Challenges of Multi-tier Governance in the EU Workshop 4th October 2012

OUTLINES
Challenges of multi-tier governance in the EU

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CHALLENGES OF MULTI-TIER GOVERNANCE IN THE EU
Workshop Programme
4th October 2012, PHS 3C50

9.05-9.15 Welcome by AFCO chair Carlo Casini

9.15-9.30 Introduction by Roberto Gualtieri & Rafal Trzaskowski

9.30-11.30 Flexibility and differentiated integration under Lisbon treaty
What is the impact of the differentiated integration on the functioning of the EU?
- Institutional dilemmas of the Economic and Monetary Union (Jean-Victor Louis)
- Which lessons to draw from the past and current use of differentiated integration? (Janis Emmanouilidis)
- European Stability Mechanism and Treaty on stability, coordination and governance: role of the EU institutions and consistency with EU legal order (Bruno De Witte)
- Which institutional solutions for managing the multi-tier governance can be found in the framework of the current EU treaties? (Jean-Claude Piris)

10.20-11.30 Debate

11.30-12.30 European and national institutions in multi-tier governance
What are the roles and tasks for the EU institutions and national institutions?
- Inter-institutional balance in the EU: is the community method still relevant? (Renaud Dehousse)
- How to assess an institutional architecture for a multi-level Parliamentarism in differentiated integration? (Wolfgang Wessels)

12.00-12.30 Debate

15.10-16.30 Legitimacy and accountability of the multi-tier governance
Does multi-tier governance challenge the EU legitimacy and its accountability to the citizens?
- Democracy and limits of EU competence (Joseph H. Weiler)
- Democratic challenges arising out of the eurocrisis (Matthias Kumm)
- Is the EP legitimate as a parliamentary body in EU multi-tier governance? (Andrea Manzella)

15.50-16.30 Debate

16.30-18.15 Multi-tier governance beyond existing mechanisms
Are new competencies, powers and constitutional mechanism needed?
- New institutional solutions for multi-tier governance? (Gianluigi Tosato)
- EU political economy and multi-tier governance (Vivien A. Schmidt)
- Budgetary solidarity in multi-tiered Union? (Iain Begg)
- Conclusion: what future(s) for the multi-tier governance? (Ingolf Pernice)

17.20-18.15 Debate

18.15-18.30 Concluding remarks by Roberto Gualtieri & Rafal Trzaskowski
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Panel I

Flexibility and differentiated integration under Lisbon treaty

What is the impact of the differentiated integration on the functioning of the EU?

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European Stability Mechanism and Treaty on stability, coordination and governance: role of the EU institutions and consistency with EU legal order

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Panel I - Flexibility and differentiated integration under Lisbon treaty

Institutional dilemmas of the Economic and Monetary Union

Jean-Victor Louis

It is not possible to handle EMU in isolation. One should adopt a more global view of a constitutional nature in order to consolidate and democratise EMU.

The ‘messy structure’ of economic governance, the role of ‘summitry’, the lack of democratic control, the variety of instruments, the diversity of their legal nature which creates legal uncertainty and the anarchic differentiation it organises, may be temporarily justified but it is now time to aim at a more efficient and democratic institutional setting.

A. Differentiation within or outside the founding Treaties

The choice is to be made between strengthening EMU outside the EU legal order, through one or a series of treaties on the model of the ESM treaty and the treaty on stability, convergence and governance in the euro area (TSCG), or through using the legal basis offered by the TFUE (articles 127.6, 136 and 138 plus, as the case may be, article 351 or the general enhanced cooperation clauses) and, if necessary, a treaty revision under the procedures provided in Article 48 TEU. Preference for action under the Treaties is often expressed while conceiving the need for Treaty reform at medium or long term. For a growing number of political leaders especially in Germany, it is not possible to progress under the existing treaties or to adopt another international treaty that would add to the problems of legitimacy and efficiency.

The choice for differentiation on the basis of the founding treaties and with EU institutions playing their traditional role under the Community method is advocated “in the interests of coherence, in the interests of democracy, and in the interests of openness and transparency.” (President Barroso, 6 June 2012).

Others taking into account the practical impossibility to get a unanimous decision of Member States for such a reform, argue for the recognition and better organisation of a temporary ‘avant-garde’ group based on an international Treaty concluded by the Member States having adopted the euro, the solution of a differentiation within the Treaties appearing as a second best. A parliamentary organ different from the European Parliament is suggested.

The ‘Tommaso Padoa-Schioppa group’ (‘Completing the Euro. A road map towards fiscal union in Europe,’ a report for Notre Europe, quoted infra as “TPS report”) “suggests moving forward not on the basis of the present treaty but by shifting to a new intergovernmental Treaty (IGT). The group is confident that such a shift could be achieved while still preserving the involvement of EU institutions as much as possible.” The new EU17 structure “would be parallel to the EU27 framework, but strongly linked to it...The IGT could at a later stage be integrated into the traditional legal structure of the EU”.


There are also drafts for a treaty revision of a constitutional nature, pleading for the building of a political union which would complete the EMU within a more democratic EU. We refer to the report of the CDU adopted at their Party Congress of 14/15 November 2011 with the proposals of a bi-cameral legislator and a president of the Commission elected by universal suffrage, and to the more recent “Einspruch gegen Fassadendemokratie” published by Peter Bofinger, Jürgen Habermas and Julian Nida-Rümelin (FAZ, 3 August 2012). This latter paper aims at a reform of the Treaty that would create a unified monetary territory for a “Kerneuropa”, open to other EU countries, a supranational democracy without becoming a federal state.

We submit to the debate the following reflections:

- If, formally, the Schengen agreements and the Prüm Treaty (sometimes called Schengen III) could be invoked as precedents for the conclusion of separate international agreements among a number of Member States, the importance of the content, the political meaning and the consequences for the political configuration of Europe, of the new step towards an effective economic governance is without precedent. Banking Union, at its final stage includes elements of Fiscal Union, and Fiscal Union goes hand in hand with more Economic Union and it includes and needs, more Political Union.

- Under the case law of the European Court of Justice parallel international treatises must be compatible with the founding treaties. One may admit that they would complete the treaties for comforting them in the realisation of their objectives but they cannot contradict them. In case of emergency, temporary solutions at the borderline of a sound treaty interpretation could be justified, but not ‘revolutionary’ changes in the institutional structure. There are advantages for democracy and transparency in following the revision procedures of the TEU (see Ingolf Pernice, Mattias Wendel a.o., “A democratic solution for the crisis. Reform Model for a democratically based economic and financial constitution for Europe”, Berlin, WHI-Papers 01/2012, quoted infra as the “Humboldt report”).

- The choice to be made between differentiation within and differentiation outside the EU depends very much on the direction the UK will take in its relations with the Continent on the reform in which the Summits of 28 and 29 June 2012 have engaged the EMU.

- The national constitutional limits (BVerfG) to EMU have to be kept in line whatever the solution which is chosen: what is the core of the no bailing out rule (article 125 TFEU) as a pillar of monetary stability, a requirement of the German Grundgesetz (GG)? Could the so-called “eternal clauses” of the GG be modified by a Constitution approved by referendum?

**B. Democratic Control and the question of the government**

Specific questions are to be considered; among them are the following:

- The parliamentary control on EMU: the EP or a Euro committee of a mixed composition? What teaches us up to now the experience with the role given by the Lisbon Treaty to national parliaments for subsidiarity control? (see Peter
Becker/Anne Pintz, ‘Die neue Rolle der nationalen Parlamenten in der EU’, SWP-Zeitschriftenschau 3, Berlin, July 2012) What kind of accountability would be needed on new policies: similar to the present monetary dialogue or more? How to organise the ECB accountability in the exercise of prudential supervision? What to think about the proposal in the “Humboldt report” (p. 23) which would provide for a “minority right” and give to the European Parliament the final decision on deficits?

• Which role for a Finance Minister or the “fiscal body such as a treasury office” mentioned in the Van Rompuy report of 25 June 2012? Will it be in the future a place for peer’ control which has demonstrated both its inefficiency and its ability to survive? The TPS report (p. 17 and 21) rightly insists on the necessity for the EU to be the actor of the policy. Nevertheless, the Finance minister should have the main role as an agent (only? mainly?) in case of crisis: “Sovereignty ends when solvency ends” seems to be the leitmotiv (TPS report, p. 23) following the view of J.C. Trichet on “Federalism by exception”. Which substantial powers should imperatively be left to national parliaments in budgetary affairs?

C. The Euro area on the global scene

How best to implement art. 138 §§1 and 2 on the single voice and unified representation in international financial institutions and conferences? This relates to the Bretton Woods institutions but also to a number of bodies (Financial Stability Board, Standards Setting Bodies) which role in prefiguring EU legislation is important. Isn’t the strengthening of the competences on economic governance and financial supervision a strong argument for solving the long-lasting problem of giving to the EU the weight it deserves in international fora? For legal as well as political reasons and for the sake of coherence, the EU international representation should reflect the adjustment of competences in the internal sphere.

Biography

Jean-Victor Louis Hon. Professor, ULB; former President, Institute of European Studies, ULB (1980-1992); former part-time Professor, European University Institute, Florence (1998-2003); hon. degree, University Paris II (2001); hon. General Counsel, National Bank of Belgium (1980-1998); General Editor, Cahiers de droit européen; President, Foundation Wiener-Anspach.
Panel I - Flexibility and differentiated integration under Lisbon treaty

Which lessons to draw from the past and current differentiated integration?

Janis Emmanouilidis

I. STARTING POINT AND KEY ASSUMPTION

‘Differentiated integration’ (DI) and ‘multi-speed Europe’ are already a reality as the existing EU 27 is characterized by different levels of cooperation and integration and the degree of flexibility is most likely to increase further in the future. The central question is thus not whether there will be a differentiated Europe, but how it will or rather how it should look like. But differentiated integration is no magic potion and no end in itself; it rather is a necessity if the EU wants to remain effective and overcome current and future challenges. At the same time, one should not omit the challenges posed by differentiated integration, especially if cooperation is conducted on a permanent basis outside the EU framework (see also below).

Key responses to the euro crisis since 2010 (i.a. EFSF/ESM; ‘fiscal compact treaty’; Euro Plus Pact; ‘Stability and Growth Pact III’ (‘six pack’; ‘two pack’); banking supervision) have and will most likely continue to lead to a higher level of integration especially among the countries of the Eurozone. The ‘road map’ aiming at a “Genuine Economic and Monetary Union” due to be presented by the four presidents (Presidents Van Rompuy, Barroso, Juncker and Draghi) to the EU Summit in December 2012 will most likely include additional measures leading to a higher level of differentiated integration on the basis of the Lisbon Treaty and maybe even beyond the Union’s current primary law. The final outcome of this process is by no means predictable and its success is by no means certain, but at the end of day it will most likely have to lead to some form of sui generis fiscal and economic union.

II. ELEVEN KEY LESSONS FROM THE PAST AND FROM MORE RECENT DEVELOPMENTS

The debates about directorates, triumvirates, pioneer and avant-garde groups, core groups, centres of gravity, Europe à la carte etc. have been to a large extent characterized by oversimplifications, by threats and fears, and by semantic and conceptual misunderstandings, which overshadow the fact that differentiated integration provides a strategic opportunity in a bigger and more heterogeneous EU. The experience of the last decades (i.a. Schengen, ‘Euro’, Prüm Treaty) has repeatedly proven that closer cooperation between member states has been a (strong) catalyst for a deepening of EU integration.

Differentiated integration within the EU has not followed a single master plan with a predefined idea of Europe’s finalité. Differentiated integration has rather followed the principle of functional-pragmatic differentiation aiming to overcome blockades of
certain member states in specific areas of (potential) cooperation inside or outside the EU Treaties. In addition, differentiated integration has been understood and applied as a last-resort mechanism – as an *utima ratio* if ‘progress’ could not be achieved with all member states at the same time.

