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A DEMOCRATIC SOLUTION TO THE CRISIS
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REFORM MODEL FOR A DEMOCRATICALLY BASED ECONOMIC AND FINANCIAL CONSTITUTION FOR EUROPE

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SUMMARY

1. The financial and economic constitution of the European Union needs both to enhance its capacity to act and to reach a higher degree of democratic legitimacy: Greater democratic legitimacy may well result in greater political capabilities. In contrast, the increasing shift towards intergovernmental decision-making on fundamental political issues has proven to be a momentous error. This development not only exacerbates the democratic deficit but also demonstrates – contrary to all promises of efficient (inter-) governmental crisis management – a distressing degree of inefficiency.

2. The intergovernmental bargaining process of the Fiscal Compact suffered from poor democratic openness and legitimisation. While the Fiscal Compact strives in its content, amongst others, to strengthen structures of discourse and the public sphere, the making of the Compact was characterized by a surprising lack of precisely these features. A wider preliminary public and parliamentarian discourse could have generated better results, and might even have resulted in a successful amendment of the Treaty.

3. Democratic legitimacy must be strengthened in line with the complementary-asymmetric structure of EU legitimacy. No strand of legitimacy alone (e.g., neither the European Parliament nor national parliaments) can provide a sufficient level of legitimacy. Its strengthening has to go hand in hand with a strengthening of the *common European discourse and the development of a European public sphere*.
   When considering the opportunities and limits of various *forms of differentiated integration*, the unity of the EU must remain a common concern; consequently, the constitutional principles of *coherence*, *loyalty* and *solidarity* are to be followed assiduously.
   The proposed reforms aim to provide the EU with greater capacities to act on issues that are beyond the reach of individual Member States' policies, as well as a higher degree of democratic legitimacy. In this regard, the financial crisis may turn out to be a *constitutional moment* of the European Union, as it generates new leitmotifs that will serve as narratives guiding future understandings and concepts for all stakeholders.

4. In order to be sustainable, the reform has to overcome the current asymmetry of the Economic and Monetary Union. The fiscal pillar has to be complemented by a strengthened politico-economic pillar. Beyond financial and economic policy, general institutional and media-related reformatory steps also need to be taken.

5. Regarding the *fiscal policy pillar* it is necessary to ensure that the external effects of each national decision in fiscal policy are taken into account when drafting the national budget. The *European interests* need parliamentary representation, both in the implementation of the European Semester and the provisions contained within the Two-Pack, as well as within the process of national fiscal policy-making. Members of

the European Parliament's Budget Committee should therefore participate in the meetings of respective national parliamentary committees. Moreover, *inter-parliamentary cooperation* needs to be strengthened, particularly in the area of the budget, reaching a more intense level of cooperation than a COSAB (Conférence des Organes Spécialisés dans les Affaires Budgétaires), at best an emulated model of the COSAC.

6. Article 126 TFEU should be amended so that the Commission's monitoring actions are subject to pre-emptive parliamentary control. Even a parliamentary minority should have the right to request the Commission to report to the European Parliament. Eventually, the European Parliament should obtain the *ultimate say in the deficit procedure* whenever the Council fails to take a decision on a recommendation of the Commission.

7. Enhanced democratic legitimacy of decisions solely affecting Euro-zone members could be reached by the means of three alternative institutional models: with the help of the *European Parliament as a whole*, through a *special Euro-arrangement within the European Parliament* (in its respective parliamentary committees), or by the means of a *new, formally separate parliamentary institution* consisting of directly elected representatives or delegates of the national parliaments. In terms of the European Union as a whole the European Parliament's role should be strengthened, particularly with regard to the EU's own fiscal resources, as well as its structural and cohesion funds, both undergoing fundamental reform and extension.

8. The reform must establish a *strong economic policy pillar* of the EMU, which includes the fields of social, employment, labour market and tax policy, as well as a centralized prudential supervision of banks and other systemically relevant and transnationally active private and public financial institutions, complemented by a central transnational deposit insurance scheme. At least three instruments of varying levels of intensity exist for the purpose of further sectoral developments: increased cooperation in general and binding decision-making under new supranational competencies in particular should complement coordination. The aim is to ensure the necessary *convergence* of national economic policies while simultaneously providing enough discretion for relevant policies at the Member State level. *Margins*, in terms of minimum and maximum regulatory limits, may suffice as the means for providing guidance and stability as well as the necessary flexibility on the national level. The following metaphor concerning road traffic illustrates this flexible approach: while the different types of roads represent the abovementioned regulatory instruments, the concrete design of each road, as well as the applicable rules, stand for the specific political agenda and its aims, benchmarks and limits.

9. The consolidation of the fiscal and economic policy pillars should be further strengthened by reforms of overarching character, taking into account the enhanced political nature of the Union and strengthening the democratic legitimacy of its

policies. One aspect would be the merging of the position of the President of the Commission and the President of the European Council, a scenario in which the 'double-hatted' President were to be elected and politically controlled by the European Parliament. Conferring to the European Parliament the right of initiative in the legislative process would be another. In addition, the emergence of a European public sphere should be fostered by a common European broadcasting agency under public law – going beyond the current scope of Arte and Euronews.

10. Some of the proposed reforms would require a revision of the Treaties, others could be implemented by alternative means. Their cautious and differentiated realisation would be in compliance with national Constitutions in general and with the requirements of national constitutional courts' jurisdiction, including in particular that of the German Federal Constitutional Court.

A DEMOCRATIC SOLUTION TO THE CRISIS – REFORM MODEL FOR A DEMOCRATICALLY BASED ECONOMIC AND FINANCIAL CONSTITUTION FOR EUROPE

INTRODUCTION

The European Union is in a state of upheaval. The economic and financial crisis has shaken political communities and societies to the core, sometimes with brutal suddenness. At the epicentre stands the euro: the Community currency has changed from being a symbol of the proud unity of Europe to the symbol of a profound crisis within Europe. The repeatedly cited 'birth defect' of an asymmetric economic and monetary union has reached a constitutional and existential dimension that exposes the limits of legal integration and demands a fundamental political decision as to the future of that integration.

The frequent observation that political decision-makers at all levels are compelled to fall in with financial and economic trends and find themselves on the defensive manifests itself in noticeably more clearly articulated demands for the recovery of political autonomy, reinforcing the primacy of politics. Meanwhile, the European Union is daily put to the test of living up to its own aspiration to be a political union.

No more than two years after the Lisbon Treaty entered into force, the European legal system finds itself challenged down to its constitutional foundations. While a change to the Treaties underpinning the EU following the hard-won reform of the institutions — kicked off in 2001 but only entered into force in 2009 — continued to be seen as a pipe-dream, the debate in the wake of the crisis, at least since the autumn of 2011, has been fuelled almost daily with new reform proposals aimed at further developing European constitutional law. The suggestions range from specific amendments to the Treaties to radical surgery involving the re-founding of the eurozone.

However, the economic and financial reforms launched thus far have only half checked the underlying causes driving the debate on reform. The debate on the reform of the economic and financial system suffers from one glaring shortcoming: it largely disregards the key question of *democratic legitimation*. This shortcoming is symptomatic of the issues with the recent Fiscal Treaty signed in March 2012, which represents the high point of the reforms to date.[1] The need for adequate democratic legitimation in the *definition* of the reform, based on a transnational discussion involving those whose various roles guarantee the overall legitimacy of European action, is largely ignored.[2]

This shortcoming affects an aspect that is key and indeed fundamental to the nature of the Union as a legal community and its perception of itself as a political union. While the Fiscal Treaty and the many reform proposals arise out of an executive conceptual background, the

[1] For more recent developments, refer to the negotiations between the European Commission, the Council and the European Parliament on the 'two-pack' Regulations (http://ec.europa.eu/economy_finance/articles/governance/2012-03-14_six_pack_en.htm) and other working groups looking at the reform of the euro such as the group based within the EUI studying 'The Democratic Governance of the Euro'.

[2] Concerning one strand of European legitimacy, which is the strengthening of the rights to information of the German Bundestag, cf. the very recent decision of the German Federal Constitutional Court, judgement of 19 June 2012, - 2 BvE 4/11 -, online at http://www.bverfg.de/entscheidungen/es20120619_2bve000411.html (25.6.2012).

reform process suffers from a poverty of ideas (and perhaps a lack of courage) to suggest how the necessary procedural streamlining and strengthening of competences within a future European financial and economic policy can be based on sound democratic foundations.

This is where the present study comes in. The key question addressed here is how to achieve a greater capacity for action in Union financial and economic policy whilst simultaneously strengthening the democratic legitimacy. The reform proposals call for a new approach to basic questions concerning the Union and European constitutional law, an approach based on federal democratic legitimation and participation. Here we have to counter the commonly held view that increasing efficiency and effectiveness and the growth of democratic legitimation have to be addressed as conflicting principles. An increase in democratic legitimation can bring an increase in the capacity for action. The all too well-trodden path during the crisis, past the parliaments into the back rooms of intergovernmental processes, contrary to all claims made for the power of governmental crisis policy, displays a shocking degree of inefficiency and ineffectiveness. The trend towards 'summiting' (*Martin Schulz*)[3] is a mistake, even viewed solely from the standpoint of the efficiency of political decision-making structures. Even a Member of the European Council, *Mario Monti*, highlights the danger of further intergovernmentalisation.[4] The *status quo* entails a further danger: the increasing nationalism, which follows the North-South divide, negates the European spirit per definitionem. Further developing supranational democracy is necessary also in this respect.

For all that, it seems clear that the reform process cannot end just because the Fiscal Treaty has been implemented. For a fundamental reform of the EMU, we therefore have to work to ensure that the Convention on EMU reform called for earlier in the reform debate[5] is held in the medium term after all.[6] This would not only mean opting for a particular form of integration to underline the fundamental character of the EMU; it would also mean a return to a form of constitutional process that would establish a kind of 'thick' federal-democratic legitimation as a basis for future action.

European 'crisis management' has so far been criticised in public mainly in terms of the specific euro stabilisation mechanisms; however, concerns are now growing that we risk wasting the potential for renewal and transformation that is inherent in any structural crisis.[7] In order to exploit this potential, this paper uses a number of analyses to illustrate possible means of constitutional simplification in the reform process. We begin by recalling the process behind the Fiscal Treaty and pointing to alternative paths to reform (section I). We then set out several critical observations showing shortcomings in the present procedure

[3] 'Das demokratische Europa — 10 Punkte für einen demokratischen Neustart der EU' (Democratic Europe — 10 points for a democratic relaunch of the EU), speech given at Humboldt University in Berlin on 24.05.2012.
[4] *Mario Monti* und *Sylvie Goulard*, Die Demokratie neu denken, FAZ, Le Monde and Corriere della Sera v. 15.2.2012.
[5] Cf. e.g. the original plan of *Angela Merkel* (see ZEIT-ONLINE of 13.11.2011, http://www.zeit.de/politik/ausland/2011-11/merkel-konvent-eu-vertraege, last accessed 17.04.2012) and a similar motion from the Greens in the Bundestag, Bundestag papers 17/7501 of 26.10.2011 (defeated in the session on 26.10.2011, see records of plenary session, p. 15975D).
[6] On the idea of a Convention, see e.g. *Andrew Duff*, 'Federal Union Now', 2011, p. 18 f.
[7] In the words of *Hillary Clinton*: 'Never waste a good crisis'.

which, taken positively, should point the way towards a permanent reform of the Economic and Monetary Union (II). This must not be restricted to — admittedly essential — amendments to the central fiscal policy rules, but needs to cover the power to implement economic policy, overcoming the prevailing asymmetry of the present Economic and Monetary Union (III). In the European constitutional alliance, reform must be firmly built not only on European but also on national constitutional law. Here, European constitutional law offers the European Parliament various options for initiating the reforms, to make further use of the existing scope for action while respecting national constitutions (IV).

I. THE FISCAL TREATY — A CRITICAL REVIEW

This paper sets out to draw up principles for a future reform. The brief critical examination of the Fiscal Treaty is intended to illuminate certain constitutional issues that help to underpin these reform proposals. The crucial steps to reform, initiated by the so called Six-Pack[8] and set out to be continued by the Two-Pack[9], are preconditioned.

1. The road to the Fiscal Treaty

On 2 March 2012, the Member States of the Union, with the exception of the United Kingdom and the Czech Republic, signed[10] the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (the Fiscal Treaty).[11] By signing this multilateral agreement, they abandoned the original plan for a revision of the Treaties according to the process laid down in Article 48 TEU, as this would have required unanimity. As an instrument of international law, the Fiscal Treaty has to be ratified by the Member States in compliance with their national constitutional requirements. The subsequent ratification process by the parliaments and possibly upper houses[12] – and in Ireland by a constitutional change decided by referendum — is meant not only to transpose the contents of the Treaty into national law based on the traditional model but also to provide *ex-post* democratic legitimation for the foreign policy actions of the executive in the context of the Treaty negotiations. From the standpoint of legitimation, the international Treaty framework seems procedurally deficient in many ways.

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[8] Regulation EU/1173/2011 (OJ 2011, L 306/1); Regulation EU/1174/2011 (OJ 2011, L 306/8); Regulation EU/1175/2011 (OJ 2011, L 306/12); Regulation EU/1176/2011 (OJ 2011, L 306/25); Regulation EU/1177/2011 (OJ 2011, L 306/33); Directive 2011/85/EU (OJ 2011, L 306/41).

[9] Propositions COM(2011)0819 and COM(2011)0821. The European Parliament has adopted the Two-Pack on June 13th 2012 at first reading with major amendments, see 2011/0385(COD) and 2011/0386(COD).

[10] The Czech Republic has since indicated that it intends to comply with the substance of the Pact without any formal commitment to it.

[11] Accessible at: www.european-council.europa.eu/media/639244/04_-_tscg.de.12.pdf (last accessed on 20.06.2012).

