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La protección del ciudadano-consumidor

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Capítulo I

The New Architecture of the European Economic Governance: a Leviathan or a flat-footed Colossus?[1]

Dr. Nicolas de Sadeleer

1. Introduction

Due to the accumulation of structural deficits by certain Member States, bail-outs of debt-ridden banks and fiscal stimulus plans intended to re-launch growth, budget deficits started rapidly expanding after 2009. Accordingly, the 2008 financial crisis was followed by a substantial fiscal crisis which compromised the financial stability of the eurozone as a whole.

Among the different reasons for the crisis which is undermining the European construction, many authors have been highlighting the asymmetry of the Economic and Monetary Union (EMU). On the one hand, a single currency falling under an exclusive competence with its own independent central bank (the ECB) which has permitted the monetary Europe to speak with one single voice, whilst on the other hand the prevailing disorder where national economic policies are not integrated but only set within limits.[2] As far as the latter are concerned, as it is known the Member States retain their

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1 The author Jean Monnet Chair, Professor at the Facultés universitaires Saint-Louis, Visiting Professor at the Catholic University of Louvain would like to thank J.V. Louis for his most valuable help. In addition, he expresses his gratitude to Mr T. Roberts and Mrs L.A. Nyssens for their invaluable support. He wishes also to thank the two anonymous reviewers for their brisk comments.

2 The powers of the EU are shared in the area of coordination of economic and employment policies as well as of social policies (Articles 4(1) and 5 TFEU). Unlike shared competences listed in Article 4(2), these competences are only the subject of coordination measures, and not of legislative harmonisation (Article 5 TFEU). On the other hand, the EU enjoys exclusive competence in the area of monetary policy for Member States whose currency is the euro (Article 4(1) c) TFEU).

sovereignty subject to compliance with a certain number of headline principles, such as sound public finances and an 'open market economy with free competition'.[3] The ECB has therefore been required to determine monetary policy without being able to count on the support of a genuine European economic government. This situation has persisted since the German authorities for many years considered that the establishment of a European economic government would end up leaving a sword of Damocles hanging over the independence of the ECB.[4]

Whilst this new crisis laid bare the weaknesses within economic integration, it has not however sounded the death knell for political Union, which has to some extent been reinforced. Indeed, over the course of the last two years a range of new mechanisms have risen out of the depths of the European Union: the Euro Plus Pact, the European Semester, the "six-pack" rules, the "two-pack" proposals, and the Treaty on Stability, Coordination and Governance. All in all, these mechanisms are intended to reinforce fiscal discipline. There is a question as to whether this masks a deep-seated crisis of identity within the EU institutions which are simply at a loss what to do, or should one see here a real desire to reinforce the EMU, which recently fell victim to a congenital defect?

The first part of this article summarises the succession of mechanisms which have made economic governance possible and discusses their contribution to the reinforcement of fiscal discipline. The second part shows how this flurry of reforms is likely to impact of on the principle of institutional balance.[5]

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3 Article 119(1) TFEU.

4 N. Jabko, 'Which Economic Governance for the EU?', 2 *SIEPS* (2011), p. 12.

5 J.P. Jacqué 'The principle of Institutional Balance' 41 *CMLRev* (2004) 383.

2. The architecture of the New Economic Governance

A. Introductory comments

In the wake of the financial crisis, the EU has implemented various mechanisms in incremental stages in order to stop the financial and the budgetary crisis from spreading. In an attempt to remedy inadequacies within the organisation of the prudential oversight system for financial establishments which the 2008 crisis had laid bare, it first adopted a European System of Financial Supervisors (ESFS) comprised of three sector authorities (banks, insurance and pension companies, and markets and financial services) as well as a European Systemic Risk Board (ESRB).[6] Since this paper is focused on macro-economic and fiscal control, this question will not be addressed, even though we are all aware of the role which the ESFS is required to play within the new control structure within the system of economic governance.[7]

Subsequently, a common debt fund in the form of a limited company incorporated in Luxembourg (European Financial Stability Facility (EFSF)) was established on 9 May 2010 by the 17 Member States of the eurozone.

Starting from 2013, the European Stability Mechanism (ESM), a new intergovernmental agreement concluded by the 17 Member States of the eurozone in accordance with paragraph 3 of Article 136 TFEU, will replace the EFSF and

6 N. Moloney, 'EU Financial Market Regulation after the Global Financial Crisis: 'More Europe' or More Risks ?', 47 *CMLRev* (2010), p. 1317-1383 ; F. Martucci, J. Lasserre Capdeville and J.-P. Kovar, 'Le système européen de surveillance financière', 6 *Europe* (June 2011) 4-9 ; Fr. Van der Mensbrugghe, 'New Pan-european regulators for the financial sector', *Annales d'études européennes de l'UCL* (2011), p. 165-1863 ; J.V. Louis, 'The Unexpected Revision of the Lisbon Treaty and the Establishment of a European Stability Mechanism', in D. Ashiagbor, N. Contourids, I. Lianos (eds), *The European Union after the Treaty of Lisbon* (Cambridge, Cambridge University Press, 2012).

7 The work of the ESRB shall be taken into due consideration in the drafting of indicators relevant to financial market stability. The Commission shall invite the ESRB to provide its views regarding draft indicators, relevant to financial market stability. See article 4(5) Regulation (EU) No 1176/2011 of the European Parliament and of the Council of 16 November 2011 on the prevention and correction of macroeconomic imbalances, 2011 OJ L306/25.

the European Financial Stability Mechanism (EFSM)[8] with a view to providing financial assistance to the Member States of the eurozone.

A simplified reform of Article 136 TFEU was necessary[9] in order to circumvent the "no bail-out" rule enshrined in Article 125 TFEU.[10] On 25th March 2011, the European Council adopted in virtue of Article 48(6) TFEU, under the heading, *simplified revision procedures,* Decision 2011/199/EU. That decision amends Article 136 TFEU with regard to a stability mechanism for Member States whose currency is the euro. A third paragraph is added to article 136 TFEU. It reads as follows: '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'. The Irish Supreme Court has decided to refer to the Court of Justice pursuant to Article 267 TFEU the question of the validity of the European Council Decision and the question of whether Ireland, by entering into and ratifying the ESM Treaty, would undertake obligations incompatible with the Union Treaties. The plenary session of the Court of Justice is called on to give preliminary rulings on the validity of the European Council Decision.

Besides, the EU has redrawn the Lisbon Strategy (EU 2020) (B) and 23 Member States have concluded the Euro Plus Pact (C).

Taking account of the unprecedented scale of this crisis, the European Parliament and the Council of the European Union adopted six legislative measures (5 regulations and a directive) during the Autumn of 2011 (the "six-pack") intended to remedy deficiencies in the Stability and Growth Pact (SGP), in particular by reinforcing and expanding the range of preventive and corrective mechanisms. Four acts deal with fiscal issues whereas the two others aim at detecting and addressing emerging macroeconomic imbalances with the EU and the euro area (D).

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8 Council regulation (EU) No 407/2010 of 11 May 2010 establishing a European financial stabilisation mechanism, 2010 OJ L118/1.

9 See the Decision of the European Council of 25 March 2011, OJ 2011 L 91/1.

10 J.-V. Louis, 'The No-Bailout Clause and Rescue Packages', 47 *CMLRev* (2010), p. 971-986.

Finally, the decision taken on 9 December 2011 by the heads of State and government meeting within the European Council, except the British Prime Minister and later the Czech authorities, to sign an intergovernmental agreement on 1 March 2012 on Stability, Coordination and Governance in the Economic and Monetary union (TSCG) completes this structure. Accordingly, the TSCG of 1 March 2012 will be considered (E).

All these measures fulfil the objectives set out by the Task Force on Economic Governance in the EU established by the European Council of 25-26 March 2010 (see fig. 1).

2010 Task Force on Economic Governance Proposals	Implementation
Enhancing fiscal discipline	Euro Plus Pact, six-pack, two-pack, Fiscal Compact
Broadening multilateral surveillance	Regulations 1174 and 1176/2011 on macroeconomic surveillance and directive 2011/85
Policy coordination	European Semester
Crisis management	EFSF, EFSM, ESM
Reinforcement of economic governance	Euro Plus Pact, six-pack, Fiscal Compact

Fig. 1

B. The Europe 2020 Strategy

By replacing the Lisbon Strategy whilst retaining the open coordination method, the 2020 Strategy adopted by the European Council in 2010 is principally aimed at enhancing competitiveness. Its success is conditional upon the means implemented by the Member States. The Strategy has three priorities:

- intelligent growth
- based on knowledge and innovation,
- which is sustainable and inclusive (high employment rates and economic, social and territorial cohesion).

National reform programmes (NRP) must be presented at the same time as stability and convergence programmes within the context of the European Semester which will be discussed below. In contrast to convergence and stability programmes which pursue lasting ordering of public finances, the NRP implement major planks of economic and social policy.

C. The Euro Plus Pact

At their meeting on 11 March 2011, the heads of State and government from the eurozone as well as 6 other Member States which do not use the euro as their currency adopted the idea initially mooted by Germany of a competitiveness pact. Following a non-binding inter-governmental approach aimed at reinforcing the treaty mechanisms on the fight against excessive deficits, the Euro Plus Pact is based on four leading rules: the reinforcement of economic governance, the improvement of competitiveness and convergence of States' levels of competitiveness, the integrity of the single market and the involvement of the Member States.

It may be recalled in particular that this Pact invites the parties and national Parliaments to establish the "budgetary golden rule" which is already written into certain national constitutions,[11] which will now be imposed on the parties to the TSCG.[12]

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11 Article 109 of the *Grundgesetz* provides for that 'In managing their respective budgets the Federation and the Länder shall take due account of the requirements of the overall economic equilibrium'. Spain was the second country after Germany to approve a "golden rule" of budget stability in the constitution. On the 7th of September 2011, the Spanish Senate approved an amendment to article 135 of the constitution introducing the requirement of a balanced budget provision and a strict limit on the indebtedness that both the national government and the regional governments may incur. On the 7th of September 2011, the Italian Lower House approved a constitutional reform introducing a balanced budget obligation (Article 81). See J.-V. Louis, 'La nouvelle 'gouvernance' économique de l'espace euro', in *Mélanges en hommage au professeur Joël Molinier* (Paris, Lextenso éditions, 2012).

