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Editors

Democracy in the EMU in the Aftermath of the Crisis

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Preface

1. The aim of this book is to explore the role of the democratic principle in the context of the Economic and Monetary Union (EMU). The time is indeed quite ripe for opening a discussion on such issues.

We all knew that, right from the beginning, the EMU regime had its own features, which distinguished it from any other area of competence of the European Union (EU) and, among others, did not contemplate the conferral of "strong" powers to the European Parliament.

We were also aware that things had not much improved with the Treaty of Lisbon.

However, a certain measure of "democratic deficit" in the area of Economic and Monetary Union policies seemed to be tolerable as long as the economic situation in Europe and particularly for the euro-area Member States remained florid. At that time, the scarce involvement of the European Parliament was regarded as a fair price to pay for a mechanism, which was producing positive results in economic terms for both the Member States and their citizens.

Besides, as far as the Monetary "branch" of EMU was concerned, it was felt that the independence of the European Central Bank (ECB) from the Member States was a sufficient guarantee that the managing of the euro would be correct and impartial and did not require a direct parliamentary interference.

On the other hand, the Treaties only established a rather loose "coordination" of the economic policies of Member States. The procedures laid down to ensure the respect of the Maastricht criteria in terms of ratio between GDP and, respectively, government deficit and debt left a wide margin of manoeuvre for each Member State. Budgetary decisions were still taken at State level, and this allowed National parliaments to play their democratic role.

2. Things changed dramatically as from 2008, with the explosion of the financial and, later, sovereign debt crisis.

Peer Review Process

The manuscript has been subjected to the peer review process prior to publication. Peer reviewers' reports are kept by the publishing houses.

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The Role of the ECJ Beyond EU Law

Roberto Baratta

Abstract When intended to complement EU law or to enlarge its application to Third Parties, international treaties can empower the ECJ with additional tasks beyond the realm of EU law. This paper explores both the potential and legal constraints of the ECJ's extra powers, building upon some selected cases of practice. It argues that if one looks at this practice in depth through the prism of the purposes for which such special category of treaties were enacted and the reasons that led to them, the common denominator for involving the ECJ can be identified in the need to safeguard their consistency with the fundamental role the ECJ enjoys in the EU legal order under Article 19 TEU. The reference to the ECJ, both for solving disputes between themselves and for protecting individual rights as guaranteed by EU law (or by provisions which are identical in substance to it), is not just in line with the principle of institutional conferral. It is also a route the Contracting Parties are bound to take in order to respect the autonomy of EU law.

Contents

1 Introduction

International instruments may empower the ECJ with additional tasks beyond the realm of EU law, *i.e.* outside its usual scope. Intended to complement EU law or to enlarge its application to Third Parties, they are a special set of international treaties

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strictly *related to EU matters* in the sense that their functioning involves the interpretation and application of its *acquis*, even when their core topic transcends it.

Although the Treaty of Lisbon set aside the former Article 293 TEC, which mainly served as a legal basis to confer the ECJ extra competences in the field of private international law,[1] the current institutional architecture still allows Member States to draw up international agreements supplying the ECJ with additional powers. Recent practice has confirmed this trend. A first group of such treaties are those concluded by many, but not necessarily all, Member States alone. Being limited to Union Members, these can be described as *inter se* agreements stipulated in their sovereign external capacity. A second group of agreements granting powers to the ECJ may be found in treaties concluded between the EU and Third States, which submit themselves to the jurisdiction of the ECJ mainly for solving disputes on the interpretation and application of the relevant instrument.

Academic lawyers have devoted little attention to this topic. Thus this paper explores both the potential and legal constraints of the ECJ's extra powers, building upon some selected cases of practice. It focuses as a starting point on a survey of the recent practice (Sect. 2). It then addresses the EU legal constraints when entering into international agreements related to EU matters (Sect. 3). Finally, conclusions will be drawn (Sect. 4).

2 Empowering the ECJ via *inter se* Agreements or Through Treaties Concluded with Third States: A Survey of Recent Practice

By concluding *inter se* agreements Member States have different options to grant extra powers to the ECJ. These agreements can be founded on explicit provisions of the Treaties (1). Moreover, as practice shows, they may originate from Member States' own will, regardless of the existence of a primary law provision enabling this action (2). Finally, a third possibility regards international treaties entered into the EU and Third States. These instruments may grant exclusive jurisdiction to solve disputes concerning the interpretation and application of the relevant instrument or other litigations arising out of this kind of relations in the course of the treaty (3).

(1) A first option is explicitly provided for in Article 273 TFEU.[2] It covers the power to adjudicate laid down in a "special agreement" for disputes that fulfil two requirements. On the one hand, *ratione personarum* these disputes must involve

[1] I am essentially referring to Brussels Convention on the jurisdiction and the enforcement in civil and commercial matters, and to the Rome Convention on the law applicable to contractual obligations.

[2] It reads as follows: "The Court of Justice shall have jurisdiction in any dispute between Member States which relates to the subject matter of the Treaties if the dispute is submitted to it under a special agreement between the parties".

Member States only; on the other hand, the agreement should relate "to the subject matter of the Treaties". The latter substantive condition reveals the material connection of the agreement with EU law.

Accordingly, Member States are capable of further reference to the ECJ on the basis of a *compromis*, which is presumably meant to specify the terms of the disputes and the legal framework within which the Court is to operate. It is arguable that such possibility could also be founded upon a more comprehensive agreement between Member States containing a broad *compromissory* clause for sets of disputes. Given its "international" foundation, in the sense that the Treaties do not confer ECJ such a power outright, it is *prima facie* an optional choice that Member States (or some of them) may or may not exercise.[3] In that sense, it must be distinguished from the ECJ's exclusive jurisdiction stemming from Article 344 TFEU. However, a different and more compelling construction—as it will be suggested *infra*—appears possible.

