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Carlos Jiménez Piernas (ed.) /
Alberto M. Aronovitz (ass. ed.)

New Trends in International Economic Law

From Relativism to Cooperation

Universidad de Alcalá

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Euro Zone Rescue Mechanisms: A New International Financial Law Complementary to the EU Law

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1. The Reforms to Economic Governance and the Identity of the New Legal Framework

1. *The financial crisis in context*. Since the fall of 2009, the European sovereign debt crisis has had a toxic effect on the international financial system.[1] As a matter of fact, the euro is the official currency of 19 out of 28 European Union (EU) Member States; the euro zone States account for more than 20 percent of the

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1 The main factors and the regulatory responses to the financial crisis are examined in LASTRA, R.M. and WOOD, G., The crisis of 2007-09: nature, causes, and reactions (2010) 13 *Journal of International Economic Law*, p. 531 *et seq*. Also, GERLOFF, A., The European Union's Approach to the European Debt Crisis and the Sustainability of the Euro Area, (2011) 5 *International Business Research, Teaching and Practice*, p. 22 *et seq*. The notions of financial crisis, currency crisis and debt crisis are distinguished in the article of WALTER, Ch., Debt Crisis, (2011) *Max Planck Encyclopaedia of Public International Law*, available at www.mpepil.com (08.02.2012). For a survey of the process towards EU economic governance, see Central Bank of Spain, The reform of economic governance in the euro area, essential elements, (2011) March *Monthly Bulletin*, p. 99 *et seq. Available at* http://www.ecb.int/pub/pdf/other/art1_mb201103en_pp99-119en.pdf (08.02.2012).

world's economy; Greece, Ireland, Portugal, Spain and Cyprus needed financial assistance, and Italy is already the world's third-biggest debtor.

The ongoing crisis has affected EU Member States in different ways. A brief chronology of the main financial events can be the following. On 18 May 2010, the euro area Member States disbursed their first instalment to Greece via bilateral loans centrally pooled by the European Commission.[2] The IMF approved a stand-by arrangement. On 14 March 2012, the second programme was supported with financing by the euro area Member States through the European Financial Stability Facility (EFSF). However, at that time Greece ran the risk of exiting from the euro and becoming a failed State. The economy of Greece, a sovereign State, was largely dictated by the "troika" (the European Commission, IMF and European Central Bank) within the framework of the two financial assistance programmes. On 8 March 2012 over 85% of Greece's private sector creditors agreed to take part in a historic 200 billion euros debt swap. The largest ever sovereign debt restructuring meant that private creditors were ready to forsake on average 50% of the face value of 200 billion euros in bonds.[3] The expiry of the second programme was scheduled by 28 February 2015, and a new elected left-wing government requested for an extension of the programme by four months. Then, the EFSF Board of Directors decided upon the extension of the financial assistance subject to the commitment of the Greek government to take a list of reforms.

Ireland had to be bailed out in the autumn of 2010, but in December 2013 the State had successfully completed the financial assistance programme. It was based on contributions from the European Financial Stabilisation Mechanism (EFSM), the EFSF, the IMF and bilateral loans. Ireland is now subject to post-programme surveillance until 75 % of the assistance has been repaid.[4] The next victim was Portugal in the spring of 2011. In June 2014, Portugal exited the three-year financial programme and, consequently, is now under post-programme

[2] See, European Commission Directorate-General for Economic and Financial Affairs, The economic adjustment programme for Greece, *Occasional Papers*, No. 61, 2010, available at http://ec.europa.eu/economy_finance/publications/occasional_paper/2010/pdf/ocp61_en.pdf (09.03.2015).

[3] According to the Institute of International Finance the Greek debt exchange underscores the value of the Report of the Principles Consultative Group on 2011 Implementation of the Principles for Stable Capital Flows and Fair Debt Restructuring, 2011, available at http://www.iif.com/press/press+240.php (09.03.2015). See also, UNCTAD's Draft Principles on Promoting Responsible Sovereign Lending and Borrowing, 26.04.2011, available at http://www.unctad.org/en/docs//gdsddf2011misc1_en.pdf (09.03.2012). The private sector involvement exercise was financed in the euro area, by means of the issuance of bonds by the European Financial Stability Facility. In effect, Greece offered investors EFSF bonds.

[4] For details, see European Commission post-programme surveillance for Ireland, available at http://ec.europa.eu/economy_finance/assistance_eu_ms/ireland/index_en.htm (11.03.2015).

surveillance.[5] Some European governments had to sell huge amounts of debt in bond auctions at the beginning of 2012. And credit-rating agencies downgraded the debt of one State after another making clear that the problem was not just individual countries, but the euro zone as a whole.

In the spring of 2012, Spain experienced tensions in sovereign debt markets and the balance sheets of Spanish banks raised doubts about the need to recapitalize them with EFSF funds. Spain took important steps to reduce its budget deficits, restructure its banking sector and reform the labour market. Besides, Spain reformed its Constitution for the second time since it was adopted on 27 December 1978.[6] In effect, the new article 135 of Spain's Constitution included a balanced budget rule that was going to be set out in article 3 of the Fiscal Compact.[7] Notwithstanding, on 25 June 2012, Spain made a request to the Eurogroup for a bank recapitalisation facility. EFSF, the Kingdom of Spain as beneficiary Member State, Fondo de Restructuración Ordenada Bancaria (FROB) as guarantor and the Bank of Spain signed a Master Financial Assistance Facility Agreement on 24 July 2012.[8] In accordance with the EFSF Guideline on Recapitalisation of Financial Institutions, a Memorandum of Understanding (MOU) was entered into between the Commission, Spain, and the Bank of Spain setting out the institution and country-specific horizontal elements of the conditions attached to the provision of

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5 See European Commission post-programme surveillance for Portugal, available at http://ec.europa.eu/economy_finance/assistance_eu_ms/portugal/index_en.htm (11. 03.2015).

6 Consequently, Spain enacted the Organic Law of Budget Stability and Financial Sustainability, Ley Orgánica 2/2012, de 27 de abril de Estabilidad Presupuestaria y Sostenibilidad Financiera, where it is stated that the ESM and the Fiscal Compact constitute the pillars of a reinforced Economic Union. Spain's Official Journal (*BOE*, No. 103, 30.04.2012).

7 Spain's Official Journal (*BOE*, No. 233, 27.09.2011). The preamble of the amendment states, "the objective of the present amendment to article 135 is to fulfil the principle of balanced budget, involving all the public Administration, so as to reinforce the commitment of Spain with the European Union (...)". On this amendment see, FALCÓN Y TELLA, R., La reforma del artículo 135 de la Constitución, (2011) 25 *Revista General de Derecho Europeo*, p. 1 *et seq*. In this line, see the amendment of 2009 (2011) to articles 109 and 115 of Germany's Basic Law. Prof. Falcón y Tella understands that "la nueva redacción del precepto presenta serias deficiencias técnicas, resulta bastante confusa y desde el punto de vista jurídico poco o nada añade a las obligaciones ya impuestas por el artículo 126 del TFUE en relación con el Protocolo sobre el procedimiento aplicable en caso de déficit excesivo, entre otras cosas porque no se establece ningún límite concreto sino que se remite al ordenamiento comunitario y a lo que, dentro de éste, disponga una futura ley orgánica a aprobar antes de finales de junio de 2012".

8 Spain's Official Journal (*BOE*, No. 296, 10.12.2010) available at http://www.boe.es/boe/dias/2012/12/10/pdfs/BOE-A-2012-14945.pdf (10.12.2012) and http://www.efsf.europa.eu/attachments/efsf_spain_ffa.pdf (24.07.2012).

the financial assistance.[9] The European Stability Mechanism (ESM), an international organisation constituted via the Treaty of 2 February 2012, was inaugurated on 8 October 2012 and the EFSF assistance was transferred to the ESM.[10] It was ESM's first disbursement of financial assistance. On 29 November 2012 Spain had to conclude a Financial Assistance Facility Agreement with the ESM along with a Transfer and Assumption Agreement with the ESM and the EFSF.[11]

In June 2012, Cyprus was to be the fifth euro zone State to ask for financial help from its partners.[12] On 24 April 2013 the ESM Board of Governors decided to grant stability support to Cyprus for the recapitalisation of the banking sector.

Evidently, in response to the crisis serious structural reforms have been tackled by EU Member States and the EU institutions, aiming at strengthening coordination of fiscal and economic policies within the 19 euro area Member States. However, different approaches have been put forward over the last years. When it comes to the political stance of the main stakeholders, neither Eurobonds nor the European Central Bank, as a lender of last resort, was a suitable option for Germany, the EU leader. The European Council, for its part, took a joint approach to emphasizing some key policy areas: fiscal discipline, job creation, tax harmonisation, access to credit and a Europe-wide permanent rescue fund.[13] As for the legal responses to the crisis, different groups of EU Member States are currently developing a complex set of international financial laws composed of international law and EU law, which may be subject to criticism.[14] For instance, the essential basis for the consent of the contracting States to be bound by the ESM Treaty was unilaterally predetermined by the German Federal Constitutional Court Decision taken on 12 September 2012. Actually, on 26 September 2012, the representatives of the contracting States, including Germany, agreed on a joint binding interpretative declaration relating to the limits of payment liabilities of the ESM Members as well as to the information on the Treaty implementation to the national parliaments.

[9] Spain's Official Journal (*BOE*, No. 296, 10.12.2010).

[10] Spain's Official Journal (*BOE*, No. 239, 04.10.2012). It entered into force on 27.09.2012 following the German ratification according to article 48 (1) of the Treaty.

[11] The Financial Assistance Facility Agreement is available at http://www.esm.europa.eu/pdf/FFA%20Spain_Main%20Agreement_Execution%20Version_for%20publication.pdf (07.12.2012).

[12] Cf. the Statement by the Eurogroup of 27.06.2012, available at http://eurozone.europa.eu/media/750926/eg_statement_cyprus_27_june_2012.pdf (11.07.2012).

[13] Press remarks by the President of the European Council H. Van Rompuy following the informal meeting of members of the Council, 30.12.2012, EUCO 15/12, available at http://consilium.europa.eu/ (30.01.2012).

[14] See, PASTOR PALOMAR, A., El Derecho internacional en los mecanismos de rescate en la zona euro, in F. Aldecoa Luzárraga, C.R. Fernández Liesa & M. Abad Castelos (eds.), *Gobernanza y reforma internacional tras la crisis financiera y económica: el papel de la Unión Europea*, Madrid 2014, pp. 285-310.

There is also an important judicial decision on the rescue mechanisms that was handed down in a difficult economic context and after the financial assistance was granted to the States mentioned above. In effect, a reference for a preliminary ruling was made from the Supreme Court of Ireland to the European Court of Justice (ECJ) in proceedings brought by Thomas Pringle, a member of the Irish Parliament, against the Government of Ireland.[15] Consequently, the ECJ rendered a pragmatic Judgment on 27 November 2012 that was based, first, on the validity of European Council Decision 2011/199/EU, amending article 136 of the TFEU with regard to a stability mechanism for Member States whose currency is the euro. Secondly, the 2012 EJC Judgment touched upon the interpretation of various articles of the European Treaties and the general principles of effective judicial protection and legal certainty. Overall, it can be said that the 2012 ECJ Judgment dispelled the doubts about the compatibility of the financial assistance mechanisms with the no bail out clause set out in the EU law.