12 See *infra*, E.

Moreover, this Pact applies to matters which in some cases are amenable to harmonisation under Union law (tax harmonisation pursuant to Article 113 TFEU), whilst in others fall under national jurisdiction (agreements between social partners on wage moderation). Control over the commitments made by the States parties to the Pact is assured by their peers. Each year, the States parties will report on the projects adopted in order to honour their commitments. Their implementation must be incorporated into the NRP provided for under the 2020 Strategy as well as into stability and convergence programmes provided for under the SGP. The Commission is also required to play a role in assessing compliance with these commitments.

D. The reinforcement of the SGP

1. Introductory remarks

Mindful of the fragility of this construction and of the risk that the Member States will relax their budgetary discipline due to the protective function of the Euro, in 1997 the European Council and the Council of the European Union adopted an alternative form of European governance: the SGP. Concluded after the Maastricht Treaty once EMU had become a reality, this Pact had the merit of setting out guideline rules within the euro area. It consists formally in a resolution of the European Council of 17 June 1997 and two regulations adopted by the Council on 7 July 1997.[13]

The SGP is based on two pillars: on the one hand, a preventive approach involving multilateral surveillance, and on the other hand a corrective dimension relating to the sanctions procedure for excessive public deficits. The preventive and corrective limbs should not be regarded in isolation.[14] Indeed, both mech-

13 Regulation (EC) No 1466/97 of the Council of 7 July 1997 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies, 1997 OJ L209/1; Regulation (EC) No 1467/97 of the Council of 7 July 1997 on speeding up and clarifying the implementation of the excessive deficit procedure, 1997 OJ L209/6. See. J.-V. Louis, *Commentaire J. Mégret. L'Union européenne et sa monnaie* (Brussels, Presses de l'ULB, 2009), p. 108-115.

14 Recital 19 of Directive 2011/85/EU of the Council of 8 November 2011 on requirements for budgetary frameworks of the Member States, 2011 OJ L306/41. See in particular Regulation 1173/2011 (EU) of 16 November 2011 which sets out a system of sanctions for enhancing the enforcement of the preventive and corrective parts of SGP in the euro area.

anisms are intended to force Member States to reduce the ratio between their forecast or actual public deficit as a percentage of GDP to 3% and to lower their public debt as a proportion of GDP to 60%.[15] In thereby guaranteeing sustainable levels of public debt, compliance with these two thresholds could have led to a harmonisation of budgetary policies without feeling the need, following the spirit of the framers of the SGP, to establish genuine economic governance.[16]

However, the SGP has not produced the expected effects since the Council enjoyed broad discretionary powers as to compliance by national authorities with the criteria which, following the difficulties encountered by France and Germany in respecting them,[17] were relaxed in 2005.[18] Whereas they should have been close to equilibrium, certain budget deficits continued to grow, especially after the 2008 economic downturn. Moreover, any application of the regime of fines provided for under the sanctions procedure for excess public deficits would have been tantamount to using a sledgehammer to crack a nut; when the nuclear option is available one tends not to use it.

Seeking to reinforce economic governance within the EU and more specifically within the euro area, the fiscal discipline has been reinforced significantly by the "six-pack" which is comprised of five regulations and one directive. These six acts, which were adopted by the Parliament during the first reading on 28 September and by the Council on 4 October 2011, entered into force on 16 December 2011. The architecture of the "six-pack" is somewhat complicate.

Two regulations (1175/2011 and 1177/2011) contain significant amendments to the preventive and corrective mechanisms of the SGP provided for under regulations 1466/97 and 1467/97 (subsections 2 to 4). A third regulation

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15 Article 126(2) TFEU and Protocol n°12 on the excessive deficit procedure.

16 J.-P. Fitoussi, 'Politiques macroéconomiques et réformes structurelles: bilan et perspectives de la gouvernance économique au sein de l'UE', 120 *Revue d'économie publique* 2 (2010), p. 253.

17 Case C-27/04 *Commission v. Council* 2004 ECR I-6649.

18 Regulation (EC) No 1055/2005 of the Council of 27 June 2005 amending Regulation (EC) No 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies, OJ 2005 L174/1.

(1173/2011) concerning the effective implementation of fiscal surveillance of the eurozone reinforces the two limbs of the SGP.[19]

In addition to strengthening fiscal discipline with the intention of reducing public debt levels, the "six-pack" will also guarantee enhanced coordination of surveillance and evaluation rules which had proved to be indispensable due to the accumulation of the programming process. Since the programming and assessment of several national programmes by different institutions raises important coordination problems, enhanced coordination has proved to be indispensable, in particular through the "European Semester" (subsection 5).

Moreover, two additional regulations on macro-economic surveillance (1176/2011 and 1174/2011) are introducing a new mechanism for macroeconomic surveillance entailing an excessive imbalance procedure (subsection 5).

Finally, a directive (2011/85) harmonizes the budgetary frameworks of the Member States with a view to avoiding excessive deficits (subsection 6). All in all, four of these acts are related to fiscal control whereas the two others are seeking to enhance macroeconomic convergence.

2. Enhancing fiscal discipline through the reinforcement of the preventive arm of the SGP

As stated as above, the SGP is focused on the one hand on a preventive dimension under Regulation 1466/97, based on multilateral surveillance of States from the eurozone, which are required to present their medium-term budgetary objectives (MTOs) which are set out to ensure public finance sustainability.

The MTOs pursue a triple aim:

- providing a safety margin with respect to the 3% of GDP deficit limit,
- ensuring rapid progress towards sustainability,
- allowing room for budgetary manoeuvre, in particular taking into account the needs for public investment.[20]

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19 Regulation (EU) No 1173/2011of the European Parliament and of the Council of 16 November 2011 on the effective enforcement of budgetary surveillance in the euro area, 2011 OJ L306/1.

20 Ecofin Council, *Specifications on the implementation of the Stability and Growth Pact and Guidelines on the format and content of Stability and Convergence Programmes* (2010), p. 4.

Since 1997 the Member States have been subject to an obligation to achieve in a differentiated manner their MTOs along the adjustment trajectory. Accordingly, the MTOs are differentiated for individual Member States according to the diversity of economic and budgetary positions and developments, the fiscal risk to the sustainability of public finances, as well as the prospective demographic changes. As a result, the country-specific MTOs may diverge from the SGP requirement of a close to balance or in surplus fiscal position.[21] They are likely to be more stringent where the level of debt and estimated costs of an ageing population are higher.

The MTOs are reviewed every three years.[22] They are set out within a stability programme (for Member States in the eurozone) or a convergence programme (for Member States outside the eurozone), updated every year. These programmes serve as a basis for multilateral surveillance by the Council, which in virtue of Article 121 TFEU should ward off, at an early stage, the occurrence of excessive public deficits and promote the coordination of economic policies. Accordingly, the annual stability or convergence programmes must demonstrate how the Member States are intent upon achieving sound fiscal positions in the medium term. In the context of their assessment, the Commission assesses these programmes and the Council gives its opinion on them. Where the Council considers that the MTO should be strengthened, it can invite the Member State concerned to adjust its programme. Pursuant to Article 121 TFEU, a rapid alert system enables the Ecofin Council to address a recommendation to a State in the event of budgetary overrun.

Let us turn to the more fundamental questions that arise here: the criteria underpinning in the budgetary surveillance framework and the sanctions.

So far, the implementation of the SGP has focused mainly on the *deficit criterion*. However, in the past, certain governments have run up public debts during periods of growth, whilst they should have taken advantage of such periods in order to reduce their debts. In doing so they voluntarily deprived themselves of the ability to adopt stimulus policies during subsequent periods of deep re-

21 Articles 3 (2) and 7(2) of Regulation 1466/97.

22 Article 2 bis (3) of Regulation 1466/97 as amended by Regulation (EU) No 1175/2011.

cession. In other words, the debts became so high that it is no longer possible to increase them in order to deal with emergency situations.

Admittedly, there has been a growing awareness of the need to broaden the scope of the multilateral surveillance. In this connection, the Task Force on Economic Governance that was established by the European Council of 25-26 March 2010 took the view that 'the high indebtedness is a drag on medium- and long-term growth prospects, aggravates the risk of financial instability and reduces the ability to run counter-cyclical fiscal policies when the need arises'.[23]

In placing henceforth the focus on public debt and fiscal sustainability in the budgetary surveillance framework, the "six-pack" marks a turning point. In effect, the priority will now focus on *debt reduction*, in particular through the allocation to future years of exceptional debt reduction measures.[24] This should make it possible to avoid situations in which measures are not allocated as a priority to reducing the debt, as occurred in the past. In other words, indebted Member States will have to start putting aside after years of lavish spending.[25]

In addition, the « six-pack » defines a new 'expenditure benchmark' to assess progress towards the country-specific MTOs. This benchmark places a cap on the annual growth of public expenditure according to a medium-term rate of growth. For Member States that have not yet reached their MTOs, the rate of growth of expenditure should be below this reference rate with a view to ensuring adequate progress. In particular, if that that norm is not matched, the Member States are called on to increase government revenues. Conversely, discretionary revenue reductions have to be compensated by reductions in expenditure.[26]

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23 Report of the Task Force to the European Council, *Strenghtening economic governance in the EU* (Brussels, 21st October 2010), p. 7.

24 Recital 18 and article 5(1), 2nd al. of Regulation 1466/97 as amended by Regulation (EU) No 1175/2011; Recital 18 of Directive 2011/85/EU of the Council of 8 November 2011 on requirements for budgetary frameworks of the Member States, 2011 OJ L306/41.

25 It must be noted that in its 2010 Specifications on the Implementation of the SGP, the Ecofin Council already invited the Member States 'to use unexpected extra revenues for deficit and debt reduction'. See Ecofin Council, *Specifications on the implementation of the Stability and Growth Pact, above* (2010), p. 5.