**Differentiated integration** has **not led to a ‘closed core Europe’**, i.e. it has not resulted in a small, coherent group of member states, which has formed an exclusive avant-garde (actively) separating itself from other EU countries. On the contrary, the different areas and forms of differentiated integration (including Schengen; ‘Euro’; CSDP; Charter of Fundamental Rights; or enhanced cooperation concerning divorce law or the EU patent) involve different groups of member states. Conversely, differentiation within the EU has **not led to a coherent ‘club of outsiders’** including member states which do not participate in any area/form of differentiated integration. Finally, differentiated integration has **not led to** another potential variant of differentiated integration: the **creation of a ‘new Union’** or a ‘Union within the Union’ with a separate institutional structure and a separate set of primary law.

Most **institutional and political challenges** related to differentiated integration **can be eased if cooperation is ‘organized’ inside the EU**. Flexibility within the EU framework: (i) respects and benefits from the Union’s single institutional framework; (ii) preserves the powers and composition of the European Commission, the European Parliament and the European courts; (iii) limits the ‘anarchic’ and uncontrolled use of flexible forms of cooperation; (iv) guarantees a high level of calculability due to the existence of clear-cut rules concerning the inception, the functioning and the widening of differentiated cooperation; (v) is characterized by a high degree of inclusiveness and openness towards member states (originally) not participating (‘pre-ins’ and ‘outs’); (vi) ensures a high level democratic scrutiny/legitimacy through the involvement of the European Parliament; (vii) enables the continuous development of the EU’s *acquis* in line with the requirements of the EU Treaties; and, most importantly, (viii) reduces the overall risk of a rupture or even confrontational split between the ‘pre-ins’/’outs’ and the ‘ins’.

One rather recent development could have a particular effect on differentiated integration within the EU: the **use of the instrument of enhanced cooperation** since the entry into force of the Lisbon Treaty (transnational divorce; EU patent; and potentially regarding the financial transaction tax) has **proven that the strict conditions laid down in the EU Treaties can be met** and that the existing legal and institutional provisions can work in practice. The recent experience makes it rather likely that the instrument of enhanced cooperation will be applied even more in the future.

One should **not demonize the allocation of opt-outs** if it is limited to a relatively small number of member states. The granting of opt-outs has in the past been the only way to overcome the opposition of certain member states towards a further deepening of integration. At the end of the day, even a ‘radical instrument’ such as an **opt-out can result in integrationist dynamics** throughout the Union, as the widespread use for example of the ‘opt-in’ by the UK and Ireland in the area of Justice and Home Affairs has shown. However, one should not omit that the **granting of ‘opt-ins’ has reduced the pressure** on respective member states to fully join a particular form of (differentiated) cooperation.
Closer cooperation outside the EU bears a number of potential risks (including in particular: challenges to the EU’s institutional coherence or the danger of a (deep) split between ‘ins’ and ‘outs’) and has in the past been sought only as an ultima ratio. In such cases, EU integration has profited if cooperation outside the EU has followed the notion of an intergovernmental avantgarde, which is open to all member states and aimed at integrating the legal norms adopted and the cooperation initiated outside the EU into the EC/EU at the soonest possible moment. Previous cases like the Treaty of Prüm have proven that the chances to incorporate a legal and political acquis into the EC/EU framework are higher if the participating states keep the ‘outs’ constantly informed/involved and if key EU states actively promote a ‘quick’ incorporation of outside cooperation into the Union’s framework. In this context and in the framework of the ‘euro rescue’, it is worth mentioning that the signatories of the “Treaty on Stability, Coordination and Governance” have agreed that within five years at most following its entry into force, the necessary steps will be taken to insert the substance of the intergovernmental treaty into the EU’s legal framework (‘repatriation clause'; Article 16).

The management of the euro crisis has led to a number of intergovernmental arrangements/treaties outside the EU framework (EFSF; ESM; Euro Plus Pact; Treaty on Stability, Coordination and Governance (TSCG) (also known as ‘fiscal treaty’ or ‘fiscal compact treaty’), which – according to some commentators – could lead to a more permanent ‘two-speed’ or even ‘two-tier’ Europe between euro and non-euro countries.

One should not underestimate this risk. However, euro countries have been eager to keep non-euro countries and EU institutions closely aligned to these and other intergovernmental arrangements. Six non-euro countries have joined the Euro Plus Pact (Bulgaria, Denmark, Latvia, Lithuania, Poland and Romania) and eight non-euro countries have signed the TSCG (Bulgaria, Denmark, Hungary, Latvia, Lithuania, Poland, Romania, Sweden). With respect to the involvement of EU institutions, the Commission has been attributed a particular role in the implementation of the fiscal compact included in the TSCG. In addition, and in order to strengthen the link between ‘ins’ and ‘pre-ins’/’outs’, it was agreed that (i) meetings of the Euro Summit would take place after European Council meetings, that (ii) the President of the European Council would also preside the meetings of the heads of state and government of the Euro-17, and that (iii) non-euro countries would participate in at least one Euro Summit per year.

In sum, euro countries have actively sought to avoid a rupture or even split between euro- and non-euro countries. In addition, non-euro countries, especially the so-called ‘pre-ins’, have since 2010 exerted strong pressure on the Euro-17 not to be decoupled from major developments in the Eurozone, which at the end of the day have strong consequences also for countries which have not (yet) introduced the common currency. Last but not least, the measures aiming to overcome the euro crisis have not led to a weakening of supranational EU institutions. On the contrary, key reactions to the euro crisis have strengthened in particular the role of the European Commission, which plays a stronger role in the framework of the enhanced Stability and Growth Pact and a key role in the European Semester, in the Macroeconomic Imbalance Procedure and in national ‘rescue programmes’ as part of the troika. With respect to the role of supranational institutions, one should not omit, that the European Parliament runs the
risk of being sidelined in some of the processes aiming to lead to a “Genuine Economic and Monetary Union”.

With respect to the euro crisis, one should not overlook the circumstance, that the higher level of cooperation among euro countries since 2010 has been initiated and implemented under very specific circumstances: the unique pressures on the common currency and on the EU in general have put unprecedented pressure on member states to come up with ‘crisis recipes’, which required particular (re)actions among euro countries. At the same time, non-euro countries (grudgingly) ‘accepted’ more differentiation, as the economic, financial and political costs of a failure to rescue the common currency would have had a (highly) negative impact on them and on European integration in general. However, the ‘devil lies in the detail’ as euro and non-euro countries have to seek compromise solutions with respect to individual measures, which affect not only euro but also non-euro countries. One prominent recent example is banking supervision, which – even if it is applied ‘only’ to financial institutions in the Eurozone – has potential (strong) effects on the banking system in non-euro countries.

The euro crisis has provoked a new debate about the potential perspectives and consequences of ‘negative differentiation’, i.e. the possibility of a member state exiting the Union or – as discussed in the case of Greece – the euro. The latter is not explicitly foreseen by the current EU Treaties. However, since the Lisbon Treaty the EU’s primary law (Article 50 TEU) for the first time includes a withdrawal clause, which states that after the country in question has notified its intention to withdraw to the European Council, the two sides – i.e. the exiting state and the EU – will negotiate and conclude an agreement “setting out the arrangements of its withdrawal, taking into account of the framework for its future relationship with the Union.”

III. KEY SET OF QUESTIONS FOR THE FUTURE

On the basis of the above listed key lessons from the past and from more recent developments one can identify six major sets of questions/challenges for the future:

Set of questions 1: Avoiding a ‘two-tier Europe’
What needs to be done in order to avoid the creation of a ‘two-tier’ or ‘two-level Europe’? How can non-participating countries be closely aligned to new forms of differentiated integration without undermining the efficiency of the system? How to ensure that the deepening of economic and fiscal integration will not create new entry barriers for ‘pre-ins’ who at some point of time want to or rather have to join the euro? How can one avoid that measures taken to ‘rescue’ the common currency will not negatively affect non-euro countries?

Set of questions 2: Reform of EU Treaties
Will the attempts to create a “Genuine Economic and Monetary Union” at some point in time require an amendment of the EU Treaties? How and when can intergovernmental arrangements/treaties adopted since 2010 (in particular the TSCG) be integrated into the EU framework? Does the EU in the years to come have to engage in yet another major treaty reform exercise including a European Convention? If yes, will this reform process be
limited to economic and fiscal matters or will it entail also a more fundamental reform of the EU’s primary law going well beyond issues related to the current euro crisis?

Set of questions 3: Institutional challenges
Will a deepening of economic and fiscal integration require the reform of existing institutional arrangements or even the creation of new institutions/bodies? Will a higher level of differentiation between euro and non-euro countries require a distinction between members of the European Commission and/or members of the European Parliament coming from countries which have or have not introduced the euro? Would the latter not undermine institutional coherence and foster distrust between ‘ins’ and ‘pre-ins’/’outs’ with possible negative spill-over effects for the EU as a whole? In more radical terms, is there a need to set up new separate, parallel institutions for the Eurozone? Would the latter for example include setting up a separate institutional arrangement providing legitimacy for decisions taken within the Eurozone (‘euro chamber’)? How can national parliaments be associated more closely to decisions taken among euro countries? Should one consider the introduction of a separate ‘euro budget’ and if yes, what should it be ‘used’ for and how big should it be?

Set of questions 4: Consequences of a potential inability to deepen economic and fiscal integration within the EU framework
What to do if individual member states outside the euro are not willing to accept a further deepening of integration towards a “Genuine Economic and Monetary Union”? Assuming that the worst of the euro crisis can be overcome, would this lead to a more hesitant position of non-euro countries vis-à-vis a higher level of differentiation within EMU? Would opposition from non-euro countries lead to new and more permanent intergovernmental arrangements/treaties outside the EU framework? In more general terms, what happens if a future new Treaty, which provides the legal grounds for a higher level of integration especially among euro countries, cannot enter into force due to ratification failure in one or more member state? Would this ultimately lead to the creation of a ‘new Union’ or a ‘Union within the Union’ with new institutional structures on the basis of a separate treaty?

Set of questions 5: New ‘forms of belonging’
Will a higher level of differentiated integration within the EU lead to new ‘forms of belonging’ beneath the level of full membership or even to cases of ‘negative differentiation’ due to a voluntary withdrawal of member states from the EU or from certain key policy areas? What are the potential consequences of possible cases of ‘negative differentiation’ for the EU and for a country exiting the Union? Would new ‘forms of belonging’ beneath full membership create opportunities for non-EU countries to align themselves more closely with the Union without becoming a fully-fledged member (‘membership minus’; ‘partial membership’; ‘limited membership’)?

Biography
Janis A. Emmanouilidis is a Senior Policy Analyst and Head of Programme at the European Policy Centre (EPC) in Brussels. He has published widely on the European Union’s overall political and institutional development, the perspectives of differentiated integration in an EU 27+, the Union’s foreign, security and defense policy, and on EU enlargement. His latest book, The Delphic Oracle on Europe, co-edited with Loukas Tsoukalis, was published by Oxford University Press in May 2011. Janis has been an advisor to various governments, EU institutions; European parties and NGOs on a broad range of issues related to European integration and has commented widely on EU affairs in the media. Janis has studied international relations and strategic studies in the UK and economics in Germany.
Panel I - Flexibility and differentiated integration under Lisbon treaty

European Stability Mechanism and Treaty on stability, coordination and governance: role of the EU institutions and consistency with EU legal order

Bruno De Witte

1. There are numerous examples of international treaties concluded between member states of the EU ever since the 1950’s, in areas such as tax law, environmental protection, defence, culture and education. An early example was the creation in 1960 of Eurocontrol, an international organization charged with common air traffic management tasks by eight European states, including five of the six European Community countries. Although the European Community gradually developed its own aviation regulations, Eurocontrol has maintained its existence as a separate international organization with a complex legal relation to the European Union. The most prominent example of an inter se agreement (that is: an agreement between some but not all the EU member states) was the Schengen cooperation regime, composed of a first Agreement signed in 1985, and an implementing Convention adopted in 1990. The Schengen instruments were expressly presented as an interim arrangement in preparation of a final regime at the level of the European Community, rather than as a separate and rival co-operation regime. The same was true for the Social Policy Agreement concluded, as a separate part of the Maastricht Final Act, between 11 of the then 12 member states; and for the Prüm Convention later on.