[12] In Germany, it is disputed whether ratification requires a 'constitutional' majority according to Article 23(1) sentences 2 and 3 of the Grundgesetz (Basic Law), as the Federal Government maintains, or a simple majority according to Article 59(2) sentence 1 of the Basic Law; this became particularly evident during the course of the public expert hearing of the EU-committee of the German Federal Council on 25.04.2012 as well as during the meeting of the budget committee of the German Parliament on 07.05.2012.

The first draft of the Fiscal Treaty was published after the meeting of the European Council on 9 December 2011[13]. The subsequent work on this produced a second draft, which was presented by the President of the European Council after the informal summit meeting of the European Council on 30 January 2012 in Brussels. Accepted with minimal changes, it was signed by 25 Member States on 2 March 2012. The Fiscal Treaty only in rare cases – particularly with regard to the legal duty to implement a debt break on the level of national constitutional law – exceeds the existing provisions of secondary law of the Six-Pack. At times during the negotiations, efforts were made to tie back to existing sources of legitimation to generate additional procedural legitimacy. For example, the national parliaments were informed of the progress of the negotiations by forwarding to them the drafts of the Treaty;[14] three Members of the European Parliament were invited to attend the final round of negotiations on the Fiscal Treaty, and the number of contracting States whose currency is the euro required for the Fiscal Treaty to enter into force was increased from the original nine to twelve.

2. Criticism: disparity between the substance and the process of reform

However, these efforts to secure the (voluntary) involvement of the national parliaments do not ultimately alter the fact that the overall process of 'international bargaining' suffers from a lack of democracy. This is particularly clear if we think of the (constitutionally prescribed rather than voluntary, as here) involvement of the Member States and the national parliaments in a revision of the Treaty in accordance with Article 48 TEU.

Criticism can also be levelled at the path taken towards the Fiscal Treaty, however, because a contradiction can be seen between those methods that are intended to provide for better financial and economic policy in the future and those by which the Fiscal Treaty came about: whereas the elements of *discourse* and *public sphere* were supposed to be reinforced after the Fiscal Treaty, just these attributes are absent from the process of producing the Pact. We will discuss this in more detail below.

a) Strengthening of European debate and European openness in financial and economic policy after the Fiscal Treaty.

We welcome the fact that the Fiscal Treaty intends to strengthen the elements of *discourse* and *public sphere*:

- *Ex ante* reporting on national debt issuance (Article 6 of the Fiscal Treaty);
- Discussion and, where appropriate, coordination of all planned major national economic policy reforms, with a view to benchmarking best practices and working towards a more closely coordinated economic policy (Article 11 of the Fiscal Treaty);

[13] See also the Statement by the Euro Area Heads of State or Government of 09.12.2011.
[14] For a positive evaluation of this practice in Finland, see *Anna Hyvärinen*, in: Anna Kocharov (ed.), 'Another Legal Monster? An EUI Debate on the Fiscal Treaty Treaty', EUI Working Paper 9/2012, p. 16.

- Organisation of a conference of representatives from the relevant committees of the European Parliament and of the national parliaments to discuss budgetary policy and other issues (Article 13 of the Fiscal Treaty);
- Planning and reporting obligations for Member States subject to a deficit procedure and improved reactiveness of the EU institutions (Articles 5–8 of the Fiscal Treaty), and numerous steps to institutionalise dialogue and openness in secondary reform laws[15].

The expansion of discourse as a means of defining policy is rightly seen as part of the way out of the crisis: given their actual economic significance, national policy plans are taken to constitute transnational policy plans.[16] Unmistakable spill-over effects from economic decisions in one Member State in fact demand a fresh understanding of common European legitimation. Such proposals must therefore be defended in transnational arenas, learning processes can be institutionalised and aids and options indicated. This brings political deliberations into the forefront of reform, not any shift of final *decision-making* powers.

b) Lack of European debate and openness in drawing up the Fiscal Treaty.

While therefore the element of accountability in and through discourse is seen as a central part of the reform, the same principles have not been applied to the reform *itself*. As noted under I.1, for the Fiscal Treaty a path based on international law was taken, which is legally basically valid[17], but requires no discussion among the broadest possible public. A reform by way of Article 48 TEU and if possible Article 20 TEU and Articles 326 ff. TFEU would have involved the European Parliament and the national parliaments in the reform process, or involved them much more closely. It would also have established forums for the involvement of civil society. In the definition of the Fiscal Treaty, the governments of the 25 Member States largely prevented this involvement; in so doing, they failed to apply to the creation of the reform documents the same means from which they expect a solution to the crisis.

That is not to say that an approach based on international law should necessarily be ruled out in the future from a federal-democratic perspective. Where this path is seen as necessary, however, the hoped-for gains must be closely examined; the expected more efficient implementation (as compared to a Treaty amendment procedure) does not necessarily follow.

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[15] Cf. e.g. the *Economic Dialogue* between various EU bodies (the European Parliament, the Council, the Commission, the President of the European Council, the President of the Euro Group, and the Member State concerned), 'to ensure greater transparency and accountability' according to Article 2-ab of Council Regulation (EC) No 1466/97 of 7 July 1997 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies, last amended by Regulation (EU) No 1175/2011 of the European Parliament and of the Council of 16 November 2011 (OJ L 306 of 23.11.2011, p. 12); the *publication of the stability and convergence programmes* in Article 4(2) and Article 8(2) of the same Regulation; and the eleventh recital to Regulation (EC) No 1175/2011: 'The strengthening of economic governance should include a closer and more timely involvement of the European Parliament and the national parliaments.'

[16] Explicitly stated in the seventh recital to the Statement by the Euro Area Heads of State or Government of 09.12.2011 (emphasis added): 'For the longer term, we will continue to work on how to further deepen fiscal integration so as to better reflect *our degree of interdependence*.'

[17] For the legal options for the possible legal means of reform, see *Ingolf Pernice*, 'International Agreement on a Reinforced Economic Union'. Legal Opinion of 09.01.2012, p. 4.

It is more important to expand on the first steps towards involving the parliaments in drawing up the Fiscal Treaty (see I.1 above): it is possible to conceive of self-limiting modifications to the classical foreign policy approach based on international law, which pre-empt the need for national ratification. The voluntary involvement of bodies such as the European Parliament, national parliaments and representatives of civil society can provide additional federal-democratic legitimation (even where this is not legally required), admittedly without entirely replacing the link between political decisions and democratic participation as laid down in European constitutional law.

For the Fiscal Treaty, this means that, despite some hesitant steps towards democratic discourse and a European public sphere, the process of creation lags significantly behind the substantive content of the Fiscal Treaty in this regard. This shows that different yardsticks have been established for the reform procedure itself than for the instruments of reform. However, if standards recognised as correct are not applied to the process of establishment itself, this fresh birth defect will have a bearing on the foundations laid.[18]

II. THE IMPORTANCE OF THE REFORM OF THE ECONOMIC AND MONETARY UNION FROM A FEDERAL-DEMOCRATIC PERSPECTIVE

Based on these considerations, we will now highlight some constitutional aspects that have a bearing on legitimising the politically inspired further reform of the Economic and Monetary Union (EMU). They should therefore find a place in the continuing process of constitutionalising the European financial and economic system and should bear on every individual aspect (thus, having effects as topoi).

1. The thick network of European federal democracy

European public actions are legitimised by a network of legitimation elements. In primary law, various elements are mentioned in highlighted provisions in Articles 10–12 TEU, each reflecting specific founding principles of the Union. First, there is the fundamental dual structure of EU legitimacy, which represents citizens both as Union citizens and as citizens of a Member State (Article 10 (2) TEU); then there is the importance of the European Parliament and national parliaments, enhanced by the Lisbon Treaty; and there are forms of direct participatory democracy (as set out especially in Article 11 TEU). This in turn brings up the involvement of the individual players in the political-social context, such as the feedback process from national interest groups and national parliaments. There is also broad scope for specific forms of involvement, including Internet-based mechanisms for participation, for example.

In terms of its asymmetry, this multi-layered structure is very important in enabling deliberative decision-making: recognising the benefits but also the limits of the individual

[18] On the significance of a transnational common European debate among the European public, see II.2. and III.3.b) below for more detail.

democratic forces enables the most open federal-democratic development of influence. Only in the interaction that this makes possible can the individual legitimising elements be brought into a common European debate. The focus of a firm federal-democratic basis for further EMU reforms must therefore be directed at embracing and integrating this network of players while taking account of the significance of its various contexts and rationales. The idea of a European public sphere then assumes a particular importance.

2. Common European debate in a European public sphere

A sound medium-term normative framework for a new EMU system can only come about on the basis of a *common European debate*, involving and transcending the individual European public spheres:[19] no *single* vehicle for legitimation can do all this solely, as its own function defines the limit to its European contribution. So although increased participation by national parliaments in the debate about 'European internal policy' forms an important part of such a European public sphere (one thinks for example of the specific communication of the complex rules to citizens of the Member States[20]), it cannot be a substitute for common European decision-making and deliberation. Nor, however, can the European Parliament be equated with a common European public sphere.

Only when the various vehicles of legitimation work together in a common European debate based on a European public sphere understood in this sense, and in full awareness of the various perspectives, can there be any synthesis of these perspectives. As negative examples, we would cite the debate on the ratification of the Fiscal Treaty, where instead of a common European discussion the debates are taking place in the national contexts: Discussions are taking place in a fragmented manner in the Member States without the exchange with colleagues in the other parliaments that is essential to the regulatory aim. A similar quality of national introversion also marks the public debate ahead of a national referendum, as we see on a regular basis in Ireland in connection with the ratification of European (Treaty) reforms.

3. General ideas and examples to enhance federal-democratic participation

More general reforms should benefit from the present willingness to create and develop new forms of federal-democratic cooperation and give them a more prominent place in the debate as forms of social practice. We will therefore go on to talk about various concepts that could help to politicise Union policy-making and bring about greater participation by the European public.

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[19] Cf. contributions of politicians and scholars on the developments in the area of the European public sphere from different perspectives in Ingolf Pernice / Lars S. Otto (eds.), 'Europa vermitteln im Diskurs – Entstehung einer Europäischen Öffentlichkeit' (Communicating Europe via discourse—Emergence of a European public sphere], 2011.

[20] An example might be Article 7 of the Fiscal Treaty, which states the much-discussed reverse qualified majority in the procedure to establish a deficit in a Member State: the connection with Article 126 (6) TFEU and the sanction procedure according to Regulation (EU) No 1173/2011 is hard for the lay person to see, to say nothing of the vagueness surrounding the 'obligation to support the Commission's proposals' (see *Ingolf Pernice*, footnote 17 above, pp. 11 ff.).

The efficacy of European media as communicators of political issues can be enhanced. Current approaches, where they qualify as EU programmes at all, have so far been limited (one thinks for example of the Internet TV channel for the European Parliament, EuroparlTV). Various forms of innovation might be conceived of: for example, national media might make space for other national perspectives. One could also consider developing a genuine EU-funded and EU-based TV station. This could fill a gap and report on European political issues beyond the limited national horizons. It could broadcast in as many European languages as possible, overcoming language barriers and enabling a European debate not only within the political institutions but also in the population.[21]

Also, with regard to the parties in European elections campaigns there is potential for innovation to further politicise European debate in several perspectives. An important aspect here is the repeated demand for a stronger party-political dimension at the EU level.[22] Compared to the stress on the normative importance of political parties in Article 10 (4) TEU, the social relevance of political decision-making lags far behind, which is also attributable to the fact that no genuine EU parties have so far formed, only alliances of national parties.

Changes are possible in many respects: national parties (of similar political orientation) can draw up shared European positions on specific European policy issues and transfer them verbatim into the respective national party programmes.[23] Furthermore, we hear repeated calls for transnational lists of EP candidates, to break the monopoly of national parties on EP elections. The European parties might also put forward a joint candidate for the post of President of the Commission, giving the result of the election a still clearer connection to the executive leadership of the EU. [24]

4. Differentiated integration: Opportunities and limits

Ever since *Willy Brandt* called for a 'policy of gradation of the integration' in 1974, the political debate and constitutional arguments on the forms and options for differentiated integration have been periodically discussed with some vehemence[25], so most recently the European Foreign Ministers' Future of Europe Group, for example.[26] There are currently

[21] See on this topic in another context III.3.b) below.
[22] See e.g. the recent speech of *Martin Schulz*, footnote 3 above.
[23] Ibid.
[24] Cf. on this issue III.3.a).
[25] For historical overviews of the political initiatives, the legal consequences and types, see e.g. *Daniel Thym*, 'Ungleichzeitigkeit und europäisches Verfassungsrecht' (Supranational Differentiation and European Constitutional Law), 2004, pp. 28 ff. *Bernd Martenczuk*, 'Die differenzierte Integration und die föderale Struktur der Europäischen Union' (Differentiated integration and the federal structure of the European Union), EuR 2000, 351 (352 ff.); *Tobias Bender*, 'Die Verstärkte Zusammenarbeit nach Nizza' (Enhanced cooperation since Nice), ZaöRV 2001, 729 (732 f.).
[26] Foreign Ministers' group on the Future of Europe, Chairman's Statement for an Interim Report on 15 June 2012, http://www.auswaertiges-amt.de/cae/servlet/contentblob/620574/publicationFile/169581/120630_Zwischenbericht_Zukunftsgruppe.pdf, p. 7 (last access: 25.06.2012). This group includes the foreign ministers of Belgium, Denmark, Germany, Italy, Luxemburg, Austria, the Netherlands, Poland, Portugal and Spain. The former foreign minister of France, Alain Juppé, was represented by a personal delegate. The future debates of the group will include the new French foreign minister Laurent Fabius.

various models whereby European law at different stages does not apply or at the same time in all Member States ('differentiated integration'[27] and 'non-synchronism'[28], respectively). These have transcended the debates of the early years when any form of differentiated integration was rejected as being contrary to European law: European law now recognises many forms of differentiated integration (including differences in primary law as with the EMU, special provisions in secondary legislation, restrictions to the scope of secondary legislation[29] or agreements under international law between some Member States). As before, however, the question of forms of differentiated integration *de constitutione lata* and *de constitutione ferenda* remains open[30]. Such discussions reflect the transformation of the European Community or Union into a political union.