As is known, the most renowned examples of that approach arose in the Euro economic area, *i.e.* the ESM Treaty, the so-called Fiscal Compact (or *Pacte budgetaire*, *Patto di bilancio*, *Fiskalvertrag*), as well as the Agreement on the transfer and mutualisation of contributions to the Single Resolution Fund, which was negotiated between 27 Member States to complete the third pillar of the Banking Union.[4]

Being part of a broader set of EU measures to tackle the Eurozone crisis,[5] which also include the Banking Union and the ECB monetary *activism*,[6] all these treaties are built together upon a sort of political and legal equation—more solidarity (the ESM Treaty) needs more discipline (the Fiscal Compact), while the *Banking Union* system enhances the financial stability of the Eurozone as a whole. They may be considered as comprehensive tools to strengthen the new regulatory framework of the EU economic governance, namely for Eurozone States.[7] In all of these *inter se*

[3] *E.g.* Mazzarini (2014), p. 2154 et seqq.

[4] See Council No. 8457/14 EF 121 ECOFIN 342, 14 May 2014. This Agreement set out the international legal obligation to transfer the contributions raised at national level towards the Single Resolution Fund. Indeed, some Eurozone States did not agree to found that obligation upon the law of the Union. As a result, such obligation is established by the Agreement, which lays down the conditions upon which the Contracting Parties, in accordance with their respective constitutional requirements, have agreed to transfer the contributions that they raise at national level to the Fund.

[5] For an in-depth analysis of the economic narrative of the Eurozone crisis, see Tuori and Tuori (2014), p. 61 et seqq.

[6] Cf. Tuori and Tuori (2014), p. 101 et seqq. as regards the ECB's contribution to combating the sovereign debt crisis; Baratta (2014a).

[7] However the ESM Treaty, by granting of financial assistance to Member States that are experiencing severe financing problems, is in legal terms more innovative than the Fiscal Compact. By imposing a strict fiscal discipline, the latter is meant to reduce the risk of public debt crises but reflects to a large extent the normative content of EU secondary law. Yet they are linked because it was agreed that the granting of financial assistance in the framework of the new programmes under the ESM, is conditional, as of 1 March 2013, in the ratification of the Fiscal Compact "by the ESM Member concerned" (recital 5 of the ESM Treaty). For a comprehensive overview of the developments in the EU economic governance, see Borges (2012), p. 1 et seqq.;

agreements, the Contracting Parties decided to confer the ECJ some powers to adjudicate. Yet the compliance with the conditions provided for in Article 273 TFEU was called into question.

As regards the *ratione personarum* requirement enshrined in Article 273 TFEU, the Agreement on the Single Resolution Fund—irrespective of its unusual construct—seems to be fulfilled.[8] By contrast, for the ESM Treaty the approach should be more nuanced. The *Pringle* ruling[9] held that it was satisfied by the ESM judicial settlement of disputes set out in Article 37 of the ESM Treaty.[10] It is rightly so for disputes *between ESM States* in connection with the interpretation and application of the Treaty, including any dispute about the compatibility of the decisions adopted by the ESM with the same Treaty.[11] However the Full Court adopted a broad approach as to the issue of whether it can be seized for disputes arising between an ESM State and the ESM itself, which is deemed to act as an international organisation. It is in fact described as an international financial institution[12]; indeed it was conceived as an "international organisation under public international law".[13]

[8]It is worth noticing that the dispute settlement between the Contracting Parties covers the interpretation of the Agreement's provisions, as well as the allegation by one Party that another Contracting Party has not complied with its obligations under the Agreement. The ECJ's competence includes any disputes concerning the reimbursement the Contracting Parties owed to the Member State that is not participating in the Single Supervisory Mechanism and in the Single Resolution Mechanism ("non-participating Member State") for the amount that that non-participating Member State has paid in own resources corresponding to the use of the general budget of the Union in cases of non-contractual liability and costs related thereto, in respect of the exercise of powers by the institutions of the Union under the SRM Regulation (see Articles 14 and 15 of the Agreement). Moreover, according to the preamble No. 18, the ECJ has been granted the power to verify the existence of any fundamental change of circumstances and the consequences deriving from it. The preamble considers it a dispute concerning the application of the Agreement for the purposes of Article 273 TFEU that can therefore be submitted to the Court of Justice by virtue of that provision.

[9]ECJ 27 November 2012, Case C-370/12, *Pringle*. See Thym and Wendel (2012), p. 733 et seqq.; Craig (2013), p. 3 et seqq.; de Witte and Beukers (2013), p. 805 et seqq.; Munari (2015), p. 723 et seqq.

[10]According to Article 37, para. 2, of the ESM Treaty, the Board of Governors is to decide "on any dispute arising between an ESM Member and the ESM, or between ESM Members, in connection with the interpretation and application of this Treaty, including any dispute about the compatibility of the decisions adopted by the ESM with this Treaty". Under Article 37, para. 3, the dispute is to be submitted to the Court of Justice, if an ESM Member contests the decision of the Board of Governors. As is clear from recital 16 of the ESM Treaty, the Parties to the ESM Treaty based this role for the ECJ on Article 273 TFEU.

[11]All Eurozone States are Members of the ESM Treaty. Even though it is open to non-Euro Member States, none of these has joined.

[12]Article 1 of the ESM Treaty.

[13]Conclusion of the European Council of 24–25 March 2011.

If one distinguishes the ESM's subjectivity from its membership, it would be a legal fiction to hold, as the ECJ did, that.