2. In current practice, inter se treaties between EU member states are principally used for rather mundane matters. They deal with subjects that are not yet absorbed within the scope of activities of the European Union, either because they are of concern only to two or three countries and not to the European Union as a whole (this is typically the case for agreements dealing with the protection of rivers or mountain ranges) or because their subject matter lies outside EU law-making competence, as is the case with culture and education, and (more controversially) with bilateral tax treaties. These agreements are still rather numerous but they usually do not deal with vital matters of foreign policy. However, the option of concluding inter se agreements always remain present in the toolbox of the EU states’ foreign policy, as was illustrated by the recent conclusion of the Treaty setting up a European Stability Mechanism (hereafter: ‘ESM Treaty’) signed by the 17 euro area countries, and of the Treaty on Stability, Coordination and Governance in the European Union (hereafter: ‘Fiscal Compact’), signed by 25 EU member states.

3. The fact that the EU member states may, in principle, continue to conclude treaties between themselves does not mean that they are entirely free to do so as and how they wish. Inter se international agreements between two or more member states of the EU are allowed, but only within the limits set by EU law obligations. The practical importance of the principle of primacy of EU law over partial agreements between member states was illustrated by a judgment of the European Court of Justice in 2006 that found the application of a Schengen Convention rule to be incompatible with the rights of free movement which third country nationals who are family members of EU citizens derive from their EU citizenship.
from Community law. The Court’s finding was facilitated by the fact that Article 134 of the Schengen Convention contained an express conflict rule giving priority to Community law, but the ECJ would no doubt have come to the same conclusion with regard to an agreement that does not contain such an express primacy rule. In fact, whereas the Fiscal Compact contains a clear rule recognizing the primacy of EU law (Art. 2.2), the ESM Treaty does not have such a rule – but this does not change the legal reality which is: the undisputed precedence of EU law over conflicting provisions in treaties between its member states. This primacy not only protects EU law as it stands today but also as it might become in the future: if, for example, new provisions of secondary EU law will be enacted that conflict with the Fiscal Compact Treaty (for example: stating that euro states are always allowed to have a budgetary deficit of up to 2%, rather than the 0.5% or 1% threshold set by the Fiscal Compact), then those new EU law provisions will prevail.

4. A number of allegations of conflict with EU law have been made, in relation to either the ESM Treaty or the Fiscal Compact. Some of those allegations, relating to the former instrument, have also been made in the context of a preliminary reference by the Irish Supreme Court in the Pringle case, which is currently pending before the CJEU. The main allegations, which I will briefly discuss in turn under points 5 to 9 below, are: interference with the exercise of (exclusive) EU competences; breach of the no-bail-out clause of Art 125 TFEU or, more broadly, of the essential character of EMU law; conflict with primary and secondary EU law in the field of economic policy (the ‘six-pack’ essentially); the unjustified ‘use’ of EU institutions in the implementation of those international agreements.

5. Inter se agreements are not allowed in matters falling within the EU’s exclusive competence. Monetary policy is, in relation to euro area countries, an exclusive competence of the EU (Art 3.1 TFEU); it has been argued, also in the Pringle case, that the ESM Treaty deals with monetary policy and is therefore illegal under EU law. However, in the system of the TFEU, the question of financial assistance to member states is clearly located in the Economic Policy chapter (Articles 120 to 126) rather than in the Monetary Policy chapter (Articles 127 to 133), and economic policy is a shared competence, in which the Member State have preserved the right to develop their own policies, alone or together with others. With the entry into force of the new Art 136(3) TFEU, which expressly authorizes the euro states to set up a stability mechanism, the competence issue will be solved beyond any doubt.

6. Still with regard to the ESM Treaty, it has been argued that it violates the no-bail-out clause of Art 125 TFEU, or at least that it allows for its violation. Indeed, Art 125 states that EU member states shall not be liable for the financial commitments of other member states, and one of the reasons for the creation of the ESM is precisely to make euro countries liable for each other’s debts, although only indirectly and only to the extent of each country’s contribution to the Mechanism. There is, indeed, a potential conflict there. But the entry into force of the new Art 136(3) TFEU, which is scheduled for 1 January 2013, will remove this conflict, since it explicitly allows the creation of a collective financial support mechanism under certain conditions, in derogation from the general no-bail-out clause. If the ESM Treaty enters into force in October 2012 (as is announced), the ESM

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1 ECJ, Case C-503/03, Commission v Spain, judgment of 31 January 2006, particularly the recitals 33 to 35.
organs will have to wait until 1 January 2013 to adopt their first country support programmes, if they want to avoid any inconsistency with EU law.

7. In relation to the Fiscal Compact, it has been argued that its provisions on budgetary balance duplicate existing provisions of primary or secondary EU law in relation to budget deficits. Indeed, the TFEU sets the maximum deficit at 3%, whereas the Fiscal Compact reduces that to 0,5% or 1%, depending on the countries. However, it is clear that, whereas these figures are different, they are not incompatible. Just as the TFEU leaves the member states free to set a ‘golden rule’ which is stricter under their own constitutional law (as Germany and Spain have done, for example), it also allows the member states to do so collectively, by means of an inter se agreement.

8. The next controversial question is that of the ‘borrowing’ of the EU institutions under an international agreement. As is well known, both the Fiscal Compact and the ESM Treaty provide for certain tasks to be accomplished by the Court of Justice and the European Commission (with minor references also to the EP, the Council and the ECB). There is a major difference to be made, in this respect, between the Court of Justice and the other institutions. Article 273 TFEU (which has been in the EEC Treaty from the very beginning) allows the member states to submit to the Court of Justice, “under a special agreement between the parties”, “any dispute between Member States which relates to the subject matter of the Treaties”. The subject matter of the ESM Treaty and the Fiscal Compact is indeed closely connected to the TEU and TFEU, and Article 8(3) of the Fiscal Compact is expressly declared to be a ‘special agreement’ in the sense of Article 273 TFEU. In the ESM Treaty, that reference is to be found in recital 16 of the preamble. This possibility of giving extra competences to the Court of Justice has been repeatedly used in the past, most famously perhaps in the Brussels Convention on jurisdiction and recognition of judgments (now replaced by the so-called Brussels-I Regulation), which was a separate convention concluded between the member states of the EC in which they created a preliminary reference procedure involving the Court of Justice, similar to but not identical with the general preliminary reference procedure provided by the EC Treaty.

9. What about the other EU institutions? According to Article 13(2) TEU, the EU institutions shall act within the limits of the powers given to them under “the Treaties” (meaning: the TEU and the TFEU, and no other treaties). This would be a strong textual argument for the view that it is not possible to give any new competences to the Commission, the Parliament, the Council or the ECB under separate international agreements such as these two. The best way to address this problem is, in my opinion, to distinguish between ‘competences’ and ‘tasks’. What Article 13 TEU seeks to convey is that the competences of the institutions are fixed by the treaties; it does not exclude that extra tasks may be given to the institutions as long as those tasks fit within their existing competences.2 To explain this difference, a parallel can be made with secondary EU legislation, by which new tasks are often given to the Commission, e.g. to further implement a piece of legislation. Those tasks fit within the general constitutional mandate of the Commission but they are extra tasks, in the sense that they are not specified with so many words in the Treaties but are being gradually defined as EU law develops. In our case here, this does not happen

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2 The Court of Justice has accepted, in the so-called Bangladesh judgment of 1994, that the Commission could perform tasks entrusted to it by the member states under a separate international agreement: European Parliament v Council and Commission, Joined Cases C-181/91 and C-248/91.
through secondary legislation but through a separate international agreement, the main difference being that the Commission, the Council and the Parliament are under no obligation to perform those tasks but are free to accept them or not. Now, do those extra tasks fit within the institutions’ competences, as defined in particular by the TFEU chapter on economic policy? I would indeed think so. In particular, the role given to the Commission (and the ECB) by Art 13 ESM Treaty, to negotiate and monitor the Memorandum of Understanding with countries benefiting from financial support, is modeled on an existing mechanism under EU law. Also, the reporting and assessment role given to the Commission under Art 8 of the Fiscal Compact fits within its existing functions under EU economic policy legislation.

10. My conclusion is that none of the provisions of the ESM Treaty or the Fiscal Compact is, by itself, in breach of EU law (at least not of EU law as it will stand after the entry into force of the new Article 136(3) TFEU). Later implementation of those treaties may lead either the ESM organs or the member states to act in conflict with EU law, and in that case the normal sanctions for infringement of EU law would apply. This legal assessment does not imply that the choice made by the member states to conclude separate international agreements must be applauded. Certainly with regard to the content of the Fiscal Compact, the adoption of EU legislation would have been preferable – from the perspective of democratic legitimacy and legal stability. But the ESM Treaty and Fiscal Compact are not written in stone. If new EU law is made, in the near or distant future, which contrasts with any of the provisions of these two treaties, then those provisions will have to be discontinued.

Biography
Bruno De Witte is Professor of European Union Law at Maastricht University, and part-time Professor at the Robert Schuman Centre of the European University Institute, Florence. He is co-director of the Maastricht Centre for European Law. He was a professor of European Union Law at the European University Institute, Florence, from March 2000 to February 2010, and co-director of the Academy of European Law at the EUI. His main fields of research include: Constitutional reform and Treaty revision in the European Union; Relations between international, European and national law; Protection of fundamental rights in Europe, in particular anti-discrimination law; the rights of minorities, language law and cultural diversity in Europe; Decision-making and legal instruments of EU law.
QUELLES SOLUTIONS INSTITUTIONNELLES POURRAIT-ON ENVISAGER POUR GERER LA GOUVERNANCE MULTI-VITESSES SANS MODIFIER LE CADRE DES TRAITES ACTUELS DE L’UE ?

Le point de départ de ma contribution est double :

- pour résoudre durablement la crise de l’Euro zone, quelle que soit la nécessité de « bail-out » ou de « firewalls », il sera nécessaire de constituer celle-ci en une véritable union économique et monétaire ; les Conclusions du Conseil Européen des 28-29 juin vont dans cette direction ;
- pour y parvenir, du fait qu’il paraît politiquement impossible aujourd’hui de modifier les Traités UE, faute d’accord unanime des 27 Etats Membres, il convient de trouver une autre solution, qui devra impérativement être compatible avec ces Traités.

Si ce double postulat est exact, seuls deux types de solutions sont envisageables :

- soit les 17 de l’Euro zone s’intègrent davantage en utilisant toutes les possibilités de coopération renforcée offertes par le cadre des Traités actuels,
- soit ils complètent ce cadre par un « traité additionnel » intergouvernemental leur permettant de procéder à une plus forte intégration.

PREMIERE OPTION : LES MEMBRES DE L’EURO ZONE UTILISENT AU MAXIMUM LES POSSIBILITES DE COOPERATION RENFORCEE OFFERTES PAR LES TRAITES ACTUELS :

- Les articles 136 et 138 TFUE concernant l’union économique et monétaire, à condition que tous les 17 participent, et dans la limite du champ d’application de ces articles, continueront à offrir la meilleure base juridique pour agir dans ce domaine.
- Les dispositions générales des Traités UE relatives à la coopération renforcée, à condition qu’au moins 9 Etats participent au cas par cas, pourront compléter ces deux articles en permettant de coopérer davantage dans d’autres domaines.

Cette option présente un grand nombre d’avantages. Elle est immédiatement utilisable. Aucun nouveau traité ne doit être négocié ni conclu. Les dispositions institutionnelles des Traités s’appliquent pleinement. Toutes les institutions jouent leur plein rôle, avec leur pleine composition. Au Conseil, seuls les membres représentant les États participants
décident. Au Parlement européen et à la Commission, tous les membres décident. Le respect des décisions par les États participants est soumis au contrôle normal de la Commission et de la Cour de Justice.

Cependant, cette option présente également des inconvénients. Elle ne comporte pas l’engagement juridique de réaliser une union économique, laquelle implique nécessairement une convergence des politiques budgétaires et économiques non prévue par les Traités. De ce fait, il n’est pas évident qu’elle soit suffisante, ni politiquement pour convaincre les populations et les marchés financiers, ni économiquement pour réussir, faute d’obligations juridiques susceptibles d’être sanctionnées. Par ailleurs, les États participants pourraient avoir des difficultés politiques à accepter que les décisions les concernant exclusivement soient proposées et décidées par une Commission et un Parlement dans leur composition reflétant la totalité des États membres de l’Union européenne.