It is still uncertain whether these measures may restore the euro zone to health because structural reforms take years to bear fruit. However, it seems useful to make a systematic study of the political and legal international responses to the European debt crisis. This paper does not discuss international law, EU law and soft law relating to financial market regulation and supervision, the so-called Banking Union, for instance: the Single Supervisory Mechanism and the Single Resolution Mechanism for banks, the need to regulate hedge funds, the private equity funds and the credit rating agencies.[16]

2. *A normative environment: the sincere cooperation of EU Member States*. Intergovernmental measures should not jeopardise the architecture of the Economic and Monetary Union (EMU) based on the EU Treaties.[17] Article 3.4 TEU asserts that “the Union shall establish an economic and monetary union whose currency is the euro”. It is well known that the central pillars of EMU are considered to be the free movement of capital between the Member States and between Member States and non-EU States (article 63 TFEU), a single currency (article 119 TFEU), controls on national deficits (article 126.1 TFEU) and, finally,

[15] 2012 ECJ Judgment, Case C-370/12, available at http://curia.europa.eu.(24.07.2012).

[16] On this topic, see the paper by TIETJE, Ch. and LEHMANN, M., The role and prospects of international law in financial regulation and supervision (2010) 13-3 *Journal of International Economic Law*, p. 663 *et seq*. From a European perspective, see the Financial Services Action Plan, available at http://ec.europa.eu/internal_market/finances/actionplan/index_en.htm#documents (30.01.2012).

[17] For a general survey see LÓPEZ ESCUDERO, M., La Unión Europea ante la Crisis Económica y Financiera, Nota editorial, (2011) 39 *Revista de Derecho Comunitario Europeo*, p. 5 *et seq*; also, see, LÓPEZ ESCUDERO, M., El Derecho internacional ante la Crisis Económica y Financiera Global de 2008, in J. Martín y Pérez de Nanclares (ed.), *Estados y Organizaciones internacionales ante las nuevas crisis globales*, Madrid 2010, p. 195 *et seq*.

coordination and surveillance of national economic policy (articles 120 and 121 TFEU).[18] Thus, euro zone States are bound to act as members of the European Union in conformity with the EU Treaties and with EU law, pursuant to the principle of sincere cooperation set out in article 4.3 of the Treaty on European Union (TEU). Obviously, the fidelity principle also applies to the EU institutions. There arises the problem of consistency and relationship between the new international financial law and the EU law. In that respect the 2012 EJC Judgment held that "the establishment of a stability mechanism, such as the ESM, does not infringe the provisions of the TFEU relating to economic and monetary policy. Further, as is apparent from paragraphs 111 to 113 of this Judgment, the ESM Treaty contains provisions which ensure that, in carrying out its tasks, the ESM will comply with EU law. It follows that article 4.3 TEU does not preclude either the conclusion by the Member States whose currency is the euro of an agreement such as the ESM Treaty or their ratification of it".[19]

3. *The relationships between different forms of international financial law and the role of the EU institutions.* As will be examined in detail later, the 19 euro zone States understand that they should not be held back from developing common financial laws. This article considers the different forms of law, in international law and EU law, to which Member States have resorted to confront the European debt crisis. Since these forms of law bear on the same subject matter, it is necessary to discuss whether a new European international financial legal framework is emerging or whether it is a random collection of norms with significant impact on domestic law and policy-making. This begs the question of the existence of a special "self-contained" regime and of the relationships between its rules and principles. Is there a new legal framework built on a combination of extra-EU international law treaties and EU law? And, is it emerging as a field characterized by convergence (with EU law) rather than fragmentation?[20]

The International Law Commission defined an international special regime as "a group of rules and principles concerned with a particular subject matter (…) applicable as *lex specialis*. Such special regimes often have their own institutions to administer the relevant rules". Consequently, a special regime could consist of primary rules relating to a special subject matter together with secondary rules concerning breach and reactions to breach. However, the UN body also stressed that there were various uses for the notion of special regime, which includes the notion of self-contained regime. In a broad sense "the term is used to refer to

18 CHALMERS, D., DAVIES, G. & MONTI, G., *European Union Law*, 2nd ed., Cambridge 2011, p. 712 *et seq*.

19 2012 ECJ Judgment, Case C-370/12, pars. 151-152.

20 On this kind of debate focusing on international investment law, see SCHILL, S.W., Whither Fragmentation? On the literature and sociology of international investment law, (2011) 22-3 *The European Journal of International Law*, p. 875 *et seq*.

interrelated wholes of primary and secondary rules, sometimes also referred to as "systems" or "subsystems" of rules that cover some particular problem differently from the way it would be covered under general law".[21] In fact, the group of European responses to the debt crisis has involved the making of special rules, which set up their own institutions to administer and construe the legal framework.

In this vein, the set of the European arrangements concluded between the Member States to cope with the financial crisis are subject to the ECJ jurisdiction in accordance with article 273 TFEU. The 2012 ECJ Judgment understood that "the allocation by article 37.3 of the ESM Treaty of jurisdiction to the Court to interpret and apply the provisions of that treaty satisfies the conditions laid down in article 273 TFEU". This conclusion can be applied to the other rescue mechanisms since the role allocated to the ECJ satisfies the conditions laid down in article 273 TFEU. For instance, the MOU signed with Greece under the pooled bilateral agreements is likely to concern the interpretation of provisions of the EU law.[22] And the duties allocated to the Commission and to the ECB in the ESM Treaty constitute tasks that "do not alter the essential character of the powers conferred on those institutions by the EU and the TFEU", following the 2012 ECJ Judgment.[23] Under the ECJ case-law the Member States are entitled to entrust tasks to the EU institutions outside the framework of the Union, in areas which do not fall under the exclusive competence of the Union.[24] Therefore, the Union does not have exclusive competence in economic policy and the Commission and ECB, within the ESM Treaty, do not entail any power to make decisions of their own. The 2012 ECJ Judgment underlines that "the activities pursued by those two institutions within the ESM Treaty solely commit the ESM".[25] By its involvement in the rescue mechanisms the European Commission promotes the general interest of the Union ensuring that the different MOUs signed with Greece, Ireland, Portugal, Spain and Cyprus are consistent with the EU law. The tasks allocated to the ECB are in line

[21] Cf. International Law Commission, Conclusions of the work of the Study Group on the fragmentation of international law: difficulties arising from the diversification and expansion of international law, (2006) *Yearbook of the ILC* p. 2. This document draws on the Report of the Study Group of the ILC, A/CN.4/L.682, pars. 123 *et seq*. For an exhaustive discussion see, RODRIGO HERNÁNDEZ, A.J. and GARCÍA SEGURA, C. (eds.), *Unidad y Pluralismo en el Derecho internacional público y en la Comunidad internacional*, Madrid 2011; and BUFFARD, I., CRAWFORD, J., PELLET, A. and WITTICH, S. (eds), *International law between universalism and fragmentation, Festschrift in Honour of G. Hafner*, The Hague, 2008.

[22] The rescue package granted to Greece is made dependent on compliance with measures consistent with Council Decisions adopted on the basis of articles 126.9 and 136 TFEU.

[23] 2012 ECJ Judgment, see n. 19 para. 159.

[24] 2012 ECJ Judgment see n. 19 para. 158.

[25] 2012 ECJ Judgment, see n. 19 para. 161.

with those conferred by the TFEU and the Statute of the ESCB, i.e. the support of the general economic policies in the Union, according with article 282.2 TFEU. Thus, there cannot be confusion of legal personality between the EU and the ESM. Notwithstanding, the purpose of this paper is not so much to emphasize the speciality of this new legal framework[26] but to present its functional orientation and therefore to analyse how international law and EU law interact and complement one another.

The idea of two complementary regimes is stated in various paragraphs of the 2012 ECJ Judgment (58, 69, 109 and 125). For instance, the ECJ asserts that "the stability mechanism whose establishment is envisaged by article 1 of Decision 2011/199 serves to complement the new regulatory framework for strengthened economic governance of the Union".[27] Moreover, the ECJ contends in general terms that "the grant of financial assistance by one Member State or by a group of Member States to another Member State is therefore not covered by (article 123 TFEU) prohibition".[28] This provision prohibits the ECB and the Member States' central banks from granting overdraft facilities or any other type of credit facility to public authorities and bodies of the Union and of Member States, and from purchasing directly from them their debt instruments.

4. *Transitional arrangements*. This feature may be illustrated by the Treaty on Stability Coordination and Convergence in the Economic and Monetary Union, which is just one element of the reforms to economic governance.[29] As a matter of fact, 25 Member States signed it on 2 March 2012, that is all except the UK and the Czech Republic.[30] Such differentiated integration not only throws up concerns about fragmentation of the EU political system but also poses the costs of exclusion. Moreover, the new Treaty, also called the "Fiscal Compact", was conceived to be concluded outside the structures of the EU Treaties. It is neither a development

[26] Obviously, the legal framework would be a branch of a wider area of functional specialization, i.e. international economic law. On the scope and definition of international economic law see, HINOJOSA MARTÍNEZ, L.M. / ROLDÁN BARBERO, J. (eds.), *Derecho internacional económico*, Madrid 2010, p. 53; and FERNÁNDEZ ROZAS, J.C., *Sistema de derecho económico internacional*, Pamplona 2010, p. 38.

[27] 2012 ECJ Judgment, see n. 19 para. 58.

[28] 2012 ECJ Judgment, see n. 19 para. 125.

[29] Available at http://european-council.europa.eu/media/639235/st00tscg26_en12.pdf (03.03.2012).

[30] The Fiscal Compact shall enter into force, as indicated by article 14 (2), on 1 January 2013, provided that 12 Contracting Parties whose currency is the Euro have deposited their instrument of ratification, or on the first day of the month following the deposit of the 12 instrument of ratification by a Contracting Party whose currency is the euro, whichever is the earlier. As of 07.12.2012, 12 Member States had deposited their ratification instruments at the EU Council.

of EU laws nor an amendment of the EU Treaties (article 48 TEU).[31] Member States are not establishing enhanced cooperation between themselves within the framework of the EU procedures so as to further the objectives of the Union (article 20 TEU and articles 326-334 TFEU).[32] Instead, the Fiscal Compact means that a group of Member States wants to establish enhanced cooperation outside the EU framework in order to achieve the new objective of financial stability.[33] In this respect, the euro area Heads of State or Government stated on 9 December 2011 that "the objective remains to incorporate these provisions into the Treaties of the Union as soon as possible".[34] The preamble of the Fiscal Compact ratifies its provisional nature (paragraph 7) and article 16 states that "within five years, at most, of the date of the entry into force of this Treaty, on the basis of an assessment of the experience with its implementation, the necessary steps shall be taken, in accordance with the Treaty on the EU and the TFEU, with the aim of incorporating the substance of this Treaty into the legal framework of the EU". It

[31] Spain's Council of State contended in its Legal Opinion No 362/2012, of 12.04.2012, that the Fiscal Compact constitutes a different legal regime to the EU law, even if some fiscal powers are conferred upon the EU institutions and these powers derive from those set out in the Constitution of Spain (article 93).

[32] As it is the case with Council Regulation (EU) No 1259/2010 of 20.12.2010, implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (*OJ* L 343/10 29.12.2010). On the procedure of enhanced cooperation, see CHALMERS, D., DAVIES, G. & MONTI, G., *European Union...*, see n. 18, p. 113; also, MANGAS MARTÍN, A., La Cooperación Reforzada en el Tratado de Amsterdam, (1998) 10 *Comunidad Europea Aranzadi*, p. 27 *et seq.*; URREA CORRES, M., *La Cooperación Reforzada en la Unión Europea. Concepto, Naturaleza y Regimen Jurídico*, Madrid 2004, p. 105; BENEYTO, J.M. (dir.), *Unity and Flexibility in the Future of the European Union: the Challenge of Enhanced Cooperation*, Madrid 2009, available at http://www.ceuediciones.es/documents/ebookceuediciones1.pdf (12.01.2012). As for the mechanism of enhanced cooperation vis a vis the conclusion of *inter se* agreements to deepen some Member States integration, see MARTÍNEZ CAPDEVILA, C., ¿Son los acuerdos *inter se* una alternativa a la cooperación reforzada en la UE? Reflexiones al hilo del Tratado de Prüm (2011) 40 *Revista Española de Derecho Europeo,* p. 419; BAST, J. and HEESEN, J., European Community, Supplementary Agreements between Member States, (2012) *Max Planck Encyclopedia of Public International Law,* available at www.mpepil.com (09.03.2012).