26 Recital 20 of Regulation 1466/97 as amended by Regulation (EU) No 1175/2011.

That being said, as far as the fiscal positions of the Member States are concerned, the MTO can still be watered down. In effect, Member States may disregard it, 'while providing a safety margin with respect to the 3% of GDP government deficit ratio'.[27]

It must also be noted that the respect of the MTOs shall be included in the national medium-term budgetary frameworks in accordance with Chapter IV of Council Directive 2011/85/EU of 8 November 2011 on requirements for budgetary frameworks of the Member States, commented below.[28]

The new regime of sanctions merits also special note. As discussed above,[29] the SGP has been suffering from a credibility problem for a long time. Indeed, during the first decade, when the violation of the rules on excessive deficits was chronic, no fines were imposed against the offending Member States. From now on however, the preventive arm will be reinforced by the adoption of a regime of progressively increasing sanctions starting from an early stage. If a Member State in breach fails to adopt measures following a recommendation by the Council identifying a significant departure of its fiscal position from the MTO, the Council may require it to lodge an interest bearing deposit of 0.2% of GDP[30] with it, as a precursor to infringement proceedings, which may be transformed at a later stage (corrective limb) into a non-interest bearing deposit. [31] These sanctions have been put in place in order to reinforce the credibility of the prevention measures.[32] Moreover, the reverse qualified majority procedure guarantees henceforth that these sanctions will be applied almost automatically.[33] It follows that the Council's powers are in actual fact extremely limited be-

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27 Article 2 bis(2) of Regulation 1466/97 as amended by Regulation (EU) No 1175/2011.

28 Article 2 bis (4) of Regulation 1466/97 as amended by Regulation (EU) No 1175/2011.

29 D, 1.

30 Article 4(1) of Regulation (EU) 1173/2011 of 16 November 2011 on the effective enforcement of budgetary surveillance in the euro area, 2011 OJ L306/1.

31 Subsection 3.

32 J.V. Louis, *Mélanges en hommage au professeur Joël Molinier*, p. 6.

33 Article 4(2) of Regulation (EU) No 1173/2011 of 16 November 2011 on the effective enforcement of budgetary surveillance in the euro area, 2011 OJ L306/1.

cause the Commission's proposals can only be amended or rejected within a specific time limit by qualified majority.[34] The Commission is fully aware of its new prerogatives.

3. Enhancing fiscal discipline through the reinforcement of the corrective arm of the GDP

Since 1997, a corrective mechanism, the implementation of which is assured by Regulation 1467/97, ensures the implementation of the excessive deficit procedure (EDP) laid down in Article 126 TFEU. The EDP is triggered by the deficit exceeding the 3% of GDP threshold. In case the deficit is deemed to be excessive, the Council issues a recommendation to the Member States concerned to correct their excessive deficits and gives a time frame for doing so. Today, 21 out of 27 Member States are still in EDP. Finland, Sweden, Lituania and EE are not subject to an EDP. In May 2012, concluding that the correction of the excessive deficit for Germany and Bulgaria is ensured, the Commission recommended that the Council abrogates the EDP, as foreseen in Article 126(12) TFEU, for these two Member States.

The changes brought to the corrective arm by the "six-pack" originates in response to the concern that the EDP has not been effective in curbing debt development. As far as the corrective aspect is concerned, the debt surveillance framework has been strengthened: in addition to the public sector deficit criterion (3%), the debt criterion (60%) will now be applied.[35]

Accordingly, the Member State must reduce by 1/20th annually (on average over 3 years) the gap between its debt level and the 60 % reference for the debt-to-GDP ratio.[36] As emphasized below, Article 4 TSCG en-

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34 At the outset the European Parliament supported this reform whereas Germany and France opposed it.

35 Article 2 (1bis) 2nd al. of Regulation 1467/97 as amended by Regulation (EU) No 1177/2011.

36 Article 5(1) al. 1 and 2 of Regulation 1466/97 as amended by Regulation (EU) No 1175/2011. It ought to be remembered that in accordance with the report on the SGP reform endorsed by the European Council on 22 March 2005, euro area and ERM II Member States that have not yet reached their MTOs should achieve an annual adjustment in cyclically adjusted terms, net of one-offs and other temporary measures, of 0,5 % of GDP as a benchmark. By the same token, in its *2010 Specifications on the Implementation of the SGP*, the Ecofin Council invited the Member States subject to an EDP procedure to achieve a minimum annual impovement in its cuclically adjusted balandce of at least 0.5% of GDP as a benchmark. See Ecofin Council,

shrines the same requirement. In order words, the ratio of the difference between public debt and the 60 % debt-to-GDP threshold must fall by 5% annually.[37]

What is more, even Member States which respect the public deficit criteria will now be required to adopt measures in order to bring their public debt below the 60% threshold. Accordingly, bringing the deficit below 3% of GDP is not sufficient any more for the abrogation of the EDP unless the debt has been put on a satisfactory declining path. As a result, an EDP may be launched where the Member State does not comply with the debt-reduction pace requirement. Nonetheless, EDP Member States already in EDP in January 2012 having to comply with agreed fiscal consolidation paths, benefit a transitional period of three years.

The Council of the European Union and the Commission are called on to examine whether the Member State concerned is improving its budget situation in applying such standards.

Financial sanctions provided for in Article 126(11) TFEU must henceforth constitute a real incentive for compliance with the notices under Article 126(9) TFEU.[38]

As far as the eurozone members in breach of their SGP obligations are concerned, this change in scale will furthermore imply a new set of gradual financial sanctions that can be imposed throughout the procedure. The Council may require the Member State concerned to lodge an interest bearing deposit of 0.2% of GDP with it, which may be transformed into a non-interest bearing deposit.[39] The interest-bearing deposit imposed should be released to the Member State concerned together with the interest accrued on it once the Council has been satisfied that the situation giving rise to the obligation to lodge that deposit has come to an end. Besides deposits, fines may be imposed. In effect, if no action is taken in order to correct the exces-

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Specifications on the implementation of the Stability and Growth Pact (2010), p. 8.

37 Article 2 (1bis) 1st al. of Regulation 1467/97 as amended by Regulation (EU) No 1177/2011.

38 Recital 21 of Regulation 1467/97 as amended by Regulation (EU) No 1177/2011.

39 Articles 4 and 5 of Regulation (EU) No 1173/2011 of 16 November 2011 on the effective enforcement of budgetary surveillance in the euro area, 2011 OJ L306/1.

sive deficit, in a third stage the Council may, acting on the basis of a Commission recommendation, impose a fine of up to 0.2% of GDP on the State concerned.[40] The effectiveness of these sanctions should be buttressed by the new reverse qualified majority procedure.[41] What is more, the parties to the TSCG are committing themselves to support the proposals submitted by the Commission where it considers that a Member State whose currency is the euro is in breach of the deficit criterion in the framework of an EDP procedure.[42]

In contrast, for non-eurozone members in breach of their SGP obligations, the Council is empowered to adopt decisions (qualified majority) imposing fines based on Article 126(11) TFEU with respect to non-effective action in response to the notice to correct the excessive deficit under Art. 126(9) TFEU.[43] Therefore, the Commission has to reckon upon the suspension of Cohesion Fund commitments for non-eurozone Member States subject to an EDP which are not taking effective action at an early stage to correct it. For instance, in January 2012 the Commission threatened Hungary with a freeze on its EU development funds for the year 2013 if it does not comply with the new rules.[44]

The table (fig. 2) describes the new enforcement measures underpinning the SGP in the Eurozone.

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40 Article 6(1) of Regulation (EU) No 1173/2011.

41 Article 5(2) of Regulation (EU) No 1173/2011.

42 Article 7 TSCG.

43 Articles 10 and 11 of Council Regulation (EU) No 1177/2011 of 8 November 2011 amending Regulation (EC) No 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure, 2011 OJ L306/33.

44 However, in May 2012 the Commission has concluded that Hungary has taken the necessary corrective action to correct its excessive deficit for the lifting of the suspension of its Cohesion Fund commitments amounting 500 million euro.

Trigger of the sanction	Sanction	Voting procedure
Council decision establishing failure to take action in response to a Council recommendation under Art. 121(4) TFEU.	Interest-bearing deposit in virtue of Article 4 of Reg. 1173/2011 (as a rule 0.2% of GDP)	Reverse qualified majority voting (RQMV)
Council decision based on Art.126(6) TFEU	Non-interest-bearing deposit in virtue of Article 5 of Reg. 1173/2011 (as a rule 0.2% of GDP)	RQMV
Council decision based on Art.126(8) TFEU (i.e. non-effective action in response to the recommendation to correct the excessive deficit under Art. 126(7))	Fine in virtue of Article 6 of Reg. 1173/2011 (as a rule 0.2% of GDP)	RQMV
Council decision based on Art.126(11) TFEU (i.e. non-effective action in response to the notice to correct the excessive deficit under Art. 126(9))	Fine in virtue of Article 11 of Reg. 1467/97 as amended (0.2% of GDP + variable component)	Qualified majority voting

Fig. 2

4. The European Semester: deeper and broader coordination

The "European Semester" indubitably constitutes the great novelty of the reform.[45] From now on, the cycle of surveillance and coordination will operate within a synchronised framework. The European Semester, which was organised in an informal manner in 2011 on the basis of a decision of the Ecofin Council of 6 September 2010, a second European Semester will be required during 2012 under Regulation (EC) no. 1175/2011 amending Regulation (EC) no. 1466/97.[46] This semester has the object of ensuring closer coordination of economic policies and a sustained convergence of economic performance of the

45 J.V. Louis, 'The Enforcement of Economic Governance' *in* M. Lepoivre, J. Keller-Noëllet and S. Verhelst (eds.), *The European Union and Economic Governance. Studia Diplomatica,* LXIV-4 (2011), p. 58-61.