**DEUXIÈME OPTION**: LES MEMBRES DE L’EURO ZONE CONCLUENT UN TRAITE INTERGOUVERNEMENTAL « ADDITIONNEL » AUX TRAITÉS UE AFIN DE PROCÉDER À UNE PLUS FORTE INTEGRATION

Cette option permettrait aux États participants de s’engager juridiquement à établir entre eux une véritable union économique et monétaire. Un traité additionnel prendrait évidemment du temps pour être négocié, conclu et appliqué. Mais une décision de principe, à la condition d’être assez claire et précise, pourrait être à même de convaincre les populations et les marchés financiers qu’une solution durable est possible et qu’elle est en vue. La faisabilité juridique de cette option, dans la mesure où le traité additionnel serait compatible avec les Traités UE et confirmerait leur primauté, ne poserait pas de problème. La principale difficulté serait d’ordre politique, et elle serait majeure, à savoir obtenir l’adhésion des populations et des parlements nationaux.

Encore conviendrait-il auparavant de s’entendre sur un cadre institutionnel. Il serait bien évidemment préférable de ne créer aucun organe nouveau, l’UE étant déjà très complexe. La Cour de Justice, la Cour des Comptes et la BCE pourraient, avec l’assentiment des 27, participer à l’application d’un traité additionnel sans changer leur composition ni leur statut. Pour le Conseil européen et le Conseil, il n’y aurait pas de difficulté non plus : ils se réunissent déjà dans la composition de l’Euro groupe.

La question serait plus ardue pour le Parlement européen, s’agissant de matières qui relèvent actuellement des compétences nationales. Pour des raisons juridiques (voir articles 10(2) et 14(2) TUE) mais aussi politiques, il semble difficile de conférer le contrôle démocratique aux seuls députés du PE élus dans les États participants. Les gouvernements de ces États pourraient, par ailleurs, ne pas souhaiter un contrôle exercé par le Parlement européen dans sa pleine composition. De leur côté, les Parlements nationaux pourraient exiger, en contrepartie de leur acceptation de transférer certains de leurs pouvoirs essentiels au niveau européen, d’avoir un contrôle des décisions qui seraient prises à ce niveau dans l’avenir, en arguant également de l’insuffisante légitimité des membres du Parlement européen (qui ne votent pas l’impôt). Une solution envisageable pourrait consister à créer une délégation européenne des Parlements nationaux des États participants, élus par exemple au sein de leurs commissions budgétaires. Cette délégation pourrait avoir des pouvoirs de codécision ou d’avis
conforme dans les décisions à prendre dans les domaines nouveaux couverts par la coopération.

Quant à la Commission, les gouvernements des États participants pourraient être réticents à ce qu’une institution constituée par et pour 27 membres leur impose ses décisions dans des domaines aussi sensibles. Mais la création d’un organe similaire à la Commission, avec les ressources humaines correspondantes, est, à l’évidence, hors de question. Une solution envisageable pourrait être de créer une petite autorité politico-administrative, ou un « ministre des finances de l’Euro zone », chargé(e) de contrôler l’application des décisions et de saisir éventuellement la Cour de Justice des cas de non-respect. Cette autorité ne serait pas autorisée à créer une nouvelle bureaucratie ; elle devrait donc subdéléguer la préparation de substance de ses décisions à d’autres entités. Il est suggéré qu’elle le fasse en priorité à la Commission elle-même, à condition que les 27 l’acceptent. De cette façon, le système serait très proche du cadre institutionnel de l’UE.

Le traité additionnel devrait contenir au surplus des dispositions appropriées pour protéger efficacement les droits et intérêts des autres États membres de l’UE, sous le contrôle de la Cour de Justice, et offrir un statut d’observateur «actif» à ceux d’entre eux qui souhaitent avoir au plus tôt l’euro comme monnaie. Il devrait également contenir des dispositions adéquates pour préserver tant les compétences que l’unité et la cohésion de l’UE, dont l’Euro zone continuera à faire partie intégrante.

**Biography**

Jean-Claude Piris, consultant and author of "The Future of Europe: Towards a Two-Speed Europe?" (Cambridge University Press, January 2012); "The Treaty of Lisbon: A Legal and Political Analysis" (CUP, 2010); co-author of "Completing the Euro: A Roadmap Towards Fiscal Union in Europe" (Notre Europe, September 2012). Jean-Claude was formerly Legal Counsel of the European Council and of the Council and Director General of the Legal Service of the Council of the European Union (1988-2010), served as Legal Counsel of the Intergovernmental Conferences which negotiated and approved the Treaties of Maastricht, Amsterdam, Nice, Constitutional Treaty, and Lisbon. He was also the former Director for Legal Affairs of the OECD, a former French Diplomat to the United Nations and French Conseiller d'Etat e.r.
Panel II

European and national institutions in multi-tier governance

What are the roles and tasks for the EU institutions and national institutions?

Renaud Dehousse
*Inter-institutional balance in the EU: is the community method still relevant?*

Wolfgang Wessels
*How to assess an institutional architecture for a multi-level Parliamentarism in differentiated integration?*
Inter-institutional balance in the EU: is the community method still relevant?

Renaud Dehousse

1. The essence of the “Community Method”?  
   - Delegation of powers to Supranational bodies  
   - Corollary: limitations of Member states’ sovereignty (QMV)

   A stable model despite:  
   - The emergence of a powerful new actor, the EP  
   - The dramatic increase in the number of participants (enlargement)

2. A model under pressure  
   - Disenchantment of public opinion (EB+ national elections)  
   - National governments' increasing reluctance to delegate powers since Maastricht:  
     - Pillars structure  
     - EMU  
     - OMC  
     - Crisis: Centrality of the European Council (Merkel’s union method)  
   - Creation of countervailing powers to prevent a strengthening of Commission’s role (high representative, European Council President, Independent agencies)

3. The Operating System by Default  
   - MS have accepted to revert to the Community Method in case alternatives have proved inefficient:  
     - Gradual “Communitarization” of JHA  
     - EMU reform as a result of the sovereign debt crisis (TSCG and 6/2 packs as a remedy to the weaknesses of the Stability Pact)

4. Implications for the discussion on Differentiated Integration  
   - Premises:  
     1) Differentiation is always prompted by a reluctance to accept delegation and discipline
2) Important to preserve Community Method, which has proved superior to any alternative so far ➔ resist the danger of dilution: lukewarm governments fear to be excluded and want to be “in”

3) Institutional clarity: public opinion must understand who is in charge and will be accountable

- **How can supranational institutions be inserted into the “differentiated” governance system?**
  - No major concern for ECJ (TSCG)
  - Nor for the commission as long as its members remain faithful to their duty of independence (but good policy to have nationals of “in” states in charge of the relevant portfolio, as has been the case for EMU)
  - **The real problem is with the EP:**
    - MEPs supposed to represent union citizens (Art. 10 and 14 (2) TEU)
    - But strong links to their country (governments keep arguing about the distribution of seats; national parties play a crucial role in their election) ➔ viewed as their country’s representatives
    - Not a problem if only a handful of countries remain outside (TSCG)
    - Can be highly problematic when “in” countries are a minority (e.g. banking union between founding countries). What if proposals are killed by majorities of MEP from “out” countries?

**Conclusion**

The EP faces a difficult choice. If it insist on its unitary character, and refuses to support the establishment of a parliamentary assembly comprising only members of the "in" countries, two things are likely to happen:

- MS will insist on a weak parliamentary body, deprived of a clear policy-making or control function; (e.g. Art13 TSCG)
- They will focus on national parliaments as the main source of legitimation.

See the limited space devoted to the Parliament in President Van Rompuy’s issues paper of September 2012.

**Biography**

**Renaud Dehousse** is a professor at Sciences Po, where he holds a Jean Monnet Chair in European Union Law and Political Science and directs the Centre d’études européennes. After completing his legal studies at the Université de Liège (Belgium), he obtained a doctorate at the European University Institute in Florence. At Sciences Po, he co-directs the Master's program in European Affairs and the Euro/Transatlantic Master's program, in partnership with the Universities of Bath, Madrid (Carlos III), Berlin (Freie Universität and Humboldt), Prague (Charles), Siena, Washington (Seattle) and North Carolina (Chapel Hill). His work focuses on the European Union’s institutions and its political system. In 2011, he edited the book "The ‘Community Method’: Obstinate or Obsolete?" analyzing the transformation of the community method and of its alternatives through the recent years.
Panel II - European and national institutions in multi-tier governance

How to assess an institutional architecture for a multi-level Parliamentarism in differentiated integration?

Wolfgang Wessels

I. The analysis: ever increasing complexity of multi-tier governance

1. Forms of multi-tier, flexible differentiated integration, in which not all member states have the same rights and obligations, have considerably increased in number and variations (see Graph 1). We observe variations of multi-tier governance in several of the Union’s exclusive, shared and supporting competences. The Lisbon Treaties have again established additional legal opportunities (see permanent structured cooperation in Art. 46 TEU).

Graph 1: Europe: United (?) in Diversity

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The new treaties outside the EU framework (the TESM and TSCG) as further forms of governances adopted by the European Council in the crises years have again increased the relevance and the complexity of modes of EU governance. At the same time we observe a rich variation of labels like ‘multi-speed’, ‘core Europe’, ‘geometry variable’.

2. For parliaments on the national and the European level the complexity of multi-tier governance has considerably increased the difficulties to play an adequate role vis-à-vis strong multilevel players of the executive branch of government - especially in view of the dominant role of the European Council (see Graph 2). Asymmetries of power positions increase with most forms of multi-tier governance.

Graph 2: Multi-level Players^4

The role of parliaments has generally decreased in procedures of the multi-tier governance: The legitimacy issue must be addressed. Keeping in mind our traditional constitutional understanding we might claim that these developments would have given Montesquieu a headache.

Picture 1: Montesquieu’s headache^5

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^4 Jean Monnet Chair Wolfgang Wessels 2012.

3. Analyzing experiences and evidence of multi-level parliamentary cooperation, the lack of incentives for parliamentarians from both levels to overcome organizational hurdles is so far the most significant reason for a slow extension of legal forms of cooperation and for using existing opportunities.

II. Institutional options: playing on one level

To (re-)visit institutional options I discuss some general considerations that need to be adapted to the respective forms of multi-tier governance.

1. On the national level: from absence to a full parliamentarisation

   Graph 3: Developments on the national level

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One major strategy aims at the reinforcement of control/supervision and co-decision powers of national parliaments from a traditional model of no or few direct competences to a full parliamentarisation vis-à-vis national governments in specific areas of multi-tier governance. A highly significant example is the Bundestag: The Bundesverfassungsgericht has reinforced its veto power in German decision-making in matters dealing with the Euro zone crisis. One likely consequence will however be a fragmented debate tending to stress just national parochial interests.

2. The EP on the EU level: exercising its function

An important issue is how the EP can and should exercise its functions in those areas of multi-tier governance in which the TFEU has empowered the EP to act according to the normal treaty rules. The doctrine that the EP represents all European citizens and not national constituencies will be increasingly disputed: ‘No representation without taxation’.

III. Playing on both levels

The most significant issue is how parliamentarians of both levels can cooperate to compete with strong multilevel players of the executive branch. Since the increase of the powers of the EP and the losses of legislative competence of national parliaments, one favourite line to react to assumed democratic deficits are proposals to create institutional and procedural opportunities to compensate the ever more important and uncontrollable role of national governments in and via the European Council by a cooperation between national parliaments and the EP. In a coordinated division of labour, parliaments of both levels should jointly exercise a comprehensive participation in the preparation and an ex-post scrutiny and control. These considerations are based on a strategy of a multi-level alliance or coalition of parliaments vis-à-vis power seeking executives. The strategic position of the European Council as key player on both levels could be balanced by a multi-level set up of parliaments based on a dual European and national legitimacy7.

1. Ongoing activities

We observe several ways and approaches of parliaments on both levels to inform each other and deliberate on issues of shared responsibilities. Thus committees of national parliaments offer a special status to their colleagues from the EP. We also observe bilateral visits and interparliamentary conferences, as well as meetings of Chairs of many select committees like finance and budget committees, the meetings of the Chairs of the Presidents of the Parliamentary Assemblies and ad hoc experiences like video-conferences between a given assembly and MEPs.