[33] For a survey of the new Treaty, see MARTÍN Y PÉREZ DE NANCLARES, J., El Nuevo Tratado para Reforzar la Unión Económica: una 'cura de urgencia' excepcional y transitoria, (2012) 1 *ARI Real Instituto Elcano*, available at http://www.realinstitutoelcano.org/wps/portal/rielcano/contenido?WCM_GLOBAL_CONTEXT=/elcano/elcano_es/zonas_es/europa/ari1-2012 (07.02.2012). Also, see, PERNICE, I., *Internationanl Agreement on a reinforced Economic Union*, Humboldt University Berlin, January 2012, available at http://www.gruene-europa.de/cms/default/dokbin/400/400827.rechtsgutachten_zum_europaeischen_fiskal@de.pdf (15.02.2012).

[34] European Council, Statement by the euro area Heads of State or Government, 09.12.2011, available at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/126658.pdf (07.02.2012).

remains to be seen whether unanimity will be reached among Member States to incorporate the Fiscal Compact into the EU Treaties.

The establishment of the ESM is another indicator of the provisional nature of the developing legal framework. In effect, the ESM assumed the tasks previously fulfilled by the EFSF and the EFSM, in providing financial assistance to euro area Member States (article 39 of the ESM Treaty of 2 February 2012). For instance, the financial assistance provided to Spain by the EFSF in July 2012 was transferred to the ESM by means of an international agreement. In effect, on 29 November 2012 the EFSF, the ESM and the Kingdom of Spain (FROB as the Guarantor and the Fund, the Bank of Spain as the Central Bank) reached a Transfer and Assumption Agreement, pursuant to article 40 of the ESM Treaty. Thus, the EFSF commitment to provide financial assistance to Spain in the form of a bank recapitalisation facility was assumed by ESM in so far as such commitments related to undisbursed and unfunded portions thereof.

5. *The role of domestic law.* The identification of this set of norms further entails the characterisation of the Intercreditor Agreement and the Loan Facility Agreement either as international contracts or as international treaties. Both agreements were concluded in 2010 to bailout Greece. And two amendments to the Loan Facility Agreement were needed (2011, 2012) to adjust the interest rate and the maturity of the loans. Under this view, it is necessary to take into account the clause laid down in these four agreements which states that "this agreement and any non-contractual obligations arising out of or in connection with it shall be governed by and shall be construed in accordance with English law. The parties undertake to submit any dispute which may arise relating to the legality, validity, interpretation or performance of this Agreement to the exclusive jurisdiction of the Court of Justice of the European Union". The matter of how these international agreements relate to internal law will be taken up in connection with the discussion of each European financial rescue measure.

2. Agreements on Pooled Bilateral Loans for Greece

6. *Two components of the rescue package: The Intercreditor Agreement and the Loan Facility Agreement*. Greece was in the fifth year of a recession and on the brink of default at the beginning of 2012. The country had received by then a first bailout plan worth 110 billion euros. A second bailout plan, worth 130 billion euros, was agreed on 21 February 2012 to prevent a default.[35] The double rescue package

[35] Cf. the Eurogroup Statement of 21.02.2012 on "the successor programme", available at http://ue.eu.int/media/1440478/statement_on_greece_21_february_2012.pdf (23. 02.2012).

began operating on 23 April 2010 when Greece requested bilateral loans from the other euro area Member States.[36] Pursuant to that request, the euro area Member States decided to set up a mechanism in an intergovernmental framework via pooled bilateral loans. The mechanism also involved International Monetary Fund (IMF) financing. In effect, on 8 May 2010, 15 euro area Member States reached an international agreement called "intercreditor agreement". The pooled bilateral loans would be governed by the provisions of another international agreement, named "loan facility agreement", to be entered into between 14 euro are Member States and KFW, acting in the public interest, subject to the instructions of and with the benefit of the guarantee of Germany, as lenders, and Greece, as borrower. Upon request by the European Commission the ECB opened an account in the name of the lenders and accepted payments to be made from or to the account, in connection with the Loan Facility Agreement.[37] This role of the ECB marks the complementary character of the institutional legal framework, combining EU law with international law.

On 11 March 2011 the Heads of State and Government of the euro area decided to conclude an Amendment to the Loan Facility Agreement dated 8 May 2010, aiming at adjusting the interest rate on the Greek loan and increasing the maturity of all loans.[38] The first Amendment was signed on 14 June 2011 but on 21 July 2011 the Heads of State and Government of the euro area decided to extend substantially the maturities of the existing Greek facility and, consequently, a second Amendment to the Loan Facility Agreement was negotiated and about to be signed on 21 July 2011. The new programme for Greece included the IMF financing as well as the voluntary contribution of the private sector. It was stated that the representative's intent was to use the EFSF as the financing vehicle for the

[36] Cf. the Statement by the Heads of State and Government of the Euro Area of 25.03.2010, available at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/113563.pdf (07.02.2012). On an economic analysis of the impact that the global conditions had on Greece, see OLIVARES-CAMINAL, R., The EU Architecture to avert a Soverign Debt Crisis, (2011) 2 *OECD Journal: Financial Markets Trends,* available at http://www.oecd.org/dataoecd/11/36/49191980.pdf (12.02.2012).

[37] Article 3 of the Intercreditor Agreement authorises the European Commission to open an account with the European Central Bank to be used for processing all payments. The operation of the rescue Agreements requires an extension of the categories of persons eligible to be customers of the ECB: central governments of the EU Member-States or public entities designated by such central governments to act on their behalf as customers. Therefore, the ECB adopted the Decision of 10.05.2010 concerning the management of pooled bilateral loans for the benefit of the Hellenic Republic and amending Decision ECB/7 (ECB/2010/4) (*OJ* L 119, 13.05.2010).

[38] Cf. Conclusions of the Heads of State or Government of the euro area, available at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/119809.pdf (07.02.2012).

next disbursement.[39] Finally, the second Amendment was not signed by the European Commission until the Eurogroup reached a new agreement on 27 February 2012. The lenders agreed to an additional retroactive lowering of the interest rates of the Greek Loan Facility so that the margin amounts to 150 basis points. And provision was made for the disbursement of the 6th loan. The European Financial Stability Facility (EFSF) was agreed to provide the undisbursed contribution from the Greek Loan Facility, i.e. the remaining amount to be contributed by the euro zone States.

The Intercreditor Agreement and the Loan Facility Agreement entered into force on 11 May 2010[40] and the two Amendments on 30 March 2012.[41] Provision is made for the Intercreditor Agreement to remain in full force and effect for a three-year programme period as long as there are any amounts outstanding under the Loan Facility Agreement (article 12 Intercreditor Agreement). The period during which financial assistance under both Agreements is available to Greece is different as far as each Member State participating in those instruments is concerned. Finance assistance to Greece could not be based on Council Regulation (EU) No 407/2010 of 11 May 2010 establishing a European financial stabilisation mechanism because the country was already experiencing serious difficulties with respect to its financial stability before the entry into force of the Regulation.[42]

As stated in Regulation (EU) No 1311/2011 of 13 December 2011 the EU institutions also sought "to enhance the synergies between the loan programme for Greece and Union funds, and (...) to increase Greece's capacity to absorb Union funds in order to stimulate growth and employment by refocusing on improving competitiveness and employment creation (...). This amendment to Council Regulation (EC) No 1083/2006 of 11 July 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the

39 Cf. Statement by the Heads of State or Government of the euro area and EU institutions, available at http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/ec/123978.pdf (07.02.2012).

40 Spain's Official Journal (*BOE*, No. 117, 13.05.2010, No. 313, 29.12.2011 and No. 3, 04.01.2012).

41 Spain's Official Journal (*BOE*, No. 89, 13.04.2012). It is interesting to note article 3 (1) of both Amendments, because the provision sets out the possibility of a simultaneous entry into force and provisional application of the treaty, depending on the national laws and legislation of the relevant Member State. The critical date is the date on which the Commission has received a written confirmation that all lenders under their national laws are duly authorized to be bound by the treaty, including the authorization of provisional application. In fact, the first Amendment of 14.06.2011 and the second Amendment of 27.02.2012 were applicable for Spain on 30.03.2012, but the second Amendment was provisionally applied pending the Parliament authorization and the Government expression of consent to be bound by the treaty.

42 Council Regulation (EU) No. 407/2010 of 11.05.2010 establishing a European financial stabilisation mechanism, (*OJ* L 118, 12.05.2010).

Cohesion Fund contributes to such synergy efforts".[43] Thus, the Regulation allowed an increase of interim payments and payments of the final balance from the Structural Funds as well as from the Cohesion Fund for those Member States which were facing serious difficulties and had requested to benefit from this measure. In fact, the measure allowed an earlier reimbursement of available funds. Again, there is an example of EU law (Structural Funds, Cohesion Fund) complementing international law (the rescue deals).

7. *These financial agreements are international law treaties*. The Intercreditor Agreement and the Loan Facility Agreement are interrelated instruments with the same legal status. They declare that the pooled bilateral loans will be granted to the borrower pursuant to the terms of the Loan Facility Agreement; therefore, they share the same rules of administration and interpretation. The governing law must be found in the 1969 Vienna Convention on the Law of Treaties because they constitute international treaties in accordance with the definition set out in article 2.1.a) thereof. This was the view of the euro zone States, according to the steps that they took to implement the treaty norms concerned with the State consent to be bound by the treaties.

Article 1.2 of the Intercreditor Agreement reads as follows: "Upon the Commission having received Commitment Confirmations (as set out in Annex 4) from at least five Parties comprising at least 2/3 of the Total Commitment (a 'critical mass of Member States'), this Agreement shall enter into effect and be binding on and between those Parties which have provided such Commitment Confirmations. This Agreement shall enter into force and become binding upon each remaining Party with effect from the date when the Commission receives the Commitment Confirmation of such Party. It is acknowledged and agreed that the Commitment Confirmation of a Party may be of provisional application in accordance with the national laws and legislation of the relevant Party". Similarly, article 15.1 of the Loan Facility Agreement states that "following its signature by all parties, this Agreement shall enter into force on the date on which a) the Lenders have received the official notification in the form of the Legal Opinion by the Legal Advisor to the State at the Ministry of Justice, Transparency and Human Rights and the Legal Adviser to the State at the Ministry of Finance in the form of Annex 4 that this Agreement has been duly executed on behalf of the Borrower and all of the Borrower's obligations in relation to this Agreement are valid, binding and enforceable in accordance with their terms and nothing further is required to give effect to the same; and b) the Commission has received Commitment Confirmations from a Critical Mass of Lenders, on which date this Agreement shall enter

[43] Regulation (EU) No. 1311/2011 of 13.12.2011 amending Council Regulation (EC) No 1083/2006 as regards certain provisions relating to financial management for certain Member States experiencing or threatened with serious difficulties with respect to their financial stability (*OJ* L 337/5 20.12.2011).

into force and be binding on and between the Borrower and those Lenders which have provided such Commitment Confirmations. (…) A Commitment Confirmation means a written confirmation (….) by a Lender to the Commission that under its national laws it is duly authorised to participate as a Lender under this Agreement. 2. It is acknowledged and agreed that the Commitment Confirmation of a Lender may be of provisional application in accordance with the national laws and legislation of the relevant Member State (…)".