There is no disputing the dynamic potential that forms of differentiated integration have — the problem is how individual political projects can be driven forward without the idea of integration within a *common framework* being torn apart by spill-over effects. We will also point to the effect that the duplication of differentiated integration in the Fiscal Treaty will have on the Member States: with the entry into force of the Fiscal Treaty, two forms of differentiated integration are combined and being applied to the field of economic and monetary policy: the primary law differentiation between euro and non-euro States is combined with the differentiation of contracting States. This will create four 'clubs' within the EU: a club of 12, of 17, of 25 and of 27.[31]

- 12 Member States have to ratify the Fiscal Treaty in order for it to enter into force according to Article 14 (1) and (2) of the Fiscal Treaty itself.
- The 17 Member States whose common currency is the euro form another club; the 12-State structure then places economic and political pressure (of differing degrees in terms of the real economy, of course) on each Member State to ratify, because from 1 March 2013, ratification of the Fiscal Treaty becomes a pre-condition for receiving support from the ESM,[32] while non-ratification of the each State cannot in itself prevent the Fiscal Treaty from entering into force.
- Eight other Member States whose currency is not the euro also intend to submit to the budgetary and economic policy set out in the Fiscal Treaty
- One Member State whose currency is not the euro and does not wish to be bound by international law intends to respect the Treaty, and another Member State whose currency is not the euro is unwilling to commit itself to the substantive content of the Fiscal Treaty either under international law or voluntarily (see I.1 above).

From this, we can see the benefits of forms of differentiated integration in general: one advantage is that, in areas where at least some Member States see a need for political action and are themselves willing to act, action and even a certain level of integration is possible *at*

[27] In the widest possible understanding of the debate.
[28] Seminal work by *Daniel Thym*, footnote 25 above.
[29] Such as the enhanced cooperation pursuant to Article 20 TEU and Articles 326 ff. TFEU.
[30] See e.g. *Jean-Claude Piris,* 'The Future of Europe: Towards a Two-Speed EU?', 2011, pp. 106 ff.
[31] Thanks to *Jörg Asmussen* for clarifying this aspect in his contribution to the workshop (Roundtable: Practice Meets Science) on 27.04.2012 at the Walter Hallstein-Institute for European Constitutional Law.
[32] See recital 5 to the ESM Treaty and recital 25 to the Fiscal Treaty.

all (because a policy of the lowest common denominator is rejected). Within a *common framework* provided by the European constitution, all Member States can then be activated (in joint negotiations), whereby account can ultimately be taken of national majorities without these ultimately being able (as European minorities) to block progress. The second advantage is that this brings about the realisation of European principles in a fundamental balance: an approach that takes national differences seriously and safeguards sovereignty while allowing them to be incorporated within a common framework.[33] A third advantage lies in the subsequent practical testing of the (initially) separate policy provisions: there is institutional competition, to which the non-participating Member States (and also those moving forward) must submit, which may in turn provide an impetus towards uniform integration. This competitive tension is seen by some as a benefit in itself, as it generates a pressure on systems to prove their worth.

The risks of any form of differentiated integration generally lie in the centrifugal political forces to which the federal structure of the Union is exposed. The idea of a political Union goes hand in hand with its federal-democratic basis, which gets challenged by forms of differentiated integration. This can produce a negative spill-over effect when it comes to overall integration. It is also associated with reduced transparency and democratic accountability[34], which in turn needs to be viewed in light of the importance of a common European discussion as a basis for further politicisation of the Union.

The crucial legal risk behind these considerations is the impact on the idea of legal unity,[35] i.e. the promise that European law applies equally in all Member States.[36] For the EU as a legal community[37] , the idea of legal unity has a particular bearing on the principle of equality contained in the idea of the law, particularly in its function as an instrument of integration. Any fragmentation into more and more sub-communities could turn into a fundamental risk to the federal structure of the Union, which does after all promise *unity* in diversity.

Balancing the advantages and the risks of differentiated integration refers to constitutional principles that require especially detailed examination with forms of differentiated integration, particularly[38] *consistency*, *loyalty* and *solidarity* – aspects that in turn need to be viewed in the light of a common European debate in the European public sphere.

According to Article 7 TFEU, the Union should ensure consistency between its policies and activities in the various areas, taking all of its objectives into account and in accordance with

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[33] *Daniel Thym*, footnote 25 above, pp. 345 ff.

[34] *Bernd Martenczuk*, footnote 25 above, p. 359; *Armin Hatje*, 'Grenzen der Flexibilität einer erweiterten Europäischen Union' (Limits to the flexibility of an enlarged European Union), EuR 2005, 148 (155).

[35] *Bernd Martenczuk*, footnote 25 above, pp. 359 ff.

[36] A founding principle of the Union, see only *Flaminio Costa v ENEL* [1964] ECR 585 (6/64).

[37] *Walter Hallstein*, 'Der unvollendete Bundesstaat' (The incomplete Federal State), 1969, pp. 154 f.; *id.*, 'Die Europäische Gemeinschaft' (The European Community), 1973, pp. 31 ff., and as a key aspect of his conception of a European constitution *Ingolf Pernice*.

[38] Other principles that could have a bearing but are not discussed here are the principles of subsidiarity in the broader sense and of proportionality, which are especially important in the case of a differentiated approach under international law.

the principle of limited conferral of powers. The concept of consistency can be read as a call to coordinate the policies of the Union in accordance with its competences and mould them into a harmonious whole. The concept of consistency includes the consistent realisation of Union aims (Article 3 TEU) and the resolution of specific conflicts between these aims. If the Union takes measures in a given policy area, it is duty-bound not to undermine the realisation of other initiatives. The principle of consistency mainly applies at the planning level, while the principle of sincere cooperation (Article 4 (3) TEU) mainly addresses the operational level. The principle of sincere cooperation operates both vertically in the relationship between the Union and its Member States and horizontally in the relationship between the Member States themselves. It expresses the legal obligation placed upon them to assist each other in carrying out tasks which flow from the Treaties, in implementation of the stated aims. To this end, the Member States should take any appropriate measures and refrain from any other actions which could jeopardise the attainment of the Union's objectives.

From 'loyalty to the Union' come – in conjunction with solidarity cited as a fundamental value (Article 2 sentence 2 TEU) – specific obligations of solidarity based on a long-term expectation of reciprocity (solidarity as an 'assurance of reciprocity'[39]) and working in parallel with the application of the loyalty principle in the vertical and horizontal dimensions of the Union. From this follow the obligation to subordinate self-interest to the interests of the Community and the duty to provide assistance to those who need it.[40] Alongside the rational cost-benefit calculation, solidarity can also be seen as a 'medium for integration [...], essential to shared political decision-making and hence to the communicative creation of democratic power and the legitimation of the exercise of sovereignty.'[41]

On an overall view, such principles will often lead to a legal challenge in the definition of differentiated integration, such as the openness of all clubs to all Member States (possibly dependent on certain objective conditions), while also encouraging entry[42].

All in all, it follows that forms of differentiated integration should (for the process of the further politicisation of the Union) be looked at more closely as a means of enhancing our capacity to act. This principle is especially important in the light of future economic policy.[43] But this is not a panacea – the risks of imbalances all the way to centrifugal forces tearing the Union apart and ultimately unacceptable damage to the idea of legal equality within the Union are substantial. Differentiated integration still demands legal justification. A cautious

[39] *Markus M. Müller*, 'Mut zur Staatlichkeit. Volk, Demokratie und Staatlichkeit in der Verfassungsdebatte' (The will to nationhood; peoples, democracy and nationhood in the constitutional debate), in: Klaus Beckmann / Jürgen Dieringer / Ulrich Hufeld (eds.), 'Eine Verfassung für Europa' (A constitution for Europe), 2nd edition, Tübingen 2005, p. 119 (131).

[40] *Christian Calliess*, 'Die europäische Solidaritätsprinzip und die Krise des Euro — Von der Rechts- zur Solidargemeinschaft?' (The European solidarity principle and the crisis of the euro — from a community of law to a community of solidarity?), in: Berlin e-Working Papers on European Law, No 1, p. 11.

[41] *Jürgen Habermas*, 'Zur Verfassung Europas — Ein Essay' (On the constitution of Europe—An Essay), 2011, p. 56 (authors' translation).

[42] See e.g. the codified special case in Article 328 (1) TFEU. Thanks to *Jörg Asmussen* for clarifying this general aspect in his contribution to the workshop (Roundtable: Practice Meets Science) on 27.04.2012 at the Walter Hallstein-Institut for European Constitutional Law.

[43] See III.2 c) below.

development of existing forms of differentiated integration, taking careful account particularly of consistency, loyalty and solidarity, must however be incorporated into discussions on reform.

5. Democratic added-value from increased capacity for action

The various proposals made in this paper as to how the Union can achieve a greater capacity for action in financial and economic policy offer not only political but also *democratic* added-value. With *Michael Zürn,* we may observe that democracy expresses itself in two ways: in the control of public authorities and in the (desired) realisation of collectively defined goals.[44] Any necessary politicisation of the EU must therefore take account of the (transnational and global) *regulatory needs*. It follows that the less scope there is for action to turn collective goals into regulatory provisions, the smaller the element of 'rule' (*kratein*), which damages democracy just as much as action with insufficient legitimacy. Any kind of integration leading to shackled EU institutions would then no longer be democratic, even with the optimum election and control of these institutions.[45]

Reforms that lead to a greater capacity for action on the part of the EU should therefore be seen as fulfilling democratic responsibilities.

6. Potential for transformation and new approaches — opportunities from a European *constitutional moment*

The huge potential for transformation that could grow out of the current crisis not only has a bearing on reforms of primary law;[46] it also allows us to think in terms of new types of European constitution that can act as narratives. The citizens of Europe have experienced and recognised their interdependence more clearly than ever before. Although calls for national separation have been loud, this would not only mean giving up the state of integration already attained, it would also fail to achieve the desired political and social goals.

The only thing to do, therefore, is to seek new ideas for action according to a consistent overall understanding. This expresses the idea of the EU as a political union. For the impending constitutional reforms, this also offers the possibility — as much as the necessity — of defining new approaches to change the understanding of the players. The political communities and the citizens of Europe then have the opportunity to create such new guiding principles instead of falling back on received wisdom.[47] In the spirit of the European

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[44] *Michael Zürn*, 'Das Bundesverfassungsgericht und die Politisierung der Europäischen Union' (The Federal Constitutional Court and the politicisation of the European Union), in: Claudio Franzius / Franz C. Mayer / Jürgen Neyer (eds.), 'Strukturfragen der Europäischen Union' (Structural issues in the European Union), 2010, pp. 46 ff.

[45] See *Michael Zürn*, footnote 45, pp. 51 f. In another context, see also BVerfG (Federal Constitutional Court): elections to a Bundestag which no longer had any tasks or powers of any substance would be incompatible with the requirements for a democratic election (see BVerfGE (BVerfG decisions) 89, 155 (156) — Maastricht).

[46] See notes in section IV of this paper on the fiscal policy pillar of EMU reform.

[47] We only need to look for example at the sometimes remarkably creative arguments on the legal implementation of the Fiscal Treaty, such as the petition that is intended to be brought to the German Federal

integration thus achieved, this could ultimately realise the performative potential of the dialogue on financial and monetary reform, and so act as a *constitutional moment*[48]. Such theoretical models then have the chance to coagulate in the medium term into constitutional *law*.[49]

III. REFORM STEPS TO FURTHER DEVELOP THE EUROPEAN ECONOMIC AND MONETARY CONSTITUTION

If the reform is to redress the imbalance in the existing Economic and Monetary Union, it needs two equal pillars. The fiscal policy pillar, in need of (further) urgent reform, must necessarily be complemented by a viable economic policy pillar. There are also some promising general reform proposals with an institutional and media focus that look beyond fiscal and economic policy.

The continuing crisis makes one thing clear: it will not be possible to cling to the *status quo*. The Union stands at the crossroads. Either it (or part of it at any rate) must decide upon greater integration in order to regain its capacity for political action, or it will no longer be able to hold back movements towards disintegration and a partial return to national autonomy. The reversion to nation-states cannot however be the answer to the complex problems thrown up by the global order of the 21st century with its rapid shift of power to the Asia-Pacific region. If a Europe that seems increasingly small from a global perspective wishes to preserve its fundamental values in the world of tomorrow, it cannot retreat into petty nationalism.

1. The pillar of fiscal policy reform

The euro crisis has exposed the great mutual dependence of the euro countries, and indeed all EU Member States, a dependence which also entails a great responsibility. The fiscal policy pillar must accordingly be reinforced by way of collective mechanisms oriented towards the specific principles of the Union. That means that any responsible budgetary policy for the Member States — where they retain competence in this area — must observe common principles. These include taking account of the overall (spill-over) effects that domestic budgetary decisions may have on other Member States and on the EU. This consideration reflects the mutual dependence of the collective. Inter-parliamentary cooperation is especially important here. This is the only way in which a new budgetary architecture can be established, which can serve as a genuine collective instrument and hence live up to this shared responsibility.

Constitutional Court demanding it to rule that German citizens should vote on the ESM Treaty and the Fiscal Treaty by referendum (announced e.g. by the former Minister of Justice *Herta Däubler-Gmelin* and the constitutional lawyer *Christoph Degenhart*, cf. Handelsblatt, 13–15.04.2012, pp. 16 f.).

[48] The fact that such a transformative moment can also arise in a debate *after* an amendment to the law is referred to by *Joseph H. H. Weiler*, Introduction: 'We will do, and hearken', pp. 3 f., in: id., 'The Constitution of Europe', 1999, seeing the *constitutional moment* in the debate following the Maastricht Treaty.