> a dispute in which the ESM is a party may be considered to be a dispute between Member States within the meaning of Article 273 TFEU.[14]

Either the ECJ has deliberately circumvented the problematic tie between the ESM and its Members, which reflects a still unsolved theoretical issue concerning the (international) personality of an organisation possessing its own will as a *subject* distinct from its Contracting Parties[15]; or that passage of *Pringle* may be considered as an implied evidence of the thesis according to which an international organisation is but a tool in the hand of its Members, its distinct will being ultimately a legal fiction.[16]

Even during the negotiation of the Fiscal Compact, respect for the *ratione personarum* condition proved hard to achieve. The need to maintain the dispute as a strictly intergovernmental matter clashed with the political desire to involve the Commission in assessing the correct implementation of the balanced (or in surplus) budget rule (Article 3, para. 1, a, in domestic law according to Article 3, para. 2),[17] which is the only dispute falling under the power of the ECJ pursuant to Article 8 of that agreement.[18] This explains the crucial, but limited role given to the Commission in issuing a report on whether a Party implements the balanced budget rule into domestic law properly; and the automaticity of the ECJ involvement, should the

[14]See *Pringle* ruling, cit., para. 175 and Tuori and Tuori (2014), p. 159, who agrees with the reasoning of the ECJ.

[15]It seems worth adding that as a matter of principle an organisation-hood stems from possessing an its own distinct will, namely when its decision-making is based on majority voting, which is actually the way in which the ESM organs operate. Once its subjectivity is confirmed by the fact that it externally and effectively acts as an international legal subject, it should be considered as an entity different from its Members.

[16]Klabbers (2009), p. 35 et seqq.

[17]Article 3, para. 2, stipulates that "the rules mentioned under paragraph 1 shall take effect in the national law of the Contracting Parties at the latest 1 year after the entry into force of this Treaty through provisions of binding force and permanent character, preferably constitutional, or otherwise guaranteed to be fully respected and adhered to throughout the national budgetary process".

[18]Needless to mention that the Commission's task was seen as a political necessity to counter the habit of mutual indulgence amongst the Eurozone Governments (Baratta 2013, p. 31 et seqq.). As is known, Member States are to a large extent unwilling to dispute amongst themselves, as the practice related to Article 259 infringements illustrates (see recently Kochenov 2015).

Commission report negatively against a party (in that situation "[. . .] the matter will be brought to the Court of Justice [...] by one or more Contracting Parties").[19]

All in all, a solution consistent with the subjective condition in question seems to be achieved if one considers that the Contracting Parties' commitment operates in the sphere of their discretionary powers. Indeed Member States agreed to reduce their international discretion to lodge a claim in order to shape an enforcement system that admittedly suits them best. Nothing in the exercise of their international sovereignty seems to prevent them from agreeing *ex ante* to rely on the Commission's assessment, and as a result to subordinate their choice to bring claims before the ECJ to an external (and above all, independent) evaluation. Thus, as long as the Commission formally is not a part of the proceedings, the requirements of primary law appear to be met. Moreover, it seems reasonable to assume that conferring new monitoring tasks to the Commission does not alter its institutional character of being, amongst other functions, a "guardian" of the system.

Coming to the substantive condition set forth in Article 273 TFEU,[20] clearly it is met by the dispute settlement set out in the ESM Treaty. As the Full Court pointed out in *Pringle*, a dispute on the interpretation or application of that Treaty,

[19]This is not to say that the Commission will be a party in the proceedings (de Streel and Etienne (2012), p. 182 et seqq.; Rossolillo (2012), p. 10 et seqq.; Ubertazzi (2013), pp. 83 and 85–86). Indeed, such an outcome would hardly be in compliance with the EU legal framework. Thus, only States collectively (Article 8, para. 1, second sentence) or unilaterally (Article 8, para. 1, third sentence)—and, in the latter case, regardless of the Commission's report—have the legitimacy to lodge a case against another State. The dispute remains strictly intergovernmental even in the case where a Party persists in not taking the necessary implementing measures after the first judgement of the ECJ. Yet, this second action is not automatic and unilateral in nature ("a Contracting Party [. . .] may bring the case before the Court of Justice [. . .]", Article 8, para. 2, first sentence). The problem is the overall coherence of the system as far as the six "Arrangements Agreed" are concerned. In fact, on 2 March 2012 all the Signatories agreed to annex to the Minutes of the Signing of the Treaty six "Arrangements Agreed" deemed to be applied in relation to Article 8, para. 1, second sentence, should the Commission conclude in a report to the Parties that one of them has failed to comply with Article 3, para. 2, of the Fiscal Compact. The aim of the Arrangements is to enhance the automaticity of the judicial control by construing the action as a collective and obligatory tool—within 3 months of the Commission's report, the "Trio of Presidencies" (as set out in Annex I to Council Decision 2009/908/EU of 1 December 2009) will lodge an application "in the interest of, and in close cooperation with, all the Contracting Parties". Minimising the politicisation of the dispute is the aim pursued by the Annex. In addition, the same Arrangements are to be used in relation to Article 8, para. 2, should the Commission assess that a Party has not taken the necessary measures to comply with the judgment of the ECJ provided for in Article 8, para. 1, of the Treaty. Stepped outside the documents to submit to ratification by national Parliaments, according to international customary law they are interpretative criteria of Article 8. They aim at enhancing the automaticity of the judicial control by construing the action as a collective and obligatory tool should the Commission conclude in a report that one of them has failed to properly implement the balanced budget rule into domestic law or, at a possible later stage, that a Party has not taken the necessary measures to comply with the judgement of the ECJ. Doubts however may be raised as to the consistency of the Arrangements with the nature (non automatic and unilateral) of the action laid down in Article 8, para. 2. See however Adam (2013), p. 39; Bartoloni (2013), p. 96.