46 Articles 11 and 12 of Regulation 1466/97 as amended by Regulation (EU) No 1175/2011.

Member States within the context of multilateral surveillance under the preventive part of the SGP.[47]

This will make it possible to monitor in particular the implementation of broad economic policy guidelines (BEPG)[48] as well as guidelines for employment.[49] It also includes the stability or convergence programmes provided for under Regulation 1466/97.[50] A further novel feature is the provision that the NRP intended to implement the Union's growth and employment strategy may be assessed.[51]

This coordination certainly has the merit of increasing interdependence between the different programming processes, which appears to be justified given that structural policies are closely related to fiscal policies. On the one hand the former must be financed by the latter, whilst on the other hand the States are entitled to expect tax revenues to climb following increases in growth.

Though they remain separate, the existing surveillance processes are henceforth aligned in terms of timing. The "Semester" will commence at the start of the year with a horizontal assessment by the Commission based on an annual report on growth (January)[52] which will enable the European Council to formulate strategic guidance (March). Starting from April, this guidance will have to be taken into account within medium-term budget strategies as part of stability programmes (for the 17 Member States of the eurozone) or convergence programmes (for the 10 other States) as well as in NRP seeking to guarantee the objective of the Europe 2020 Strategy. The last stage of the "Semester" will be concluded during June and July with the formulation of political guidelines

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47 Article 2 bis (1) of Regulation 1466/97 as amended by Regulation (EU) No 1175/2011.

48 Articles 5(1) and 121(2) TFEU. See Council Recommendation 2008/390/EC of 14 May 2008 on the broad economic policy guidelines for the Member States and the Community (2008-2010), 2011 OJ L 137/13.

49 Article 148(2) TFEU.

50 See the Code of conduct of the Ecofin Council of 7 September 2010. See the Specifications on the implementation of the Stability and Growth Pact and Guidelines on the format and content of Stability and Convergence Programmes.

51 *Supra*. B.

52 The 2012 Commission report was adopted on 23rd November 2011 and not in January 2012. See Communication from the Commission, Annual Growth Survey 2012, COM(2011) 815 final.

by the Council and the Commission for each country. Moreover, the budgetary criteria specified for the following year will be required to comply with the guidelines specified during the semester.

- **January**: the Commission publishes its annual report on growth, setting priorities for the EU in order to stimulate growth and create employment over the coming year.
- **March**: the European Council adopts the EU guidelines on national policies.
- **April**: the Member States submit their stability or convergence programmes as well as their NRP.
- **June**: the Commission evaluates the programmes and addresses its own recommendations to each State. The Ecofin Council examines these recommendations and the European Council approves them.
- **July**: The Ecofin Council formally adopts the recommendations for each country.

Is the coordinated assessment at EU level likely to ensure that the EU/euro area dimension is better taken into account when Member States prepare their budgets and their PNR? Whether this coordination will contribute to a higher degree of policy coordination among Member States remains to be seen.

That being said, the Member States must take due account of the recommendations issued by the European Council when drawing up their economic, employment and fiscal policies before taking any major decision concerning their national budgets for the coming years. The failure by the State authorities to respond to the guidelines which are issued to them could result in new recommendations from the Council of the Union, a warning from the Commission under Article 121(4) TFEU on multilateral surveillance, or in economic control measures.[53]

The table below describes the different mechanisms underpinning the preventive branch of SGP.

53 Article 2 bis (3) of Regulation 1466/97 as amended by Regulation (EU) No 1175/2011.

Preventive Arm SGP (I)			
Treaty Law	**Object**	**Legal basis**	**Instruments**
Multilateral surveillance	Coordination of the macroeconomic and microeconomic policies	Articles 5 and 121(1)-(3) TFEU Article 148(2) TFEU	BGEP (Council Recommendation 2010/410) Employment guidelines (Council Decision 2008/618)
Warning Mechanism		Article 121(4) TFEU	ECOFIN Recommandation

Preventive Arm SGP (II)				
Soft Law		**Object**	**Member States Duties**	**Enforcement**
Resolution SGP 1997	European Council 1997	Orientations regarding the SGP enforcement		European Council
Strategy Europe 2020	European Council 2010	Intelligent growth	NPR	European Council Recommendations Commission recommendations
Euro Plus Pact	European Council 24-25/3/2011	Coordination of economic policies	Golden rule and additional commitments	Member States Assessment by the Commission
European Semester	-Specifications SGP and Guidelines ECOFIN 7/9/2010 -European Council March 2011 -Article 2bis Regulation 1466/97	Cycle of surveillance and coordination operates within a synchronised framework	Stability / convergence programmes And NRP	**UPSTREAM** Commission report ECOFIN European Council orientations **DOWNSTREAM** Commission project Council approval ECOFIN orientations

Figs. 3 and 4

5. Broadening economic surveillance to encompass macro imbalances and competitiveness

The SGP also suffered from other faults. In effect, the debt crisis has uncovered gaps within the surveillance both of fiscal and economic policies. Since healthy public finances may mask excess levels of household debt, housing bubbles, lack or loss of competitiveness, price and salary growth, unbalanced patterns of trade and investment, the deficit threshold is certainly not the only bulwark against the risk of insolvency. Indeed, in focusing exclusively on fiscal aspects, the surveillance regime disregarded macroeconomic questions.

There is no doubt that this compartmentalised approach prevented the Commission from detecting problems at an early stage can account the fiscal crises in Ireland and Spain, where public debt levels as a proportion of GDP lay at around 30% in 2007. Indeed, the surveillance mechanisms put in place were not able to detect the rapid increased in debt levels for Spain and Ireland. Compared to the 30% of GDP in 2007, Spain's debt had doubled by 2010. As regards Ireland, whilst the Commission had forecast public sector debt at less than 30% of GDP in 2008, it suddenly rose to more than 80% in 2010. As was provided for under the 2020 Strategy, the "six-pack" broadens the SGP to macro-structural surveillance for individual countries. To this effect, Regulation 1176/2011 addresses macroeconomic imbalances and divergences in competitiveness in all Member States. [54] In line with the SPG, this regulation reckons upon a preventive and a corrective mechanism. It introduces a procedure applicable to 'excessive macroeconomic imbalance' based in particular on an alert mechanism based on a scoreboard. This mechanism is designed to detect macroeconomic imbalances quickly by using a limited number of economic indicators. The imbalances will be picked up using a scoreboard and a detailed balance sheet, and may result in the adoption of preventive measures.

In case of particularly serious imbalances, the Council may decide to place the Member State in an 'excessive imbalances position' based on a recommen-

54 Regulation (EU) No 1176/2011 of the European Parliament and of the Council of 16 November 2011 on the prevention and correction of macroeconomic imbalances, 2011 OJ L306/25.

dation by the Commission. This would trigger the 'corrective arm' of the mechanism based on Article 121(4) TFEU.

As far as the euro zone is concerned, Regulation 1174/2011 reinforces Regulation 1176/2011 by making provision for different sanctions in the event of failure to comply with recommendations regarding the correction of excessive macroeconomic imbalances from the Council of the Union.[55] The Council decisions concerning the sanctions based on Article 136 TFEU will be restricted to euro area Member States.[56]

There is a question as to whether Union lawmakers were able to extend the regime of sanctions applicable to excessive public debts to the new excessive macroeconomic imbalance procedure. Indeed, there are several stumbling blocks to overcome. Given that Article 352 TFUE requires a unanimity vote, neither the Commission nor the Council have been considered that provision as a relevant legal basis to endorse such mechanisms. What is more, Article 136 TFEU does not contain any specific provision to this effect.[57] For J.-V. Louis, everything has happened as if this provision amounted to a simplified amendment of the Treaty by way of legislative provisions enacted to bolster the effects of Article 121 on the surveillance and coordination of economic policies and Article 126 on excessive deficits.[58] His view is that Article 136 TFEU has been conceived more on the model of reinforced cooperation, in line with Articles 20 of the EU Treaty and 326 to 334 TFEU.

6. Harmonisation of the requirements applicable to national fiscal frameworks

The directive on the requirements applicable to the national fiscal frameworks of Member States, which was adopted by the Council following consultation with the European Council – due to the fact that it was based on Article 126(14) TFEU

55 Regulation (EU) No 1174/2011 of the European Parliament and of the Council of 16 November 2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area, 2011 OJ L306/8.

56 The vote of the member of the Council representing the Member State concerned by the decisions shall not be taken into account.

57 M. Ruffert, 'The European Debt Crisis and European Union Law', 48 *CMLRev* (2011), p. 1800.

58 J.-V. Louis, in *Mélanges en hommage au professeur Joël Molinier*; M. Ruffert, 48 *CMLRev* (2011), 1801.

– contributes to reinforcing both the preventive and the corrective approach of the SGP by requiring the Member States to comply with their obligations relating to fiscal matters.[59]

Effective and timely monitoring of compliance with these rules must be based on reliable and independent analyses assured by the 'institutions or independent fiscal offices'.[60]

Given that most fiscal measures have budgetary implications that go well beyond the annual budgetary cycle, annual budget legislation has to incorporate the multiannual budgetary perspective of the budgetary surveillance framework of the Union. In other words, in order to be consistent with both the preventive and the corrective parts of the SGP, planning of annual budget legislation should adopt a multiannual perspective stemming from the MTOs framework. Against this backdrop, in accordance with Article 5, Member States are called on to adopt numerical fiscal rules 'over a multiannual horizon' with a view, on the one hand, to comply with the reference values on deficit and debt and, on the other, to promote a multiannual fiscal planning horizon, including adherence to the Member State's MTOs.

Furthermore, MTOs go hand in hand with a 'medium-term budgetary framework providing for the adoption of a fiscal planning horizon of at least 3 years'. This new framework must ensure that national fiscal planning follows a multiannual fiscal planning perspective'.[61] It follows that annual budget legislation must be consistent with the provisions of the medium-term budgetary framework. [62]

59 Directive 2011/85/EU of the Council of 8 November 2011 on requirements for budgetary frameworks of the Member States, 2011 OJ L306/41.