[49] See reference by the legal historian *Michael Stolleis* to the move from constitutional theory to constitutional law in his 'Geschichte des Öffentlichen Rechts' (History of public law), vol. 4, 2012, p. 20

There is also a need for a redefinition of the deficit procedure laid down in Union law, which needs to work more effectively. Here, the role of the European Parliament in particular needs to be strengthened, both to exploit its classical parliamentary function as a control body of the executive and also to give the wishes and ideas of Union citizens an effective role in common budgetary responsibility and to maintain transparency.

However, if the crisis is to be overcome in the medium to long term, even these — doubtless necessary — repair measures seem to fall short. It may be that a permanent solution to the problem can only be achieved by some kind of (at least partial) federalisation of fiscal policy within the eurozone. This not only raises the matter of the substantive scope of such an increase in integration; the institutional representation of a club of euro States within the Union (always open to others to join) in particular throws up issues of constitutional law.

a) Consideration of external effects of fiscal policy decisions by Member States in connection with *domestic* budgets, and inter-parliamentary cooperation

aa) The Two Pack and the European Semester

The 'European Semester', set up on the initiative of the 'Task Force on economic governance' headed by EU Council President *Van Rompuy* has already created a tool for preventive monitoring. The aim is to synchronise and combine the previously separate processes of budgetary policy coordination under the Stability and Growth Pact and the structural reforms under the EU growth strategy 'Europe 2020'. Among other things, the European Semester obliges the governments of the Member States to present their plans for their national budgets (stability and reform programmes) to the Commission by April each year. The Commission then draws up recommendations for each country by June, which then have to be passed by ECOFIN and the European Council. These recommendations are then passed on to the national parliaments, which can incorporate them into their budgetary deliberations. There is thus no interference with national budgetary rights.[50]

Rather, an extension of this procedure should enable better budgeting. Fundamental to this is the recognition that the present interlacing of the national economies of the EU Member States in the course of European integration causes national economic and financial policy decisions to have spill-over effects well beyond their own areas of sovereignty. If, for example, Berlin decides to cut investments in infrastructure, this may affect construction companies in Spain; if Athens neglects its budgetary discipline, this has a *de facto* impact on the creditworthiness of France, and may even plunge the Union as a whole into chaos. Hardly any budgetary decision by one country has no impact at the European level, so such decisions should not logically be taken without sufficient consideration of the other European interests

[50] To enhance the efficiency of the European Semester, one could suggest enhancing the binding nature of the provision by incorporating it into the Treaties. This provision of primary law must however ensure that the Commission's recommendations to the individual countries could be not merely considered in the establishment of their budgetary plans but could lay down an obligation to consider them, requiring observance but without making specific elements of the recommendation binding, as any decision on how to manage the budgets must remain within the competence of the national parliaments.

in the respective national budgets. This is not a matter of transferring competences but of redressing information deficits. The Member States are often unaware of certain effects, so considering the Europe-wide significance of fiscal policy decisions will help to reinforce the budgetary process and develop tools to allow countries to assess their budgetary decisions in an informed and responsible manner.

The budgetary plans of the euro countries shall be subject to a joint timetable under the Two Pack which was adopted with numerous amendments by the European Parliament on June 13th 2012 at first reading with major amendments. The aim is to align this better with the European Semester and to give the euro countries sufficient time to incorporate the improvements proposed by the Commission and the Council into their national budgets promptly.

bb) Parliamentary Representation of European interests in national fiscal policy decision-making processes

However, while the Treaties provide for the involvement of national parliaments in the legislative procedures of the Union in many areas, in order to give its decisions additional democratic legitimation while also respecting national interests in line with the Union principle of subsidiarity (Article 5 (3) TEU) and the identity of the Member States (Article 4 (2) TEU), this culture of considering and respecting the external effects of national decisions on European partners has not yet established itself at the national level.

Any solution, also demanded on the principle of democracy, must therefore *guarantee the representation of European interests in national fiscal policy decision-making processes and institutionalise these in law.* A crucial element of this is to examine every budgetary item in terms of its European implications; this must be incorporated into the process in such a way that adequate compliance can also be documented. One possibility might be the way this is incorporated into the German legislative process, where questions of 'costs' and 'alternatives' appear as established themes.

In the interests of constant dialogue between the EU and the national parliaments, one could consider setting up budgetary committees in the Member States based on the model of the Bundestag 'Committee on the European Union' set up under Article 45 of the Basic Law and made up of members of the Bundestag and MEPs, so that MEPs with the nationality of one Member State were regularly involved in the committee discussions within their home parliaments. The MPs and MEPs should be granted a right to speak, to allow them to pass on information relevant to 'European' budgetary policy to their national parliaments, and so guarantee early mutual information and effective coordination of European and national budgetary policies. Furthermore, at least one MEP who plays a key role within the Budgetary Committee in the European Parliament (rapporteur or shadow) should be involved – irrespective of his or her nationality.

cc) Inter-parliamentary cooperation

An important instrument for communicating these implications is inter-parliamentary cooperation. It must guarantee early coordination and alignment of parliamentary budgetary work beyond the borders of the individual Member States. For this it is necessary, depending on the individual budgetary items, to give a say to those Member States whose interests are substantially affected by the measures to be taken. Even at the stage of parliamentary debate on budget plans, national representative bodies must be informed and made aware of the external implications of their policies, to enable the arguments raised to be incorporated into the discussion and subsequent decisions.

One might doubt the effectiveness of framing such inter-parliamentary cooperation within the only moderately successful model of the 'COSAC', i.e. as a conference of budgetary committees of the national parliaments and the European Parliament, a ***COSAB (Conférence des Organes Spécialisés dans les Affaires Budgétaires)*** as Article 13 of the Fiscal Treaty appears to suggest. A more intense form of cooperation should be envisaged here. It is important that information will be assembled in an effective and transparent manner, to support the various players within the European budgetary architecture and achieve a material interlinking of national budgetary processes within the European parliamentary collective.[51]

b) Deficit process according to Article 126 TFEU (*de lege ferenda*)

The deficit process according to Article 126 TFEU needs to be reformed, with the principles of increased efficiency and greater democratic legitimation given equal consideration, as they are interrelated. Under current law, according to Article 126 (2) sentence 1 TFEU, the Commission monitors the development of the budgetary situation and of the stock of government debt in the Member States with a view to identifying gross errors. According to sentence 2, it should in particular examine compliance with budgetary discipline on the basis of two criteria, the ratio of the planned or actual government deficit to gross domestic product, the ratio of government debt to gross domestic product. The reference values used here have been set in Article 1 of Protocol 12 at 3 % for the first criterion and 60 % for the second. If a Member State does not fulfil the requirements of one or both of these criteria, the Commission will prepare a report in accordance with Article 126 (3) TFEU, first subparagraph. According to Article 126 (3) TFEU, second subparagraph, it *may* also prepare a report if, notwithstanding the fulfilment of the requirements under the criteria, it is of the opinion that there is a risk of an excessive deficit in a Member State.

aa) Parliamentary control of the Commission's monitoring activities

While current law only allows the Economic and Financial Committee to comment on the report from the Commission, and economic dialogue has been strengthened by the 'six-pack', the European Parliament should in future be involved as a monitoring body at this stage of the

[51] *Ingolf Pernice/ Steffen Hindelang*, 'Potenziale europäischer Politik nach Lissabon — Europapolitische Perspektiven für Deutschland, seine Institutionen, seine Wirtschaft und seine Bürger' ('Potential for European policy after Lisbon — European policy perspectives for Germany, its institutions, its economy and its citizens'), EuZW (European Journal of Economic Law) 2010, 407, 408 f.

procedure. Under a *new Article 126 (4), first subparagraph to be inserted into the TFEU, the report from the Commission should be passed to the European Parliament*. The European Parliament should have the opportunity to improve the efficiency of the Commission's monitoring activities by way of preventive controls at an early stage in the process. If at least 25 % of the Members of the European Parliament are of the view that the Commission has not adequately examined the budget of a Member State, they may pass a resolution requiring the Commission to revisit the national budget in question. They may then raise specific issues that the Commission must focus on in its renewed examination. The European Parliament may also, with the approval of 25 % of its Members, request the preparation of the report from the Commission if the Commission has not already produced such a report for a Member State. The European Parliament can also comment on the Commission's report.

This *parliamentary minority right* serves to *monitor the working methods of the Commission* and is intended to enable it to rectify any irregularities or gaps in its report (or to produce this report in the first place) and to provide for a comprehensive review of national budgets in terms of compliance with the tightened Maastricht criteria. Members of the Commission may be questioned on this before the European Parliament. For the effective exercise of parliamentary control, the Parliament needs an administrative infrastructure staffed by experts. Its actual composition concerns the Parliament's internal organisation and so is a matter to be decided by the European Parliament itself, which would not be addressed by Article 126 (4) TFEU as amended.

Article 126 (4) TFEU, second subparagraph as amended will retain the existing provision whereby the Economic and Financial Committee comments on the report from the Commission in the role of advisory body.

bb) Parliamentary right of final decision on deficits

If the Commission believes that a Member State is running an excessive deficit or such a deficit could arise, the proposed *Article 126 (5) TFEU as amended* provides for it to submit comments to the Member State concerned and notify both the Council *and the European Parliament.*

According to paragraph 5 of the Statement by the Euro Area Heads of State or Government of 9 December 2011, the new rules will have automatic consequences where the Commission has established that the 3 % ceiling has been breached, unless the Council decides by a qualified majority, on the basis of the observations that the Member State in question may wish to submit, and after examining the overall position, that there is no excessive deficit (proposed Article 126 (6) TFEU as amended). With regard to the second criterion, the debt criterion for Member States with government debt in excess of 60 % of GDP needs to be specified in the form of a numerical benchmark for debt reduction (1:20 rule).

If a qualified majority of the Council is opposed to the finding of an excessive deficit, the *European Parliament may decide, with an increased majority threshold*, e.g.

- an absolute majority of its Members, or
- two-thirds of the votes cast and a majority of the Members (cf. Articles 234 and 354), or
- even a two-thirds majority of its Members

that there is nevertheless an excessive deficit (proposed new *Article 126 (6a) TFEU as amended*). In urgent cases, this decision may be made by the Economic and Financial Committee (proposed new *Article 126 (6a) sentence 2 TFEU as amended*)

The institutional involvement of the European Parliament in the procedure according to Article 126 TFEU is then an example of the way in which increased efficiency can go hand in hand with a greater degree of democratic legitimation.

cc) Legal protection

Legal protection against the decision by the Commission that there is an excessive deficit can be obtained by the respective Member State from the Court of Justice, which will rule on the matter by the accelerated procedure. The Court of Justice must examine the legal control of the recommendation to ensure that it does not interfere with national sovereignty in budgetary matters. Particular stress must be placed on the principle of limited conferral of powers, which would stand in the way of any exercise of the Commission's powers that involved it interfering in competences of the Member States with specific budgetary instructions.

In assessing the expected differences in specific economic estimates, the Court must look at the consideration the Member State has given to the Commission's recommendation in drawing up its national budget. The more the Member State has addressed the concerns raised, the less the Court should be able to substitute its own assessment for that of the Member State.

c) Future prospects of fiscal union?

The economic complexity and diversity of the crisis means that it is only possible to reconstruct the cause and effect relationships up to a point. Where, however, the search for causes reaches its limits (and not only for lawyers[52]), it is hard to generate any reliable recommendations for action. The depth of penetration of the crisis also suggests that any viable reform in the medium to long term must go beyond the repairs to the fiscal policy pillar that we have already mentioned (and which should be implemented as soon as possible). This is true both for the eurozone and for the Union as a whole.

aa) Institutional Aspects

[52] The often-quoted saying that where there are two lawyers there will usually be three opinions seems to apply equally to the study of economics.

Demands for fiscal union come from the management of the European Central Bank, tied to calls for political union. According to this, the European Stability Mechanism (ESM) could be extended to include a special EU budgetary fund for the eurozone, which could be fed for instance by a new EU financial transaction tax (within the eurozone).[53]

The question that inevitably follows is how the call for democratic legitimacy of decisions affecting the eurozone alone could be realised institutionally. The fundamental tension between providing adequate safeguards for euro-specific special interests on the one hand and safeguarding the overall institutional framework of the Union on the other can be resolved in three ways. The first option is to fall back on the *European Parliament* as a whole. This raises the question whether fundamental issues such as the budget should be decided upon by MEPs whose country of origin is not itself in the eurozone. Another possible decision-making body might be a *special session of the European Parliament* (or of its committees[54]), made up of MEPs from the eurozone. This approach would have the advantage of being based on an existing institution, which could always be adapted in a flexible and non-bureaucratic way, while also allowing for differentiated integration. On the other hand, this solution also involves fragmenting the European Parliament into various formations based on national affiliations, and hence casts doubt on the constitutional conception of the European Parliament as a representative body for Union citizens in the meaning of Article 14 TEU — and not for individual nations.[55] The third possibility might then be to create a *new parliamentary institution* consisting of directly elected members or representatives of the national parliaments, which would be formally separate from the European Parliament. Admittedly, this would only work at the expense of further complicating the already complex institutional structure of the Union and so would raise serious concerns.

bb) Aspects of Financial Policy

For the EU-27, the Commission Communication of 19 October 2010[56] (the EU Budget Review) and the subsequent Green Paper on the Future of VAT triggered a fundamental discussion of the financing of the EU.[57] Associated with this, a cross-party proposal from MEPs *Haug*, *Lamassoure* and *Verhofstadt* called for a fundamental redesign of the financing of the EU, including the introduction of a European value-added tax.[58]

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[53] Cf. *Jörg Asmussen*, 'Eine Europäische Agenda 20…' ('A European agenda for 20...'), speech at 'DIE WELT' Currency Conference on 21.05.2012, accessible at http://www.ecb.int/press/key/date/2012/html/sp120521.de.html (03.06.2012). On the question of a union of the financial markets, see notes under III.2.b)dd) below.