The most extensive network is the ‘Conference of Parliamentary Committees for Union Affairs’ (known as COSAC). The results and the impact of this loose set-up are marginal both on the EP’s as on the national parliaments’ side. The Lisbon Treaty has not upgraded these arrangements which are still outside the EU’s formal institutional architecture. Vague provisions of the Lisbon Treaty enable ‘the European Parliament and national parliaments to determine the organisation and promotion of effective and regular

7 see Ibid. (2012, forthcoming) for some considerations.
interparliamentary cooperation within the Union’ (Art.9, Protocol 1). COSAC is empowered to organize meetings also on CFSP and CSDP topics, which would cover parts of the European Council’s agenda. This set-up got only negligible rights: ‘(It) may submit any contribution it deems appropriate for the attention of the European Parliament, the Council and the Commission’ (Art.10, Protocol 1). It is an issue of debate if COSAC needs to install groups of national MPs from multi-tier arrangements, excluding respective MEPs from opt-out countries. Another set up of this kind is the newly created Inter-Parliamentary Conference for the Common Foreign and Security Policy (CFSP) and the Common Security and Defence Policy (CSDP), composed of both EU national parliamentarians and MEPs.

In a similar approach Article 13 of the Treaty of Stability, Coordination and Governance in the Economic and Monetary Union also proposes that the EP together with the national parliaments ‘determine the organisation and promotion of a conference of representatives of the relevant committees of the national parliaments and representatives of the relevant committees of the European Parliament in order to discuss budgetary policies and other issues covered by this Treaty’.8

There are other examples of multi-level parliamentary cooperation beyond the models described above. These forms like other proposals to extend forms of cooperation are not likely to overcome the basic lack of motivations for really working together. We need a stronger legal constitutional role for this set up which is even more difficult to establish for a subgroup of countries.

2. Upgrading the cooperation

In the political and academic debate we also find proposals for an upgraded set up for interparliamentary cooperation. A specific form would be a French style ‘Congrès’9 which – composed of members of the national parliaments and of the EP – would take specific decisions on most relevant issues of the respective multi-tier governance. More relevant are joint forms of deliberations for making the EU polity, e.g. by a Convention in which national and EP parliamentarians cooperate to draft new treaty articles. This form of a multi-level parliamentary forum has been formalized in the Lisbon provisions for the ‘ordinary revision procedure’: ‘(It) shall adopt by consensus a recommendation (to an IGC)’ (Art. 48(3) TEU): It is not a permanent body and restricted to a special function in rare occasions: Treaties outside the legal framework of the EU treaties are not elaborated by a convention. Again: do we need a convention of parliamentarians from just those countries who prepare a new treaty?

IV. Conclusion: no way out of the vicious circle?

Looking at the observed weaknesses of the multi-level parliamentarism in general I see even more difficulties for strengthening the relation between fewer national parliaments and the EP in multi-tier constellation. My basic assumption is that incentives of

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parliamentarians of both levels to get into a meaningful dialogue are not much larger than in ordinary Community business. As long as their work does not have an impact on decision-making, especially in and by the European Council, even highly salient issues will not lead to more than exchanges of views of MPs of a lower rank in their national parliaments. National MPs might also be hesitant to give the EP full legitimacy if MEPs from opt countries play a role. Without power no incentive to use institutional and procedural opportunities of the multi-level cooperation. Such a consequence will however have a major negative effect as national MPs as veto players will lack European perspectives. Without a European political space narrow national perspectives will dominate the discourse and the taking of decisions. Fragmentation and blockages have negative effects.

To create a new mixed institution and to give it real power via revisions of the EU treaty (Art. 48 TEU) might encounter major obstacles especially if the EP delegation would exclude MEPs from opt out countries.

To get out of the vicious circle we might need to design ambitious steps creating a fully-fledged architecture just for major forms of multi-tier governance. As an innovation this set up could include new mixed institution composed of parliamentarians from both level but without those from opt out countries. We all know that such a step would accelerate the splitting of the Union. But let us not deceive ourselves: incremental steps of more informal contacts will not solve the fundamental structural weaknesses of parliaments in a multi-level multi-tier constellation.

**Biography**

Prof. Dr. Wolfgang Wessels is chair holder of the Jean Monnet Chair for Political Science at the University of Cologne since 1994 and, since 2011, Jean Monnet Chair ad personam. His priorities in teaching and research include the political system of the European Union, the role of the EU in the international system, the deepening and widening of the EU, modes of governance and theories and strategies of European integration. Prof. Wessels is co-editor of the "Jahrbuch der Europäischen Union" (31st Edition) and the "Europa von A-Z, Taschenbuch der europäischen Integration" (12th Edition) and has published widely in leading journals and edited volumes. Prof. Wessels is currently publishing a book on the European Council. He is chairman of the executive board of the Institut für Europäische Politik (IEP, Berlin) and of the Trans European Political Studies Association (TEPSA, Brussels). Since 1981 he is Visiting Professor at the College of Europe, Brugge and Natolin. Presently he is coordinator of the Erasmus Academic Network "LISBOAN - researching and teaching the Treaty of Lisbon", the “EXACT” Marie Curie Initial Training Network and the "Observatory of Parliaments after the Lisbon Treaty (OPAL)".
Panel III

Legitimacy and accountability of the multi-tier governance

Does multi-tier governance challenge the EU legitimacy and its accountability to the citizens?

Joseph H. Weiler
Democracy and limits of EU competence

Matthias Kumm
Democratic challenges arising out of the eurocrisis

Andrea Manzella
Is the EP legitimate as a parliamentary body in EU multi-tier governance?
Democracy without the People – European Legitimacy in Time of Crisis

It is in a time of crisis, when things are going poorly and unpopular measures are called for, that a polity needs to reach deep into the legitimacy resources of its governance processes. Typically European legitimacy discourse employs two principal concepts: Input (democratic) legitimacy and Output (result) legitimacy. I will add a third, less explored, but in my view central legitimating feature of Europe – Political Messianism. I will explain why in my view, all three are exhausted, inoperable in the current circumstance.

First, as regards process legitimacy, there is, Lisbon Treaty notwithstanding, a persistent and troubling political and democracy deficit. Consider the singular well known fact that despite a continuous increase in the powers of the European Parliament since 1979, there has been a continuous drop in voter participation in EP elections, compromising the EPs own legitimacy and ability to provide such for the Union as a whole. This is not the fault of Parliament. I will explore the reasons for this – which is related to the very structure of governance in the European Union and certain features of its constitutional architecture regarding competences. I will offer some suggestions for proper remedies.

“Democracy without the People” tries to capture these structural issues:

First, the two most fundamental features of any democracy which connect the governed with those who govern, the principle of accountability and the principle of representation, have no purchase in European politics. Public disaffection is not surprising.

Second, the absence of a European Demos (as in Demos-cracy) is not just a generic flaw, but a major obstacle in any move towards all forms of fiscal union. Fiscal Union has to be predicated on social factors which are presently lacking.

Third, constitutionally Europe has still not resolved the issue of demarcation of competences – itself a major, if underexplored, sense of alienation.

I will then make the obvious point that the habitual (Commission favored) legitimating device – success, results – evaporates when there is popular impression (justified or not) of deep European failure.

I will finally explain what in my view has been the most effective legitimating device of Europe over the years: A compelling vision for the future, a promise of a Promised Land, a captivating moral narrative. This is what political scientists call Political Messianism. I will explain why it, too, has evaporated in the current circumstances.
With its three traditional legitimating devices all inoperable, the ability to tackle the current crisis is hugely compromised. One needs to understand these deep structural issues in order to develop medium and long term alternatives.

Biography
Professor J.H.H. Weiler currently serves as the Director of Jean Monnet Center for International and Regional Economic Law and Justice at NYU School of Law and as the Radbruch-Kantorowiz Professor at Hertie School of Governance in Berlin. He was previously professor of European Law at Harvard Law School, the College of Europe, Bruges and Head of the Law Department at the European University Institute, Florence. He also serves as Editor-in-Chief of the European Journal of International Law and ICON, the International Journal of Constitutional Law, widely considered as leading scientific journals in their respective fields. His books The Constitution of Europe (Cambridge University Press) and Un Europa Cristiana (BUR Rizzoli) are considered classics and have been translated into a dozen languages. In the past he served on the Committee of Jurists advising the Institutional Affairs Committee of the European Parliament and was a speech writer for EP President Klaus Haensch.
Democratic challenges arising out of the eurocrisis

Matthias Kumm

I. The starting point: The European crisis in its constitutional context

The central cause for the crisis in Europe is neither an original design flaw of the Treaty of Maastricht that makes the EU unable to effectively deal with asymmetric shocks, nor is it undisciplined spending by profligate states in violation of the provisions of the Stability and Growth Pact. Instead the core cause of the crisis lies in the structural symbiosis between states and banks. Under the current regime states are effectively lenders of last resort for banks and banks are lenders of last resort for states. That creates moral hazard for banks that, with implicit state guarantees, can socialize risks while privatizing profits. And it opens up weaker states to speculative attacks and instability of financial markets, given the absence of the ECB as a lender of last resort. Under a future fiscal and banking Union that symbiotic relationship must be loosened: The ECB in cooperation with the ESM (ensuring state fiscal discipline) must function as a lender of last resort for states, while banks should no longer be able to rely on public bailouts.

In the first part I will briefly explain why alternative accounts of the crisis are less persuasive and explore how the coordinated responses by the Member States (the ESM and Fiscal Pact), the ECB (in particular the ECB’s “big Bazooka” policy announced on Sept. 8) and the Commission (proposals for banking supervision and a proposed Directive for the recovery and resolution of credit institutions and investment firms) can be seen to address these issues.

II. New democratic challenges

Even though these measures, if fine tuned appropriately (the devil is in the detail), might well go a long way towards addressing the crisis, they create new democratic challenges.

To address them Europe needs to free itself from the stranglehold of state executive branches while simultaneously checking the power of the ECB and the Commission. The following will focus on three important points that should inform the debates on how to do this. First, the EP elections should be transformed into a genuine electoral competition for government in Europe (no collective self-government without government) and by being able to raise its own resources from taxing certain activities, rather than accomplishing its tasks by means of state or interstate transfers (no representation without taxation). On the other hand problems of differentiated integration – in particular the fact that not all Members are or will part of the Eurozone anytime soon – are manageable.
1. **The necessity to genuinely politicize European decision-making:**

The measures taken as a response to the crisis have, seen as a whole, strengthened the European influence on national decisions in core areas of fiscal and economic sovereignty and are designed to strongly constrain national politics. Yet institutionally this shift of power is not accompanied by a strengthening of a genuinely democratic political process on the European level. On the European level they strengthen the role of the executive branch of Member States (particularly in the ESM), the ECB (which has stretched its mandate when it announced the program to buy sovereign bonds on the secondary market), and the Commission (in the context of the Fiscal Compact).

To counter this, it is not enough to ensure that the executive branch of national governments is closely supervised and provided with input from national parliamentary processes (the path the German Constitutional Court has consistently focused on). The possibility to democratically control the national executive on the European level is limited for structural reasons.

Instead a genuine politicization of European politics is necessary and desirable. This can be done by transforming the EP elections into an electoral competition for the government in Europe. The core vehicle would be for the main parties to name a Presidential candidate before the elections and have that candidate campaign as such in Member States.

There are many arguments that have been put forward against such a development, and there are some risks. But these arguments are generally unpersuasive, the risks are lower than often assumed and the benefits would be considerable. Furthermore no Treaty amendment would be necessary.

2. **The corrosive effect and democratic inappropriateness of organizing financial solidarity through interstate transfers, as currently organized. Instead: the democratic necessity for Europe to have its own resources.**

The interstate nexus between solidarity and supervision currently established under the ESM and the Fiscal Compact is likely to exacerbate national frictions and corrode rather than foster European solidarity. (See Greek/German debates - compare also to debates surrounding the German Federal Finanzausgleich: Why Bavarians resent Berliners). Discuss problem of endowment effect as it relates to the allocation of tax income).