Such characterization as international treaties is not modified by the fact that article 14 thereof provides that the agreements, and any non-contractual obligations arising out of or in connection with them, "shall be governed by and shall be construed in accordance with English law". Logically, English law cannot be the governing law for Spain to express its consent to be bound by the agreements. In fact, article 2.4 of the Intercreditor Agreement clearly indicates that "the Commitment of each Party (Germany on behalf of KFW) under the Loan Facility Agreement (…) is firm and binding. It is only subject to the fulfilment of any procedures (in particular parliamentary authorisation) that are required under each Party's national law".

In Spain, for instance, both agreements were considered to be international treaties pursuant to the 1969 Vienna Convention on the Law of Treaties. Accordingly, the Council of Ministers authorised the signature and the provisional application of each treaty. Later, the Council of Ministers sent the treaties to the Parliament seeking its authorisation to express Spain's consent to be bound by them. Finally, the treaties were published officially in the Official Gazette in order to be integrated into the domestic legal system, and following article 96 of the 1978 Constitution.[44]

Certainly, the Intercreditor Agreement as well as the Loan Facility Agreement comply with the definition of a treaty set out in general international law, namely in article 2.1.a) of the 1969 Vienna Convention.[45] To be a treaty for the purposes of the 1969 Convention, the agreement has to be international. Both financial agreements create binding legal international obligations between euro zone States. It is true that the Loan Facility Agreement was concluded between States

[44] Cf. "Acuerdo entre Acreedores de 8 de mayo de 2010 y Acuerdo de Servicio de Préstamo", both published in *BOE*, No. 117, 13.05.2010 and *BOE*, No. 313, 29.12.2011. See also the Legal Opinion of the Council of State No. 990/2010, 02.06.2010, where it was stated that the treaties fell within the scope of article 94 of the 1978 Constitution and, consequently, both instruments required the prior authorisation of the Parliament, available at http://www.boe.es/aeboe/consultas/bases_datos_ce/doc.php?coleccion=ce&id=2010-990 (13.02.2012).

[45] On the Law of Treaties, see the seminal work of REMIRO BROTONS, A., *Derecho internacional público, 2. Derecho de tratados*, Madrid, 1987; also VILLIGER, M.E., *Commentary on the 1969 Vienna Convention on the Law of Treaties*, Leiden 2009.

and KFW, which is not a subject of international law. But it is also true that KFW was designated as lender on behalf of Germany. Also, KFW was appointed as Germany's delegate in relation to the performance of certain duties and functions. Notwithstanding such delegation, article 1.3 of the Intercreditor Agreement sets out that "Germany shall remain fully liable for the performance of its obligations under this Agreement". The party to this financial Agreement is Germany, and so it is a subject of international law the one obliged to ensure to the other parties and the European Commission the performance by KFW, as lender, of the international obligations included in the treaties. Provision is made for the Bank of Greece, acting as agent on behalf of the borrower, to sign the treaty with the Hellenic Republic.

From the point of view of the law of treaties, another peculiarity lies in the authorisation by the parties (other than Germany) to the European Commission to sign the Loan Facility Agreement on their behalf, subject to the prior approval by all of them, after having liaised with the ECB (article 2.1 Intercreditor Agreement). Besides, the Commission was entrusted with the tasks in relation to the coordination and management of the pooled bilateral agreements. These authorisations took effect as of the signature of the Agreement and the mandates are in line with the case law of the Court of Justice of the European Union.[46]

It is worth commenting on a further point relating to the international law of treaties. The agreements enter into force upon the Commission having received Commitment Confirmations from a critical mass of Member States. And, it is acknowledged and agreed that the Commitment Confirmation of a Lender may be of provisional application in accordance with the national laws and legislation of the relevant Member State (article 1.2 Intercreditor Agreement and article 15.2 Loan Facility Agreement). Clearly, it means that the entry into force and the provisional application may occur at the same time as the Commission receives the Commitment Confirmations from the States. The asymmetry and peculiarity of the terms laid down in the clause must be underlined. In this case, the entry into force is the result of a combination, on the one hand, of the State's expression of consent to be bound by the treaty with, on the other hand, the State expression of consent to provisionally apply the treaty, pending the subsequent final expression of consent to be bound and the entry into force for the State concerned. Obviously, the intent of the negotiating States of the treaty text was to foster its immediate application through both mechanisms. However, there is a conceptual distinction

[46] Cf. Joined Cases C-181/91 and C-248/91, *Parliament v. Council and* Commission, Judgment of 30.06.1993, para. 20. The CJEU stated that "the (...) Treaty does not prevent the Member States from entrusting the Commission with the task of coordinating a collective action undertaken by them on the basis of an act of their representatives meeting in the Council", available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61991CJ0181:EN:PDF (13.02.2012).

in the law of treaties between the effects of entry into force and those of provisional application. In sum, this is an example of fragmentation in multilateral treaty practice whereby provisional application among some States is possible even if the treaty has already entered into force between other States.[47]

Such practice is governed by *pacta sunt servanda* and, consequently, States are free to agree the entry into force of a bilateral treaty together with the provisional application thereto. Some States cannot recognize the provisional application of treaties due to domestic law limitations.[48] This is not the case in Spain, where article 15 of the Law on Treaties and other International Agreements of 2014 allows for the provisional application of treaties.[49] It would mean a kind of "unilateral" entry into force of the treaty which is a weird, though possible, application of article 24 of the 1969 Vienna Convention.[50] Actually, the principle rule according to which a treaty enters into force is the agreement of the negotiating States. The residuary rule, i.e., failing such agreement, the treaty enters into force "as soon as consent to be bound by the treaty has been established for all the negotiating States" (article 24.2, 1960 Vienna Convention).

The two amendments to the Loan Facility Agreement follow the same pattern as the basic treaty, dated 8 May 2010, with respect to the legal status of the instruments.[51] Similar problems arise as to the governing law of the Amendment and non-contractual obligations (subject to English law), the submission of any dispute to the EU Court of Justice, the presence of KFW as lender on behalf of Germany, the Bank of Greece signature of the treaty as the borrower's agent, the euro zone States empowerment to the European Commission to sign the treaties on their behalf, and the waiver of the borrower immunity on the grounds of

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47 On this question, see VILLIGER, M.E., *Commentary on the 1969...*, see n. 45, p. 355.

48 *Ad.ex.*, the reservations to the 1969 Vienna Convention made by Colombia, Costa Rica, Guatemala and Peru.

49 According to article 15 of the Law on Treaties and other International Agreements, treaties relating to article 93 of the 1978 Constitution are excepted from provisional application since they imply the allocation of constitutional powers to international bodies.

50 In Spain's treaty practice, see Canje de Notas constitutivo de Acuerdo entre el Reino de España y los Estados Unidos Mexicanos por el que se modifica el Canje de Notas para la supresión de visados diplomáticos, de 17.04.1989, hecho en Madrid el 07 and 14.12.2011, *BOE*, No. 313, 29.12.2011; Canje de Notas de 30 and 31.07.2003, constitutivo de Acuerdo entre el Reino de España y la República de Colombia sobre el reconocimiento recíproco y el canje de los permisos de conducción nacionales, *BOE*, No. 240, 07.10.2003; Acuerdo entre España y Colombia relativo a la regulación y ordenación de los flujos migratorios laborales, de 21.05.2001, *BOE*, No. 159, 04.07.2001).

51 Cf. the Legal Opinion of Spain's Council of State No. 218/2012, 08.03.2012, available at http://www.boe.es/aeboe/consultas/bases_datos/consejo_estado.php (12.03.2012).

sovereignty, in respect of itself or its assets from legal proceedings in relation to the treaties.

8. *Conditionality of the loans. Obligations of the lenders under the pooled bilateral loans. Authorisation of disbursements.* The rescue package granted to Greece is made dependent on compliance with measures consistent with Council Decisions, adopted on the basis of Articles 126.9 and 136 TFEU.[52] For instance, the fiscal surveillance and the adjustment path for the deficit correction established by the Council of the European Union refers to a reduction in tax exemptions, a permanent levy on real estate collected through electricity invoices, a cut in pensions, a revised wage grid for civil servants, or the adoption of legislation for the collection of the solidarity surcharge through withholding tax. All these measures are based on the powers conferred by the Member States to the EU institutions in the TFEU, but there arises the question of whether Greece has lost its budgetary sovereignty beyond the provisions of the EU Treaties.[53]

Moreover, articles 1 and 2 of the Loan Facility Agreement state that the lenders make available to Greece a loan facility in euro, subject to the terms and conditions of a Memorandum of Understanding (MOU) signed by the EU Commission with Greece and the Bank of Greece. Such a MOU can be characterised as a binding international administrative agreement, which implements a framework treaty. This type of agreement is in the international practice of European States like France, Germany, Spain, etc…[54] For instance, article 2 of Spain's 2014 Law on Treaties and other International Agreements, states that the administrative agreement is governed by international Law due to the fact that its conclusion is provided in a former treaty. This question will be taken up again with respect to the MOUs provided in the EFSM Regulation, the EFSF 2010 Framework Agreement and in the ESM Treaty. No lender shall be responsible for the obligations of any other lender, so the rights of each lender shall be separate and independent rights and "any debt shall be a separate and independent debt" (article 2.2.). Disbursements are subject to formal requisites set out in article 3, *ad.*

[52] Until the 15.02.2012, the Council had adopted the following Decisions: Council Decision 2010/320/EU, 10.05.2010, amended by Council Decision 2010/486/EU, 07.09.2010, amended by Council Decision 2011/57/EU, 20.12.2010, amended by Council Decision 2011/257/EU, 07.03.2011, Council Decision 2011/734/EU, 12.07.2011, and Council Decision 2011/791/EU, 08.11.2011.

[53] Against this framework, it is interesting to pay attention to UNCTAD's Draft Principles on Promoting Responsible Sovereign Lending and Borrowing, 26.04.2011, available at http://www.unctad.org/en/docs//gdsddf2011misc1_en.pdf (07.02.2012). The purpose of UNCTAD's document is to identify the basic principles and best practices applied to sovereign lending and borrowing and in elaborating the implications of these standards and practices for lenders and borrowers.

[54] See, WILDHABER, L., *Treaty-making power and Constitution*, *An international and Comparative Study*, Basel and Stuttgart, 1971, pp. 109 *et seq.*

ex. "the Commission having received a legal opinion satisfactory to the Lenders given by the Legal Advisor to Greece (...), the Commission having received confirmation from the euro area Member States, other than Greece, that they are satisfied with the compliance by the Borrower with the terms of the MOU and the conditions laid down in the Council decisions (...), no event of default having occurred which is continuing". If these conditions are satisfied, the Commission shall notify the borrower of the loan that the lenders are willing to extend to the borrower. Then the lender must deliver to the Commission a Commitment Confirmation and shall transfer to the credit of the lenders' account its participation in each loan. Besides, the Loan Facility Agreement provides for norms concerning interest, costs, expenses, repayment, and cancellation. All payments shall be paid without set-off or counterclaim, free and clear of, and without deduction for and on account of, any taxes, commissions and any other charges for the entire term of the Agreement (article 7.1). Provision is made for events of default, inspections, fraud prevention, audits, assignment and transfer of a lender's rights and obligations.

In sum, these pooled bilateral loans for Greece may be viewed as one of a comprehensive package of international financial law measures in response to reduce the risk of systemic contagion.[55] Finance assistance to Greece could not be based on the European Financial Stabilisation Mechanism (EFSM) because the country was already experiencing serious difficulties before the entry into force of the Regulation governing the EFSM.[56] Euro zone financial stability was considered to be a public good and international law contributed to achieve a certain degree of economic stability.[57] The Greek bail out differs significantly from those of Ireland and Portugal. In fact, the euro zone States established new lending facilities for both States in serious financial distress.

