But those treaties, once they enter into force, have a legal life of their own, raising among other questions that of the mechanisms for their interpretation and dispute settlement, and that of the

¹⁷ For a discussion of those differences, see C. Closa, 'Moving Away from Unanimity. Ratification of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union', *RECON Online Working Paper* 2011/38.

¹⁸ The linkage between ratification of the Fiscal Compact and benefiting from ESM support is expressly made in both the preambles of the ESM treaty and of the Fiscal Compact.

rules for their later amendment or termination. In the case of the ESM Treaty, in particular, a new international organization has been set up with its own subsystem of international law, with legal rules on the composition of its organs, on decision-making, but hardly anything on political accountability and judicial control (and no amendment clause either).

b) Opting Out of EU Law: The *Pringle* Case

The other main legal consequence of taking the international law route is that the alarm light of EU-law compatibility is immediately flashed. Indeed, the fact that the EU member states may, in principle, continue to conclude treaties between themselves does not mean that they are entirely free to do so as and how they wish. *Inter se* international agreements between two or more member states of the EU are allowed, but only within the limits set by EU law obligations. The practical importance of the principle of primacy of EU law over partial agreements between member states was illustrated by a judgment of the European Court of Justice in 2006 that found the application of a Schengen Convention rule to be incompatible with the rights of free movement which third country nationals who are family members of EU citizens derive from Community law.¹⁹ The Court's finding was facilitated by the fact that Article 134 of the Schengen Convention contained an express conflict rule giving priority to Community law, but the ECJ would no doubt have come to the same conclusion with regard to an agreement that does not contain such an express primacy rule. The Fiscal Compact, in fact, contains a clear rule recognizing the primacy of EU law (Art. 2.2). The ESM Treaty does not have such a rule – but this does not change the legal reality which is: the undisputed precedence of EU law over conflicting provisions in treaties between its member states.

Given this legal context, it is interesting to see that a number of allegations of conflict with EU law were made, in relation to the ESM Treaty or the Fiscal Compact.²⁰ The main allegations, which I will briefly discuss in turn are: interference with the exercise of (exclusive) EU competences; conflict with specific norms of primary and secondary EU law; and the unjustified 'use' of EU institutions in the implementation of those international agreements.²¹

¹⁹ ECJ, Case C-503/03, *Commission v Spain*, judgment of 31 January 2006, particularly the recitals 33 to 35.

²⁰ In fact, many of the legal criticisms of the ESM Treaty could be made also already of the EFSF arrangements, but I will not examine those separately. The analysis relating to the ESM Treaty can be applied, *mutatis mutandis*, to the EFSF legal regime.

²¹ For discussions of these issues in the legal literature, see among others: P. Craig, 'The Stability, Coordination and Governance Treaty: Principle, Politics and Pragmatism', 37 *European Law Review* (2012) 231 (who finds a number of inconsistencies between the Fiscal

Some of those allegations have been recently examined by the Court of Justice of the European Union in the context of a preliminary reference by the Irish Supreme Court in the *Pringle* case, which I will take as my focus.²²

The *Pringle* case originated in the Spring of 2012. At that time, the public debate on the euro crisis was dominated, in Ireland, by the referendum on ratification of the Fiscal Compact, which was held on 31 May and which paved the way for Ireland's ratification of that treaty. The Irish government, in the meantime, had planned to deliver the ratification of the ESM Treaty without submitting it to a referendum. It considered that those instruments did not necessitate a prior amendment of the Irish Constitution, in which case a referendum would have been mandatory. Mr. Thomas Pringle, an independent member of the Irish parliament for Donegal South West, thought otherwise and brought a legal action before the High Court to try to stop the ratification. The generous Irish standing rules allowed him to bring the claim for a court injunction by which the government would be prohibited from pursuing the (merely) parliamentary approval of the ESM Treaty (and also of the amendment of Art 136 TFEU), on the ground that this would be in violation of the Irish Constitution. He also argued that both legal instruments were anyway in breach of primary EU law.