Interstate instruments are also questionable from a democratic point of view. Risks and benefits of integrated EU role should be reflected in how revenue is raised. Limits of national responsibility should be reflected in what taxes can be raised nationally and how taxes are allocated between public authorities. There should be no presumption in favour of interstate mechanisms, given the distorted perceptions they give rise to. Besides a common insurance scheme as part of a more comprehensive banking union the EU should be able to tax actors and transactions whose activities exhibit a particularly close nexus to the integrated market (examples include taxes on banks, taxes on shareholders, perhaps share of corporate tax, VAT etc.). Given the interdependence of financial markets, does it make democratic sense to initially allocate financial responsibility for bank failures...
nationally and then have the EU step in only when a state is in serious difficulty as a result of having to bail out banks? High financial market interdependence brought about by European rules, including those relating to a common currency and monetary policies, plus common supervision as proposed suggests that would make little democratic sense. Accountability (also in the form of financial responsibility) must follow control.

If in the financial responsibility lies on the European level and public funds will continue to be needed to prop up the financial sector, there are strong reasons to insist that these funds should not be raised though state contributions, but by European taxes and fees (e.g. imposed on the financial sector or the business sector), and raised as genuinely European funds.

3. **Specific Democratic Problems of differentiated integration?**

The dynamics of European integration are currently strongly driven by concerns relating to the consequences of the European Monetary Union. Yet only 17 out of 27 states are currently part of the Eurozone. There are a host of problems that Euro-driven deeper integration raise with regard to specific policy areas (I will discuss some concerning banking supervision).

But interests so far have not aligned around a Euro-zone vs. non-Eurozone axis, thereby undermining the idea that the European Union will be more deeply divided along these lines.

Furthermore if specific legislative proposals allow for opt-outs and opt-ins for non Euro-states, these problems are at worst manageable and at best provide incentives to join the club.

Finally the potentially destructive veto capacity of non Euro-states, who may not share the same sense of urgency for common rules in a particular area, are blunted by the possibility of other states to move ahead within the enhanced cooperation procedure.

**Biography**

**Mattias Kumm** is Research Professor for “Rule of Law in the Age of Globalization” and Head of the Rule of Law Center at the WZB, Berlin and Professor of Law at Humboldt University, as well as holding an appointment as Inge Rennert Professor of Law at NYU School of Law. He is currently a Visiting Professor at the European University Institute, Florence. His research and teaching focuses on basic issues in Global, European and Comparative Public Law.
Panel III - Legitimacy and accountability of the multi-tier governance

Is the EP legitimate as a parliamentary body in EU multi-tier governance?

Andrea Manzella

1. The question that motivates this paper can easily be reversed. The point that mostly arouses interest today is to see if the new forms of European economic governance can get to reach their intrinsic \textit{de jure} and \textit{de facto} legitimacy and if and how the European Parliament can contribute to this need of renewed legitimation.

In fact, the changes in the European governance under the pressure of the Great Crisis have an extent that requires this re-legitimation. The fact that many are wondering about the ways legally viable for a pan-European referendum is not accidental: it's nearly directed at relieving the Member States' governments, parliaments and courts of the increasingly heavy responsibilities towards a worried public opinion.

The latest developments of the European governance are characterized by three major changes.

The first transformation concerns the resort to international law to bypass the block of the new measures for monetary stabilization.

The second change pertains to the foray into the constitutional law of the Member States, in order to allow their financial homogeneity.

The third change concerns the institution of a permanent inter-parliamentary cooperation between the European Parliament and the national representative Assemblies.

In all these changes of pace in the governance, the European Parliament plays an essential role of legitimizing link.

2. The resort to international law to establish the European Stability Mechanism (ESM) and especially the "Treaty on stability, coordination and governance" of the economic and monetary Union (the so called Fiscal Compact) has created a mechanism for strengthened cooperation "by other means".

This "enhanced cooperation" achieved by international means witnesses better than any other example the deterioration of the supposed contradiction between the intergovernmental and the Community procedures within the Union's legal system. Instead, here we have the interpenetration of the Community law's principles and the pactional initiative of the Member States formally taken outside of the founding Treaties. On one hand, this is a sign of a strong phenomenon attracting the activities anyhow put in place by the Member States into the legal framework of the Union (see art.16, FC, on the future "incorporation"), a phenomenon related to their structural transformation in
"Community States". On the other hand, it is a sign of the substantial homogeneity between the intergovernmental actions taken in the sphere of international pactional law and the Community actions, both taken in the same teleological context: the objectives of the Union.

The new governance properly rejects any "contagion" by the natural participatory limitation foreseen in the FC cooperation of the whole plenum of the European Parliament. On the contrary, it is reaffirmed that also the States excluded from the cooperation, through the European Parliament, can have a droit de regard on the cooperation space they do not participate in. No alteration in the composition of the European Parliament is thus foreseen in the functions that are assigned to it by the FC. For this aspect, then, a formal equalization of the States out and the States participating is admitted.

The institutional indivisibility of the EP - which should be seen as a current guarantee of unity within differentiation and as future guarantee on the reunification of States and rules in the planned "incorporation" - is also preserved in what is one of the most significant elements of the new governance: the inter-parliamentary cooperation (see n. 4).

3. The forays into the constitutional laws of the Member States occur within three procedures: the "European semester" (Ecofin, Sept. 7th, 2010); the "balanced budgetary position" (art. 3, 2 FC: "through provisions of binding force and permanent character, preferably constitutional"); the abandonment of the rule of unanimity for the entry into force of the Treaty on stability (art. 14, 2, FC: "provided that twelve Contracting Parties whose currency is the euro have deposited their instrument of ratification").

The substantial alienation of the parliamentary budgetary powers, the standardization of the financial constitutions of the Member States and the abandonment of the principle of unanimity are the signs of a "constituionalizing" trend which is very difficult to be explained through the theory of the multi-level governance. The conception of a mixture of European constitutional legislation and national constitutions seems closer to reality: a mixture that takes place on the same regulatory level.

Now the question is: which is (beyond the formal aspect of the legal basis in the articles of the TFEU) the legitimation of these changes of constitutional relevance? And which is the contribution of the EP to this legitimation?

In other words, the statement that in the new governance "the EP discusses, but does not decide" (Fasone) is true, but the EP's "powers to control the decisions, even if not to adopt them" (Bonini) remain unaltered.

At a time when, as we have seen, the constitutions - which are the EU's identity - get closer, the institutional control by the EP on the various activities carried out in the new governance by the Commission is also a form of increasing transparency and knowledge in favor of national parliaments. And, this way, to contribute to the overall legitimation of the European governance.
4. The third change in European governance concerns the relationship between the EP and national parliaments.

Both article 13 of the Fiscal Compact and (a meaningful repetition) paragraph 4 of the Van Rumpuy document (referred to in point II.4, of the EC-Conclusions of June 28th and 29th) use the concept of "inter-parliamentary cooperation."

However, this is not an unexplored procedure. The "Convention method" was already tested successfully in drafting both the Charter of the Fundamental Rights of the EU (now annexed to the Lisbon Treaty Decl. n. 1 "with legally binding force") and the Treaty for a European Constitution (adopted in Rome on October 29th, 2004, but then "canceled" by the later French and Dutch referenda). The reference to "parliamentary cooperation" in the latest European texts is thus not a generic clause of parliamentary control. Instead, it is a reference to a specific and well-known procedure.

This repeated reference seems indeed to indicate a kind of "third way" for democratic participation and legitimation within the Union: it differs both from the multiplication of the powers of the European Parliament and from the interference in the decisions of the national parliaments (present in different rules of the Lisbon Treaty).

Parliamentary cooperation stretches and strengthens the wire of the parliamentarization of the EU, involving not only the European Parliament, but also strongly implicating national parliaments as co-promoters of the policies, as subjects which are co-bound by common limits (like the balanced budget) and as subjects being part of conferences and conventions. Therefore, we can and we must speak of an "European parliamentary system", because of these increasingly tight connections between the European Parliament and national parliaments.

But now this thread seems to lead to a new perspective. Now we can legitimately ask ourselves if the increasing use, in the new texts, of a parliamentarism by committees should not ultimately result in a real new representative institutional dimension. A lightening from the strong pressure exerted by the national Chambers and the constitutional courts (in the wake of the German one), as well as a balancing of the verticalization occurred in the economic governance of the Union.

5. The new challenges of European governance have thus not damaged the role of the EP. The inevitable need for verticalization and centralization of the decisions in times of crisis and the curtailment of the procedures prior to deliberation have surely not eliminated the knowledge and inspective parliamentary procedures. It’s these procedures that increasingly characterize contemporary parliamentarism and, by linking it to the claims for transparency and motivation coming from the electorate, they qualify it as a permanent factor of legitimation.

The right to vote the EP, in fact, is not only a precise, creative value of the institution, but is exercised in all the activities of the EP for the duration of the legislature, due to the transitive principle of representative democracy. The right to vote the EP - it’s no coincidence that it opens the Charter of Rights which is dedicated to European citizenship - must indeed be considered to be the link between the parliamentary democracy and the democracy of rights, the *jus activae civitatis*. 
In short, there is indivisibility in the design of the "democratic principles" codified in Title II of the TEU. However, what is most important is that it’s not possible to neglect the most significant feature of the EP legislation anymore: the unification of the active and passive electorate, footing on the equality of all citizens of the Union.

If we wanted to find an appropriate definition of the European Parliament, this would be: "political institution of the citizenship." A notion, which obviously is independent from the demos, but which, in legal terms and with respect to the latter, has a higher value of legitimacy. A "legitimizing" citizenship that, so to speak, represents an axis of penetration into multi-level legislation (and casts doubt on its conceptual value in favor of a more mature horizontal intertwining of the constitutions).

Without this parliamentarism of dialogue, of monitoring and of cooperation between the European Parliament and national parliaments, the current European governance really would resemble to an intergovernmental alliance that like a steel cage falls on European society, forcing it to find an alternative road, without the breeze and the hopes of constitutionalism.

Since all legitimacy starts from the popular vote, it is clear that we need to focus on it to deal with the European malaise, which the Great Crisis has led to a terminal stage.

Talking about the "political" Union thinking only of the spillover of the economic and monetary institutions would be repeating a mistake. A new political Europe can only be born by strengthening the citizen’s right to vote: the basis and the legitimation of every democratic political community.

**Biography**

Panel IV

Multi-tier governance beyond existing mechanisms

Are new competencies, powers and constitutional mechanism needed?

Gianluigi Tosato
New institutional solutions for multi-tier governance?

Vivien A. Schmidt
EU political economy and multi-tier governance

Iain Begg
Budgetary solidarity in multi-tiered Union?

Ingolf Pernice
Conclusion: what future(s) for the multi-tier governance?
Panel IV - Multi-tier governance beyond existing mechanisms

New institutional solutions for multi-tier governance?

Gianluigi Tosato

In a Union of 27 members (soon to become 28), it appears increasingly difficult to advance the European integration process with the participation and consent of all Member States. My presentation intends to delineate possible amendments to the existing Treaties, aimed at facilitating the operation of multi-tier integration mechanisms.

Firstly, it is suggested that the procedure for the revision of the Treaties be modified. The proposed change would provide that an amendment to the Treaties enters into force for the ratifying States when a specific target of ratifications has been achieved. This procedure would supplement the simplified procedure established in art. 48.6 TFEU and its scope would be limited to the same subject matters (Union policies and internal actions). At present, in the absence of a general agreement, Member States willing to amend the Treaties are confronted with the alternative of either abandoning their project or pursuing it outside the EU legal order. As is well known, the latter path has been recently followed in the case of the Fiscal Compact and the ESM Treaty. But it is not an ideal solution, because of the difficulties linked to the presence of external and autonomous legal systems. The proposed change would allow avoiding such problems.

This amendment would introduce a form of “enhanced cooperation” at primary law (Treaty) level and would function in a manner similar to the existing “enhanced cooperation” procedure. Thus, participating Member States would be allowed to make use of the institutions and mechanisms laid down in the Treaties without prior approval from the non-participating Member States. As in the ordinary procedure, only representatives of the participating Member States would be entitled to vote in the deliberations of the Council concerning matters falling within the remit of the Treaty amendment. A similar limitation would also apply to members of the EP representing the people of a Member State which has not adhered to the Treaty amendment. These EP members would consequently not be involved in the relevant parliamentary deliberations.