[55] Cf. Press Release, Council of the EU, Extraordinary Council Meeting, Economic and Financial Affairs, Brussels, 9/10.05.2010, available at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ecofin/114324.pdf (12.03.2012). Some scholars believe that the Greek rescue package essentially bailed out the banks and other creditors who had purchased Greek sovereign debt and therefore the package imposed the burden of adjustment "almost entirely on the taxpayers of Greece and indirectly on the taxpayers of all euro zone States", ALEXANDER, K., Sovereign debt restructuring in the EU: lessons from the recent crisis, in Sethe R. *et al* (eds.), *Kommunication: Festschrift für R.H. Weber zum 60,* Bern 2011, p. 803 *et seq*, also available at http://www.zora.uzh.ch/55141/1/Alexander_Kommunikation_FS_Weber_2011.pdf (12. 03.2012).

[56] Council Regulation (EU) No. 407/2010 of 11.05.2010 establishing a European financial stabilisation mechanism, (*OJ* L 118, 12.05.2010).

[57] On international financial regulation (legal framework) and international public goods, see TRACHTMAN, J.P., The international law of financial crisis: spillovers, subsidiarity, fragmentation and cooperation, (2010) 3 *Journal of International Economic Law*, p. 721 *et seq*.

3. Temporary Rescue Facilities for Ireland, Portugal and Spain: The European Financial Stabilisation Mechanism, the European Financial Stability Facility

9. *The EFSM set out in a Council Regulation and activated for Ireland and Portugal.* On 9/10 May 2010 the ECOFIN Council decided to establish the EFSM based on article 122.2 of the TFEU. This provision foresees the possibility of granting EU financial assistance to any Member State (including non-euro zone States) in difficulties or seriously threatened with severe difficulties caused by exceptional occurrences beyond its control. Having regard to the proposal from the European Commission, the Council of the EU adopted Council Regulation (EU) No 407/2010, on 11 May 2010.[58] The EU financial assistance takes the form of a loan or of a credit line, from which the beneficiary draws down funds granted to the Member State concerned. The Commission is empowered on behalf of the EU to contract borrowings on the capital markets or with financial institutions (article 2 of the Regulation). The financial assistance is granted by a decision adopted by the Council.[59] Therefore, the Commission and the beneficiary Member State must conclude a Memorandum of Understanding (MOU) detailing the general economic policy conditions laid down by the Council (*ad. ex.* fiscal policy, financial sector regulation and supervision, fiscal structural measures, labour market and education, goods and services markets, housing markets, judicial system, competition, public procurement and business environment). The MOU could be characterised as an international administrative agreement.[60] Every six months these conditions can be re-examined by the Commission, and the Council can decide on any adjustments to be made to the initial conditions (article 3 of the Regulation). Council implementing Decisions on granting Union financial assistance to Ireland and Portugal specify that “the detailed financial terms should be laid down in a Loan Facility Agreement”. The loan is disbursed in instalments and decided by the Council (articles 4 and 6 of the Regulation). The first instalment is released “subject to the entry into force of the Loan Agreement and the MOU” (article 1 of Council implementing Decisions on assistance to Ireland and Portugal). Then, the Commission is authorised to borrow, by issuing bonds, on the capital markets or

[58] Council Regulation (EU) No. 407/2010 of 11.05.2010 establishing a European financial stabilisation mechanism, (*OJ* L 118, 12.05.2010).

[59] Having regard to article 3.2 of Council Regulation No. 407/2010, the Council of the EU adopted Council implementing Decision No. 2011/77/EU of 07.12.2010 on granting Union financial assistance to Ireland (*OJ* L 30, 04.02.2011) and Council implementing Decision No. 2011/344/EU of 30.05.2011 on granting Union Financial assistance to Portugal (*OJ* L 159, 12.05.2010). These Decisions were subsequently amended.

[60] In this sense, PASTOR PALOMAR, A., El Derecho internacional en los mecanismos de rescate ..., see n. 14, pp. 295 *et seq.*

from financial institutions under. The EU budget guarantees the repayment of the bonds. The beneficiary Member State must transfer the principal and the interest due under the loan to an account with the European Central Bank (article 8 of the Regulation). The EFSM does not exclude recourse to the facility providing medium-term financial assistance for balances of payments.[61] And the ECB and the Central Banks of the Eurosystem carried out interventions in the euro area debt securities markets, in accordance with article 123 of TFEU relating on the prohibition of monetary financing.

Some scholarly works raised doubts about the constitutionality of the Council Regulation (EU) No 407/2010, namely its compatibility with article 122.2 of TFEU, because this norm states that the EU may grant under certain conditions financial assistance to the Member State concerned, where this State is in difficulties caused by natural disasters or exceptional occurrences beyond its control. It can be argued that Greece, Ireland and Portugal contributed to create the crisis, but it is also necessary not to forget that the EFSM constitutes a transitional arrangement.[62] As a matter of fact, the EFSM forms part of an international loans package alongside the European Financial Stability Facility (EFSF) and the International Monetary Fund (IMF).[63] While EFSM is available to all 27 EU Member States, EFSF is only for the euro area Member States. Purchases of sovereign debt are also made by the ECB. The maximum total borrowing under the EFSM is 60 billion euros. Thus far, it has been activated for Ireland and Portugal, following official requests, for a total amount up to 48,5 billion euros (22,5 for Ireland and 26 for Portugal) to be disbursed over three years.[64] EFSM and EFSF have both a temporary nature. As seen, the first facility was created by EU law whereas the second one by an international treaty.

10. The EFSF is a public limited liability Company incorporated in Luxembourg and a party to the 2010 Framework Agreement together with the euro area Member States. On 9/10 May 2010 the ECOFIN Council also decided to complement the EFSM

[61] See arts. 143 and 144 TFEU and Council Regulation (EC) 332/2002, 18.02.2002.

[62] In this sense, DE WITTE, B., The European Treaty Amendment for the Creation of a Financial Stability Mechanism, (2011) 6 *European Policy Analysis*, p. 1 *et seq*, p. 6, available at http://www.eui.eu/Projects/EUDO-Institutions/Documents/SIEPS20116epa.pdf (12.04.2012).

[63] On an economic perspective of the IMF relationship with the so called financial regional agreements, see the survey of the Central Bank of Spain, GARRIDO, I., MORENO, P. and SERRA, X., El FMI y los Acuerdos Regionales de Financiación, (2012) *Boletín Económico*, p. 69 *et seq.*, available at http://www.bde.es/webbde/SES/Secciones/Publicaciones/InformesBoletinesRevistas/BoletinEconomico/12/Mar/Fich/art6.pdf (12.04.2012).

[64] For an overview of EFSM funding and loan disbursements, see European Commission, Programmes for Ireland and Portugal, 05.03.2012, available at http://ec.europa.eu/economy_finance/eu_borrower/efsm/index_en.htm (14.03.2012).

through the EFSF, in order to financially support euro area Member States (excluding non-euro zone States) in difficulties caused by exceptional circumstances beyond such State's control. The IMF would participate with half the amount drawn from EFSM and EFSF (250 billion euros maximum). On 28 November 2010 there was agreed a financial assistance programme for Ireland (85 billion euros) and on 17 May 2011, the parties agreed on a financial assistance programme for Portugal (78 billion euros).

The EFSF treaty was signed on different dates, i.e. in Brussels on 5 July 2010, in Dublin, Helsinki and Madrid on 10 June 2010. It entered into force on 4 August 2010.[65] The parties to the treaty are the euro area Member States and the EFSF, a Company incorporated on 7 June 2010 and governed by the laws of Luxembourg. The object of the Company shall be to facilitate or provide financing to euro area Member States in financial difficulties which have entered into a Memorandum of Understanding with the European Commission containing policy conditionality. Thus, the Company shall be entitled to raise money by issuing financial instruments or by entering into financing arrangements with its shareholders or third parties, in respect of which the liabilities of the Company may be guaranteed by some or all of its shareholders or may be collateralized or benefit from credit support mechanisms. It is managed by a Board of Directors. The Directors are appointed by the general meeting of shareholders. Financial support is made in the form of loan facility agreements and loans of up to 440 billion euros within a limited period of time. The Company shall be dissolved when its purpose is fulfilled. However, the bonds issued to pay for the Irish bailout are scheduled to be paid off over a 10 to 20 year period. Consequently, the European Stability Mechanism (ESM) will assume the tasks fulfilled by the EFSF and the EFSM. On this question, it is important to take into account article 11.2 and 3 of the 2010 Framework Agreement which sets out that "the euro area Member States undertake that they shall liquidate EFSF in accordance with its Articles of Association on the earliest date after 30 June 2013 on which there are no longer loans outstanding to a euro area Member State and all funding instruments issued by EFSF and any reimbursement amounts due to Guarantors have been repaid in full. In the event that there are any residual liabilities of EFSF on its liquidation the euro are Member States shall in a final meeting of shareholders decide on what bases these may be divided between the euro area Member States".

Each euro area Member State was supposed to take appropriate measures under its respective domestic law so as to ensure that the EFSF is operative. To this end, Spain adopted "Real Decreto-Ley 9/2010, 28 May 2010, por el que se autoriza a la

[65] Spain's Official Journal (*BOE*, No. 164. 11.07.2011). Unlike the Amendment to the 2010 Framework Agreement (article 3.5), the 2010 Framework Agreement does not provide its provisional application (article 1). Note that this treaty entered into force only a few weeks after it was signed.

Administración General del Estado al otorgamiento de avales a determinadas operaciones de financiación en el marco del Mecanismo Europeo de Estabilización Financiera de los Estados miembros de la Zona del Euro".[66] Moreover, a deed of guarantee must be executed by the guarantor (the euro area States parties) with a trustee and the issuer (the EFSF), on the basis of the terms set out in the 2010 Framework Agreement (article 2.3). Pursuant to a Guaranteed Debt Issuance Programme the EFSF may issue notes, bonds or other debt securities from time to time. Each guarantor is required to issue an irrevocable and unconditional guarantee of the due payment of scheduled payments of interest and principal due on funding instruments issued by EFSF. A deed of guarantee expires on the date when all notes issued under the Programme have been irrevocably paid in full and all obligations of the guarantors under the deeds of guarantee have been paid. The deed of guarantee is governed by English law, as stated in the 2010 Framework Agreement. And the enforcement of the deed of guarantee shall not be contrary to mandatory provisions of Member State's law.

Finally, it is worth noting that the EFSF is not a subject of international law, therefore, the EFSF treaty-making power has been functionally conferred upon it by the 16 euro area Member States which are also parties to the 2010 Framework Agreement. This element transforms the conventional statist pattern of international economic law. Public actors and private actors are building up the new European international financial law. The Member States and EFSF entered into this international treaty "to set out the terms and conditions upon which EFSF may make loans to euro are Member States" (point 6, preamble, 2010 Framework Agreement).

11. Distinguishing features of the 2010 Framework Agreement as an international law treaty. For a start, it is clear that this is an international treaty according to general international law (the 1969 Vienna Convention). Article 1.1 of the text sets out a typical clause of entry into force: the States shall provide written confirmation that "they have concluded all procedures necessary under their respective national laws to ensure that their obligations under this Agreement shall come into immediate force and effect (…)". Besides, the international obligations provided in the 2010 Framework Agreement, i.e. the execution of the Deed of Guarantee, may imply obligations for the public treasury. For instance, in Spain, it involves the application of the Spanish General Budgetary Law 47/2003, of 26th November.[67] The provision set forth in article 15.3 of the treaty requires a treaty

[66] Spain's Official Journal (*BOE*, No. 131, 29.05.2010).