[54] Ibid., in relation to the Economic and Financial Committee of the European Parliament.

[55] See e.g. the view of the Federal Constitutional Court (BVerfG), judgement of 30.06.2009, BVerfGE 123, 267, 371 ff.– *Lissabon*.

[56] COM(2010) 700, p. 31. Possible sources of EU financing (EU own funds) mentioned are: EU taxation of the financial sector, EU revenues from the Emissions Trading System, an EU charge related to air transport, European VAT, an EU energy tax and an EU corporate income tax.

[57] Green Paper 'On the future of VAT', COM(2010) 695, p. 4.

[58] *Jutta Haug / Alain Lamassoure / Guy Verhofstadt*, Europe for Growth – For a Radical Change in Financing the EU (2011), pp. 42 ff.

Although federalisation does not necessarily have to be associated with increased invasiveness, provided that the system is inherently consistent,[59] no such advances can be implemented among the Member States at present. When it comes to safeguarding national sovereignty, tax policy remains one of the most sensitive areas. This is reflected in the state of integration at the European level. The rules on tax (Articles 110 ff. TFEU) in the Lisbon Treaty are limited to prohibitions against discrimination and moves to harmonise tax to bring about the single market. Moreover, the scope for action by the Union in this area is almost exclusively tied to the requirement for unanimity and subject to various procedural restrictions.

One particularly controversial topic is the issue of financing via Eurobonds. *De lege lata*, in any case the models based on the principle of 'joint and several' liability[60] would require an amendment of Article 125 TFEU.[61] Further, the jurisprudence of the German Federal Constitutional Court excludes Germany from 'subjecting itself to an incalculable automatism of a liability community which follows a course of its own that can no longer be steered' by the German Bundestag.[62] *De lege ferenda* it should be verified if – or in which institutional setting – it would be reasonable to create the legal foundations for Eurobonds. Eurobonds could be a temporary solution in order to overcome the financial shortcomings of one or several Member States, if three conditions are met: *Firstly* the requirements laid down in Article 136 paragraph 3 have to be fulfilled, *secondly* the total amount of shared obligations must be limited and *thirdly* these obligations must be part of a policy commonly accounted for by the euro-States. In such a scenario, the criteria set up by the German Federal Constitutional Court would be met, because an incalculable automatism of liability would not be established. For the future one might also think of using differentiated and nuanced models.[63] However, such models must stick to the principle that there can be no community of joint liability without a community of joint action. A community of joint liability can only be established under the condition of creating a veritable Europeanisation of the fiscal and economic policy.

Apart from that, a forward-looking form of financing might be provided by the project bonds that are currently under discussion.[64] Sensible and necessary reform projects would then be financed by capital generated on the open market, without burdening the budgets of the Member States or the Union. Finally, it seems essential to increase the capital base of the European Investment Bank in order to give it more scope when it comes to granting loans to finance projects.

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[59] Thanks to *Giuliano Amato* for raising this idea. A glance at US financial federalism may illustrate this, cf. *Randall Henning / Martin Kessler*, Fiscal federalism: US history for architects of Europe's fiscal union (2012).

[60] For the various models cf. the *Goulard*-rapport, No 2012/2028(INI), available at http://www.europarl.europa.eu/sides/getDoc.do?type=COMPARL&mode=XML&language=EN&reference=PE491.075 (25.6.2012).

[61] In detail *Franz C. Mayer / Christian Heidfeld*, ‚Verfassungs- und europarechtliche Aspekte der Einführung von Eurobonds' (Constitutional and EU-law aspects of the introduction of Eurobonds), NJW 2012, 422 (425).

[62] BVerfG, judgment of 7 September 2011 – 2 BvR 987/10 u.a. – NJW 2011, 2946, 2951, para. 127 f.

[63] Cf., for instance, the „Blue-Bond"-concept of *Jacques Delpla / Jakob von Weizsäcker*, The Blue Bond Proposal, available at http://www.bruegel.org/publications/publication-detail/publication/403-the-blue-bond-proposal/ (20.6.2012).

[64] In that sense also the Foreign Ministers' group on the Future of Europe, footnote 26 above, pp. 6 ff.

In order to generate sustainable growth, the present set-up of structural and cohesion policy needs to be reviewed. The crisis has once more highlighted the existing substantial economic and social differences between the Member States. More intensive support for the economically weaker regions of the Union seems urgently needed and vital to equalising competitiveness within the Union in the longer term. A European initiative for growth will be cheaper in the medium- to long-term than a one-sided policy of austerity, which affects the national budget because of declining tax revenue and leads into a vicious circle which increases the financial volume necessary to rescue the State in trouble. This initiative can be realised particularly by a reform (and substantial increase) of the structural funds. Their financial means could be used for the foundation of enterprises and programmes aiming to creat growth, particularly in the fields of education and infrastructure. To this end, the structural funds available to the EU must be deployed in a more targeted and efficient manner. For example, we should focus on expanding the digital infrastructure all over Europe. At the same time, we should not shy away from reassigning the existing funds to get the better of hitherto unresolved problem areas such as combating youth unemployment.

2. Economic policy pillar

The current crisis is largely if not solely attributable to the imbalance between a coordinated economic policy on the one hand and a common monetary policy on the other. Austerity measures and more effective budgetary discipline only strengthen the fiscal policy pillar, while contributing nothing to overcoming the systemic asymmetry within the EMU. Although they may result in a temporary calming of the markets (and even this only in places), they do not provide an adequate basis for creating the economic and social foundations for growth. A sustainable reform agenda cannot therefore dispense with close collaboration in the areas of social, employment, labour market and tax policy and banking regulation in the longer term. In the medium-term this should also include an increased conferral of competencies at EU level, a demand also supported by the European Foreign Ministers' Future of Europe Group.[65] The path to be taken to achieve greater capacity for action can be illustrated by the example of road traffic.

a) Current state of integration

A glance at the current state of integration in the present trouble spots clearly shows the need for action.

aa) General: Governance and procedure

Based on the fundamental but not always sharp differentiation between an economic policy oriented towards the conditions for economic governance on the one hand and a procedural policy directed at intervention in the operation of the individual processes on the other, we obtain the following picture. In the field of governance, internal market policy (Article 26

[65] Cf. footnote 26 above, pp. 2, 4 f.

TFEU) and competition law (Articles 101 ff. TFEU) constitute two very clearly supranational policy areas. According to Article 3 (1) (b) TFEU, the Union has exclusive competence in 'the establishing of the competition rules necessary for the functioning of the internal market'. Although it may be debated whether this places all of competition law within the exclusive competence of the Union, the Lisbon Treaty (Articles 101 ff. TFEU) does grant the EU bodies relatively broad scope for action. The Community method is already very far advanced in this area.

In contrast, procedural policy is only represented to a comparable extent by structural and regional policy. The Union uses structural funds to support the structural policy actions of the Member States, which in turn coordinate these among themselves. Further rules of procedural policy are laid down in Article 3 TEU. According to this, a high level of employment, a high level of social security, equality between women and men and convergence of economic performance are among the aims of the EU's macro-economic stabilisation policy. It is characteristic of these areas, however, that use is only made of coordination as a form of action that preserves sovereignty. Article 5 TFEU then represents the key provision within the Lisbon Treaty when it comes to the (mere) coordination of national economic policies. Admittedly, the Open Method of Coordination does increasingly crop up as a third 'form of action' at the EU level.

bb) Labour market and employment policy (Articles 145 ff. TFEU)

The section on employment policy goes back to the Amsterdam Treaty and has not been substantially altered even by the Lisbon Treaty. The type of regulation is reminiscent of the economic policy set out in Articles 120 ff. TFEU. Basically, the *direct competence for employment policy remains with the Member States,* and the States alone decide upon the substantive direction of their employment policies, which may range from active State intervention all the way to a liberal policy dependent on market forces alone. The options for action by the Union in this area are correspondingly limited. Binding Member States to the aims of Article 3 TEU, and coordinating the employment policies of the individual States via the procedure set out in Article 148 TFEU, in the course of which the Council produces annual *employment policy guidelines* and reviews employment policies in the light of these, constitute the most profound forms of intervention available to the Union. In some cases, however, overlaps with other policy areas, such as social policy, may give greater freedom of action to the Union, particularly as Articles 145 ff. TFEU only covers government employment policy and does not include company-level or collective measures.

cc) Social policy

Social policy is listed as a shared competence in Article 4 (2) (b) TFEU and is reflected in Articles 151 ff. TFEU. A more differentiated list of Union competences in Article 153 TFEU shows the limited scope of current integration in this area. Despite the apparently far-reaching competences of the Union, the degree of supranationalisation is tightly limited, partly because harmonisation measures in most areas are restricted to promoting supporting and

complementary activities by the EU, cf. Article 153 (2) (b) TFEU. Legislative activities by the Union in this area have been few and far between in the last few years. In particular, the key issues of social security are still handled by the Member States, albeit subject to various aspects of European law.

dd) Banking regulation

The competences of the Union are currently especially limited in the area of banking regulation. Under Article 127 (5) TFEU, the ESCB only assists in the smooth implementation of the measures taken by the competent authorities in the field of supervision of banks and the stability of their financial systems. However, the establishment of the European System of Financial Supervision (ESFS) on 1 January 2011 strengthened control at the European level. For example, it created the European Banking Authority (EBA), which subjects the relevant banks within the Union to a stress test. Ultimately, however, the ESFS is only responsible for observing and coordinating the national supervisory authorities.[66] Solvency supervision of banks and market supervision in day-to-day business thus remain at the national level.[67] This is not without its problems in two areas. First, close financial ties between the banking sector and government finances can result in negative downward spirals in times of sluggish economic growth in particular. Secondly, although the national supervisory authorities are obliged to safeguard the working of the common European market, they are ultimately subordinate to the interests of their own taxpayers.[68] Both are developments that have ultimately helped to intensify the present crisis. Relief may be provided here by the creation of a banking/financial market union, as proposed by a member of the board of the ECB, *Jörg Asmussen*,[69] and now also by the Commission.[70] The cornerstone of such a common policy for banking regulation would be a shared financial markets supervisory function for systemic cross-border financial institutions, supported by a central supranational investment guarantee system and a common rescue and resolution fund for systemic banks.[71] However, the implementation of such a proposal requires a far-reaching supranationalisation of the relevant powers. An interim solution could be that the ECB checks banks systematically for liquidity and stability when buying bonds on the secondary market within the framework of the ECB's open market operations.

b) Intensity of an increase in policy-related integration

While the increase in policy-related integration in the economic policy pillar must always be driven by the exact state of integration of the policy area under consideration, various possible actions with differing degrees of intensity can be derived from our initial analyses of the Fiscal Treaty.

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[66] *Herbert Schimansky / Hermann-Josef Bunte / Hans-Jürgen Lwowski*, 'Bankrechts-Handbuch' (Handbook of Banking Law), § 126, para. 14.
[67] Ibid, para. 16.
[68] *Jörg Asmussen*, footnote 53 above.
[69] Cf. interview in Die Zeit, 22.03.2012.
[70] Commission Communication, 'Action for Stability, Growth and Jobs' of 30.05.2012.
[71] *Jörg Asmussen*, footnote 53 above.

aa) Intergovernmental coordination 'outside' the Treaties

An increase in the shared capacity for action can be gained by the coordination of national policy areas legally based outside the Treaties. While this approach certainly has the bracing charm of political feasibility, it also suffers from the shortcomings identified earlier in relation to transparency and democratic deliberation.[72] Moreover, this approach is not just less democratic but also often actually less efficient than the supranational community method. In particular, the crisis management of the past few years shows with startling clarity how little any recourse to the intergovernmental method has lived up to the promise of efficient crisis control. Rather, it has helped to bring back the principle of unanimity by the back door.[73]

bb) Increased coordination of the (general) economic policies of the euro countries

The second variant is based on Article 121 TFEU, which covers the coordination and monitoring of the general economic policies that remain within national competences. In order to enable a separate need for action by the Member States whose currency is the euro, the Council can adopt measures for these Member States under Article 136 TFEU, a) to strengthen the coordination and surveillance of their budgetary discipline, and b) to set out economic policy guidelines for them, while ensuring that they are kept under surveillance. Voting rights in the Council will then be restricted to the countries whose currency is the euro. This procedure is also governed by the relevant provisions of the Treaties and the corresponding procedure under Articles 121 and 126 TFEU, whereby the process can only be initiated by a recommendation from the Commission. All Member States are then urged to act at least within the initiative[74]. Remarkably, this instrument has hardly been used at all in the present crisis. However, the parties to the Fiscal Treaty have now declared their readiness to use it more actively in Article 10 of the Treaty on Stability, Coordination and Governance.