60 Article 6(b).

61 Article 9(1).

62 Article 10.

E. New proposals from the Commission: the two-pack

The edifice is far from being complete given that on 23 November 2011 the European Commission adopted two proposed regulations intended to complete the "six-pack". Under the first proposition, the Member States from the eurozone should present their draft budgets to the Commission, which may if appropriate issue an opinion.[63] The Commission will be entitled to require that they be amended if it considers that the terms of the budget exceed the SGP. However, it does not amount to a veto power.

The second proposal seeks to hem in procedurally the surveillance of those Member States which benefit from a financial assistance programme thanks to bilateral loans, the EFSF or the ESM, or which are seriously threatened by financial instability.[64] This regulation therefore appears to offer a common framework and a gradualist approach to surveillance requirements.

The legal basis for these two propositions is Articles 121(6) and 136 TFEU, which authorise the Parliament to 'strengthen coordination and surveillance' of the fiscal discipline of Member States of the eurozone. On 7 March 2012, in virtue of based on Articles 127(4) and 282(5) TFEU, the ECB gave its opinion on strengthened economic governance of the euro area. Seeing the proposed regulations as compatible with and complementary to the TSCG, the ECB recommends some amendments aimed at: (a) further strengthening the budgetary discipline of the euro area Member States; and; (b) further enhancing the surveillance of the euro area Member States experiencing or threatened with serious difficulties with respect to their financial stability, irrespective of whether they receive financial assistance or may need to receive such assistance. In June 2012 MEPs have voted several key amendments, including a form of "legal protection" for states about to default on their debts as well as a 'redemption fund' that could help

63 Proposal for a Regulation of European Parliament and of the Council on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area, COM(2011) 821 final.

64 Proposal for a Regulation (EU) No 1174/2011 of European Parliament and of the Council on the strengthening of economic and budgetary surveillance of Member States experiencing or threatened with serious difficulties with respect to their financial stability in the euro area COM(2011) 819 final.

roll over up to €2.3 trillion worth of national debt across the eurozone. In the the European Council conclusions of 18/19 October 2012, the Council and the European Parliament are dully invited to find an agreement with a view to adopting the "two-pack" by the end of 2012 at the latest.[65]

F. The treaty of 1 March 2012 on stability, coordination and governance in the Economic and Monetary Union (TSCG)

1. Introduction

Will the range of mechanisms intended to guarantee balanced national budgets bear fruit? In the eyes of certain heads of government, since the edifice put in place over the previous years had remained incomplete, something additional had to be done in order to reassure the markets. Accordingly, the German authorities – backed up by the French – proclaimed in 2011 their intention to amend the TFEU which, having been concluded at Lisbon on 18 and 19 October 2007, only entered into force two years later on 1 December 2009, despite the urgent need to find a response to the crisis which had resulted from the termination of the defunct European Constitution. For a long time there had been questions as to whether the reforms planned should be applied to the 17 (the Eurogroup), the 23 (Euro Plus Pact) or the 27 (EU) and whether they should bring the coordination of economic policies under genuine shared competences where Union law exercises its primacy.

Taking account of the opposition of the United Kingdom representative,[66] the European Council held on Friday 9 December 2011 finally decided to conclude an inter-governmental agreement between an initial 26, which later fell to 25. The negotiations which were swiftly initiated under the aegis of the President of the European Council resulted in a political agreement on 30 Janu-

65 EUCO 156/12.

66 The UK Prime Minister vetoed the treaty, largely on the grounds that he had not managed to secure a guarantee that it would not affect the UK's financial services industry. See House of Commons, *The Treaty on Stability, Coordination and Governance in the Economic and Monetary Union*: political issues, Reserarch Paper 12/14, 27 March 2012.

ary 2012 and the signature of the TSCG on the fringes of the European Council of 1 March.

Contrary to the wishes of the German authorities, this new inter-governmental agreement will not result in an amendment of the fundamental treaties to which the 27 States are parties. As a treaty concluded between the 17 Member States of the eurozone and 8 other Member States which do not use the euro as their currency, it constitutes a self-standing legal framework which is superimposed on EU law, whilst borrowing various techniques from EU law. Put it simply, although the Treaty aims at fostering the implementation of the SGP, is not part of the *acquis communautaire*. This piece of legal wizardry that could be described as an "Economic Schengen" – due to the British veto – therefore for the moment prevents the adoption of a fully-fledged amendment treaty.

In order to be able to enter into force on 1 January 2013, the TSCG will have to be ratified by at least twelve eurozone States in accordance with their international constitutional law.[67] Taking account of the misadventures to which the treaties amending the founding treaties (including the Maastricht, Nice and Lisbon treaties) have been subject, the path will undoubtedly be littered with pitfalls. Nevertheless, for several Member States the ratification of this treaty will go hand in hand with the granting of financial assistance by the MES. In effect, starting from 1 March 2013, any assistance will be conditional upon the prior ratification of the TSCG by the beneficiary Member State.[68] In a referendum that took place on May 31st, 60 percent of Irish voters have been backing the treaty, most of whom were aware that its rejection would hurt Ireland's chances of attracting further EU bailout.

The sixteen provisions of the TSCG are grouped under five titles. The titles on Fiscal Compact (Title III, Articles 3 to 8), on the coordination of economic policies (Title IV, Articles 9 to 11) and on governance of the euro area (Title V, Articles 12 and 13) are of central importance.

Since it is not possible for us to provide a detailed commentary on this Treaty, which moreover will not enter into force immediately, this paper shall be

67 Article 14(2) TSCG.

68 Recital 5 TSCG.

limited to briefly highlighting some of the relationships that it will have with the measures discussed above.

2. Fiscal Compact

The core obligations of the TSCG are found in its title III on Fiscal Compact. It is the aim of this subsection to explore some of the key issues arising in discussion of Article 3 (golden rule), Article 7 (reversed qualified majority) and Article 8 (control of the obligation to balance budgets).

i. The golden rule

Article 3 enshrines the golden rule, according to which 'the budgetary position of the general government of a Contracting Party shall be balanced or in surplus'[69]. This requirement is deemed to have been met where the structural deficit does not exceed 0.5% of GDP at market prices, or 1% for countries with a debt above 60% of GDP.[70]

Four separated, albeit related issues, must be distinguished.

The first concerns the golden rule. Let be noted that the new intergovernmental golden rule does not match the traditional definition of a golden fiscal rule, which requires that public authorities borrow only to cover investments and not to fund current spendings.[71]

The second concerns the added value of the so-called golden rule. This provision is less innovative than certain heads of State have asserted on the account that it reasserts the commitments made in the Euro Plus Pact of 11 March 2011.[72] The essential difference consists in the fact that the 2011 Pact is first not binding and secondly was only signed by 23 States, and not the 25 States which undertook to ratify the TSCG. Another difference should also be highlighted. Compared to the Euro Plus Pact, the new treaty limits the States' powers of appreciation.

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69 Article 3(1) a) TSCG.

70 Article 3(1) b) and d) TSCG.

71 M. Artis, 'The Stability and Growth Pact: Fiscal Policy in the EMU', in Breuss, F, G Fink, and S Griller (eds.), *Institutional, Legal and Economic Aspects of the EMU (*Vienna, Springer, 2002), p. 101–16.

72 *Supra* B.

The third issue concerns the relationship between Article 3 and the obligations stemming from the "six-pack". As regards its relations with secondary law, Article 3 restates the obligation laid down by Regulation no. 1476/97 as amended by Regulation 1177/2011, whilst also reinforcing it. A first difference must be noted. The deficit threshold may not exceed 0.5 % of GDP at market prices or 1% for States whose debt is lower than 60%. Given that these thresholds are more stringent than those established under the "six-pack", the Treaty imposes significantly stricter fiscal rigour. In practice, future MTOs will have to be in line with the 0.5% limit imposed by the golden rule.[73] Another difference relates without doubt to the fact that the preventive approval of the SGP has previously been based on a permanent tension between automatism (the application of the thresholds on an arithmetical basis) and the capacity for judgment (the discretionary power exercised by the Commission). How will things work under the new Treaty? In providing for an automatic correction mechanism, will the new Article 3(1)(e) remove this capacity for judgment?

The fourth issue concerns the implementation of the golden rule which will have to be set in constitutional stone, or failing that in a rule of equivalent standing.[74] Since only the German, Italian and Spanish constitutions contain such a rule, 22 other States will have to cross the proverbial Rubicon. Moreover, the national rule will have to provide for an automatic correction mechanism which will be engaged if there is a sustained imbalance.[75] This mechanism should aim at correcting deviations from MTOs or the adjustment path.

Furthermore, it should be added that the "national appropriation" of the requirement of a balanced budget, in particular through its incorporation into the Constitution or a provision of equivalent nature, is destined to shift control from Union level to State level. It goes without saying that this obligation should, depending upon the circumstances, permit opposition parties to initiate proceedings before the supreme courts, with controls thus being shifted from EU to national level. However, this move will raise various questions.

73 S. Verhelst, 'Will the national 'golden rule' eclipse the EU fiscal norms?', *Vox EU* (2012).

74 Article 3(2) TSCG.

75 Article 3(2) TSCG.

However, will such laws be subject to actions for annulment? Who will have standing? Will it be easy to correct a budgetary law which has been annulled by the national supreme courts? Will they take sufficient time in order to rule on such applications in order not to compromise the proper implementation of the contested budget? How will the automatic correction mechanism work? It can easily be imagined that this international law obligation will cause upheaval within constitutional circles over the coming months.

Will the findings reached within the case law of the German Federal Constitutional Court relating to the constitutionality of the Lisbon Treaty and the EFSM act as an inspiration for other supreme courts? In these two judgments, the Court held that since the principle of democratic self-determination can only be exercised on the level of the nation state, the EU cannot deprive the Member States of essential powers in relation to the latter, including fiscal powers.[76] In particular, in the Lisbon judgment the Court went on to say:

'A transfer of the right of the *Bundestag* to adopt the budget and control its implementation by the government which would violate the principle of democracy and the right to elect the German *Bundestag* in its essential content would occur if the determination of the type and amount of the levies imposed on the citizen were supranationalised to a considerable extent. The German *Bundestag* must decide, in an accountable manner *vis-à-vis* the people, on the total amount of the burdens placed on citizens. The same applies correspondingly to essential state expenditure. …. Budget sovereignty is where political decisions are planned to combine economic burdens with benefits granted by the state. Therefore the parliamentary debate on the budget, including the extent of public debt, is regarded as a general debate on policy. Not every European or international obligation that has an effect on the budget endangers the viability of the *Bundestag* as the legislature responsible for approving the budget.