The case was heard, at first instance, by Justice Marty Laffoy in the High Court. She delivered her judgment on 17 July 2012 and rejected most of the applicant's claims. The appeal brought by Pringle before the Supreme Court was dealt with very rapidly. Already on 31 July 2012 the Supreme Court gave its decision in which it rejected the arguments based on *Irish constitutional law* but decided to refer several questions of *EU law* to the Court of Justice.²³

The case referred by the Irish Supreme Court proved to be an unusually important one for the Court of Justice of the EU. Its importance is shown by

Compact and EU law), and A. de Gregorio Merino, 'Legal Developments in the Economic and Monetary Union During the Debt Crisis: The Mechanisms of Financial Assistance', 49 *Common Market Law Review* (2012) 1613-1646, esp. at 1635-1640 (who concludes, like me, on the absence of conflict with EU law); see also G. Bianco, 'The New Financial Stability Mechanisms and Their (Poor) Consistency with EU Law', *EUI Working Papers*, RSCAS 2012/44.

²² Case C-370/12, *Thomas Pringle v Government of Ireland, Ireland, The Attorney General*, Judgment of the Court of Justice (Full Court) of 27 November 2012.

²³ For the various stages of the Irish court cases, see the following newspaper reports: "Independent TD takes legal action over 'far-reaching' effects of referendum", *Irish Times* 22 May 2012; "Pringle begins ESM legal challenge", *Irish Times* 19 June 2012; "EU court is asked for quick decision over treaty lawfulness", *Irish Times* 27 July 2012.

the fact that the Court decided to sit “as a full court”, that is: with all 27 judges, which is a very exceptional occurrence. The central legal question submitted to the Court was whether 17 Member States of the EU had, by concluding among themselves the Treaty establishing the European Stability Mechanism (hereafter: ESM Treaty), acted in breach of EU law. If the Court had given an affirmative answer to that question, it might have caused a serious relapse in the sovereign debt crisis that has plagued the Eurozone, and the European Union, since 2010. The importance which the Member States attached to the outcome of this case is shown by the fact that eleven governments (all of them from the euro area, except for the United Kingdom), had decided to intervene in the proceedings, whereas a twelfth government, that of Ireland, was more directly involved as the defendant party in the national court case.

It came as no surprise that the Court of Justice, after examining the case in an expedited procedure taking less than four months, rejected all the arguments challenging the validity or lawfulness of the financial rescue instruments. In doing so, the Court was led to give an interpretation about a number of provisions and principles of EU constitutional law and to address some entirely novel legal issues. This was the first CJEU judgment dealing with the legal consequences of the sovereign debt crisis, and it brings some legal certainty and guidance for the future in respect of one group of instruments from the ‘Euro crisis toolbox’, namely the international legal instruments of crisis management created since 2010.

c) The Court’s Jurisdiction to Examine International Agreements of the Member States

International treaties concluded between two or more EU Member States, such as the ESM Treaty, do not form part of EU law and, hence, do not figure among the acts whose (in)validity the Court of Justice can establish, either in a direct action for annulment or in a preliminary reference on validity. Indeed, the Irish Supreme Court in *Pringle* did not submit a preliminary question on the *validity* of the ESM Treaty but rather on whether, by concluding that treaty, Ireland (and the other 16 euro area countries) had acted in breach of its (and their) EU law obligations. Preliminary references enquiring about the interpretation of EU law are often formulated in terms of the compatibility of national law with EU law obligations; the distinctive feature of this case is that the contested act was not one of national law, but an *inter se* treaty concluded between a number of Member States.

In the framework of a reference for interpretation of EU law, the Court of Justice could not give a direct answer to the question of compatibility; it rather

uses the usual circumlocutory and slightly hypocritical formula that “the Court has jurisdiction to provide the national court with all the criteria for the interpretation of European Union law which may enable it to assess whether the provisions of the ESM Treaty are compatible with European Union law”.²⁴ The fact that the question referred to an international agreement rather than to an act of domestic Irish law does not make any difference in this context. In its case law, the Court of Justice has consistently held that the primacy of EU law extends not only to measures of national law but also to agreements between two or more Member States, which must be disapplied by national courts if they are inconsistent with EU law. Similarly, in direct actions for infringement, the Court has not distinguished between infringements caused by a State acting on its own and infringements caused by a bi- or multilateral agreement concluded between several Member States.²⁵ This is entirely logical. It would otherwise be easy for the Member States to escape from their EU law obligations by concluding a conflicting treaty between each other.