[67] Cf. Ley General Presupuestaria, Spain's Official Journal (*BOE*, No. 284, 27.11.2003). Also, the Legal Opinion of Spain's Council of State No. 1.143/2012, 10.06.2010, available at http://www.boe.es/aeboe/consultas/bases_datos/consejo_estado.php (22.03.2012), according to which "sin duda el Acuerdo Marco implica la contracción a nivel internacional de obligaciones financieras para la Hacienda Pública a través de

obligation, since it stipulates that "each of the parties hereby irrevocably and unconditionally waives all immunity to which it is or may become entitled, in respect of itself or its assets or revenues, form legal proceedings in relation to this Agreement, including, without limitation, immunity from suit, judgment or other order, from attachment, arrest, detention or injunction prior to judgment, and from any form of execution and enforcement against it, its assets or revenues after the judgment to the extent not prohibited by mandatory law".[68] Finally, in accordance with article 13.8, the Republic of Estonia became a party to the 2010 Framework Agreement by adhering to it and entering into the Amendment to that treaty.

Apart from the fact mentioned *supra*, *i.e.* that EFSF is a Company incorporated in Luxembourg with an *ad hoc* treaty-making power, further elements present the 2010 Framework Agreement as a peculiar international treaty. In effect, article 16.1 provides that the agreement and "any non-contractual obligations arising out of or in connection with it shall be governed by and shall be construed in accordance with English law". Notwithstanding, article 15.1 states that any or more of the provisions in the 2010 Framework Agreement may become "fully or in part invalid, illegal or unenforceable in any respect under any applicable law". In that case, "the validity, legality and enforceability of the remaining provisions (…) shall not be affected or impaired thereby". These provisions do not mean that the

los Compromisos de Aval que aquél determina en cuanto a porcentaje y cuantía máxima en los Anexos 1 y 2. Aunque los Estados partes no serán prestamistas directamente sino que será la FEEF quien financiará la concesión de los eventuales préstamos mediante la emisión de bonos, pagarés, efectos comerciales, títulos de deuda y otros mecanismos de financiación ("Instrumentos de Financiación"), éstos serán avalados por garantías irrevocables e incondicionales (cada una un "Aval") de los Estados miembros de la zona del euro, que actuarán como avalistas respecto de dichos instrumentos de financiación (...). En su virtud, el Acuerdo Marco ha de considerarse comprendido en el supuesto previsto en el párrafo d) del artículo 94.1 de la Constitución, requiriendo su conclusión por esta causa la previa autorización de las Cortes Generales. La eventual proyección sobre ulteriores Leyes de Presupuestos Generales del Estado de la modificación que, sobre la de 2010, ha hecho el Real Decreto-Ley 9/2010, de 28 de mayo, atrae también el supuesto al ámbito del párrafo e) del propio artículo 94.1, en cuanto cabe prever que el legislador español haya de adoptar medidas al respecto".

[68] Ley General Presupuestaria*,* see note 67*,* "la previsión del artículo 15 relativa a que cada una de las partes renuncia, de forma irrevocable e incondicional, a toda inmunidad procesal a la que tenga o pueda tener derecho respecto de su persona o de sus bienes o ingresos en relación con el Acuerdo, incluidas, a título enunciativo la inmunidad frente a demandas, sentencias u otras resoluciones, frente al embargo, retención u otra medida cautelar anterior a la sentencia, y frente a la ejecución de sus bienes, en la medida en que no esté prohibido por el derecho imperativo, hace que el Acuerdo Marco haya de entenderse que recae sobre materia reservada a la ley en el ordenamiento español y, por tanto, se incluya también en el supuesto regulado en el artículo 94.1 e) de la Constitución".

2010 Framework Agreement is not an international treaty because, as explained *supra*, the overriding obligations of the text are governed by international law.

On 21 July 2011, the Heads of State or Government of the euro area and EU institutions stated their wish to improve the effectiveness of EFSF. Actually, debt crisis contagion showed the need for more far reaching measures aimed at increasing the flexibility of EFSF linked to appropriate conditionality.[69] Therefore, the 17 euro area Member States, including the Republic of Estonia, and the EFSF signed on different dates (Spain on 5 September 2011) an Amendment to the 2010 Framework Agreement.[70] Obviously, the Amendment is an international treaty with identical characteristics to the 2010 Framework Agreement.[71] Financial assistance would be provided not only by way of loan facility agreements but also in the form of assistance facility agreements (for instance, the Master Financial Assistance Facility Agreement related to Spain) by way of loan disbursements, precautionary facilities, facilities to finance the recapitalisation of financial institutions in a euro area Member State, facilities for the purchase of bonds in the secondary markets or in the primary markets. And the over-guarantee percentage in respect of funding instruments would rise up to 165% from 120%. The result should be an effective capacity for EFSF of 440.000 million euros. It is worth recalling that in April 2012 the EFSF had about 248 billion euros of lending power after having committed 192 billion euros to Greece, Ireland and Portugal bailouts. Loans are disbursed to Member States, so they are not provided directly to banks. Obviously, the borrowers can use the funds to recapitalise their financial institutions, as it was the case of Ireland and Portugal.

12. The peculiarities of the EFSF financial assistance to Spain from an international law perspective. On 9 June 2012, Spain informed the Eurogroup that the Government would present a formal request for financial assistance. It would be provided by the EFSF until the ESM became available. Later, on 25 June 2012, Spain made a formal request to the Chairman of the Eurogroup for a bank recapitalisation facility provided by the EFSF. On 29 June 2012, the Heads of State and Government stated that the financial assistance would be transferred to the ESM, without the ESM gaining seniority status in relation to the financial assistance. They also agreed that when an effective single supervisory mechanism was established for banks in the euro area, the ESM would have the possibility to recapitalise banks directly. The European Commission in liaison with the European Central Bank, the European Banking Authority and the IMF conducted

[69] Cf. Statement by the Heads of State or Government of the Euro Area and EU Institutions, available at http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/ec/123978.pdf (22.03.2012).

[70] Spain's Official Journal (*BOE*, No. 216, 08.09.2011).

[71] Cf. the Legal Opinion of Spain's Council of State No. 1.310/2011, 28.07.2011, available at http://www.boe.es/aeboe/consultas/bases_datos/consejo_estado.php (22.03.2012).

an independent assessment of the eligibility of Spain's request. On 20 July 2012 the Eurogroup unanimously agreed to grant financial assistance to Spain.[72] As a consequence, Spain had to take the steps set out in the 2010 Framework Agreement for the financial assistance to be provided by the EFSF. In fact, on 20 July 2012, Spain's Council of Ministers agreed to take notice of the MOU on Financial-Sector Policy Conditionality and the Master Financial Assistance Facility Agreement, together with the Terms of Reference for IMF Staff Monitoring in the context of European Financial Assistance for Bank Recapitalisation.[73]

The procedure to grant financial assistance to Spain is established in article 2.1.a) of the 2010 Framework Agreement. Thus, the guarantors, i.e. each euro are Member States, must unanimously approve the financial assistance and therefore authorise EFSF to sign a Financial Assistance Facility Agreement (FFA). The above-mentioned MOU must be signed between Spain and the European Commission[74] before the date of the FFA signature, because the entry into force of the latter depends on the signing of the MOU. Moreover, the policy conditions fixed in the MOU must also be embedded in a Council Decision on specific measures to reinforce financial stability in Spain. The Council Decision must be adopted under article 136 of TFEU.

There arises the question of the juridical characterisation of the MOU and the FFA. Both are international agreements complementary to the 2010 Framework Agreement on the EFSF. The MOU details the policy conditions and through the FFA the EFSF makes available to Spain a master facility, subject to the terms and conditions of the Council Decision, the MOU and the Facility Specific Terms. According to the FFA, the aggregate principal amounts of the financial assistance to Spain shall not exceed 100 billion euros. As both, the MOU and the FFA, implement the provisions set out in the 2010 Framework Agreement they could be considered to be "international administrative agreements".

In effect, two elements define the "international administrative agreements", following the Spanish doctrine and practice, as well as article 2 b) of the 2014 Law on Treaties and other International Agreements: first, they must be provided for in a framework international treaty; second, their basic content as well as the administrative bodies in charge of signing them must be established in the framework treaty. Consequently, they are legally binding and any question of

[72] Statement by Eurogroup, available at http://ue.eu.int/uedocs/cms_data/docs/pressdata/en/ecofin/131914.pdf (20.07.2012).

[73] Cf. the Agreement of Spain's Council of Ministers, available at http://www.lamoncloa.gob.es/ConsejodeMinistros/Referencias/_2012/refc20120720.htm (20.07.2012).

[74] Article 2.1.a) of the 2010 Framework Agreement states that "the Commission shall be hereby authorised to finalise the terms of such MOU and to sign such MOU with the Borrower on behalf of the euro-area Member States once such MOU has been approved by the Eurogroup".

interpretation or application of their provisions shall be decided in accordance with the framework treaty.[75]

However, looking more carefully at the FFA wording, it could also be considered to be an international treaty as defined in general international law. Arguably, Spain's financial undertakings could involve financial liabilities for the Public Treasury, as well as require amendments of some laws or the adoption of legislative measures for its execution. Interestingly, the non-contractual obligations arising out of or in connection with the FFA shall be governed by and shall be construed in accordance with English law (article 15.1.). And the Parties undertake to submit any dispute which may arise relating to the legality, validity, interpretation or performance of the FFA to the exclusive jurisdiction of the courts of the Grand Duchy of Luxemburg. Also, Spain, FROB and the Bank of Spain irrevocably and unconditionally waive all immunity to which each of them is or may become entitled, in respect of itself or its assets, from legal proceedings in relation to the FFA, including, without limitation, immunity from suit, judgment or other order, from attachment, arrest or injunction prior to judgment, and from execution and enforcement against its assets to the extent not prohibited by mandatory law. This is a clause typically found in an international treaty, as it was the case of the 2010 Framework Agreement (article 15).

4. A Permanent Firewall: The European Stability Mechanism Together with the "Fiscal Compact"

13. The first step to build up a permanent firewall: a European Council Decision to amend article 136 of TFEU approved by all Member States in accordance with their

[75] Spain's Council of State Legal Opinion No. 55.253, of 22.11.1990, elaborated on the nature of the international administrative agreements in relation to the Spanish international practice: "no todos los actos de ejecución de un tratado realizados de común acuerdo por órganos de las Partes constituyen convenios internacionales. Existen numerosos tratados cuya ejecución no se realiza unilateralmente por cada uno de los Estados contratantes, sino que se confía a la constante colaboración de los órganos de las Administraciones públicas de dichos Estados competentes en la materia sobre la que recaiga el tratado. Puede decirse que en estos casos el convenio, celebrado tras una negociación y un acuerdo, da lugar a su vez durante su ejecución a un continuo proceso de negociación y acuerdo, que ya tiene lugar en un nivel administrativo, es decir, entre órganos que carecen de representación para obligar al Estado por medio de tratados internacionales. Estos acuerdos entre los órganos administrativos de las Partes que sean competentes por razón de la materia pueden venir previstos en el tratado principal correspondiente, que normalmente designará por su nombre a los órganos que hayan de contratar y delimitará el contenido del futuro acuerdo." This view is based on interstate agreements but it can also be applied to agreements between a State and a body of an international Organisation.

respective constitutional requirements. In line with the Council Conclusions of 24/25 March 2011,[76] the Euro Summit held on 26 October 2011 stressed the importance of adopting additional measures for the completion of economic and monetary union (EMU). For instance, the reform of the Stability and Growth Path aimed at enhancing the surveillance of fiscal policies, the introduction of the European Semester to coordinate fiscal policies at European level before national decisions are taken, and the announcement of several principles set out in the so-called Euro Plus Pact to strengthen the economic pillar of EMU.[77] At the meeting of the European Council of 28/29 October, the Heads of State or Government agreed on the need to establish a permanent firewall, *i.e.* a permanent crisis mechanism.