Another set of Treaty changes could address the flexibility mechanisms at the secondary law level, including the enhanced cooperation and the Euro area system. In the recent Fiscal Compact the contracting States have expressed their wish to make active use of these mechanisms, which have had scarce application so far. Appropriate amendments of the existing legal framework may facilitate achieving this objective. The heavy procedural and substantive conditions, to which enhanced cooperation initiatives are subject, could be somewhat relaxed. In particular, the veto power currently attributed to the Commission in sectors other than the Common Foreign and Security Policy, and to each Member State with respect to the latter sector, could be removed.
With regard to the Euro area, the normative scope of art. 136 TFEU could be expanded. The specific measures for the euro States, which may be adopted under this article, are presently limited to the budgetary discipline for the Member States and the coordination of their national economic policies. The normative power under art. 136 could be extended to cover any aspects relevant to the realisation of a fully-fledged economic and monetary union. Once amended, art. 136 TFEU would thus provide the legal basis for implementing in full the building blocks outlined in the recent “Four President Report”. Amongst other things, the specific measures under art. 136 would allow for the establishment of a central budget for the Euro area, endowed with its own resources and spending procedures.

Flexibility devices give rise to both “entry” and “exit problems. The former are duly taken care of in the Treaties. There are several provisions ensuring that Member States wishing to join to a new or an existing flexible initiative are welcome to do so at any time, provided that they satisfy all the relevant conditions (see articles 20 TFEU, 140 and 328 TFEU). Besides, any discriminatory treatment would infringe a fundamental principle of EU law (art. 2 TFEU). By contrast, there are no provisions specifically addressing “exit” problems.

The implications of this lacuna are currently debated with particular regard to the monetary union. The Lisbon Treaty, whilst providing for the withdrawal from the EU, contains no provision for the exit from the euro. Does this imply that an exit from the euro may not be effected separately? That it is only possible to leave the Union in its entirety? Whatever the preferred solution (the commentators are divided on this issue), the silence of the Treaties gives rise to considerable difficulties. Notably, the recent decision of the German Constitutional Court on ESM/Fiscal Compact deals with a somewhat analogous problem. The German Court observes that the termination of the Fiscal Compact by one of the Contracting States, although not provided in the treaty itself, is always possible under customary international law: by mutual agreement or, even, unilaterally in the event of a fundamental change of the relevant circumstances.

It is suggested here that a new provision be inserted in the Treaties to expressly regulate the “exit” from the monetary union. This norm would establish general rules to allow the withdrawal of a Member State from any flexible initiatives to which it is participating. Such an amendment would provide a general framework of reference and concurrently resolve the delicate and controversial problems presently discussed in connection with the Euro crisis.

Biography
The EU is a multi-speed, variable boundary union in which membership is already highly differentiated in the EU’s many ‘policy communities,’ such as the Eurozone, Schengen, CSDP, and so forth. Even the Single Market, which can be seen as the ‘community of communities,’ is likely to become increasingly differentiated internally once the use of ‘enhanced cooperation’ expands, as it must if the EU is to continue deepening integration. And once the Eurozone moves forward institutionally, the EU’s variability will become even greater. Set this against a background of already highly differentiated national varieties of capitalism, growing disparities between North and South or East, with some countries additionally subject to Troika (IMF, EU commission, ECB) oversight, and it should be obvious that multi-tier governance of the EU political economy is no simple matter. In this introductory policy brief, I consider how one might improve the modalities of such multi-tier governance while moving the EU forward through new tools for governing the European political economy.

**Differentiated Integration**

In this complicated set-up, what is clear is that the uniformity ideal of the past, when member-states thought to move forward in lockstep, is dead. The federal super-state exists only in the minds of the Euro-sceptics. So what is the EU becoming? A ‘two-speed’ Europe? A ‘hard core’ and a ‘periphery’? Or is the EU condemned to Europe à la carte?

The EU is better thought of as what I have called a ‘region-state’, a regional union of member-states with differentiated membership in many overlapping policy communities, with a ‘soft core’ of members who remain part of all the policy communities of the EU. Barroso may prefer to call it a ‘federation of nation-states,’ as Jacques Delors and many others before him, but what’s in a name? What is important is the conceptualization of the EU as a form of polity that requires a very special kind of governance, one that allows for increasing differentiation even as it ensures further integration.

A number of reforms of the EU’s decision rules would be required for the EU to be able to move forward more rapidly in its differentiated integration. First out would be the unanimity rule, in which any single country’s veto can block agreements, with in its place a rule of supermajorities made up of fourth-fifths or more of members plus opt-outs, in which the opting-out member-state(s) would be given the option to withdraw from the discussions and not participate in the initiative. Where the opt-out deleteriously affected the proper implementation of the initiative, ways would need to be found to accommodate the member-state while ensuring the proper operation of the directive. For Treaty-based reforms, the EU could adopt the approach of the Constitutional Convention of the mid 2000s, by mandating widespread citizen consultation, followed by a Convention with its final recommendations considered for adoption by the Council and
the European Parliament. The rule of supermajorities plus opt-out would then apply. Moreover, candidate and prospective members (e.g., the Balkans, Turkey), non-members who participate in the Single Market and other policy communities (e.g., Norway and Switzerland), or even members who may drop out in the future (e.g., the UK) would be assured a place at the table in those EU ‘communities’ of which they are members, with the right to speak and even vote in the particular policy sector in question.

In addition to changing the voting rules, the current imbalance among institutions of EU governance needs to be righted. Eurozone crisis management has led to an excess of intergovernmental decision-making paired with rising technocracy. Both the European Parliament and the Commission have been affected.

Increasing intergovernmental decision-making in the Eurozone crisis has largely sidelined the European Parliament. What the EP needs is not just a fuller role to consider and debate Eurozone crisis policies, its own political legitimacy needs to be reinforced more generally. This could happen in tandem with that of the Commission, if the Commission President and Commissioners were elected by way of EP elections in which each party had competing slates of candidates for president as well as Commission. This would serve not only as a way of galvanizing citizen interest (long in short supply), it would also serve as a first step to ensuring that the Commission gained a kind of democratic legitimacy of its own as initiator and implementer of EU legislation. It would also enable it to politically orient its implementation of EU policies in line with the preferences of the EP majority, whether in a more progressive or conservative direction.

The problem for the Commission today is that Council crisis-decisions have ‘straight jacketed’ the Commission with regard to Eurozone governance. Although the Commission has increased its responsibilities, it has lost administrative discretion and is largely forced to impose one-size-fits-all numerical targets and automatic rules to the Eurozone. With greater representative legitimacy, the Commission would also be able to legitimately exercise more flexibility when implementing Council policies, and to engage in real ‘economic governance,’ by tailoring policies better to the differing economic growth models of the member-states.

**Multi-Tier Governance in a Differentiated EU Political Economy**

The challenge for multi-tier governance of the EU political economy today is finding ways to ‘govern’ the EU that takes into account the fact that European member-states have such different varieties of capitalism, with different growth models, financial market profiles, production systems, labour markets and wage-bargaining systems, pension and health care arrangements, systems of taxation, and so on. Applying one-size-fits-all solutions here cannot possibly work.

Solutions for the North do not necessarily work in the South or the East. Northern ‘coordinated market economies’ with corporatism can flourish under conservative macroeconomic policies because their corporatist labour-management relationship can coordinate wages accordingly—based on relationships of trust, cooperation, and hard bargaining. This is not the same in Southern ‘state-influenced’ market economies because they are often missing the deep corporatist coordination and trust that makes it possible for the wage market to respond appropriately. For the Central and East European
countries’ ‘dependent market economies,’ these problems are compounded by the fact that they are largely dependent on foreign direct investment for any kind of growth. Moreover, dualized labour markets in many such countries mean that across-the-board austerity only increases the risks of unemployment and poverty for the marginalized poor and jobless. Finally, thinking that all countries can achieve Northern levels of export-oriented growth if they just stick to a ‘Culture of Stability’ spells a ‘Culture of Decline’ for many.

The plans for the ‘European Semester’ suggest that the Commission will pay attention to countries’ differences, but do not allow for much flexibility, such as what counts toward the budget deficit, in how fast it is to be reduced, or which part of the accumulated debt is to be addressed. For example, why not leave off the balance sheets growth-enhancing investments in infrastructure projects, education, training, research and development? If the EU Commission had the legitimacy of EP elections and an EP majority behind it, it would notionally be able to do this.

More generally, for deeper integration in this multi-varied capitalism, the principle of ‘enhanced cooperation’ as revised in the Lisbon Treaty could prove immensely helpful in those areas such as labour markets, social services, and individual cross-border citizen concerns where the Single Market has hit the limits of integration. Why not create new ‘enhanced cooperation zones,’ such as ‘enhanced labour mobility zones,’ in which member-states with reconcilable arrangements in pensions, health care systems, and labour contracts created a more integrated labour market through harmonization and/or various forms of reciprocal arrangements. Why not new ‘public services zones,’ in which countries with strong state-delivered services, such as medical care, developed new cross border mobility agreements? Moreover, at a more basic level, there could be ‘immigration zones,’ in which countries with similar needs harmonize their immigration policies.

The EU also needs to do more to restart the European economy while providing for EU citizens in greatest need. Project-bonds could be used for new infrastructure projects such as the European Railway System, renewable energy, and environmental sustainability as well as newly designated industrial revitalization zones and advanced technology development cooperation groups. The structural funds need to be reformed so as to be immediately accessible by the member-state regions in need, without the current bureaucratic hurdles. The CAP (Common Agricultural Policy) should be slowly transformed, beginning with a cap on big outlays to rich farmers. While part of the fund could remain to promote sustainable agriculture, most of it should be slated for a poverty alleviation scheme. Other automatic macroeconomic stabilizers need to be added, such as an unemployment insurance fund that worked across borders plus a EU employment agency to facilitate cross-border movement.

But all of this would require much more money for the EU Commission and related agencies. Instead, of increasing member-state contributions, such funds should come from new revenue streams derived from the value-added that the EU as a whole provides for member-states via the Single Market as well as the Eurozone, e.g., the much-discussed financial transaction tax—to add to funds for banking and financial market failures pledged by member-states—as well as a cross-border transaction tax on goods and services—to pay for the spill over effects of the Single Market, geared to environmental, urban, and social problems. Additional funds might come from a ‘Solidarity Tax’ levied on
EU citizens, also to build citizen-to-citizen solidarity. This, plus the market generated taxes, would ensure that the EU was no longer perceived as a ‘transfer union’ in which one or more member-states paid for the rest.

**Conclusion**

With all of these new EU revenues and responsibilities, citizens would naturally expect more democratic access to decision-making on the grounds that there be ‘no taxation without representation’, while the member-states would expect greater guarantees of fiscal probity from one and all. Indeed, in order to make any of the above work, the EU itself needs deeper political integration. For this, the election of the Commission President via EP elections, as noted above, is a beginning to ensure more democratic representation and participation. But beyond this, innovative leadership via the Council in the direction of at least some of the initiatives described above is a *sine qua non*. But in addition, new narratives and better communication to the public that explain what the EU is, in its multi-tier governance. In short, multi-tier governance in a highly differentiated EU political economy also requires multi-level democracy. But that is a topic that has already been taken up earlier today.

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**Biography**

**Vivien A. Schmidt** is Jean Monnet Chair of European Integration and Professor of International Relations at Boston University. She was the past head of the European Union Studies Association in the United States. She has published widely on political economy, democracy and discourse. Professor Schmidt received her Bachelor of Arts from Bryn Mawr College, and both her Masters and PhD from the University of Chicago. She has taught at the Science Po in Paris, the University of Massachusetts Amherst, the Institute for Advanced Studies in Vienna, European University Institute in Florence, Max Planck Institute in Cologne, the University of Paris and Lille, and visiting scholar at Nuffield College, Oxford University and at Harvard University, where she is an affiliate of the Center for European Studies.
1  
**Solidarity in the context of public finances**

Solidarity is associated in Article 80 of the treaty with ‘the fair sharing of responsibility, including its financial implications, between the Member States. When discussed in budgetary terms solidarity is usually understood as net flows of financial resources, which can be the outcome of grants, loans or revenue payments.