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76 Lisbon Case, BVerfG, 2BvE 2/08, 30 June 2009, §§ 250 and 256; aid measures for Greece and against the euro rescue package Case, 2BvR 987/10, 2BvR 1485/10, 2BvR 1099/10, 7 September 2011, § 124. With respect to the guarantees in the framework of the ESM, the constitutional court ruled that by adopting this act, the German *Bundestag* did not impair in a constitutionally impermissible manner its right to adopt the budget and control its implementation by the government or the budget autonomy of future Parliaments. Nonetheless, the Federal Government is obliged to obtain prior approval by the Budget Committee before giving guarantees.

The openness to legal and social order and to European integration which the Basic Law calls for, include an adaptation to parameters laid down and commitments made, which the legislature responsible for approving the budget must include in its own planning as factors which it cannot itself directly influence. What is decisive, however, is that the overall responsibility, with sufficient political discretion regarding revenue and expenditure, can still rest with the German *Bundestag*.'

However, the German constitutional case law is not as clear-cut as one might believe. In the first place, EU obligations with a budgetary impact do not compromise the freedom of action of the *Bundestag*. Secondly, the constitutional court indicated that international budgetary rules cannot call into question "the general responsibility" of the *Bundestag*, which 'to this effect must have a sufficient margin of political appreciation, both over revenues as well as expenditure'.[77] Accordingly, in the same manner as the SGP, the TSCG offers the contracting parties a certain degree of flexibility, provided that they respect the thresholds specified, although they may depart from them in exceptional cases.[78] Consequently, this treaty does not appear to have the effect of annulling the fiscal self-determination of its signatory states.

Article 8 enshrines the jurisdiction of the Court of Justice to verify the implementation of this rule on national level.[79] In expanding the jurisdiction of the Court, which is possible under Article 273 TFEU, the framers of the TSCG have done more than redrafting substantive law. Absent any power to control the implementation of Article 3 by the Commission, the states parties to the treaty take on responsibility. Admittedly, on the basis of the applications initiated by the national authorities, the Court of Justice will be required to rule on the compatibility of national law with the golden rule, and not of national budgets as desired by Chancellor Merkel. This operates alongside the "double infringement" mechanism in the event that the State in breach fails to com-

77 § 256.

78 Pursuant to Article 3(1) c), the Contracting Parties may temporarily deviate from their medium-term objective or the adjustment path towards it only in exceptional circumstances.

79 Article 8 TSCG.

ply with the judgment against it.[80] Whilst the enshrinement of this new competence results from a compromise of jurisdiction, in accordance with Article 273 TFEU, it does not however modify EU law. Formally speaking it will be the Member States which take action before the Court of Justice. [81] That being said, it goes without saying that the borderline between a genuine settlement mechanism and the EU legal order is a fine one. Though the control of the implementation of the golden rule is not an EU legal issue in its own rights, it is likely to involve considerations of EU legal problems.[82]

ii. Debt criterion

The TSCG is also less innovative than has been asserted since it expressly or implicitly consolidates obligations under secondary law. For example, Article 4 on the reduction of debt levels for contracting parties with a debt exceeding 60% of GDP reasserts the obligation provided for under Article 2 of Regulation 1467/97, as amended by Regulation 177/2011 (the preventive limb of the SGP).[83] In effect, the ratio of the gap between public debt and the 60 % debt-to-GDP threshold must be reduced by 5% annually.

iii. Sanctions and reverse qualified majority

With respect to sanctions against States in breach of their SGP obligations, the TSCG is also less innovative than has been asserted. Proof of this lies in the reinforcement of fiscal discipline through the means of sanctions which are almost automatic. In this regard, Article 7 of the treaty reinforces the considerable powers which the Commission exercises over the Council of the Union, as the latter must establish a "blocking qualified majority" in order to oppose sanctions proposed by the Commission, whilst at present a blocking minority is sufficient. This Copernican resolution will guarantee the semi-automatic

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80 Article 3(2) TSCG.

81 The Commission is merely called on to submit a report regarding the implementation of Article 3(2). Accordingly, the initiators of the infringement proceeding are the Member States, not the Commission.

82 Council Legal Service Opinion on the compatibility with EU law of draft Article 8 TSCG, 26th January 2012.

83 *Supra* D, 2.

nature of sanctions.[84] Account must be made of the fact that Article 7 has not amended Article 126(6) TFEU.

3. Coordination of economic policies

As regards the coordination of economic policies (Title IV), Articles 9 to 11 specify in greater detail the obligations provided for under Articles 120 and 121 TFEU on economic policy. These provisions are more statements of good intentions rather than new obligations. Since the role of these new obligations is to provide an impetus, they do not impose new tasks on the EU institutions,[85] as the extension of tasks is reserved exclusively to the Court of Justice.[86]

In its final report, the Future of Europe Group is proposing to make 'economic policy coordination between Member States more binding in selected areas which are key for sustainable economic growth and employment and essential for the stability of the Eurozone'. Such coordination should 'help overcome existing imbalances and strengthen overall competitiveness.'

4. Added value of the Treaty

The treaty is certainly not a pure copy of existing law. Although it does not amend either primary or secondary EU law, the fact remains nonetheless that it adds new elements to EU law in order to guarantee its efficacy. This is the case for example, where it reinforces the budget deficit thresholds, as specified in Article 3. It is also apparent in the possibility for the Court of Justice to review the correct transposition of the golden rule into national law. On a strict interpretation of the principle of the attribution of competences enshrined in Article 13(2) TEU it may appear that these additions may constitute an amendment to applicable law and would therefore be illegal. However, a pragmatic interpretation is called for. Pursuant to Article 4(2) TEU, the new TSCG provisions have the sole objective of facilitating

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84 See the discussion above in D, 3.

85 10th recital TSCG. See also I. Pernice, *Legal opinion of on the International Agreement on a Reinforced Economic Union* (2012), p. 18.

86 Article 273 TFEU.

compliance with the goal of achieving a balanced budget and avoiding excess deficits.[87] C-187 and 248/91 and opinion 1/00

Has this Treaty really been worth it? Yes, if it is placed within its political context. Whilst undeniably betraying a certain scepticism regarding the classical mechanisms of EU law contained in the "six-pack",[88] it will be clear with hindsight that it was really necessary. By playing the card of "national appropriation", its framers certainly sought to reassure the financial markets and the electorates of various Member States. Moreover, a link is established with the ESM, which was revised on 2 February 2012. No, if one considers its contents objectively, since it does not introduce practically anything new into Union law. Whilst it certainly does guarantee greater efficacy for various mechanisms, nonetheless, no supplementary powers are granted either to the Commission or the Court of Justice, which would in any case have run contrary to Articles 5(2) and 13(2) of TEU. Moreover, the integrity of the market has been maintained. At worst, it will have the effect of ossifying rules which would undoubtedly have been better placed within secondary law than in an intergovernmental agreement. In summary, it is a pointless treaty, which is without doubt insufficient in order to stave off a budgetary crisis, the end of which is still not in sight, although it is certainly indispensable within the current crisis situation.

3. The impacts of the reforms on the institutional equilibrium

A. Introductory remarks

As was stressed at the outset, the institutional balance in relation to budgetary and economic matters has always been atypical. On the one hand, the coordination of economic policy has been a matter for national sovereignty, whilst on the other hand budgetary control has been based on an equilibrium which is highly skewed in favour of the Council, where a blocking minority can easily

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87 By analogy, see Joined Cases C-181/91 and C-248/9 *Parliament v. Council and Commission* 1993 ECR I-3713.

88 J. V. Louis, oc, 6.

stand in the way of Commission proposals. The European Parliament has only played a secondary role in such matters.

Does the reform enshrine the victory of the Community method over intergovernmentalism or the opposite? As is known, the recourse to multilateral cooperation has proved to be necessary in order to adopt the Euro Plus Pact and to set up the EFSF and the ESM. Control by fellow signatories has become more significant in the implementation of the commitments under the Euro Plus Pact and Europe 2020 Strategy, which in a clear departure from the Community method is based on the good will of the States. Finally, compliance with the implementation of the golden rule into constitutional law or a rule of equivalent effect will be approved by the Court of Justice on the basis of applications introduced not by the Commission but by other contracting parties to the TSCG. But once again, the developments have been contradictory.

B. The European Commission

Needless to say that the "six-pack" significantly increases the powers of the Commission over the surveillance and evolution of the Member States' public finances.[89] In effect, the implementation of programmes detailing structural reforms and annual fiscal plans will be monitored both by the Commission and the Council.

Moreover, the Commission henceforth disposes of considerable powers with regard to the Council of the European Union, which must now establish a "blocking qualified majority" in order to oppose sanctions proposed by the Union executive whereas before the entry into force of the "six-pack" a blocking minority was sufficient.[90] This Copernican revolution, which was strong-

89 Recital 12 of the preamble of Regulation 1466/97 as amended by Regulation (EU) No 1175/2011.

90 Article 6(2) al. 5 of Regulation 1466/97 as amended by Regulation (EU) No 1175/2011; Article 6(2) of Regulation (EU) No 1173/2011 on the effective enforcement of budgetary surveillance in the euro area; Article 3(3) of Regulation (EU) No 1174/2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area, 2011 OJ L306/8; aArticle 7 TSCG.

ly supported by the European Parliament, guarantees the semi-automatic nature of sanctions.