In Spain, the expression of consent to be bound by the European Council Decision of 25 March 2011 (2011/199/EU) was equivalent to the procedure set out for the ratification of an international treaty.[78] Further steps at the EU institutional level were not required. The amendment of article 136 TFEU consisted of adding a paragraph under which the euro area Member States "may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole. The granting of any required financial assistance under the mechanism will be made subject to strict conditionality". The Decision was adopted under article 48.6 of the TEU, so it was not meant to increase the competences conferred upon the EU in the Treaties. This is the simplified revision procedure, which was implemented for the first time since the entry into force of the Treaty of Lisbon on 1st December 2009.

As for the amendment regime of the Treaty of Lisbon, article 48.3 was the basis for the amendment of Protocol No. 36 on transitional provisions concerning the composition of the European Parliament for the rest of the 2009-2014 parliamentary term. Thus, the Spanish Presidency of the EU Council convened an

[76] Council Conclusions 24/25.03.2011, available at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/120296.pdf (22.03.2012).

[77] Cf. Euro Summit Statement, available at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/125644.pdf (22.03.2012). The Euro Plus Pact was open to non euro area Member States and focused primarily on fields that fall under national competence relating to competitiveness, employment and convergence. The implementation of national commitments would be monitored politically by the Heads of State or Government of participating States on a yearly basis, on the basis of a report by the Commission. The choice of the specific policy action remained the responsibility of each State. The commitments would be reflected in national programmes which would be assessed by the Commission, the Council and the Eurogroup in the context of the European Semester.

[78] European Council Decision of 25.03.2011 amending article 136 of the TFEU with regard to a stability mechanism for Member States whose currency is the euro (*OJ* L 91/1, 06.04.2010).

intergovernmental conference on 23 June 2010. And a Protocol was signed on that very date under the ordinary revision procedure.[79]

The Legal Opinion 1565/2011, 13 October 2011, of Spain's Council of State maintained that the expression of consent to be bound by the Decision did not require the previous authorization of the Parliament via article 93 of the Constitution. Article 94 was applicable instead, because the Decision could not increase the competences conferred upon the EU institutions. It was pointed out that article 93 was established to vest in an international organization, under Spain's consent, some of the powers derived from the Constitution. Consequently, before contracting the obligations set out in the Decision, Spain required the prior authorisation of the Parliament (Cortes Generales) because the consent to a future ESM Treaty would imply financial liabilities for the Public Treasury and it would involve amendment or repeal of some law, or it would require legislative measures for its execution. Subsequently, the Legal Opinion 87/2012 on the ESM Treaty upheld this line of reasoning: the ESM Treaty does not increase the competences of the EU institutional framework.[80]

The reasons why the European Council considered it necessary to amend the TFEU were based on the fact that article 122.2 of the TFEU – used to create EFSM- would no longer be needed for dealing with cases of risk to the financial stability of the euro area as a whole. Besides, the no-bailout clause established in article 125 of TFEU would be balanced by the new article 136 of TFEU. Let's remember that Economic and Monetary Union is based on three outstanding prohibitions that should be read in conjunction, *i.e.* no bailout (article 125 TFEU) of any Member State, no monetary financing (article 123 TFEU) to Member States or EU institutions, and no privileged access by the State to financial institutions (article 124 TFEU).[81]

Finally, it is worth noting that the entry into force of the Decision was due on 1 January 2013 "provided that all the notifications referred to in the first paragraph (27 Member States notifications to the Secretary-General of the Council of the

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[79] In Spain, the authorisation to the Government's expression of consent to be bound by the Protocol was given by an organic law, according to article 93 of the Constitution: Ley Orgánica 9/2010, 22 December 2010 (*BOE*, No. 311, 23.12.2010). The new Protocol is published in (*BOE*, No. 312, 28.12.2011), available at http://www.boe.es/boe/dias/2011/12/28/pdfs/BOE-A-2011-20351.pdf (23.04.2012).

[80] Cf. Spain's Council of State Legal Opinions Nos. 1565/2011 and 87/2012, available at http://www.boe.es/aeboe/consultas/bases_datos_ce/doc.php?coleccion=ce&id=2011-1565 (23.04.2012).

[81] On this trinity expressing the responsibility of each Member State for its own finance, see LOUIS, J.-V., Guest Editorial: The No-Bailout Clause and Rescue Packages, (2010) 4 *Common Market Law Review*, p. 971 *et seq*. Also, HERDEGEN, M., Price Stability and budgetary restraints in the Economic and Monetary Union: The law as guardian of economic wisdom, (1998) *Common Market Law Review*, p. 9 *et seq.*

completion of the procedures for the approval of this Decision in accordance with their respective constitutional requirements) have been received, or, failing that, on the first day of the month following receipt of the last of the notifications (…)". Notwithstanding, the Treaty establishing the ESM was signed by all euro area Member States on 2 February 2012, *i.e.* before the entry into force of the Decision.[82]

14. The second step: the Treaty establishing the ESM between the euro area Member States.

The 2012 ECJ Judgment ruled that the conclusion between the Member States whose currency is the euro of the ESM Treaty was consistent with the EU law. The European Central Bank (ECB) understood in relation to the amendment of article 136 of TFEU, that there were four core features that would enhance the effectiveness and facilitate the functioning of the ESM, namely: "it should be established by means of a Treaty subject to international public law approved by the Members States whose currency is the euro, so that national laws have to be made compatible with the provisions of the Treaty; the rules for decision-making in the ESM should favour efficiency, for instance by providing for the activation of the ESM by mutual agreement of the Member States whose currency is the euro; in full compliance with the Treaties, the ESM should be granted the capacity to employ an appropriate range of instruments in order to be able to effectively fight against contagion in situations of acute market instability; and the ESM has to observe the principles of cautious and sound financial management and be subject to auditing by external and internal auditors".[83] Additionally, the ECB contended that the ESM should be safeguarded against the moral hazard inherent in any crisis management mechanism and invoked the surveillance and financing role of the IMF. From a scholarly perspective, it should be added the key issue concerning the link between the ESM Treaty and the Fiscal Compact.

In effect, on 2 February 2012, the ESM Treaty was signed by the 17 euro area Member States and thus it was established among them "an international financial institution" (article 1) with its seat and principal office in Luxembourg (article 31). Membership is open to other EU Member States as a consequence of joining the euro area. Non-euro area Member States may participate on an *ad hoc* basis alongside the ESM, in a stability support operation for euro area Member States (article 2).

[82] The text of the ESM Treaty is available at http://www.efsf.europa.eu/attachments/esm_treaty_en.pdf (23.04.2012).

[83] European Central Bank, Opinion of 17.03.2011 (CON/2011/24), (2011/C 140/05), requested from the European Council with respect to the Decision 2011/199/EU amending article 136 of TFEU, available at http://www.ecb.int/ecb/legal/pdf/c_14020110511en00080011.pdf (23.04.2012).

The 2012 ECJ Judgment depicted some of the main ESM features as an international financial institution: the objective of establishing it is the management of financial crises and not so much to reduce as possible the risk of public debt crises, as it is the case with articles 123 and 125 TFEU (para. 59); the ESM is compatible with the no bail-out clause set out in article 125 TFEU (para. 129 *et seq*); the ESM will not act as guarantor of the debts of the recipient Member States (para. 138); the ESM is not concerned with the coordination of the economic policies of the Member States, but rather constitutes a financing mechanism (para. 110). Obviously, the ECJ was interpreting an international treaty concerned with the EU law.

Literally, the purpose of the ESM shall be "to mobilise funding and provide stability support under strict conditionality, appropriate to the financial assistance instrument chosen, to the benefit of ESM Members which are experiencing, or are threatened by, sever financing problems, if indispensable to safeguard the financial stability of the euro area as a whole and of its Member States. For this purpose, the ESM shall be entitled to raise funds by issuing financial instruments or by entering into financial or other agreements or arrangements with ESM Members, financial institutions or other third parties" (article 3). To enable the ESM to fulfil its purpose, the Member States accord it a certain legal status, full legal personality and full legal capacity to carry out some acts, and several international privileges and immunities (article 32). The ESM is expected to cooperate with the IMF in providing stability support and, in exceptional cases, a form of private sector involvement shall be considered. The ESM will assume the tasks currently fulfilled by the EFSM and the EFSF. The new financial organisation shall have an effective lending capacity of 500 billion euros, an authorised capital stock of 700 billion euros and it will claim preferred creditor status. From January 2013, the new euro area government bonds will require the inclusion of standardised and identical Collective Action Clauses, in a way, which ensures that their legal impact is identical (article 12.3).[84] The ESM shall have a Board of Governors, a Board of Directors, a Managing Director and the staff (article 4). Is this firewall big enough to handle the debt crisis of big economies, like Spain? Spain has admitted sovereign debt is over 70% GDP but it must be added the guarantees that Spain has made to the European stabilization funds.

Following up the ECB guidelines for the ESM mentioned before, it is necessary to refer to the rules for decision-making in the ESM. Thus, the Board of Governors

[84] As a matter of fact, Greece implemented a massive debt restructuring in March 2012 that averted a debt default. Around 80% of Greece's creditors voluntarily agreed to a debt swap. Greece enacted collective action clauses (CACs) under Greek law to force other dissenting bondholders to accept the swap. The final participation rate was close to 95% of bondholders. As explained supra, from January 2013 it is expected that the new euro area government bonds include identical CACs.

may take the most important decisions by mutual agreement, i.e. the unanimity of the members participating in the vote (article 4). However, provision is made for an emergency procedure whereby a decision can be taken by qualified majority of 85% of votes cast (article 4.4).The emergency voting procedure shall be used "where the Commission and the ECB both conclude that a failure to urgently adopt a decision to grant or implement financial assistance (...) would threaten the economic and financial sustainability of the euro area" (article 4.4). Some States may interpret the qualified majority decision-making on the Board of Governors as an erosion of budget sovereignty, because they would be obliged to contribute amounts to the fund without their direct endorsement.

With respect to the range of financing tools, there should be mentioned the precautionary financial assistance (article 14) in the form of a precautionary conditioned credit line or in the form of an enhanced conditions credit line. Besides, financial assistance can be granted through loans to Member States for the recapitalisation of financial institutions (article 15). The ESM will also be able to grant loans (article 16) subject to strict conditionality. Finally, the Board of Governors may decide to arrange for the purchase of bonds of beneficiary Member States on the primary market (article 17) and on the secondary market (article 18). This list of instruments can be reviewed by the Board of Governors (article 19) aiming at increasing efficiency of the ESM.

Chapter 5 of the ESM Treaty provides for a sound financial management consisting of a prudent investment policy, a dividend policy and the establishment of a reserve fund. Moreover, the ESM accounts shall be audited internally and by independent external auditors.

Several EU institutions are involved in the implementation of the ESM Treaty, in spite of the fact that it is an arrangement for the 17 euro area Member States. Article 37 confers jurisdiction upon the EU Court of Justice as regards any question of interpretation or application of the provisions of the ESM Treaty, and the by-laws of the ESM, if an ESM Member contests the decision previously adopted by the Board of Directors. The judgement of the Court shall be binding on the parties in the procedure. This is in accordance with article 273 of TFEU. Moreover, the European Commission and the ECB have a role to play in the procedure for granting stability support, following article 13. Thus, on the basis of a request of a Member State, the European Commission is entrusted to assess the existence of a risk to the financial stability of the euro area as a whole or of its Member States, unless the ECB has already submitted an analysis. Besides, the European Commission, in liaison with the ECB, can be entrusted to assess whether public debt is sustainable as well as the actual or potential financing needs of the ESM Member concerned. This task should be carried out, wherever possible, together with the IMF. Finally, the ESM Board of Governors may decide to grant stability support to the Member State concerned in the form of a financial assistance

facility. If a decision is adopted, the European Commission shall be entrusted with the task of negotiating and signing a Memorandum of Understanding (MOU) with the State concerned, detailing the conditionality attached to the financial assistance facility. The content of the MOU shall reflect the severity of the weaknesses to be addressed and the financial assistance instrument chosen. The MOU shall be fully consistent with the measures of economic policy coordination provided for in the TFEU, in particular with any act of EU law.