The advantage of greater coordination lies not in more far-reaching powers to intervene in the economic policy of the Member States, as Article 136 TFEU does not constitute an authorisation for further intervention,[75] but in the fact that only the euro countries will be involved in the discussions and agreement can be reached more quickly. Nor however does this provision address the identified democratic deficits

cc) Enhanced cooperation (Article 20 TEU, Articles 326 ff. TFEU)

Another instrument that could promote the integration of economic policies, without resulting in any far-reaching (and politically hard to implement) transfer of competences, is the procedure for enhanced cooperation according to Article 20 TEU in conjunction with Articles 326 ff. TFEU. As enhanced cooperation is only possible within the framework of the Union's non-exclusive competences — and hence not in areas in which competence rests

[72] *Jean-Claude Piris*, footnote 30 above, Kapitel VI.
[73] See in particular *Martin Schulz*, footnote 3 above, p. 8 f.
[74] *Jean-Claude Piris*, footnote 30 above, Kapitel V.
[75] *Ulrich Häde*, in: Christian Calliess / Matthias Ruffert (eds.): 'EUV – AEUV Kommentar' (TEU – TFEU Commentary), 4th ed. 2011, Art. 136, para 4.

mainly with the Member States — this instrument cannot be invoked where there is as yet no corresponding competence at the Union level. This is a serious drawback especially when the need has been recognised to take cross-border action beyond the existing framework of EU competence. Where applicable, however, this instrument has the advantage that those Member States that are ready for closer cooperation can make use of the democratically legitimised institutions within the European Union and their already existing structures. A 'two-speed Europe' created in this way does admittedly carry the risk of splitting the Union. However, the present crisis shows in a positively paradigmatic way how necessary integration steps that are desired by most States can founder on the resistance of a few. Overcoming such blocking tactics is the key concern of enhanced cooperation. The Council can now take the relevant adoption decision by a qualified majority, cf. Article 20 (2) in conjunction with Article 16 (3) TEU. The Member States concerned can themselves agree, in the form of majority decisions on legal acts, without outside States being able to prevent this.

dd) Supranationalisation, shared competence

From a democratic point to view, however, only the supranational method can produce complete results — if we stand by the assumptions made at the outset — in the area of economic policy that has to be strengthened to safeguard the EMU. Only this can guarantee the combination of efficiency and the necessary degree of democratic legitimation. The creation or expansion of areas of shared competences brings the multi-level democracy laid down in Article 10 (2) TEU to full realisation,[76] as apart from the European Parliament and the democratically legitimised representatives of the executive, the national parliaments would also be involved as guardians of the subsidiarity principle.

c) Road traffic as a new model for economic policy action

For the very different policy areas in the economic policy pillar, there can be no magic solution focusing on one level of integration or another. The fields of labour market policy, health and old age care in particular are not only extremely regulation-intensive and embedded in different traditions of welfare State from one country to another; they are also especially dependent on fundamental political decisions that may change over time, and in fact need to be capable of amendment. If we add to this realisation the thought that the subsidiarity principle is not just an entry barrier to Union legislation (Article 5 (1)–(3) TEU), but a general principle shaping the European constitutional alliance,[77] it becomes evident that there can be no full harmonisation on the 'lawn mower' principle within the economic policy pillar from the outset. Full *congruence* cannot and should not be the aim of any reform of the economic policy pillar, if the fundamental structural principles of the Union are to be preserved.

Conversely, the differences must not become so great that the economic policy pillar is torn apart by these centrifugal forces and the whole edifice collapses. The aim of any balanced

[76] For a different view, see BVerfGE 123, 267, 371 ff. – *Lissabon.*
[77] This is reflected for example in Article 23 (1) of the Basic Law.

reform must therefore be to create the necessary *convergence* to hold the Member States together in terms of economic policy, while also providing sufficient flexibility at the domestic level. In other words, margins (i.e. upper and lower limits) must provide at the edges for stability and also for the necessary flexibility at the domestic level.

For this approach, *Guy Verhofstadt* used the image of a motorway in which drivers may be travelling at different speeds but where they have to observe a minimum and (this is the crucial difference from minimum harmonisation) also a maximum speed limit.[78] Allowing for the simplification that is necessarily inherent in any metaphor, key concerns relating to the new capacity for action of the economic policy pillar can be illustrated with the image of road traffic. Here the types of road represent the forms of action and the actual set-up of any given road the concrete definition of political action (particularly including the definition of limits). The rules of the road are the basis both for choosing the type of road and for the set-up of any given road. The potential offered by the use of standards setting upper and lower limits (margins) for achieving convergence is of crucial conceptual importance.[79] Both the acceptance of the potential for different roads in the same direction and the internal set-up of the roads, particularly in terms of rules on upper and lower limits, should help to increase political consent and enhance the capacity for action.

As to how a given economic policy objective can be attained, we may draw two parallels by way of illustration. *First,* (political) preferences need to be distinguished in terms of the different forms of action (types of road). This makes clear the costs to the Union and the individual Member States for the individual roads. Secondly, the set-up of the individual roads needs to be included in the political deliberations. While every type of road has certain essential features, there is a wide variation within this range. Working with limits within a form of action has a number of advantages: in contrast to mere lower limits for minimum harmonisation, limits at both ends provide for convergence within a certain framework. The importance of national (legislative) implementation is also conserved. This enables a system-compliant adaptation to the legal systems of the respective Member States, taking account of national political, social, cultural, economic, etc. characteristics. This not only reflects a federal balance at the heart of the Union (subsidiarity, secondary legislation by way of Directives), but should also be welcomed in view of the continuing role of the national parliaments on democratic grounds alone (see II.2 above). We may also express the hope that such implementation projects will encourage a greater exchange of views with other Member States and so strengthen another aspect of the European public sphere. In short, the use of margins is not just a particularly sovereignty-conserving approach (in terms of constitutional law), but it also increases the chances of political support from the Member States.

The aim is to gain the widest possible room for manoeuvre within the margin while also assuring the effectiveness of the overall system. A moped is no more allowed on a motorway than a Formula 1 car. The concept acts as a horizontal approach to regulatory density and can

[78] *Guy Verhofstadt*, 'The economic governance that the EU needs', Europe's World (2011).
[79] For the use of benchmarks, see Article 11 of the Fiscal Treaty.

be implemented by means of all the forms of action mentioned (on all types of road). Margins can be agreed both in the context of intergovernmental cooperation and also on the basis of a (possibly newly created) set of Union competences. This applies to standards based in labour market law and also to health care and old age issues. The crucial thing is that measures are capped from both sides, with the resulting margins or corridors. As an example, we could take the discussions on 'the' Europe-wide minimum wage, which could be resolved by introducing a margin (upper and lower limits) for the minimum wage. The amount of a *minimum* wage, ultimately fixed at the national level, would then have to lie between two defined fixed values defined at EU-level. Further examples are the statutory retirement age or income tax levels, including the question of its assessment base. Certainly, regional differences, particularly as to the costs of living, might require a sufficient degree of differentiation.

If the intended progress towards integration is to be realised with the existing Union competences, the next best possibility for action lies in passing secondary legislation. The binding forms of action given by Article 288 (2)–(4) TFEU provide Union lawmakers with an effective set of tools for implementing political objectives in the form of an alignment and harmonisation of the laws of the Member States or by way of individual legal acts. This form of control is also effective because secondary legislation (apart from measures aimed at specific parties) is basically binding on all Member States.[80] Any recourse to the adoption of secondary legislation requires the existence of Union powers (Article 5 (1), sentence 1, (2) TEU) and must respect the limits to the exercise of competences where applicable (Article 5 (3) and (4) TEU). For the sensitive peripheral areas of economic policy where the Union generally has no legislative powers, the Treaties provide for the minimally invasive Open Method of Coordination (cf. Articles 5, 6, 121 (4), 148 (2), 153 TFEU).[81] The Open Method of Coordination empowers the Union to issue recommendations and guidelines for the coordination of national policies in a non legally binding form, even outside its areas of competence. The Open Method of Coordination can therefore be seen as a soft form of control. However, the efficiency of this instrument is rather limited.

If this runs into political resistance in a Union of 27 Member States, current Union law offers alternative models of 'differentiation' (Thym, 2004) or 'staged integration' (Grabitz, 1984). An alternative *de constitutione lata* is enhanced cooperation according to Article 20 TEU and Articles 326 ff. TFEU. This allows a group of Member States set on deeper integration to cooperate within the institutional and legal framework of the Union system. The aim is to promote the realisation of the aims of the Union, to safeguard its interests and strengthen its integration process (Article 20 (1) TEU, second subparagraph). The 'ten commandments' for

[80] Cf. e.g. the secondary legislation in the so-called 'six-pack', footnote 8 above.

[81] For details, see *Grainne de Búrca*, 'The Constitutional Challenge of New Governance in the European Union', ELR 28 (2003), 814 ff.; *Jonathan Zeitlin*, 'Social Europe and Experimentalist Governance: Towards a New Constitutional Compromise?', in: *Grainne de Búrca* (ed.), 'EU Law and the Welfare State: In Search of Solidarity', Oxford 2006, pp. 213 (215 ff.); *Thomas Bodewig / Thomas Voss*, 'Die "offene Methode der Koordinierung" in der Europäischen Union - "schleichende Harmonisierung" oder notwendige „Konsentierung" zur Erreichung der Ziele der EU?' ('The "Open Method of Coordination" in the European Union — "creeping harmonisation" or necessary "consensus formation" to achieve the goals of the EU?'), EuR 2003, 310 ff.

enhanced cooperation ensure that the *acquis communautaire* is not damaged.[82] The crucial legitimatory advantage of the model of enhanced cooperation — where this can be used at all on grounds of competence —[83] would lie in the applicability of the normal legislative process according to Articles 289 (1) and 294 TFEU involving the European Parliament; this would involve MEPs in the decision-making process, with their direct mandate from Union citizens.
If a political project that requires an amendment to primary law stands on a broad foundation overall and only a few Member States oppose its implementation, a third possibility is an 'opt-in' solution. Opt-in solutions are common within Union constitutional law and may be laid down in protocols (i.e. formally outside the Treaties) — in the area of freedom, security and justice, for example.[84] Under this model, the opt-in Member States reserve the right to decide autonomously whether to accept every single secondary act, so can participate fully or withdraw completely.

Regardless of whether such a change could have been achieved by the ordinary or the simplified procedure,[85] a regular amendment to primary law according to Article 48 TEU not only increases transparency but also enhances the overall chances of participation for the players concerned.[86] The standard provides for the involvement of the Commission and the European Parliament, and also the ECB in monetary matters. In particular, the ordinary Treaty amendment procedure provides for the involvement of the national parliaments, which send individually accredited representatives to the convention to be assembled, and so can exert an influence on the substance of the reform even at the negotiation stage, exchange views with their European colleagues and trigger a public debate in reports to the plenary session of their own parliament.

The intergovernmental procedure for drawing up international Treaties outside the internal structure of Union law as an exclusive method, on the other hand, relies on technocratic expertise. The negotiation strategy largely rules out any political discussion in the parliamentary forums, or defers this to the period after signing the Treaty. At this stage, the national parliaments are no longer in a position to influence matters but are faced with the simple choice of agreeing to the text of the Treaty or rejecting it entirely. They are therefore

[82] *Daniel Thym*, footnote 25 above, pp. 62 ff.
[83] According to *Daniel Thym*, footnote 25 above, pp. 145 ff., it is already possible for the euro group to institutionalise an expansion of their work under the Treaties by way of enhanced cooperation, which explicitly allows for more Member States to be included, and even enables those Member States that are initially opposed to such cooperation to take part at any time on the 'principle of openness' (cf. Article 20 (3) TEU, Article 328 TFEU).
[84] See Parts I, III, IV of the Protocol (No 20) on the Position of Denmark (OJ 1997, C 340/101); Protocol (No 21) on the Position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice (OJ 1997, C 340/99). The removal of the *outs* to the constitutional periphery of the protocols suggests an objective lack of unity.
[85] For doubts as to the need for a change to the existing primary law for the measures in the Fiscal Treaty, see Editorial Comments, CMLR 49 (2012), 1 (5); Anna Kocharov (ed.), 'Another Legal Monster? An EUI Debate on the Fiscal Treaty Treaty', EUI Working Paper 9/2012, pp. 32 ff.
[86] On the Fiscal Treaty, see Editorial Comments, CMLR 49 (2012), 1 (9 f.), which also refer to the German-French dominance in negotiations and its explosive effect on legitimation. See also *Lukas Oberndorfer*, 'The Fiscal Treaty Bypasses Democracy and the Rule of Law — New Treaty Next Step in Neoliberal Crisis Management', accessible at: www.tni.org/article/fiscal-compact-bypasses-democracy-and-rule-law (last accessed on 10.04.2012).

often faced with a decision that is determined by political imperatives (or pretends to be) and practically excludes democratic debate and collective self-determination.[87]

Admittedly, there are substantial differences between the individual forms of action (types of road) in terms of implementation and control. For example, the European Commission acts as a central control body in the field of supranational legislation (Article 17 (1) TEU and Article 258 TFEU). Experience in the internal market shows that it is the only adequate institution to monitor and sanction the margins. The same is true of the role of the Court of Justice in the field of judicial enforcement. This parallel with internal market law should not disguise the fact that the *substance* of the economic policy pillar is potentially opposed to the internal market.

On the other hand, there is no similarly effective centralised control — although this would be possible — in the area of simple coordination.

3. General issues

This strengthening of the financial and economic policy pillars should also be accompanied by reform steps of a general nature, to reinforce democratic legitimation in the European institutions and establish a European public sphere.

a) Institutional reforms

In 2014, the Commission President will be elected by the European Parliament. Here, the Lisbon Treaty has significantly enhanced the rights of the European Parliament. According to Article 17 (7) TEU, the European Council must take into account the elections to the European Parliament in proposing its candidate for President of the Commission. This enables the party groupings in the European Parliament to put forward a top candidate for the office of Commission President for the first time ever and further politicise the election campaign.[88] This significantly enhances the democratic legitimacy of the European Commission. The position of Commission President could be further strengthened in the future by combining the posts of President of the Commission and of the President of the European Council.[89] This would enable the President of the Commission elected by the European Parliament to take a key role in the intergovernmental European Council and represent common European

[87] See also *Jürgen Habermas*, footnote 41 above, p. 8.

[88] See also the proposals of the Foreign Ministers' group on the Future of Europe, footnote 26 above, p. 8: 'The directly elected European Parliament today has a high degree of democratic legitimacy; the next step is to improve its democratic visibility. An important step would be the nomination of a top candidate for the next European elections that could also be a candidate for the position of Commission President. Further concrete points could be examined such as greater distinction between majority and minority in the European Parliament, European elections in all member states on the same day, drawing up a (limited) European list or a more public procedure in the European Parliament to appoint the Commission President.'