Inter se agreements can conflict with EU law for a variety of reasons, but there is a major distinction to be made, depending on the area of EU law that is involved: in certain areas, the very fact that an *inter se* agreement is concluded is in breach of the European Union’s exclusive competence; in other areas - those outside the EU’s exclusive competence - *inter se* agreements are permissible in principle. Indeed, if Member States have preserved the competence to make domestic law in a given area, they can logically also exercise that competence together, by concluding an international agreement between themselves. These agreements should not, however, contain institutional or substantive provisions that are incompatible with specific norms of EU law.²⁶

In its *Pringle* judgment, the Court basically follows this distinction in dealing with the complex preliminary question relating to the ESM treaty: it first examines those EU Treaty provisions that were argued, by Mr Pringle, to preclude the very *possibility* for the Member States to conclude an agreement

²⁴ *Pringle* judgment, para. 80.

²⁵ See, for a recent confirmation of this view, Case C-546/07, *Commission v Germany*, judgment of 21 January 2010, para. 42-44.

²⁶ For a more elaborate discussion of the conditions under which *inter se* agreements are permissible, and of the requirement of substantive compatibility with EU law, see B. De Witte, “Old-Fashioned Flexibility: International Agreements between Member States of the European Union”, in G. de Búrca and J. Scott (eds), *Constitutional Change in the EU: From Uniformity to Flexibility* (Hart, 2000) 31; and R. Schütze, “EC Law and International Agreements of the Member States – An Ambivalent Relationship?”, 9 *Cambridge Yearbook of European Legal Studies* (2008) 387.

such as the ESM treaty,²⁷ and after having rejected those arguments, it turns to examine the various provisions of EU law which were, still according to the applicant, breached by the *content* of the ESM treaty.

Firstly, the fact that *inter se* agreements are not allowed in matters falling within the EU's exclusive competence would be problematic if the Stability Mechanism were to be considered as a *monetary* policy instrument, as Pringle's lawyers argued. Indeed, monetary policy is, in relation to euro area countries, an exclusive competence of the EU, according to Art 3.1 TFEU. However, in the system of the TFEU, the question of financial assistance to member states, and budgetary matters generally, are clearly located in the Economic Policy chapter (Articles 120 to 126) rather than in the Monetary Policy chapter (Articles 127 to 133), and economic policy is – unlike monetary policy – a *shared* competence, in which the Member State have preserved the right to develop their own policies, alone or together with others. So, the Court of Justice concludes rightly that, although the creation of the ESM may have an impact on the common currency, its central importance is as a rescue mechanism for national fiscal crises. This is not an area of exclusive EU competence, and therefore an agreement between the euro states was permissible in principle.

Secondly, it had been argued that the ESM Treaty violates the no-bail-out clause of Art 125 TFEU, or at least that it allows for its violation. Indeed, Art 125 states that EU member states shall not be liable for the financial commitments of other member states, and one of the reasons for the creation of the ESM is precisely to make euro countries liable for each other's debts, although only indirectly and potentially (if the loans cannot be paid back) and only to the extent of each country's contribution to the Mechanism. There is, indeed, a potential conflict there, depending on one's interpretation of Art 125 TFEU. But the Court ruled that loans and guarantees subject to strict conditionality (the rescue instruments contemplated under the ESM treaty) do not amount to states becomes liable for each other's debts. This somewhat optimistic interpretation allowed the Court to conclude that, in this regard, there was no conflict between the ESM treaty and EU law.

This left one other major argument against the ESM treaty which I will examine more closely in a separate section below, since it goes to the heart of the coexistence between the EU legal order and extra-EU agreements: that fact that the ESM treaty, whilst not being an EU-law instrument, nevertheless gave specific roles to the EU institutions.