[20]Tizzano (1967), p. 244 (focusing on the objective [illegible]

> is likely also to concern the interpretation or application of provision of European Union law,[21]

given the strong *conditionality* which is attached to the granting of financial assistance to Member States that are experiencing severe financing problems.[22] Moreover, there is a strong *personal* tie between the Eurogroup and the ESM due to the fact that the composition of the ESM Board of Governors and its Presidency corresponds to those of the Eurogroup.[23] The same holds true for the Agreement on the Single Resolution Fund that is strictly intertwined with several EU secondary law acts.[24]

(2) Recent practice shows a second model for granting extra powers to the ECJ through intergovernmental agreements. Unlike the treaties aimed at enhancing the economic governance just mentioned, that is an international route that is unfounded on a specific legal basis of the EU Treaty. Quite illustrative in this regard is the "Agreement on a Unified Patent Court", signed in 2013 by 25 Member States, which empowers the ECJ with a set of tasks in the new patent litigation system. Instead of making use of a special Treaty rule for conferring extra powers to the ECJ in the area of European patents,[25] Member States decided to set up a

[21]See *Pringle* ruling, para. 174.

[22]Under the ESM Treaty, the agreement to be negotiated with the relevant State must be consistent with EU law and particularly with the measures taken by the EU in the area of coordination of economic policy. Consequently, the conditions to be attached to financial assistance are mostly determined by EU law (see *Pringle* ruling, paras. 173–174).

[23]It has been remarked that "in spite of institutional separateness, a personal union between the ESM and the Union (euro-area) framework has been created" (Tuori and Tuori 2014, p. 95).

[24]It is quite a weird and hybrid construction since the Agreement is tied, firstly, with the Single Supervisory Mechanism established by Council Regulation (EU) No. 1024/2013 (OJEU L 287, 29 October 2013, pp. 63 et seqq.). It confers specific tasks to the European Central Bank (ECB) with regard to policies relating to the prudential supervision of credit institutions, as well as, while acting jointly with the national competent authorities, some powers of supervision over the credit institutions established in the Member States whose currency is the Euro, and in the Member States whose currency is not the Euro which have established a close cooperation with the ECB for supervision purposes. Secondly, the Agreement is tied with the Directive (EU) 59/2014 of the European Parliament and of the Council establishing a framework for the recovery and resolution of credit institutions and investment firms, aimed at harmonising national laws and regulations on the resolution of credit institutions and certain investment firms, including the establishment of national resolution financing arrangements. The international Agreement on the Single Resolution Fund was considered as necessary on the (debatable) assumption that the participating Member States (that are charged with raising the contributions on the institutions located in their respective territories according to the BRR Directive and the SRM Regulation) remain nonetheless sovereign and competent to transfer those contributions towards the Fund. Thus, the obligation to transfer the contributions raised at national level towards the Fund derives from the international Agreement itself and not by EU law, though there is a clear substantial connection between these components.

[25]I refer to Article 262 TFEU that allows the Council to confer jurisdiction on the ECJ in disputes relating to the application of acts in the field of European intellectual property rights. However, even the ECJ in its Opinion 1/09 (8 March 2011, *Draft agreement on the creation of a unified patent litigation system*) was not enthusiastic with the plan to set up a specialised body, most likely

judicature "common" to the participating States outside the architecture of EU law. It contains a truly peculiar design of judiciary, perhaps not always perfect, but closely integrated, and formally founded on international law, which is not so far from a federal concept of justice.

Be that as it may, due to this unique feature, the Patent Court has been shaped to ensure the effectiveness of EU law and the respect for the founding principles of the EU judicial system. It suffices to recall, firstly, that the Patent Court foundation lies explicitly on the primacy of EU law in a manner that is so wide in scope that is unprecedented even within the EU legal system. Secondly, Member States may be sued for violations of EU law according to the usual infringements procedures pursuant to Articles 258–260 TFEU. Thirdly, Member States are liable for damages caused by the Patent Court according to the *Köbler* ruling. Fourthly, the Patent Court is placed under the supervisory judicial model stemming from the classic preliminary ruling procedure. Needless to say the ECJ's decisions are binding upon the Parties.[26]

(3) A third model for conferring extra powers to ECJ can be found in international treaties concluded by the EU with Third Countries.

In that regard, the monetary Agreements with the Principality of Monaco, the Republic of San Marino, the Vatican City State, as well as the Principality of Andorra are meaningful examples.[27] By virtue of these Agreements based on the procedural provisions of Article 219, para. 3, TFEU,[28] entities outside the EU are entitled to use the euro as their official currency in accordance with the relevant EU *acquis* and to produce limited quantities of Euro coins with their own design on the national side (though they are not allowed to issue Euro banknotes). Moreover, these small sized States have undertaken to implement a set of EU law, which is listed in the annexes to the same Agreements. These cover the field of Euro banknotes and coins, as well as the prevention of both money laundering and of fraud and counterfeiting of cash and non-cash means of payment, including EU banking and financial law and relevant ECB legal acts and rules on statistical reporting requirements.[29] A mechanism of Joint Committees is in charge of deciding the deadlines for the implementation by the three micro States of the new legal acts and rules in those fields.[30]

[26]As to the features of this unusual judicial construct and for further references, see Baratta (2014b), p. 101 et seqq.

[27]See for instance the Monetary Agreement between the European Union and the Vatican City State (2010/C 28/05), OJEU C 28, 4 February 2010, p. 13 et seqq.; Monetary Agreement between the European Union and the Republic of San Marino (2012/C 121/02), OJEU C 121, 26 April 2012, p. 5 et seqq. See Maresceau (2014), pp. 151 et seqq., 186 et seqq.

[28]Martucci (2016), p. 114 et seqq.

[29]See Articles 8 of the Monetary Agreements with the Vatican City State and the Republic of San Marino. Balboni (2014), p. 405 et seqq., at 423.