[89] See on that *Ingolf Pernice*, Democratic Leadership in Europe: The European Council and the President of the Union, in: Ingolf Pernice / José María Beneyto Pérez (eds.), The Government of Europe – Which Institutional Design for the European Union?, 2004, pp. 31 (38, 47-50) and *id.,* The Treaty of Lisbon: Multilevel Constitutionalism in Action, WHI - Paper 2/09, abrufbar unter http://www.whi-berlin.eu/documents/whi-paper0209(2).pdf, pp. 50-51.

interests more effectively. The President would be democratically legitimized, and the general political directions and priorities of the European Council would be fed back to the European Parliament. At the same time due to the 'politicising' of the Commission the rights of the European Parliament should be enhanced by introducing a genuine right of initiative for the European Parliament in the legislative process beyond the existing right to propose measures pursuant to Article 225 TFEU.

b) Creation of a European public sphere via a Europe-wide public service broadcaster

Unlike at the regional and national levels in the EU Member States, there is as yet no public service broadcaster at the European level. A European Union increasingly assuming responsibilities in the area of economic, fiscal and social policy as a 'political union', is however more than ever dependent for the establishment of the necessary democratic legitimation on the emergence of a European public sphere. To this end, the European Union should establish a Europe-wide public service broadcaster, to report on European political issues beyond the limited national horizon. Like Euronews, it could broadcast in as many European languages as possible, overcoming language barriers and enabling a European discourse not only within the political institutions but also among the public. The creation of a Europe-wide public service broadcaster is already possible under the existing European Treaties. Article 167 (5) TFEU contains a legal basis to promote cultural activities, that provides for measures under the ordinary legislative procedure pursuant to Article 289 (1) TFEU.[90] However, the European Union shall not prejudice to the competence of Member States to provide for the funding of their national public-service broadcasters.[91] A harmonization of national broadcasting fees would therefore be possible only through a treaty change.

IV. CONSTITUTIONAL ASSESSMENT OF THE REFORM OF THE EUROPEAN UNION

European constitutional law provides the European Parliament with various options for initiating the reforms of the European Union (1.). At the same time, the reforms have to abide by the conditions and restrictions on European integration arising from the national constitutions (2.).

1. Options for implementing the reforms under European constitutional law

[90] According to Article 167 (2) TFEU in conjunction with Article 6 (c) TFEU, the Union should not only 'support' the member States but also 'supplement' their actions in the area of cultural promotion. There is no need to refer to the competence to supplement the Treaties laid down in Article 352 TFEU. This provision could also be used as a basis for the establishment of a Europe-wide public service broadcaster, transmitting in as many European languages as possible, to realise the aims of preserving linguistic diversity and the cultural heritage in accordance with Article 3 (3) TEU, fourth subparagraph. Democracy, which also includes public debate in the media, is defined in Article 2 TEU as one of the fundamental values of the Union and is a key part of the cultural heritage of Europe.

[91] See the Protocol on the system of public broadcasting in the Member States, No. 29 to the Amsterdam Treaty (OJ 10.11.1997, C 340, p. 109).

The European Parliament can initiate parts of the proposed reforms without any amendment to the European Treaties (a)), while a comprehensive reform of the Economic and Monetary Union requires a change to the Treaties (b)).

a) Reforms without any Treaty change

Intergovernmental coordination outside the scope of the Treaties is only possible in those areas in which competences remain with the Member States. According to the case-law of the Court of Justice, the Member States cannot deviate from the provisions of the European Treaties by way of an international convention or agreed practice. Such a deviation is only possible via the formal Treaty amendment procedure according to Article 48 TEU.[92] Within the scope of the European Treaties, however, there are options for reforms below the threshold for a formal amendment to the Treaties. With such reforms, the principle of limited conferral of powers (Article 5 (1) and (2) TEU) must be observed, according to which reforms relating to institutions and competences that deviate from the Treaties require an amendment to the Treaties according to Article 48 TEU.

aa) Institutional reforms

The European Parliament can bring about institutional reforms by way of interinstitutional agreements with the European Commission, the European Council or the Council. The agreements may be based on specific powers conferred by primary law[93] or on the general obligation to practise mutual sincere cooperation laid down in Article 13 (2) sentence 2 TEU or the right of the institutions to organise themselves.[94] There are however limits to the constitutional admissibility of such agreements. Basically, no agreements can alter or add to the provisions of the Treaties.[95] According to the case-law of the Court of Justice, interinstitutional agreements only safeguard the necessary 'institutional balance'[96] where they relate to consultative rather than decision-making competences.[97] Under these conditions, Rule 127 of the Rules of Procedure of the European Parliament allows it to conclude

[92] Court of Justice, case 43/75, ECR 1976, 455, para. 56/58 – *Defrenne*; even if one departs from the case-law of the Court of Justice and follow the German Federal Constitutional Court in regarding the Member States as 'masters of the Treaties', they cannot agree upon any provisions within the scope of the Treaties by way of international agreements, in derogation of Article 48 TEU, without the consent of all Member States; see *Hans-Joachim Cremer*, in: Calliess/Ruffert, TEU/TFEU Commentary, Munich 2011, Article 48 TEU, paras. 19 ff.
[93] Cf. Article 17 (1) sentence 7 TEU and Article 295 sentence 2 TFEU.
[94] Court of Justice, case 244/81, ECR 1983, p. 1451, 1477 f., para. 11 – *Klöckner Werke*; case C-58/94, ECR 1996, p. I-2169, 2198, para. 37 – *Niederlande/Rat;* see also *Waldemar Hummer*, 'Interorganvereinbarungen: Rechtsgrundlage – Rechtsnatur – Rechtswirkungen – Justiziabilität' (Interinstitutional agreements: legal basis – legal character – legal effects – enforceability), in: Daniela Kietz et al. (ed.), 'Interinstitutionelle Vereinbarungen in der Europäischen Union' (Interinstitutional agreements in the European Union), Baden-Baden 2010, pp. 51, 83 ff.
[95] This was explicitly laid down by the Member States in the Final Act of the Nice Treaty, in Declaration No 3 to Article 10 TEU (OJ 2001, C 80, p. 77). The restrictive wording of this Declaration has been criticised in the literature, as interinstitutional agreements are aimed precisely at 'informally' improving imperfect 'formal' procedures; see *Waldemar Hummer*, footnote 94 above, pp. 74 f.
[96] Case 10/56, ECR 1958, p. 82 – *Meroni II*; case 138/79, ECR 1980, p. 3333, 3360, para. 33 – *Roquette Frères/Council*; case 149/89, ECR 1986, p. 2391, para. 23 – *Wybot*.
[97] Court of Justice, case 9/56, ECR 1958, p. 44 – *Meroni I*.

agreements with other institutions 'in the context of the application of the Treaties or in order to improve or clarify procedures'. In practice, however, the European Parliament has repeatedly used its negotiating powers, in the election of the European Commission, the establishment of the budget plan and in the legislative process for example, to strengthen its rights through very far-reaching interinstitutional agreements. In this way, the European Parliament can set precedents that later pass into primary law with the next amendment to the Treaties.[98] For example, the existing agreement on relations between the European Parliament and the European Commission[99] could be further developed in the direction of providing a genuine power of initiative for the European Parliament in the legislative process.[100] An interinstitutional agreement could also be considered to define the process of electing the President of the Commission or even to combine the posts of Commission President and President of the European Council.[101] In these areas, however, interinstitutional agreements would fall into a legal grey area, so a formal amendment to the Treaties would be advisable. In any event, a Treaty change is absolutely essential to the introduction of a parliamentary right of final decision in the deficit procedure according to Article 126 TFEU and for the introduction of a 'euro parliament' within the system of enhanced cooperation according to Article 20 TEU and Articles 326 ff. TFEU.

bb) Integration of economic policies

As well as increased coordination of the economic policies of the euro countries (Article 121 TFEU), the Treaties also allow enhanced cooperation between several Member States (Article 20 TEU and Articles 326 ff. TFEU). According to Article 326 (1) TFEU, enhanced cooperation is possible in all areas of the Treaties with the exception of areas in the exclusive competence of the Union and common foreign and security policy. No new competences may be established by way of enhanced cooperation.[102] If new competences in the areas of fiscal and economic policy, social policy or labour market and employment policy are to be transferred from the Member States to the European Union, an amendment to the Treaties will be required.

b) Reforms through Treaty amendments

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[98] *Daniela Kietz / Andreas Maurer*, 'The European Parliament and Treaty Change: Predefining Reforms through Interinstitutional Agreements', in: Daniela Kietz et al. (ed.), 'Interinstitutionelle Vereinbarungen in der Europäischen Union', Baden-Baden 2010, pp. 157 ff.

[99] Framework Agreement on relations between the European Parliament and the European Commission, OJ L 304, 20.11.2010, p. 47.

[100] According to Article 295 sentence 2 TFEU, the institutions involved in legislative procedures are expressly allowed to conclude interinstitutional agreements which may be of a binding nature.

[101] In the Final Act of the Lisbon Treaty, the Member States specified in Declaration No 11 on Article 17(6) and (7) TEU (OJ C 83, 30.3.2010, p. 342), that 'in accordance with the provisions of the Treaties', the European Parliament and the European Council may consult ahead of the decision by the European Council on the backgrounds of the candidates for President of the European Commission 'taking account of the elections to the European Parliament'. The 'arrangements for such consultations may be determined, in due course, by common accord between the European Parliament and the European Council.'

[102] For details, see *Daniel Thym*, 'Supranationale Ungleichzeitigkeit im Recht der europäischen Integration', EuR 2006, 637, 643 ff.

Here, the Lisbon Treaty significantly enhanced the rights of the European Parliament in the area of amendments to the European Treaties. Before the Lisbon Treaty entered into force, Article 48 TEU (in the previous version) only allowed the governments of the Member States and the Commission to present proposed amendments to the Treaties to the Council, which then convened an intergovernmental conference. The Lisbon Treaty has now made the European Parliament into a key player.

aa) Ordinary amendment procedure with and without a constitutional convention

Under the ordinary Treaty amendment procedure according to Article 48 (2)–(5) TFEU, the European Parliament now has a right of initiative. It can present draft amendments to the European Treaties to the Council. These drafts are passed on by the Council to the European Council. If, after consulting the European Parliament, the European Council decides by a simple majority to examine the proposed amendments, the President of the European Council calls together a convention of representatives of the European Parliament, the national parliaments, heads of state and of government and the Commission. The convention then adopts a recommendation by the consensus procedure, which it addresses to the intergovernmental conference of the Member States. The European Council may decide by a simple majority not to call the convention, but only with the consent of the European Parliament. Although the intergovernmental conference is not formally tied to the preparatory work of the convention, the process of drawing up the Lisbon Treaty showed that the recommendation of the convention carries great political weight. The changes to the Treaties agreed by the intergovernmental conference enter into force after they have been ratified by the Member States in accordance with their respective constitutional requirements. Under the ordinary Treaty amendment procedure, changes can be made to all provisions of the Treaties.

bb) Simplified amendment procedure

Under the simplified Treaty amendment procedure according to Article 48 (6) TEU, the European Parliament was also given a right of initiative by the Lisbon Treaty. Under this procedure, a Treaty amendment is made by a unanimous decision of the European Council, and then enters into force following approval by the Member States in accordance with their respective constitutional requirements. However, this simplified procedure can only be used to amend provisions in Part 3 of the Treaty on the Functioning of the European Union (Articles 26–197 TFEU). This is why institutional reforms that change for example the institutional structure according to Articles 13–19 TEU and 223–287 TFEU cannot be processed under this provision. Moreover, it is also explicitly prohibited to change the competences of the Union and hence any transfer of new competences to the European Union according to Article 48 (6) TEU. With the simplified Treaty amendment procedure, the European Council created the legal basis for the European Stability Mechanism.[103] It might be

[103] European Council Decision of 25 March 2011 amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro, (2011/199/EU), OJ 2011, L 91/1.

possible to apply this procedure to transfer the European Fiscal Treaty into primary law[104] and hence to introduce a right of final decision for the European Parliament in the deficit procedure according to Article 126 TFEU. However, this could affect the institutional structure as a whole, so it would be legally safer to opt for the ordinary procedure in this case.

2. Scope for reforms under national constitutional law

National constitutional courts monitor compliance with the principle of limited conferral of powers, so in light of the constitutions of the Member States also, reforms of the European Union can only be made by way of a formal Treaty amendment in accordance with Article 48 TEU.[105] Among the national constitutional courts, first and foremost the German Federal Constitutional Court has now set conditions and limits to further European integration by way of Treaty amendments. The Federal Constitutional Court deduced the 'identity review' from the so-called 'eternity clause' set out in the Basic Law (Article 79 (3) of the Basic Law). According to the concept of 'identity review', treaty amendments that infringe the German constitutional identity can only be adopted by adopting a new Basic Law by way of a referendum.[106] Taking account of this case-law, however, there remains significant scope for institutional reforms (a)) and a transfer of new competences to the European Union without transgressing this limit (b)). The case-law of the Federal Constitutional Court has also attracted much criticism from many scholars, also in light of the case-law of other national constitutional courts in the European Union (c)).

a) Institutional reforms

In its Maastricht judgement in 1993, the German Federal Constitutional Court ruled that the exercise of sovereign powers by the Union must be legitimised first and foremost by the national parliaments. To an increasing extent – alongside the level to which the nations of Europe are growing together – additional democratic legitimation is provided by the European Parliament.[107] The important factor is that the 'democratic foundations upon which the Union is based are extended concurrent with integration' and a 'living democracy is maintained in the Member States while integration proceeds'.[108]

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[104] According to Article 16 of the Fiscal Treaty, within five years following the entry into force of the Treaty, its substance must be incorporated into the legal framework of the European Union.