²⁷ Pringle judgment, paras. 93-107.

d) Conflict with EU Institutional Law? The “Borrowing” of the EU Institutions

One of the most controversial issues in the *Pringle* case was whether the EU institutions can be “borrowed” by the Member States when implementing an international agreement concluded outside the EU legal framework.²⁸ Indeed, the text of the ESM treaty repeatedly refers to action to be taken by the EU institutions. The Court of Justice is mentioned only once, namely in Article 37, which states that disputes between ESM members about the interpretation of the ESM treaty that cannot be resolved by the ESM organs themselves will be submitted to the Court of Justice. The Commission and the ECB figure more prominently, in several articles of the treaty. They are given important roles as “agents” of the ESM organs, both in preparing the operations of the ESM (in particular, through the negotiation of a memorandum of understanding with the country applying for ESM financial assistance), and in coordinating the implementation of the rescue operation.

In examining whether it is consistent with EU law to “use” the EU institutions outside the natural habitat of the EU legal order, the Court of Justice rightly distinguished between the case of the Court itself, and the case of the other institutions. Indeed, as far as the Court of Justice is concerned, there is an odd little Treaty article that conclusively solves the problem. Article 273 TFEU, whose text had figured in the EEC Treaty from the very beginning, allows the Member States to submit to the Court “under a special agreement between the parties”, “any dispute between Member States which relates to the subject matter of the Treaties”, and thereby to extend the jurisdiction of the CJEU beyond EU law proper. The subject matter of the ESM treaty is indeed closely connected to the TFEU, and the ESM treaty is expressly declared to be a “special agreement” in the sense of Article 273 TFEU in recital 16 of its preamble. This possibility of giving extra tasks to the Court of Justice, based on what is now Article 273 TFEU, had already been used occasionally in the past, but never, it seems, in such a high-profile agreement as the ESM treaty.

Things are more complicated with respect to the “borrowing” of the Commission and the Central Bank. *Pringle* invoked Article 13(2) TEU in this context. According to this provision, the EU institutions shall act within the limits of the powers given to them under “the Treaties” (meaning: the TEU and the TFEU, and no other treaties). On a literal interpretation, this could mean that it is not possible to give any additional functions to the Commission

²⁸ See the detailed examination of this question by S. Peers, “Towards a New Form of EU Law? The Use of EU Institutions outside the EU Legal Framework”, 9 *European Constitutional Law Review* (2013) 37.

or the ECB (or indeed the Parliament and the Council) under separate international agreements such as the ESM treaty.

Yet, the Court of Justice had accepted, in a couple of low profile judgments of the 1990s dealing with development aid, that the Commission could perform tasks entrusted to it by all the Member States under a separate international agreement. The EC Treaty, it held in the *Bangladesh* case, “does not prevent the Member States from entrusting the Commission with the task of coordinating a collective action undertaken by them on the basis of an act of their representatives meeting in the Council.”²⁹ And it repeated shortly afterwards, in the *Lomé* case that “no provision of the Treaty prevents the Member State from using, outside its framework, procedural steps drawing on the rules applicable to Community expenditure and from associating the Community institutions with the procedure thus set up”.³⁰

The case of the ESM Treaty is different from those earlier cases in that the attribution of new tasks was made, not by all the Member States acting together, but by a limited group of 17. This is a hypothesis which the Court of Justice had not yet addressed prior to the *Pringle* case. However, the non-participating Member States had, in fact, given their agreement for the use of the EU institutions. Already at the time the EFSF was created, in May 2010, the Council legal service, probably in consideration of the Court’s *Bangladesh* judgment, had prepared a short text which was adopted as a Decision of the representatives of the governments of the 27 EU Member States and simply stated: “The 27 Member States agree that the Commission will be allowed to be tasked by the euro area Member States in this context.”³¹ The same thing happened when the ESM Treaty was signed, as is mentioned in recital 10 of the preamble of the ESM Treaty: “On 20 June 2011, the representatives of the Governments of the Member States of the European Union authorized the Contracting Parties of this Treaty to request the European Commission and the European Central Bank to perform the tasks provided for in this Treaty.”