Various questions spring to mind. Should one see within the new governance a Leviathan wearing down national sovereignty to the benefit of increased Union powers over economic matters? Often decried as the quintessence of technocratic power, surely the European Commission is itself the best placed, in terms of legitimacy, to exercise a right to monitor the contents of national budgets, or to control highly political functions in a neutral manner? However, surely the mere fact of asking the question already implies an answer. Within a Europe in which it is necessary to put out one fire after another, without being able to count on a sufficient number of firemen, surely the role of the legislature will have to be reviewed? Moreover, the Ecofin Council, which does not lack any legitimacy whatsoever,[91] has the last word. Nonetheless, as has been seen with Greece, Portugal and Ireland, budgetary constraints now appear to determine the scope of the substantive law implementing policies which have not however been harmonised on EU level.[92] In effect, financial assistance was granted to these Member States on the strength of their commitment to implement significant reforms to their fiscal, social, employment and health policy, as well as public finance law, commercial law and their public administrations.[93]

C. The Euro Group

As an *ad hoc* structure for informal coordination established with the implementation of EMU, the Euro Group is not one of the ten formations of the Council of

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91 J.P. Jacqué, *Droit institutionnel de l'UE*, 6th ed. (Paris, Dalloz, 2010), p. 82.

92 D. Triantafyllou, 'Les plans de sauvetage de la zone Euro et la peau de chagrin', 2 *RDUE* (2011), p. 195-208.

93 Decision 2010/320/EU of the Council of 10 May 2010 addressed to Greece with a view to reinforcing and deepening fiscal surveillance and giving notice to Greece to take measures for the deficit reduction judged necessary to remedy the situation of excessive deficit, 2010 OJ L145/1; Council implementing decision 2011/77/EU of 7 December 2010 granting Union financial assistance to Ireland, 2011 OJ L30/4; Council implementing decision 2011/344/UE granting Union financial assistance to Portugal, amended by decision of 2 September 2011, 2011 OJ L240/8.

the Union.[94] It is comprised of the finance ministers of the Member States which have adopted the Euro as their currency. The President of the ECB is invited to attend its meetings, whereas the Commission participates as of right. It is certain that the Euro Group has been called upon to play a decisive role in the implementation of the European Semester for the Member States from the eurozone. It is charged with the preparation and follow up of the Euro Summit meetings. Moreover, its president may be invited to attend these meetings.[95]

In contrast to other formations, it has the advantage of having a stable presidency with terms of two and a half years. On the other hand, due to its informal nature, it cannot issue recommendations since it is for the Ecofin Council formally to ratify its decisions.

D. The Council of the euro area

The euro summit meeting of 26 October 2011 concluded that the heads of State and government from the euro area will meet 'informally' twice per year and elect a president for a term of two and a half years. The President of the ECB is invited to attend its meetings, whereas the Commission participates as of right. The summit should meet at key moments of the annual governance cycle, where possible after meetings of the European Council. This will accordingly seek to prevent the official institution from being short-circuited by the decisions taken by the 17 Member States of the euro area.

In providing for similar institutional arrangements, the TSCG formally provides for the existence of this Council. [96] This parallel council will be called upon to determine strategic guidelines on the conduct of economic policy, the improvement of competitiveness and the reinforcement of governance within the Eurozone.[97]

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94 See protocol n° 14. On that question, see J.-V. LOUIS, *Commentaire J. Mégret*, p. 127-131 ; A. Kasel, 'Le président de l'euro groupe et la gouvernance économique de la zone euro' (Paris: EMA, 2012), nyp.

95 Article 12(4) TSCG.

96 Article 12(1) TSCG.

97 Article 12(2) TSCG.

E. Economic and Financial Committee

As a body which engages in studies, preparation, dialogue and consultation, the Economic and Financial Committee plays a central role in the preparation of decisions relating to the functioning of EMU.[98] Pursuant to Article 134(2) TFEU, the Committee's tasks are, among others, to contribute to the preparation of the work of the Council, particularly as regards recommendations required as part of the multilateral surveillance and decisions required as part of the EDP[99], as well as to promote policy coordination among the Member States. It provides opinions at the request of the Council of the EU or the European Commission. The Economic and Financial Committee shall be consulted within the framework of the "European Semester".[100] As a serious competitor to COREPER, this Council plays a key role in the preparation of Econfin meetings. In particular, its preparatory work for the Council includes assessments of the economic and financial situation, the coordination of economic and fiscal policies, contributions on financial market matters, exchange rate polices and relations with third countries and international institutions. In order to ensure a consistent application of the principles mentioned above for defining the country-specific MTOs, regular methodological discussions take place in the Economic and Financial Committee.[101] It may also represent a threat for the Commission's prerogatives by standing between it and the Council. Its penchant for secrecy and the complete lack of political responsibility raise difficulties in terms of democratic control .[102]

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98 The Committee is composed of senior officials from national administrations and central banks, the ECB and the Commission. See Council Decision 2003/476/EC of 18 June 2003 on a revision of the Statutes of the Economic and Financial Committee, 2003 OJ L 158.

99 Article 126(4) TFEU.

100 Article 2 bis (4) of Regulation 1466/97 as amended by Regulation (EU) No 1175/2011.

101 Ecofin Council, *Specifications on the Implementation of the SGP*, above, p. 4.

102 J.V. Louis, *Commentaire Mégret,* p. 119.

F. The respective roles of the European Parliament and the national parliaments

The various progress made under the Treaty of Lisbon for parliamentary institutions was welcomed by most commentators.[103] There is now a question as to whether the European Parliament[104] and the national parliaments have missed out on the reform.[105]

Legitimacy of the fiscal approach is indeed becoming a touchstone issue. In this connection, two examples will suffice.

First, in the European Council conclusions of 18/19 October 2012, it is stressed that:

'Strong mechanisms for democratic legitimacy and accountability are necessary. One of the guiding principles in this context is to ensure that democratic control and accountability take place at the level at which decisions are taken and implemented. In this spirit, ways to ensure a debate in the context of the European Semester, both within the European Parliament and national parliaments, should be explored.' [106]

Second, in its final report, the Future of Europe Group is stressing that 'a fundamental deepening of the EMU must go hand in hand with greater democratic legitimacy. Wherever new competences are created at European level or closer coordination of national policies is established, full democratic control has to be ensured.'

Needless to say that these political commitments are likely to enhance parliamentary participation in the decision-making process.

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103 J.-C. Piris, *The Lisbon Treaty* (Cambridge: CUP, 2011), p. 113-114.

104 Ever since the entry into force of the Maastricht treaty, the institutional arrangements regarding MEU are specific. In sharp contrast with other EU economic policies such as internal market, the role of the European Parliament has always been belittled. The Lisbon Treaty does not bring any improvement.

105 M. Ruffert, 48 *CMLRev* (2011), p. 1801.

106 EUCO 156/12, para. 17.

1. European Parliament

The European Parliament did indeed adopt five of the six acts from the "six-pack" on their first reading. Nevertheless, both the definition and assessment of objectives as well as the control of national policies and budgets is the prerogative of an institutional network within which the European Council, the Ecofin Council, the Euro Group and the Commission divide up these roles. Is the European Parliament entirely absent from this network? This again calls for a nuanced response.

First and foremost, it is required to take action at the start of the annual cycle of surveillance before the European Council has defined the strategic guidelines for macro-economic and micro-budgetary policy within the context of the European Semester. In effect, there must be discussions within the Parliament.[107]

Moreover, according to Article 121 TFEU, the President of the Council, the Commission and, depending upon the circumstances, the President of the Euro Group must report to the European Parliament on the results of the multilateral surveillance and the implementation of excessive deficit procedures.[108] Exchanges of opinion with the Member State which has been the object of a recommendation by the Council may occur within the competent parliamentary committee.[109] Similarly, the President of the European Parliament may be invited to be heard by the Euro Summit Councils.[110] Last, Article 13 TSCG provides fort the oversight of the budgetary policies and other issues covered by this Treaty by both the European Parliament and national parliaments.

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107 14th recital of the preamble and Article 2 bis (4) and 2 bis terof Regulation 1466/97 as amended by the Regulation (EU) No 1175/2011. In this connection, the Future of Europe Group proposes that the European Parliament 'should, among other things, be consulted within the scope of the European semester before the formulation of fundamental aspects (e.g. the Annual Growth Survey) or on concrete recommendations affecting the EU or the euro area as a whole.'

108 Article 2 bis(4) al. 2 of Regulation 1466/97 as amended by Regulation (EU) No 1175/2011.

109 Article 2 bis ter (3) of Regulation 1466/97 as amended by Regulation (EU) No 1175/2011. See also article 8 (4) on the strengthening of economic and budgetary surveillance of Member States experiencing or threatened with serious difficulties with respect to their financial stability in the euro area (COM(2011) 819 final).

110 Article 12(5) TSCG.

2. National Parliaments

By the same token, national parliaments warrant special attention. Given that following the entry into force of the Lisbon Treaty the parliaments dispose of the power to control the correct application of the principle of subsidiarity, have the tables now been turned on them? In accordance with the principle 'no taxation without representation', one of their main functions is to approve annual budget legislation. Has their autonomy been seriously cut back?

It is certain that parliaments must be fully involved with the European Semester and the preparation of the various programmes.[111] However, in the final analysis, national budgets will now be drawn up within a framework which leaves decidedly less room for manoeuvre than in the past.

First, the "European Semester" is called upon to reinforce the powers of the prime minster and the finance minister to the detriment of those of parliament, just at it enhances the Economic and Monetary Affairs portfolio within the Commission, currently held by the Commissioner Oli Rehn.

Second, on the account that most fiscal measures have budgetary implications that go well beyond the annual budgetary cycle, Member States are now required by Directive 2011/85 to base their annual budget legislation on multiannual fiscal planning stemming from the medium-term budgetary framework. Any departure from this framework shall be duly explained.[112] As a matter of course, the directive doesn't prevent a Member State's new government from updating its medium-term budgetary framework to reflect its new policy priorities.

Whilst in the wake of the constitutional litigation it has ended up embracing the positions adopted by German ministers within European

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111 Regulation (EU) No 1175/2011 modifying the Regulation (EC) No 1466/97 underscores the association of national parliaments in drafting different programmes. See the 16th recital of the preamble of Regulation 1466/97 as amended by Regulation (EU) No 1175/2011. See also article 8(4) of the proposal for a regulation on the strengthening of economic and budgetary surveillance of Member States experiencing or threatened with serious difficulties with respect to their financial stability in the euro area (COM(2011) 819 final).