[105] For '*ultra vires* control' by the German Constitutional Court, see BVerfGE 89, 155, 188 – *Maastricht*; BVerfGE 123, 267, 353 f. – *Lisbon*. However, the Federal Constitutional Court believes it is possible to develop European law, provided that 'there is no clear exercise of Union power outside its competences and the act concerned does not result in a structurally significant shift of competences away from the Member States', see BVerfGE 126, 386, 306 – *Honeywell*; for *ultra vires* controls in a comparative constitutional perspective, see in particular *Franz C. Mayer*, 'Kompetenzüberschreitung und Letztentscheidung' (Breaches of competence and final decision), 2000, and *Mattias Wendel*, 'Permeabilität im europäischen Verfassungsrecht' (Permeability in European constitutional law), 2011, pp. 462 ff. The first instance in Europe where an *ultra vires* act was recognised was from the Czech Constitutional Court in a judgement of 31.01.2012. See *Jan Komárek*, EuConst 2012, forthcoming.

[106] BVerfGE 123, 267, 354 ff. – *Lisbon*.

[107] BVerfGE 89, 155, 184 ff. – *Maastricht*; BVerfGE 123, 267, 364 – *Lisbon*.

[108] Ibid.

In its Lisbon judgement in 2009, the Federal Constitutional Court then ruled that, to preserve a living democracy in the Member States, the European Union must not cross the threshold to become a federal State. There would be an unacceptable structural democratic deficit incompatible with the eternity clause in the German Basic Law (Article 79 (3)) if the 'extent of competences, the political freedom of action and the degree of independent opinion-formation on the part of the institutions of the Union reached a level corresponding to the federal level in a federal state, i.e. a level analogous to that of a state.'[109] In this sense, the Court has set limits to institutional reforms of the European Union. This means that the 'organisation of its responsibilities and authority' in the European Union must not be structured in such a way that the 'European Parliament would become the focus as the representative body of a new federal people constituted by it.'[110] This would be the case if the European Parliament were to be elected on the principle of electoral equality instead of being a representative body of the individual national populations by virtue of its degressive-proportional composition (Article 14 (2) TFEU, first subparagraph).[111] The threshold to a federal State would also be crossed if the 'President of the Commission were elected legally and factually by the European Parliament alone.'[112]

The Court also pointed out that, below the threshold to a federal state, the European Union needs not to meet the requirements set by the democratic principle in the Basic Law for the domestic level: 'As long as, and in so far as, the principle of conferral is adhered to in an association of sovereign states with clear elements of executive and governmental cooperation, the legitimation provided by national parliaments and governments complemented and sustained by the directly elected European Parliament is sufficient in principle.'[113] This is why the European Parliament must not be elected on the principle of electoral equality but could retain its degressive-proportional composition (Article 14 (2) TFEU, first subparagraph).[114] Although under present law the European Commission had already 'grown into the function of a European government, shared with the Council and the European Council'[115], the European Commission needs not fully to satisfy the democratic requirements for a parliamentary government laid down in the German Basic Law.[116]

However, it cannot be inferred from the Lisbon judgement that further institutional reforms would generally violate the German constitution. On the contrary, beneath the threshold for the establishment of a European federal state, there exists not merely the legal possibility, as the Federal Constitutional Court found in the Maastricht judgement, but actually the obligation to extend the democratic foundations of the Union in step with further integration steps.[117] The Federal Constitutional Court therefore not only admits institutional reforms of

[109] BVerfGE 123, 267, 364 f. – *Lisbon*.
[110] BVerfGE 123, 267, 370 f. – *Lisbon*.
[111] BVerfGE 123, 267, 372 – *Lisbon*.
[112] BVerfGE 123, 267, 380 – *Lisbon*.
[113] BVerfGE 123, 267, 364, 368 f. – *Lisbon*.
[114] BVerfGE 123, 267, 373 ff. – *Lisbon*.
[115] BVerfGE 123, 267, 380 – *Lisbon*.
[116] BVerfGE 123, 267, 368 – *Lisbon*.
[117] See footnote 108 above.

the European Union but even explicitly calls for further democratisation of the institutional structure in the course of further integration steps.

In light of this case-law, further institutional reforms are possible. In its 2011 judgement on the five per cent blocking clause in European election law, the Federal Constitutional Court itself — albeit in a different legal context — listed a number of areas in which future reforms of the European Parliament might be desirable. For example, the European Parliament was 'not yet marked by any contrast between (governing) majority and opposition' and it did 'not elect a Union government dependent on continued support' from the European Parliament. Moreover, the European Parliament had no real right of approval under the legislative procedure according to Article 294 (7) TFEU and Article 314 (4) TFEU in relation to accepting the budget plan, but only a 'right of veto'.[118]

In view of this jurisprudence, a right of final decision by the European Parliament in the deficit procedure according to Article 126 TFEU, the merging of the offices of President of the European Commission and of the European Council and a full right of initiative for the European Parliament are entirely possible, as is the introduction of a 'euro parliament'.

b) Transfer of new competences to the European Union

In its Maastricht judgement of 1993, the German Federal Constitutional Court expressly supported the possibility of substantial transfers of competences to the European Union in the areas of economic, social, fiscal and budgetary policy. In the Court's view, there were good grounds for believing that the 'monetary union may be implemented practically only if it is supplemented immediately by an Economic Union going beyond coordination of the economic policies of the Member States of the Community.'[119] At the time, the Court stressed that it was 'it is uncertain at present whether the monetary union will lead to an economic union of this nature, or whether the Member States' lack of desire to establish a Community economic policy and a "dominant budget" of the Community which would be associated with it [...] would lead to a future abandonment of the monetary union and the need for a corresponding Treaty change.'[120] The Court cited the view of the then President of the Bundesbank, *Helmut Schlesinger,* that 'a monetary union, particularly one between States which are oriented towards active economic and social policies, may ultimately be realised only in conjunction with a political union which embraces all the essential functions of public finance, and that it cannot be achieved independently of a political union or simply as a preliminary stage towards one.'[121] Despite the lack of an economic union, the Court considered the first step of a monetary union to be constitutional, because 'agreeing upon monetary union and to implement it without at the same time or immediately thereafter entering into political union is a political decision for which the relevant governmental

[118] BVerfG, judgement of the second senate of 9 November 2011, - 2 BvC 4/10 etc. -, NVwZ 2012, 33, 38, 40 f. – *Five per cent blocking clause*.
[119] BVerfGE 89, 155, 206 – *Maastricht*.
[120] Ibid.
[121] Ibid.

institutions must assume political responsibility.'[122] In the Court's view, the second step of economic union could follow later: 'If it turns out that in reality the desired monetary union cannot be realised without a (not yet desired) political union, there has to be a new political decision as to how to proceed.'[123] This political decision was also allowed under German constitutional law, because 'it did not raise any constitutional issue but rather a political one.'[124] In its Maastricht judgement, the Court ruled that the establishment of a monetary union was permitted under the German Basic Law, because there was 'legal scope' for further transfers of competences necessary to the functioning of the monetary union.[125] However, 'sufficient tasks and powers of substantial political importance must be left to the Bundestag.'[126]

In its Lisbon judgement of 2009, the Federal Constitutional Court expanded on the statement made in the Maastricht judgement that sufficient tasks and powers of substantial political importance must be left to the Bundestag.[127] In the Lisbon judgement, the Federal Constitutional Court lists a number of areas of competence in which it limits further transfers of competences to the European Union.[128]

For example, sufficient competences must be left to the Member States to 'take essential social policy decisions on their own responsibility.'[129] This would be the case if the Member States retained the 'right, and the practical possibilities of action, to take conceptual decisions regarding social security systems and other measures of social policy and labour market policy in their democratic primary areas.'[130] These particularly included 'securing of the individual's livelihood.'[131] However, the Federal Constitutional Court emphasises that the principle of the welfare state enshrined in the Basic Law assigns a responsibility to the State but says nothing about the means by which this task should be performed.[132] For this reason, the 'requirements under constitutional law as regards social integration or a "social union" are clearly limited.'[133] The possibility of European integration 'to shape the structures of a social state' in this area, progressing from 'coordination which goes as far as gradual approximation' was therefore not ruled out[134]

The Federal Constitutional Court sets much tighter limits in the area of budgetary law. This means that a 'transfer of the budgetary rights of the Bundestag' would be in breach of the German Basic Law if 'the determination of the type and amount of the levies imposed on the citizen were supranationalised to a considerable extent.' The Bundestag must decide upon the

[122] BVerfGE 89, 155, 207 – *Maastricht*.
[123] Ibid.
[124] Ibid.
[125] Ibid.
[126] Ibid.
[127] BVerfGE 123, 267, 356 – *Lisbon* with reference to BVerfGE 89, 155, 207 – *Maastricht*.
[128] BVerfGE 123, 267, 357 f., 359 ff. – *Lisbon*.
[129] BVerfGE 123, 267, 426 – *Lisbon*.
[130] BVerfGE 123, 267, 430 – *Lisbon*.
[131] BVerfGE 123, 267, 363 – *Lisbon*.
[132] BVerfGE 123, 267, 362 f. – *Lisbon*.
[133] Ibid.
[134] Ibid.

'total amount of the burdens placed on citizens' and on 'essential state expenditure [...], including the degree of indebtedness', as this constituted the 'social policy responsibility' of the German parliament.[135] In its decision on the euro rescue package in 2011, the Federal Constitutional Court expanded further on these requirements. It stated that the Bundestag must not consent to any 'intergovernmental or supranational security or payment mechanism not tied to strict rules and not limited in its effects.'[136] There must be no 'assumption of liability for decisions taken by other States.'[137] Therefore, 'any significant expenditure on collective aid measures at the international and Union level must be specifically approved by the Bundestag.'[138] However, the Federal Constitutional Court also emphasised in its Lisbon decision that further European integration remained entirely possible in the area of fiscal and budgetary policy also: 'Not every European or international obligation that has an effect on the budget endangers the viability of the Bundestag as the legislature responsible for approving the budget. The openness to legal and social order and to European integration which the Basic Law calls for, include an adaptation to parameters laid down and commitments made, which the legislature responsible for approving the budget must include in its own planning as factors which it cannot itself directly influence. What is decisive, however, is that the overall responsibility, with sufficient political discretion regarding revenue and expenditure, can still rest with the German Bundestag.'[139] If we read this passage in conjunction with the passages quoted from the Maastricht judgement[140], it is clear that there is ample scope for the transfer of further competences in fiscal and budgetary policy also.

In light of the criteria laid down by the Federal Constitutional Court, transfers of competences to the European Union in the areas of economic, social, fiscal and budgetary policy are entirely possible. However, in its Lisbon judgement, the Federal Constitutional Court tightened the still comparatively integration-friendly standards from the Maastricht judgement, in as much as tasks and powers of substantial importance in these areas must be left to the Bundestag, particularly the overall responsibility for budgetary policy. However, this tallies with the concept proposed here whereby the European Union could safeguard Europe-wide consistency by defining ranges within these policy areas, within which national policy definition would still be possible.

c) Critical evaluation of the case-law

The Lisbon judgement has been strongly criticised by many experts in German law. They find that, contrary to the view of the Federal Constitutional Court, the eternity clause laid down in the German Basic Law (Article 79 (3)) cannot be considered to place limits on institutional reforms or the transfer of further competences to the European Union.[141] The eternity clause

[135] BVerfGE 123, 267, 361 f. – *Lisbon*.
[136] BVerfG, judgement of the second senate of 7 September 2011, - 2 BvR 987/10 etc. -, NJW 2011, 2946, 2951 – *Euro rescue package*.
[137] Ibid.
[138] Ibid.
[139] BVerfGE 123, 267, 361 f. – *Lisbon*.
[140] See footnotes 125–126 above.
[141] For criticism of the judgement, see only *Armin von Bogdandy*, 'Prinzipien der Rechtsfortbildung im europäischen Rechtsraum – Überlegungen zum Lissabon-Urteil des BVerfG' (Principles of law-making in the

has to be interpreted in light of the German Basic Law's Preamble which emphasizes Germany's 'determination to promote world peace as an equal partner in a united Europe'.[142] The purpose of Article 79 (3) of the Basic Law is in the words of German Federal Constitutional Court Judge *Gertrude Lübbe-Wolff* in her dissenting opinion of 2005 to ensure that the German Basic Law is a counter model to Germany's past and 'nothing serves that purpose more likely than Germany's integration into the European Union.'[143] This view is in line with the strong support for further European integration by all major parties in the German Bundestag.

The unusual nature of the approach taken by the German Federal Constitutional Court is even more striking when compared to the Lisbon case-law in other EU Member States. No other constitutional or highest court has interpreted an eternity clause — so it exists — in such a detailed, albeit apodictic manner as the German Federal Constitutional Court did.[144] Suggestions of adopting the German approach were actually explicitly dismissed by the Czech constitutional court.[145]

European legal area — thoughts on the Lisbon judgement of the BVerfG), NJW 2010, 1; *Daniel Halberstam / Christoph Möllers*, 'The German Constitutional Court says „Ja zu Deutschland!"', GLJ 2009, 1241; *Ingolf Pernice*, 'Der Schutz nationaler Identität in der Europäischen Union' (Safeguarding national identity in the European Union), AöR 136 (2011), 186; *Christian Tomuschat*, 'Lisbon – Terminal of the European Integration – The Judgement of the German Constitutional Court', ZaöRV 70 (2010), 251; *Mattias Wendel*, footnote 105 above, pp. 86 ff., 332 ff., 348 f. and 464 ff. For a large number of commentaries see the 9 pages long bibliography in the first special issue of EuR 2010, pp. 325 ff.

[142] *Ingolf Pernice*, footnote 141 above, pp. 200 ff.

[143] *Gertrude Lübbe-Wolff*, BVerfGE 113, 273, 319 ff., 339 – *European Arrest Warrant*.

[144] For detail, see *Mattias Wendel*, 'Lisbon Before the Courts: Comparative Perspectives', EuConst 2011, 96 (126).

[145] Czech constitutional court, judgement of 03.11.2009 – Pl. ÚS 29/09 – *Lisbon Treaty II*, paras. 110 ff.