The importance of the tasks entrusted to the Commission and the ECB in the ESM treaty, compared to the rather anodyne administrative tasks of the Commission which had been challenged in the *Bangladesh* and *Lomé* cases, prompted the Court to add an extra condition for any institutional borrowing;

²⁹ Joined Cases C-181/91 and C-248/91, *European Parliament v Council and European Parliament v Commission*, [1993] ECR I-3685, para. 20.

³⁰ Case C-316/91, *European Parliament v Council*, [1994] ECR I-625, para. 41.

³¹ Council document 9614/10 of 10 May 2010. The words “in this context” refer to the other Decision of the same day, and published in the same document, through which the *euro state governments* (rather than *all 27 governments*) had agreed to set up the EFSF.

the extra tasks should not “alter the essential character of the powers conferred on those institutions by the EU and FEU Treaties”.³² This formula stems from some Opinions given by the Court in the context of the conclusion of international agreements by the EC, in which it had emphasized, by the use of that formula, that such agreements should not alter the institutional identity of the EU.³³ The formula is here transposed from the context of the EU’s external relations to the context of inter se agreements between the Member States. In applying the test, the Court finds – without surprise – that the ESM tasks entrusted to the Commission and the ECB do not affect the essential character of those institutions’ powers.

One way to understand and justify the Court’s rather liberal attitude towards the ancillary use of EU institutions in an intergovernmental framework, despite the strict language used by Article 13 TEU, is to distinguish between “powers” and “tasks”. What Article 13 TEU seeks to convey is that the powers of the institutions are fixed by the Treaties; it does not exclude that extra tasks may be given to the institutions as long as those tasks fit within their existing competences, and as long as all EU member states agree to “lend” the EU institutions. To explain this difference, a parallel can be made with secondary EU legislation, in which new tasks are often given to the Commission, e.g. to further implement a piece of legislation. Those tasks fit within the general constitutional mandate of the Commission, and do not affect the position of the other institutions, but they are *extra* tasks, in the sense that they are not specified with so many words in the Treaties but are being gradually defined as EU law develops. In the case of the ESM Treaty, this does not happen through secondary legislation but through a separate international agreement. Do those extra tasks fit within the institutions’ competences, as defined in particular by the TFEU chapter on economic policy? The Court of Justice thought so, and rightly in my view. In particular, the role given to the Commission and the ECB by Article 13 ESM treaty, to negotiate and monitor the Memorandum of Understanding with countries benefiting from financial support by the ESM, were modeled on the existing mode of operation under the EFSM Regulation, where the Commission and the ECB are called to coordinate the rescue operations, forming together with the IMF the so-called troika.

Crucially, the Court notes that “the duties conferred on the Commission and ECB within the ESM Treaty, important as they are, do not entail any power to make decisions of their own. Further, the activities pursued by those two

³² *Pringle* judgment, para. 158.

³³ Opinions 1/92, 1/00 and 1/09, referred to by the Court in the same para. 158 of the *Pringle* judgment.

institutions within the ESM Treaty solely commit the ESM".³⁴ Thus, the integrity of the EU legal and institutional order is preserved in two cumulative ways. First, because of the absence of decision-making powers under the ESM treaty there is no danger that the Commission and ECB will resort to law-making outside the constitutional constraints imposed by EU law (such as transparency, democratic accountability and respect for fundamental rights). And secondly, because their ESM-related activities will have no effects within the EU legal order, but only within the separate legal order of the ESM, the EU *acquis* (and its primacy over ESM law) will not be affected.

A borrowing of EU institutions also took place in the Fiscal Compact, the other *inter se* agreement concluded between 25 Member States at around the same time as the ESM treaty. One major difference, in that case, is that no formal text was adopted through which the two non-participating states, the United Kingdom and the Czech Republic, gave their authorization to the use of the EU institutions. Whether such an authorization, either explicit or implied, is a necessary requirement, is still unclear.³⁵ The Court of Justice saw no need to address that question in its *Pringle* judgment.

e) Consequences for the Institutional Balance and Constitutional Integrity of the European Union

My conclusion, also in the light of the *Pringle* judgment, is that none of the provisions of the ESM Treaty or the Fiscal Compact is, by itself, in breach of EU law. Later implementation of those treaties might lead either the ESM organs or the member states to act in conflict with EU law, and in that case the normal sanctions for infringement of EU law would apply. Also, if new EU law is made, in the near or distant future, which contrasts with any of the provisions of these two treaties, then the latter will have to be discontinued. Primary and secondary EU law both have precedence over *inter se* agreements between EU member states; that is quite clear and undisputed.