From an international law perspective, this kind of MOU can be deemed to be an "international administrative agreement", like the MOU signed by Spain with the European Commission on the policy conditionality. In the case of the ESM MOU, the framework treaty is the ESM treaty, where it is specifically stated that the MOU shall be fully consistent with EU law. It must be understood that the ESM Board of Governors shall decide any question of interpretation or application of the MOU on the basis of the ESM Treaty in conjunction with EU law (article 13).

As stated *supra*, there is a new institutional legal framework built on a complex combination of international law treaties and EU law. International law can be deemed to be instrumental in the current development of a differentiated European financial integration. In sum, aiming at building up a permanent fiscal firewall, the mathematical definition of Member States consents is as follows: consent to the European Council Decision + consent to the ESM treaty + consent to the Fiscal Compact (27 + 17 + 25).

15. Is the Fiscal Compact the decisive step?

The Fiscal Compact signed on 2 March 2012 can enter into force, with 12 ratifications of Contracting Parties whose currency is the euro, on 1 January 2013 (article 14.2).[85] Obviously, Germany and France should be amongst the States Parties, as the most important euro area States.[86] And the UK and the Czech Republic did not agree to it, contributing to the creation of a two-tier EU. It should

[85] Cf. The Fiscal Compact ratification details are available at http://www.consilium.europa.eu/policies/agreements/search-the-agreements-database?command=details&lang=en&aid=2012008&doclang=EN (09.05.2012). On 13.04.2012 Portugal became the first EU Member State to ratify the Fiscal Compact. Greece and Slovenia followed up.

[86] The new President of France, François Hollande, said during the presidential elections held in April and May 2012 that France would renegotiate the Fiscal Compact to include growth before it could enter into force. In this regard, article 18 of the Vienna Convention on the Law of Treaties sets out that "a State is obliged to refrain from acts which would defeat the object and purpose of a treaty when it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty". By the time of putting the final touches on this article, France had not made clear its formal intention not to become a party to the Fiscal Compact.

be reminded that the ESM Treaty requires the ratification of those States whose initial subscriptions represent no less than 90% of the total subscriptions. The Fiscal Compact is open to accession by non-euro area Member States of the EU.

The treaty was conceived of as being outside the institutional framework of the EU. But it was meant to take implementation of the financial mechanisms that had been agreed previously on to a new level. The ESM Treaty and the Fiscal Compact are complementary in fostering fiscal responsibility and solidarity. In fact, the granting of financial assistance under the ESM will be conditional on the ratification of the Fiscal Compact by the ESM Member concerned (Preamble, ESM Treaty). Thus, the Member States already rescued or those in difficulties (Spain, Italy) have a powerful argument for signing the Fiscal Compact.

According to Spain's Council of State, the Fiscal Compact entails a transfer of national budgetary sovereignty to the European Commission and so the powers conferred "take a new dimension in a different institutional framework".[87] Therefore, the Legal Opinion concluded that the Treaty needed the previous authorization of the Parliament *via* an Organic Law (article 93 of Spain's Constitution).[88] The views on this question of the other negotiating States may differ, and it can affect the internal requirements to ratify the Treaty. Moreover, some EU Member States are supposed to implement the main measures envisaged in the Fiscal Compact with constitutional amendments.

It seems that some substantive provisions of the treaty could have been enacted under existing EU law (*ad. ex.* articles 5.1, 121, 126, 136.1.a, of TFUE; Protocol No. 12 on the Excessive Deficit Procedure; and also secondary legislation, like Council Regulation 1466/97 of 7 July 1997, on the strengthening of the surveillance of budgetary provisions and the surveillance and coordination of

[87] Legal Opinion No. 262/2012, of 12.04.2012, whereby "las competencias del Consejo para la calificación de un déficit como excesivo a los efectos del artículo 126 del TFUE y de la Comisión para la consiguiente supervisión (artículo 4 del Pacto Fiscal), de la Comisión para aprobar los programas de colaboración presupuestaria y económica (artículo 5), y del Tribunal de Justicia para declarar el incumplimiento de la obligación de incorporar el pacto fiscal al derecho interno y establecer sanciones en la materia (artículo 5), constituyen determinaciones que asignan a instituciones de la Unión el ejercicio de competencias ejecutivas y jurisdiccionales en relación con los procesos de aprobación y ejecución presupuestaria y de endeudamiento público regulados en los artículos 134 y 135 de la Constitución. (...) hace que el ejercicio de estas competencias cobre una dimensión jurídica diferente a la que tiene en el ámbito de la UE por cuanto que se legitiman y despliegan sus efectos en un ámbito institucional distinto al de la Unión según lo expuesto". Professor MARTÍN Y PÉREZ DE NANCLARES, J.,, in El Nuevo Tratado, see n. 33, p. 3 *et seq*, concedes that the creation of a new intergovernmental institutional framework different to the EU institutions would lead to conflicts dealing with the interaction of both systems.

[88] On 11.05.2012 Spain's Council of Ministers agreed to send the text of the Fiscal Compact to the Parliament for an Organic Law to be approved.

economic policies).[89] This is clearly not the case for the provision aiming at making a balanced budget rule binding in a Member State's national law, or subject to the jurisdiction of the European Court of Justice. There is a considerable degree of overlap between the Fiscal Compact and the EU law in force. Besides, there is no provision in the Treaties for an automatic correction mechanism where a Member State deviates from that budget deficit rule (article 3.1.e of Fiscal Compact).

Can the EU institutions be used for the purposes of a non-EU treaty without the implication of the 28 Member States? As Spain's Council of State uphold in the Leal Opinion on the Fiscal Compact, the EU institutions have been conferred upon new powers and Spain needs an Organic Law to ratify the Treaty. Assuming this argument, the EU institutions would be involved under the Fiscal Compact in procedures they would not undertake pursuant to the EU law. But the EU institutions derive their power only from the EU Treaties as conferred by the 28 Member States. And the Fiscal Compact was signed by 25 States and it can enter into force with 12 ratifications. This situation underlines the importance of article 16, which sets out that the substance of the Fiscal Compact should be incorporated, within five years at most following its entry into force, into the legal framework of the EU. It is also worth mentioning article 2 here, because it states that the Fiscal Compact "shall be applied and interpreted by the Contracting Parties in conformity with the Treaties on which the EU is founded".

The aim of the 25 signatories of the Fiscal Compact should be the conclusion of a new international law treaty complementary to the EU law, rather than international law challenging EU law. Thus, there are worries there could be a British challenge of the new European Commission's role at the European Court of Justice (ECJ). As for the use of the ECJ set out in article 8 of the Fiscal Compact, it follows the precedents already set by the ESM Treaty and the EFSF 2010 Framework Agreement. However, the Fiscal Compact goes beyond the other international treaties. In effect, the Commission is due to present a report on the provisions adopted by the Contracting Parties in compliance with the deficit correction mechanism. Then, if the Commission concludes that a Contracting Party has failed to comply with article 3.2 of the Fiscal Compact, the matter will be brought to the ECJ by any of the Contracting Parties. The initiator will be a Member State, not the Commission. In any case, article 8 can be deemed to be an intergovernmental dispute settlement clause dealing with potential disputes between States that are also EU Member States.

It is arguable whether these powers of the Commission go further than the powers given to it under the existing EU law. Besides, the Fiscal Compact gives the ECJ

[89] Cf. Editorial Comments, Some thoughts concerning the Draft Treaty on a Reinforced Economic Union, (2012) 1 *Common Market Law Review*, p.1 *et seq*.

jurisdiction over the transposition of the balanced budget rule into national law, and it may impose financial sanctions to a State for not complying with a Court ruling. Again, it is doubtful whether the ECJ would be exceeding its legal competence under article 13.2 of TFEU, according to which "each institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them". It should be reminded that article 273 of TFEU says that the ECJ has jurisdiction in any dispute between Member States, which relates to the subject matter of the Treaties if the dispute is submitted to it under a special agreement between the parties. Surely, in the near future there will be a wealth of scholarly works on the compatibility of the Fiscal Compact with EU law.

The fiscal measures examined above could not be enough to cope with the current Greek political-economic conundrum as well as to face the consolidation of the euro zone.

5. Conclusions: A European Financial Differentiated Integration

16. The issue of economic and monetary governance in the EU has returned to the global international agenda with the sovereign debt crisis. From a regional perspective, the development of a single market for capital and financial services is still a central goal of the European integration process. However, the EU and its Member States face divergence. The existing legal framework proved inadequate to address the short-term and long-term challenges pointed out by the crisis, *i.e.* fiscal discipline, job creation, tax harmonisation, access to credit and a Europe-wide permanent rescue fund. In fact, fragmented crisis resolution arrangements were reached between different groups of Member States. Once again, there are diverse speeds in the setting-up of a new European legal framework. The 2012 ECJ Judgment relating to the ESM Treaty can be interpreted in conjunction with all the rescue mechanism and, therefore, the ECJ ruled that they were compatible with EU law.

With this backdrop, financial integration is both a process and a target that must be achieved by means of a consistent group of rules. The identification of the new legal framework entails a complicated analysis. So far, the Member States in conjunction with the EU institutions have put together what we called the European international financial law, which we also deemed to be complementary to the EU law in force. This paper examines how international treaty law and EU law interact in this new field. It is mainly based on the practice of Spain, since it was strongly hit by the crisis and ultimately needed financial assistance for the recapitalisation of its banks. Nevertheless, the main legal developments are also

related to the rest of the States effectively bailed out, namely Greece, Ireland, Portugal and Cyprus.

The first phase in the response to the Greek bailout consisted of an intercreditor agreement, characterised as an international treaty, providing for pooled bilateral loans included in three complementary international treaties, called loan facility agreements. The institutional framework of the EU plays a role in this mechanism. The second phase resulted in some disbursements that were made to Greece under the EFSF.

Unlike the Greek bailout, which was primarily based on pooled bilateral loans, Ireland, Portugal and Spain were rescued with new temporary facilities: the EFSM set out in a Council Regulation and the EFSF. The EFSF is a party to an international treaty, the 2010 Framework Agreement, in its capacity as a public limited liability Company incorporated in Luxembourg. The EFSM and the EFSF mechanisms will be superseded by the ESM, an international financial institution set up by 17 euro area Member States. Obviously, there is an interaction of public and private international institutions, which compels to reassess the conventional statist model of international economic law.

Spain requested external financial assistance in the context of the restructuring and recapitalisation of its banking sector. The policy conditions set out in the MOU and attached to the financial assistance were financial-sector specific. EFSF granted the assistance through the Master Financial Assistance Facility Agreement, an international instrument that has an ambivalent characterisation. Moreover, EU procedures established therein are relevant to the monitoring of the compliance with the obligations under the excessive deficit procedure and the European Semester. Besides, the IMF provided independent technical advice under certain Terms of Reference signed with Spain. In April 2013, the ESM Board of Governors decided to grant stability support to Cyprus.

The Fiscal Compact means that 25 Member States want to establish enhanced cooperation outside the EU framework to achieve financial stability. There is a risk of duplication or inconsistency between the Fiscal Compact and the EU law. But the objective remains to incorporate its provisions into the EU Treaties. Arguably, the Fiscal Compact will help to restore economic trust. All EU States should be interested in the success of the euro system and so they should push a new European international financial law forward. The product of this complex process may be differentiated integration throwing up concerns of fragmentation. There is still a great deal more that needs to be done. The international financial law measures already adopted were necessary but not sufficient. At the end of the day, financial markets and the European citizens are to be the judges of the reforms adopted in Europe.