[30]See Articles 11 of the Monetary Agreements with the Vatican City State and the Republic of San

It is worth noting, on the one hand, that they have accepted that the ECJ will have the *exclusive* competence for settling any dispute which may arise from the application of the relevant Agreement between the Parties (provided that they have not been resolved within the Joint Committee); and on the other hand, that the judgment of the Court is binding on the Parties, which are in addition bound to take the necessary measures to comply with the judgment within a period to be set out by the Court in its decision. In the event that one of the Contracting Parties fails to take the necessary measures to comply with the judgment, the other Party can immediately terminate the Agreement.[31]

Quite similarly, the Agreement on civil aviation between the European Community and the Swiss Confederation,[32] while aiming to establish reciprocal freedom of establishment,[33] and liberalisation of air traffic rights between any point in Switzerland and any point in the EU for carriers registered in both Parties,[34] lays down the exclusive competence of the ECJ for

> all questions concerning the validity of decisions of the institutions of the Community taken on the basis of their competences under this Agreement.[35]

A similar approach is provided for in the multilateral agreement establishing a "European Common Aviation Area", which is completed by the ECJ competence for dispute settlement whose decision is "final and binding".[36]

It would be interesting to comprehend the reasons for the positive response of third States to an international treaty implying the acceptance, in some important, albeit limited, fields of their sovereignty, both of an *external* decision-making process (*i.e.* the EU legislative and normative institutions) and an *exclusive* judicial body (the ECJ) in which they have no representative. The answers cannot but be speculative. The first one seems quite obvious: the legitimacy acquired by the ECJ and the need to guarantee the uniformity of EU law even when it is applied beyond its initial territorial scope. The second layer could be the difficulty and the costs of creating an international judge as efficient and reliable as the ECJ. The final, and perhaps the most important, reason could be the pursuit of a partial integration process into the EU legal order, implying the unilateral application of EU law in Third States so as to accept its normative and related judicial constraints.

This construct, albeit peculiar, should not be conceived in exclusively unidirectional terms as if it were a form of EU legal imperialism.[37] Yet somehow it is. It is

[31]See Articles 10 of the Monetary Agreements with the Vatican City State and the Republic of San Marino.

[32]Agreement between the European Community and the Swiss Confederation on Air Transport, OJEU L 114, 30 April 2002, p. 73 et seqq.

[33]Article 4.

[34]Article 15.

[35]Article 20.

[36]See Decision of the Council and of the Representatives of the Member States of the EU meeting within the Council of June 2006 (2006/682/EC), and the Multilateral Agreement, OJEU L 285, 16 October 2006, p. 1 et seqq., Articles 15, para. 3, and 20, para. 3.

arguable that Third States seek to be integrated in the EU legal order—*rectius*, in some specific internal market and monetary fields—with the ensuing beneficial economic effects. Some provisions laying down the possibility to invoke rights which devolve from these agreements before national Courts[38] or the principle of mutual cooperation in order to achieve the objectives of the same agreements[39] or even prohibiting any discrimination on grounds of nationality,[40] are illustrative in that regard.

The problem is that this goal has not been achieved by Switzerland if one takes into account ECJ case law.[41] Therefore, this model of integration in the internal market needs to be improved and, under this perspective, in the near future to become the basis for re-shaping the economic treaty relationships with some Western European Countries (the small sized Countries, in particular) in accordance with Aricle. 8 TEU and the related Declaration No. 3 attached to the Treaty of Lisbon.

3 Legal Constraints When Entering Into International Agreements Related to EU Matters

The above-mentioned instruments offer peculiar constructs within which, as is self-evident, the adjudicative powers of the ECJ stem from the consent of the Members States and, in some cases, from that of the Union institutions and Third Parties, a consent that is grounded in agreements governed by international law. Even assuming that the ESM Treaty, the Fiscal Compact and the UPC Agreement pertain to the competence of the Member States—to their sovereignties, so to speak—the States' autonomous capacity to act at an international level does encounter some constraints. That is all the more true when that capacity affects matters already governed by the EU legal framework.

All these international treaties raise issues of consistency with primary law. One may argue that insofar as primary law provides for an explicit legal basis to confer extra powers to the ECJ, the main concern is ensuring compliance with the conditions laid down in the same legal basis. As discussed, the ESM Treaty, the Fiscal Compact and the Agreement on the Single Resolution Fund are illustrative case studies of Article 273 TFEU. This is not to neglect the issue regarding the legality of these controversial (international) instruments, in particular that to ascertain that resorting to revision of primary or secondary EU law is politically unfeasible before having recourse to international law agreements in EU related

[38]Article 22 of the Agreement on the European Economic Aviation Area.

[39]Article 3 of the Agreement on the European Economic Aviation Area.

[40]Article 4 of the Agreement on the European Economic Aviation Area.

[41]ECJ 12 November 2009, Case C-351/08, *Grimme*; 15 July 2010, Case C-70/09, *Hengartner*; 11 February 2010, Case C-541/08, *FokusInvest*.

matter. Yet the issue under discussion here is different: may Member States and, where relevant, political institutions resort to the ECJ via international instruments outside a specific legal basis empowering them to do so, namely when a legal basis does exist?

In theory, this issue appears more problematic where a specific legal basis is provided for but there is no corresponding will to apply it. It is worth recalling that when Member States and institutions desired to establish a Patent Court, a EU law-based judiciary, making use of Article 262 TFEU was certainly an available option. As the ECJ held in Opinion 1/09, that provision can be used to confer

> on the Court some of the powers which it is proposed to grant to the Patent Court.[42]

However, the ECJ added that it

> is not the only conceivable way of creating a unified patent court.[43]

In its vision, Article 262 TFEU is just an *option* for it "does not establish a monopoly for the Court" as regards disputes in the field of intellectual property rights.[44] Arguably, an explicit legal basis for conferring extra powers to the ECJ can be circumvented by concluding an international agreement. This reading of Opinion 1/09 would entail that when resorting to a primary law legal basis, it does not suffice that a given matter falls under an area of EU action. What is further required, arguing from the ECJ's reasoning, is that Member States and the relevant institutions must have a specific will for Union action. In that case Opinion 1/09 *de facto* encouraged Member States (and the Commission behind the scene) to follow an international path outside EU legal framework.