So far, I have only discussed the question of the legal compatibility between the *inter se* treaties and EU law. But the resort to public international law also has consequences for the general institutional balance in the European Union. That assessment is different for the Fiscal Compact and for the ESM Treaty. The Fiscal Compact may be deeply problematic from a national constitutional perspective (by heavily constraining the budgetary powers of national

³⁴ *Pringle* judgment, para. 161.

³⁵ See, for discussion of that question in the context of the Fiscal Compact: S. Peers, *supra* note 29; P. Craig, *supra* note 22, at 240-247.

parliaments), but much less so from an EU institutional perspective. Indeed, the only institutional novelty created by that treaty is the meeting of the Heads of State or Government of the Contracting Parties, but that organ does not have any decision-making powers, and is just going to involve another form of 'hat switching' at European Council meetings. For the rest, the Fiscal Compact will probably give rise to little activity at the European level, and that activity will be implemented by the EU institutions (mainly the Commission and the Court of Justice) which have been 'borrowed' for that purpose.

The ESM Treaty is more problematic in that it creates its own parallel institutional structure of decision-making outside the EU framework. Even though, here again, there is some borrowing of the EU institutions (mainly the Commission, for negotiating memoranda of understanding with beneficiary countries), the formal decision-making power relating to stability support schemes is put in the hands of the Board of Governors or the Board of Directors. In personal terms, the members of these Boards are going to be the same people who compose the Ecofin formation of the Council and its working groups, but when acting within the ESM framework they are not subject to the normal constraints of EU law, such as the Commission's power of initiative, parliamentary control and judicial review. The financial support regime of European economic governance is, indeed, marked by a high degree of intergovernmentalism which contrasts with the steady advance of supranational elements in other areas of EMU law.

Many authors have noted the constitutional deficiencies caused by the choice to establish the ESM as a separate international organisation rather than as an EU agency. The criticism can be summarized by the following citation from a paper by Tuori: "Stability mechanisms, such as the EFSF and the ESM, operate as separate financial institutions outside the Treaty framework, with their own intergovernmental decision-making bodies and behind the shield of far-going immunity and confidentiality. Intergovernmental stability mechanisms remain outside the scope of application of both Treaty provisions on the principle of transparency and complementary secondary legislation. Such an institutional development makes any control by the European parliament or national parliaments, not to mention civil society and the citizenry, extremely difficult."³⁶ This is very true, but the fact remains that, when the Euro area countries wanted to set up a major rescue fund in order to preserve the stability of the euro area (a decision which, itself, seems very reasonable), EU law did not provide them with sufficient legal and financial resources, so that "going outside" and setting

³⁶ K. Tuori, "The European Financial Crisis - Constitutional Aspects and Implications", *EUI Working Papers*, LAW 2012/28, at 47.

up a separate international organisation was the only available solution. The creation of the ESM should, therefore, not be seen as an “intergovernmental plot” through which the Euro area governments sought to escape from the constraints of EU law and to exclude any involvement of the Commission and the Parliament. Indeed, they sought to preserve a number of links with the EU legal order through the borrowing of EU institutions.

More fundamentally, even if a mechanism like the ESM could have been established on the basis of EU law and with funds allocated under the EU budget, this would not have been a sufficient reason to exclude the conclusion of a separate international agreement. *Inter se* agreements between EU Member States remain permissible in principle, and useful in practice, in the fields that do not come within the EU’s exclusive competence, and the Court of Justice has pragmatically accepted this legal reality. At the same time, it has reaffirmed the primacy of EU law over such separate agreements, and its own jurisdiction to control whether the Member States respect their EU law obligations when concluding separate international agreements. There are many things one can criticize about the euro crisis policy, particularly its heavy-handed insistence on austerity policies at the national level; but it has not led, so far, to a fundamental revolution in the EU legal order and in the balance between the European Union institutions.