- Solidarity mechanisms exist in all budgetary systems as a result of explicit distributive policies, the incidence of the tax system or access to loans on different terms.

- Their fairness can be assessed in a variety of ways: at the level of the Member State or some other territorial unit, or at the level of the individual or household.

- The latter, in turn, can be assessed in terms of horizontal equity (treating units in identical circumstances equally) or vertically (outcomes linked to the prosperity of the unit). Progressive taxation is an illustration of a budgetary mechanism that targets vertical equity, while proportional taxation tends to treat units of the same level of prosperity equally.

2  
**Existing mechanisms**

The EU already has a range of solidarity mechanisms

- They encompass, first, those provided for in the treaty, notably the EU budget itself and the emergency funds for disasters set out in Article 122 or for resolving balance of payments problems set out in Article 143.

- Second, the crisis has seen the creation of new mechanisms that were initially ad hoc (EFSF, EFSM), but will become treaty based once the amendment to Article 136 establishing the ESM is fully ratified.

Member States also have access to IMF loans and can obtain loans on favourable financial terms from the EIB. In addition, the ECB’s ‘unconventional measures’, though constrained by the prohibitions on monetising public, have offered short-term help to Member States which, to the extent that they hold down borrowing costs, provide de facto fiscal benefits.

3  
**The EU budget as a solidarity mechanism**

It is an open question whether the EU budget acts as a solidarity mechanism. On the one hand, there are clearly net fiscal transfers which arise for three distinct reasons:
• The incidence of sectorial expenditure policies (above all direct payments under the CAP) which accrue in an unbalanced way to Member States with relatively larger agricultural sectors.

• The deliberate spatial targeting of Cohesion policies.

• On the revenue side of the budget, the incidence of own resources and, above all of corrections.

On the other hand, the motivation for EU spending has to be examined. What is clearly missing is any explicit top-down stabilisation capability. Instead, it is transfers within Member States, alongside private financial flows and official financing through central banks.

To some extent, CAP spending is justified by solidarity, not so much to individual Member States, but to less wealthy farmers. However, the spending is not that well-targeted, insofar as rich farmers or landowners effectively receive substantial transfers.

Cohesion Policy spending is often adjudged to be for distributive reasons, reflecting the Article 174 goal of reducing regional disparities. There is a reasonably persuasive case to be made that for part of its history the intervention logic for the policy has been one of ‘compensation’, especially the moves in the 1980s to bolster Cohesion Policy to offset the competitive effects of the single market, and the further expansion of the policy in the early 1990s to enable weaker economies to cope with monetary union. However, Cohesion Policy is considered by the Commission to be primarily an allocative policy, a perspective that has been reinforced by the alignment of Cohesion Policy with the Lisbon/Europe 2020 strategies. In this sense, the development of disadvantaged regions has a logic of increasing the aggregate output of the EU.

In addition, certain smaller budget lines such as the EGF can be interpreted as solidarity measures designed to support groups affected by the currents of globalisation

4 What is lacking

Compared with nation-states, whether federal or unitary, the EU lacks many of the mechanisms that underpin budgetary solidarity. As the 1977 MacDougall report showed the scope of potential solidarity mechanisms depends on how close integration is intended to be. These include:

• Resources for stabilisation purposes which, in a multi-level system, imply that asymmetric economic developments will trigger net flows from such funds. It is worth noting that the 1970 Werner Report included a plan for monetary union in which there would be a limited central budget for this purpose. MacDougall went further suggesting that 5-7% of GDP would be needed.

• Transfers for distributive purposes that boost current public consumption in recipient areas or assisted areas or at the interpersonal level. Such transfers are a defining feature of national social protection systems, but are ruled out at EU level.
• Equalisation grants akin to the finanzausgleich systems in Germany or Austria which can transfer horizontally without directly implicating the highest tier of government.

• Short-term solidarity funds that provide assistance in bad times, but with the expectation that the fund will be replenished in good times.

• Integrated tax and benefit systems which, acting as automatic stabilisers, lead to resource flows.

• Mutualisation of risk in which guarantees or other instruments are used to redistribute the effective cost of borrowing. Ideally designed such mutualisation (whether in the form of Euro-bonds, deposit insurance or some other instrument) would drive down the aggregate cost of capital.

5 Multi-tiered budgetary arrangements

The likely acceleration of euro area integration, including the possibility of variants on fiscal and political union which exclude other Member States or oblige them to opt-in, points to a further way in which solidarity may evolve. It has already shown that it can lead to additional challenges, as has been seen with the adoption of the Fiscal Compact via a separate treaty and with an as yet uncertain consolidation into the EU treaty. Further themes that are likely to surface include:

• Whether, and if so how, to have a common euro area budget (excluding the non-participating countries), with the possibility that it might include some of the elements discussed in the previous section.

• The arguments for allowing Member States that choose to use enhanced cooperation to elect to pay their contributions to the EU budget partly by new common taxes – particularly using a financial transactions tax for this purpose.

• Loan instruments limited to Member States fulfilling specific eligibility criteria, which could be (as with the EFSF) euro area membership, but might also include agreement on pooling resources for project purposes.

6 Constraints and objections

Many obstacles can be identified to a broadening of budgetary solidarity. They include the restrictions written into the provisions, political reservations and the vexed issues of how burdens are shared in any political economy of solidarity.

Greater differentiation in solidarity mechanisms may provoke concerns about accentuating cleavages between groups of Member States, undermining the unity of the EU, yet may be necessary to overcome blocking minorities, causing tensions.

A key issue- frequently seen during the crisis of the last four years – is moral hazard, particularly where solidarity deters corrective action.
There is also the thorny problem of liability when interventions go awry. If there are failings in bank supervision, for example, taxpayers will (as has been seen throughout the crisis) to contribute to the costs of bank resolution. Hence, the absence of a European taxpayer is likely to prove a difficult issue.

7 Conclusions and possible sequencing of new mechanisms

To follow…

Biography

Iain Begg is a Professorial Research Fellow at the European Institute, London School of Economics and Political Science. His main research work is on the political economy of European integration and EU economic governance. He has directed and participated in a series of research projects on different facets of EU policy and his current projects include studies on the governance of economic and monetary union in Europe, the EU’s ‘Europe 2020’ strategy and future employment prospects in the EU and reform of the EU budget. He has published extensively in academic journals and served as co-editor of the Journal of Common Market Studies, from 1998 to 2003. Since 2007, he has been a member of the Research Advisory Committee of the Czech National Bank, and recently served as a special adviser to the House of Lords European Communities Committee for inquiries into Economic Governance and EU budget. He has undertaken a number of other advisory roles, including being called as an expert witness on EU issues by the House of Commons Treasury Committee, the House of Lords European Communities Committee and the European Parliament. He is a frequent contributor to international conferences on EU economic policy issues.
Conclusion: what future(s) for the multi-tier governance?

Ingolf Pernice

I. Einführung


2. Die Legitimationskrise der Europäischen Union beruht auch darauf, dass die Regierungen der Mitgliedstaaten die Union tendenziell als Instrument der Stärkung ihrer exekutiven Macht bei gleichzeitiger Schwächung der Parlamente mißbrauchen und dabei die Möglichkeiten effizienter und demokratisch kontrollierter gemeinsamer Politik, wie sie die Gemeinschaftsmethode bietet, auch in den Bereichen nicht zu nutzen bereit sind, in denen sowohl isoliert nationales Handeln also auch die politische Koordinierung und Zusammenarbeit ineffektiv sind. Nachdem die Finanzkrise zeigt, dass intergouvernementale Zusammenarbeit kein wirksames Instrument für die Verwirklichung gemeinsamer Politik ist, verspricht "noch mehr Kooperation" zwischen Regierungen keine Abhilfe.


4. Zuständigkeiten, die gemäß diesem Grundgedanken der Subsidiarität auf die Union übertragen werden, bedeuten damit keine Entmachtung der nationalen Parlamente, sondern begründen neue politische Wirkungsmacht im gemeinsamen Interesse der einzelnen, die sich durch die "Verfassung" der Union als Unionsbürger eine neue komplementäre politische Identität geben. Nur wegen des Fehlens effektiver politischer Handlungsmacht der Staaten sind die Kompetenz der Union und die relative Bürgerferne der Unionsgewalt unter dem Gesichtspunkt der Demokratie zu rechtfertigen. Jeder Kompetenzzuwachs auf
europäischer Ebene muss ein Gewinn an effektiver Handlungsfähigkeit und damit an Potential politischer Selbstbestimmung sein, oder er wäre mit dem Demokratieprinzip unvereinbar.


7. Für die Vertragsreform mit Kompetenzen der EU in der Wirtschafts- und Finanzpolitik sollte die Einführung eines europaweiten Referendums neben der einzelstaatlichen Ratifikation erwogen werden. Dazu wären im Vorfeld die Integrationsklauseln der nationalen Verfassungen durch eine entsprechende Bestimmung zu ergänzen, in der die Bedingungen, Modalitäten und Rechtswirkungen des Referendums möglichst einheitlich geregelt werden. Ein politischer Diskurs hierzu in allen Mitgliedstaaten mit der Perspektive der Vertragsreform würde sich auf das europäische Bewusstsein der Bürgerinnen und Bürger und ihre Bereitschaft auswirken, sich die Europäische Union im Sinne eines “ownership” als ihre Angelegenheit anzueignen.

Legitimation und politische Kontrolle gestärkt, sondern auch das Interesse der Bürger an den Wahlen.

9. Verantwortlichkeit für die Politik der EU muss also bis in die Mitgliedstaaten und Regionen hinein sichtbar und spürbar werden. Nur so kann auch Opposition sich artikulieren, Politik im Streit zwischen Position und Opposition für die Bürgerinnen und Bürger sichtbar werden, sodass sie Partei ergreifen, sich engagieren. Dabei muss auch die Kompetenzverteilung zwischen den Handlungsebenen transparent und revisibel bleiben. Denn im Verfassungsverbund ist ihr Handeln jeweils von denselben Bürgern legitimiert und auf dieselben Bürger bezogen. Es ist die Entscheidung in der Person jedes Bürgers, ob eine Aufgabe der staatlichen oder europäischen Ebene zugeordnet wird, ob ein Problem also national oder europäisch gelöst werden soll. Sie findet Ausdruck allgemein und grundsätzlich in der vertraglichen Kompetenzordnung, im konkreten Fall muss sie in den vorgesehenen Verfahren von Kommission, Parlament und Rat getroffen werden.

10. Wenn Bürgerinnen und Bürger der Mitgliedstaaten sich durch die Verträge zugleich als Unionsbürgerinnen und –bürger definieren, wenn sie Aufgaben und Kompetenzen auf nationale und europäische Institutionen verteilen und damit als nationales bzw. europäisches Kollektiv politisch handeln, und wenn nach Art. 10 EUV neben dem direkt gewählten Europäischen Parlament die Legitimation für das politische Handeln der Union auch über den nationalen Strang erfolgt, also durch die Kontrolle der im Rat handelnden Regierungen durch die nationalen Parlamente, dann muss die europäische Dimension der parlamentarischen Verantwortung deutlicher gemacht werden, auch bei den nationalen Wahlen: Mitgliedstaatliche Parlamente sind auch europäische Parlamente. Sie sind vertikal eingebunden in die Formulierung und Umsetzung europäischer Politik, aber auch horizontal verbunden durch die Mitverantwortung für die Wirkungen ihrer jeweiligen Entscheidung auf andere Mitgliedstaaten. Diese Art der Solidarität ist auch ein Postulat der Demokratie, solange Betroffene im jeweils anderen Land an den Entscheidungen hier nicht mitwirken können.

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Biography
Ingolf Pernice studied law in Marbourg and Geneva and political economy in Fribourg and EU studies at the College of Europe. He became administrator at the European Commission at the DG Competition (1980-83), and the Legal Service (1983-92). In 1993, he became Professor of European public law and international law. In 1997, he founded the Hallstein Institute focusing on EU constitutional law in a comparative perspective. He is also founding director of the Institut fuer Internet und Gesellschaft
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