Even *Pringle* did not pose substantial limits to Member States' capability to resort to *inter se* agreements in matters potentially falling within the scope of the EU legal framework.[45] In fact, the ECJ acknowledged that Eurozone States were entitled to conclude an agreement between themselves for the establishment of a stability mechanism. It highlighted, among other arguments, that having recourse to Article 352 TFEU is not binding for the Union institutions.[46]

Looking at the treaties in question through the prism of the purposes for which they were enacted and the reasons that led to them, the common denominator for involving the ECJ can be identified in the need to safeguard the consistency of the relevant agreement with the fundamental role the ECJ enjoys in the EU legal order under Article 19 TEU ("it shall ensure that in the interpretation and application of the Treaties the law is observed"). In other words, increasing the role of the jurisdiction of the ECJ by virtue of *inter se* agreements seems to be a means to

[42]Cit., para. 61.

[43]Cit., para. 61.

[44]Cit., para. 62. Baratta (2011), p. 297 et seq.

[45]Tuori and Tuori (2014), p. 193 et seq.

[46]*Pringle* ruling, cit., para. 67. See the critical remarks rightly addressed to this ruling by Munari (2015), p. 733 et seqq.

ensure the full effect of EU law, its autonomy and, ultimately, the particular nature of the law established by the Treaties, even when the EU law is deemed to apply beyond its original architecture.

This is not to say that, as a matter of policy, Member States are uninterested in involving the ECJ for disputes arising from these specific normative frameworks: quite the contrary, for several reasons. First, the ECJ has achieved prestige and legitimacy in more than six decades of activity.[47] The high profile composition of the Court, including senior jurists from all the Member States and the overall legal reasoning of its judgments, are well known in the capitals. Although one might have a critical approach with this or that decision, the ECJ jurisprudence has achieved a coherent shape to which the Member States have generally adhered throughout the decades. Thus, it is almost a matter of course for them to rely on the ECJ's role to uphold EU law, in particular for pursuing possible violations and making agreements as judicially effective as possible, instead of relying on the systemic deficiencies of international law under the principles of State responsibility, reciprocity, reactions to alleged violations, countermeasures and so forth.[48] In addition, when Member States are seriously determined to ensure strict observation of the engagements embedded in *inter se* agreements, the involvement of EU institutions, including the ECJ, can actually be instrumental for depoliticising disputes in a complex context.[49]

Secondly, given the variety of means to solve international disputes, it would be far more problematic in legal terms (and more expansive) to produce new judicial bodies for each normative framework located in the international sphere.

Thirdly, Member States cannot but recognise, as the practice shows, that an *inter se* agreement related to EU matters enhances the fulfilment of the general goals of the Union, as these have a substantial connection with the *acquis*. Arguably, it is reasonable to uphold a broad interpretation of the objective condition set out in Article 273 TFEU, as Advocate General Kokott suggested in the *Pringle*

[47]As it has been pointed out, it is "one of the most powerful high courts in the world" (Stone Sweet (2011), p. 121.

[48]In any adjudicatory system, decision on compliance amounts to an issue of legality and legitimacy, which is vital even under international law (Huneeus 2013, p. 437 et seqq., at 440; and Kolb 2013, p. 810 et seqq., focusing on "les faiblesses de la sanction en droit international").

[49]Quite illustrative in that regard is the involvement of the Commission, an independent political institution, in the system of dispute settlement of the Fiscal Compact. Since the balanced budget rule (Article 3) plays a pivotal role in the architecture of that Treaty, the Contracting Parties needed to ensure its proper implementation by having recourse to a *super partes* assessment. See however Prete (2015), p. 81 et seqq. and 88. This author casts doubt about the effectiveness of Article 8 procedure, given the complexity of some of its wording. It should be recalled however that Article 8 is a compromise text that was hard to achieve. Moreover, complexity is not a unique feature of that provision. Unfortunately, uncertainties of legal texts are quite common in the EU secondary law for a number of reasons that cannot be summarised here (see Robinson (2014), p. 239 et seqq.; and therewith the contributions of M. Guggeis, R. Bray, R. Baratta, M. Mousmouti,

conclusions.[50] A similar logic underlies the judicial enforcement of the correct implementation of the balanced budget rule at a national level as laid out in the Fiscal Compact.[51]

However, being (or being sometimes forced to remain) outside the realm of the EU architecture, Members States are expected to pay careful attention to ensure the consistency of the concerned instrument with the EU law *acquis* as a whole. In particular, since the jurisdiction of the ECJ is inherently contentious, *inter se* agreements may not alter the nature of its function as construed by the Treaties.[52] As a result, ECJ's decisions in *inter se* agreements are to be binding. To put it differently, Member States, as well the EU institutions when they enter into agreements with Third States with the aim of *integrating* them within some monetary and economic fields of EU law, would be prevented from allocating a mere consultative power to the ECJ.

This inherent feature of the EU judicature may also explain why its role beyond EU law should in principle be limited to solving classical legal disputes. It is worth noticing for instance that under the Fiscal Compact, the scope of ECJ jurisdiction regards only the correct implementation of the balanced budget rule in domestic law, and no more than that. This provision is not meant to make justiciable the event in which a national authority approves an imbalanced budget. It would simply not fall within the ECJ competence. This is hardly a surprise because the vast majority of the Member States realised the need to stay outside the EU legal framework for political reasons, yet they still had to preserve the judicial nature of the ECJ. Its crucial task is to state the law (Article 19 TEU), without touching upon political or economic evaluations.