112 Article 10 of Directive 2011/85/EU of the Council of 8 November 2011 on requirements for budgetary frameworks of the Member States, 2011 OJ L306/41.

institutions,[113] the *Bundestag* will in any case not escape the Caudine Forks of the new budgetary arrangements.

G. Concluding remarks

The Euro Plus Pact, the ESM, as well as the TSCG are testament to a move towards intergouvernementalism. Nonetheless, the TSCG does not call into question the primacy of EU law. Since they were not able to amend neither the TEU nor the TFEU, the parties to the TSCG ensured that it would be consistent with EU law. Given that there is no question of its encroachment upon the competences of the Union,[114] the principle of primacy remains unaffected. Moreover, with the TSCG obligations strengthening pre-existing mechanisms of primary and secondary law calling for reinforced cooperation,[115] the Community method need not give ground to any inter-governmental method.[116] On the contrary, the parties to this Treaty are making full use of the existing EU institutional mechanisms.

Moreover, the adoption of the "six-pack" is testament to the fact that directives and regulations have not been dwarfed by these intergovernmental arrangements. Moreover, the "two-pack" appears as an appropriate vehicle to flesh out the economic partnership programmes set out by the TSCG.

At the end of the day, but the European Parliament, all EU institutions appear to be much stronger given that they were granted more competences. In particular, the new powers conferred on the Commission and the Council are likely to give real teeth to economic governance in the EU. The TSCG confirms

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113 See also BVerfG (2BvE 2/08), of 11 September 2011 on the MESF, § 128, by virtue of which the *Bundenstag* is called on to give its assent to the considered aids. See L. Dechâtre, 'La décision de Karksuhe sur le MESF: une validation sous condition et une mise en garde sybilline pour l'avenir', 1 *CED* (2011), p. 321.

114 Article 2(2) TSCG. See also Articles 3 and 7 stating that the Treaty is to be applied without prejudice to EU law.

115 Article 20 TEU and articles 326 to 334 TFEU.

116 J. V. Louis, 'Un traité vite fait, bien fait? Le traité du 1er mars 2012 sur la stabilité, la coordination et la gouvernance dans l'Union économique économique', 2 *RTDE* (2012), p. 4.

some of the surveillance mechanisms introduced by the "six-pack". Whether the balance of power has tilted in favour of one institution remains to be seen. Some institutional developments have been contradictory. Besides, the crisis has shown the extent to which informal mechanisms are likely to prevail over formal mechanisms. Last, given that an *avant-guarde* of countries whose currency is the euro is likely to foster more integrate economic policies, this might be the beginning of a permanent 'two-class' EU.[117]

1. Conclusions

Whilst the financial crisis highlighted the inadequacies in the surveillance and regulation of markets, the debt crisis has brought to the fore the gaps within the structuring of economic and fiscal policies. In order to remedy this, the institutions of the EU have not tarried in reforming and beefing up the SGP and, absent any power to amend any provisions of the TFEU, in adopting several intergovernmental agreements overarching Union law (EFSF, ESM, TSCG).

Needless to say that the budgetary surveillance framework currently in place, defined in the SGP, remains broadly valid. Indeed, the SPG is still an essential part of the fiscal and macroeconomic framework of the EMU, which contributes to achieving macroeconomic stability in the EU and safeguarding the sustainability of public finances.

Nonetheless, the modifications brought to the SGP by the 2011 « six-pack » reflect a significant shift towards greater focus on debt and fiscal sustainability, with a view to reinforcing compliance and to ensuring that national fiscal frameworks reflect the EU's fiscal rules. In particular, the criterion of public debt is henceforth better reflected in the budgetary surveillance mechanism. Accordingly, the Commission and the Council will be able to scrutinise the Member States' public finances much more carefully and pre-emptively than before. By the same token, the introduction of a new mechanism for macroeconomic surveillance is broadening the EU fiscal surveillance. Moreover, to increase the effectiveness of the SGP, a wider range of sanctions and measures are provided for in both the preventive and the corrective arms of the SGP. The financial sanctions range from interest-bearing deposits to fines. For euro area countries, the Commission will be able to

117 J.-C. Piris, 'Avanti tutti, Europa!, *European Voice,* 29 March 2012, p. 13.

enforce more strongly than before the Council's recommendations by proposing sanctions at an earlier stage. What is more, the introduction of a reverse majority rule for the adoption of enforcement measures is likely to reinforce the effectiveness of the sanctions. In addition, a reinforced *ex-ante* coordination, called the "European semester", allows a simultaneous assessment of both fiscal discipline (stability and convergence programmes), macroeconomic stability and structural reforms (PNR) fostering growth and employment. Needless to say that the "six-pack" represents hitherto the most drastic reinforcement of economic governance since the launch of the EMU.[118]

In addition, the "two-pack" shall soon add more teeth to the "six-pack".

Last but not least, the TSCG, better known as the "Fiscal Compact", represents a step forward in providing "national appropriation" of the fiscal control mechanisms. It buttresses some of the "six-pack" obligations. In particular, it reinforces the two nominal anchors of the SPG: the GDP reference value for the deficit ratio (from a 3% to a 1 or 0,5 % threshold) and confirms the 60% of GDP reference value for the debt ratio (through a reduction at an average rate of one twentieth per year as a benchmark) as well as the control of the medium-term budgetary objectives which are the centrepiece of multilateral surveillance.

At this stage, various observations may be made.

The crisis undeniably renders fully apparent the need to replace the rules at the heart of economic governance, following decades of deregulation. Neither soft law nor the control over fiscal policies through the sanction of the markets are sufficient any longer.

Nevertheless, one has the impression of meandering through an English style park rather than a classic French garden. Indeed, one can only be struck by the heterogeneous nature of the texts setting out the new structure of governance, which is based on provisions forming part of international law (EFSF, ESM and TSCG), treaty (Articles 121, 126 and 136 TFEU) and secondary law, hard law (the "six-pack" and the forthcoming "two-pack"), soft law (2020 Strategy and Euro Plus Pact), directives and regulations.

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118 O. Rehn 'EU's new "six-pack" shows just how tough Europe will be on national governments' *The Telegraph*, 20 October 2011.

Competences are not clear-cut: the 2020 Strategy and the Euro Plus Pact stand astride EU and national competences whereas the TSCG requirements reckon upon EU competences.

Moreover, the scope of these measures varies. As shown below, some rules are applicable to the 17 States with the Euro as their common currency,[119] whilst others apply to the whole Union,[120] and others still to 23 States.[121]

Measures	Member States
"Six-pack" regulations 1175/2011, 1176/2011 and 1177/2011	27 EU Member States
Reference values mentioned in the Protocol No 12 on EDP and Numerical Fiscal Rules (Articles 5 to 7 Directive 2011/85)	26 (all EU MSt except UK)
TSCG	25 (all EU MSt except UK and Cz)
Europa plus	23 (all EU MSt except Sw, Hu, Cz, and UK)
Six-pack regulations 1173/2011 and 1174/2011	17 MSt having the euro as a currency

Fig. 5

Moreover, these measures seek to proliferate the regimes of preventive control and sanctions (notices, reports, warnings, deposits, fines, etc.).

In addition to its Byzantine structure, the new governance also involves an accumulation of coordination and evaluation procedures (the "European Semester", the Euro Plus Pact and the 2020 Strategy), with all of the problems of scheduling and overlap which this entails for a public service which is operating under budgetary constraints.

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119 Regulation 1174/2011.

120 Regulations 1173/2011 and 1176/2011; directive 2011/85/EU.

121 Europa plus Pact.

It also results in an increase in informal decision making procedures, whether this may be with the Euro Group – an informal grouping within the Council – or more recently with the Council of the Eurozone which, following its creation by the European Council on 26 October 2011, has now been called upon to play a significant role in economic integration within the eurozone. One also has the feeling that the informal procedures will progressively replace formal decision making procedures, even if this involves formalising them as well.

Furthermore, this governance still resembles a flat-footed colossus since it is liable to fall foul of the principle whereby powers must be allocated.[122] There is also a valid question over whether the rules adopted by the eurozone (Article 136 TFEU) enable the sanctions applicable to excessive public deficits (Article 126 TFEU) to be extended to other pillars of the SGP, including in particular macroeconomic surveillance. Or is this a false problem? Only time will tell.

Will the accumulation of these processes distract us by throwing sand in our eyes? Will the application of the "six-pack" rules in a strict manner make sense in the face of a significant economic downturn? Is the new treaty sufficient in order to set up a new economic governance whilst respecting the powers of the national parliaments and the European Parliament? Would the TSCG be any more effective than the reformed SGP? Will these reforms live up to the task? Will they be able to reduce imbalances in terms of indebtedness and competitiveness? In any case, will the waves of reform be able to reassure the markets, or will it all be necessary to do more in order to reassure the financial markets? Given that fiscal challenges differ among the Member States, the question arises as to whether a one-size-fits-all approach fits the need for a differentiated speed of consolidation.

By themselves the "six-pack" and the TSCG won't bring the EU out of the crisis that started with Greece, spread to other peripheral Eurozone Member States and is likely to continue to challenge the future of the monetary union, let alone EU itself.

Nevertheless, the grey areas remaining must not mask the will to bolster fiscal discipline through an enhanced coordination and a range of sanctions.

122 Article 5(1) TEU.

Despite all the imperfections within the edifice which we are now describing, the signal given by the Union and the parties to the TSCG is as clear as crystal.

Be that as it may, that is still not the full story. Since the Union has been backed into a corner, the identity crisis which is undermining the integration project will at any cost have to lead to significant progress in terms of economic governance. The monetary federation has now been complemented by a budgetary federation, which in the end will inevitably lead the Union towards a tax federation. One day, with or without the United Kingdom authorities, it will be necessary to reform the treaties establishing the Union, and that reform will certainly no longer be limited only to Articles 121 and 126 TFEU.