In short, by virtue of the principles of institutional conferral and separation of powers on which the Union is founded, the EU judges are not the appropriate organs to interfere in economic and political affairs. Therefore, should the Member States decide to repatriate the balanced budget rule into the realm of EU law, without laying down any *justiciability* restriction in that respect, clearly the ECJ would not challenge this new empowerment—or *rectius* it would not have the possibility to do so according to the founding principles of the current Treaties. However, one may reasonably expect that the ECJ will adopt a self-restrained approach such as that

[50]In this case Advocate General pointed out that "Since the allocation of tasks under Article 273 TFEU is dependent on a special agreement between the parties, it is moreover sufficient if the subject matter of such an agreement is related to the subject matter of the European Union Treaties. It is not a requirement that every single dispute arising from the ESM Treaty must imperatively be shown to be related to the European Union Treaties", cit., para. 186.

[51]This judicial remedy is instrumental to the proper application of the Stability and Growth Pact and namely to the related primary and secondary law. In that sense the balanced budget rule indeed shows a complementing link to the economic union, as Article 1, para. 1, of the Fiscal Compact further demonstrates as regards it as a whole.

[52]See ECJ 14 December 1991, Opinion 1/91, *Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the*

usually applied whenever an institution possesses a margin of appreciation for evaluating monetary, economic, political and social data. The judiciary experience in the field of competition law and state aids is illustrative[53]; the same holds true if one looks at the *Gauweiler* ruling as recognising the technical assessment the ECB enjoys as an independent institution charged with exclusive monetary policy tasks.[54] For the ECJ is usually, and understandably, unwilling to substitute its view for that of the political institution concerned.

More in general, Member States are prohibited from concluding an *inter se* agreement that might affect common rules or alter their scope pursuant to Article 3, para. 2, TFEU).[55] Accordingly, an implied condition is that such agreement must respect the EU *acquis* as a whole. This explains the reason why the Court's attributed powers under the Fiscal Compact concern the transposition of the balanced budget rule (as well as the related correction mechanism) into domestic law, but not the concrete compliance with that rule in a given national budget.[56] It is actually an obligation differing from those falling within the scope of the exclusion clause provided for in Article 126, para. 10, TFEU. In sum, the drafters were careful not to encroach on that originally limited role of the ECJ.[57]

Therefore, as long as the powers and roles conferred to the ECJ are neither altered, nor undermined, primary law does not prevent Member States and EU political institutions from providing additional tasks to the EU judiciary under an international treaty. Certainly, this possibility is to be grounded on the need to ensure the full effect of EU law when it is deemed to apply beyond its original scope. Yet it cannot be ruled out *a priori*.[58] After all, ECJ case law has apparently endorsed the possibility of acquiring new powers under international agreements insofar as some foundational requirements are respected. Opinion 1/91 admitted in principle such an option,[59] as did the *Pringle* ruling with respect to Article

[53]In these areas, leaving aside compliance with procedural rules, including the provisions of reasons, judicial control is essentially limited to assessing whether the Commission accurately stated the facts and whether manifest errors of evaluation or misuses of power occurred.

[54]ECJ 10 June 2015, Case C-62/14, *Gauweiler and others*, para. 68 et seqq.

[55]This prohibition also stems from Article 3, para. 2, TFEU, even though that provision, read with Article 216 TFEU, governs the competence of the EU for agreements with third countries or international organisations. In any case, this is the approach apparently adopted by the ECJ in the *Pringle* ruling, cit., para. 101.

[56]Baratta (2013), Martucci (2016), pp. 763–764.

[57]See however Ziller (2012), p. 115 et seqq., at 129–133; Ziller (2013), p. 609, who states that Article 8 circumvents Article 126, para. 10, TFEU; likewise, Adam (2013), p. 40. For a different perspective, de Streel and Etienne (2012), pp. 182–185, at 184; de Witte (2012a), pp. 14–17, at 17.

[58]This is not to say that a difference cannot be made between the ECJ and other political institutions as regards the possibility to borrow the EU institutions under an international agreement (as noted by de Witte (2012b), p. 139 et seqq., at 155).

[59]See Opinion 1/91 in which the Court noted that: "Admittedly, there is no provision of the EEC Treaty which prevents an international agreement from conferring on the Court of Justice jurisdiction to interpret the provisions of such an agreement for the purposes of its application in non-member countries. Neither can any objection on a point of principle be made to the freedom which the EFTA States are given to authorize or not to authorize their courts and tribunals to ask

273 TFEU.[60] Further, ECJ's Opinion 1/09 essentially suggested the creation of a "common" Patent Court situated within the judicial system of the EU and, consequently, capable of ensuring the full effectiveness and respect for the foundations of EU law.[61]

4 Conclusions

When Member States enter into agreements *strictly related to the subject matter of EU law*, the reference to the ECJ, both for solving disputes between themselves and for protecting individual rights as guaranteed by EU law, is not just consistent with the principle of institutional conferral. It is also a route they are bound to take in order to comply with the ultimate rationale of the EU system. In other words, awarding additional jurisdiction to the ECJ cannot be seen as a mere option.[62] It rather appears as an obligation insofar as *inter se* agreements may affect the autonomy of EU law and its effectiveness. After all, it seems vital for the EU legal order that, in order to forestall future differences of interpretation, its *acquis* is given a uniform interpretation and application irrespective of the circumstances in which it is to be applied.[63]

This holds true also for international agreements whose purpose is to create economic areas with Third States based on EU rules (or on provisions which are identical in substance to it) and equal conditions of competition, as well as to provide for adequate means of enforcement at administrative and judicial level. By affirming the exclusive jurisdiction of the ECJ, the underlying *rationale* is to ensure the uniform application of EU law. It seems a functionally persuasive ground even from the perspective of a Third State seeking to partially integrate itself into the economic and internal market area of the EU.

All in all, they are a *special* category of international treaties strictly intertwined with *the subject matter of EU law as a whole* since they are, as discussed, intended either to complement EU law or to enlarge its application to Third Parties. In this scenario empowering the ECJ with additional tasks (beyond the realm of EU law) appears the only way to preserve the autonomy of EU law.

[60]See *Pringle* ruling, cit., para. 170 et seqq.

[61]See Opinion 1/09, cit., para. 82.

[62]One could argue that for instance in the area covered by Article 273 TFEU, the ECJ is entitled to adjudicate an international dispute, which is outside the exclusive jurisdiction of the Court on disputes concerning the interpretation and application of the Treaties pursuant to Article 344 TFEU. Consequently, Member States would be empowered to confer with the ECJ but not obliged to do so. However, this perspective does not consider the underlying rationale of the ECJ involvement in *inter se* agreements as suggested above in the text.

[63]See by analogy ECJ 18 October 1990, Joined Cases 297/88 and 197/89, *Dzodzi*, para. 37; 16 June 1998, Case C-53/96, *Hermès*, paras. 24–33; 14 december 2000, Joined Cases C-300/98 and 391/98, *Parfums Christian Dior*.

As submitted, under certain conditions, additional tasks can and should be attributed to ECJ outside the Union framework.[64] The implied assumption is that the ECJ, while acting beyond EU law in the event of *inter se* agreements, does not affect the rights of the EU Member States not participating in the relevant instrument. Quite to the contrary, the EU judiciary continues to work in the general interest in accordance with the EU legal order as a whole. It would not be convincing to argue that Article 13, para. 2, TEU precludes allocation of new tasks to the institutions outside the EU legal framework unless a unanimous will in favour is expressed. This conclusion would hardly be consistent with both the general principles and the recent practice of *inter se* agreements. Moreover it would go too far. After all, the principle of conferral cannot be derogated with the blessing of the national Governments. Therefore, a unanimous will is not required in order to attribute additional tasks to the ECJ, provided that its role and nature is not altered.[65]

That being said, it seems also arguable that as a matter of policy, international *inter se* instruments related to EU law should remain exceptional tools justified in emergency situations. The ESM Treaty and the Fiscal Compact were conceived just as provisional and urgent (though necessary) measures.[66] The juxtaposition of the EU legal framework and an international instrument ratified by a limited number of Member States should be accepted on a temporary basis only. For such a mixture may reinforce the fragmentation and uncertainty of the legal framework and also, as far as the ESM Treaty and the Fiscal Compact are concerned, the division between the Euro area and non-euro area States. They raise legal issues and concerns (some of them examined above) not always easy to fit in the legal framework of primary law.[67] Although *inter se* agreements remain at Member States' disposal, as the ECJ held in *Pringle*, they

> are prohibited from concluding an agreement between themselves which might affect common rules or alter their scope.[68]

[64] *Pringle* ruling, cit. para. 74.

[65] See, in general, ECJ 10 April 1992, Opinion 1/92, *Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area*, paras. 32 and 41; and 18 April 2002, Opinion 1/00, *Proposed agreement between the European Community and non-Member States on the establishment of a European Common Aviation Area*, para. 20; see also Opinion 1/09, cit. paras. 74-76.

[66] Particularly in the case of Fiscal Compact, that approach was in principle considered viable, provided that any inconsistencies with the law and related principles of the EU (*contra legem* provisions) had to be avoided. The ECJ jurisprudence is clearly oriented in the sense that the effects of a multilateral mixed agreement on the bilateral relations between Member States cannot affect primary law, as well as the allocation of responsibilities defined in the treaties (see, in that regard, ECJ 30 May 2006, Case C-459/06, *MOX Plant*, para. 123; Opinion 1/91, cit., para. 35, and Opinion 1/00, cit., paras. 11 and 12.

[67] Craig (2012), p. 231 et seqq.; Finscher-Lescano (2013), p. 9 et seqq.

[68]

Further, the method of concluding an international agreement among a limited number of Member States raises a *repatriation problem*.[69] As for instance the *sunset clause* in Article 16 of the Fiscal Compact recognises, the great majority of Member States already considered the need to bring its regime back within the EU system since that exceptional instrument was conceived in the middle of the crisis. Some provisions of the Fiscal Compact, subsequent to its adoption, have already been implemented within the EU legal order through secondary law.[70] In fact, experience shows inevitable disharmonies between the *inter se* agreement and the EU normative framework.

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The *OMT* Case: Institution Building in the Union and a (Failed) Nullification Crisis in the Process of European Integration

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I am indebted to Professor Massimo Luciani (University of Rome "La Sapienza") and Dean William Treanor (Georgetown Law Center) for insights into the US Nullification Crisis. This article was written during a Fulbright Schuman research period in Washington D.C. The present article is dedicated to Professor Ugo Villani on his 70th birthday. This article represents the literature and case-law as of January 2016.

Abstract This article examines the birth and development of the OMT programme and its implications for the EU integration process. It then analyses the *OMT* case from two perspectives. First, as an example of "Institution building" in the European Union: developments that lasted 2 years (2010–2012) and allowed the EU to establish a "permanent" programme which was capable of ensuring the effective exercise of ECB monetary policy. The legality of the OMT was recently confirmed by the Court of Justice in the *Gauweiler* judgment. Second, the *OMT* case reveals evident Member State dissatisfaction with the working of the European Union. This is highlighted in the *sui generis* 2014 preliminary reference of the German Constitutional Court, regarding the methods and the conclusion reached, on the legality of the OMT. The BVerfG reference led to the 2015 *Gauweiler* judgment. This position (as well as, before it, the position of the *Bundesbank* on the same issue) shows, ultimately, a distrust in the ability of the Union to enact, in the general interest of the Member States, measures in areas where the legislative power is now transferred to the European level. This situation resembles *mutatis mutandis* the 1832 "nullification crisis" between the State of South Carolina and the Federal Government of the United States of America. By analysing this phase of American legal history, the article tries to identify a common pattern of behaviour in "two tier legal systems"—such as the US and the EU—in their respective integration processes. This historical comparison sheds light on the peculiarity of

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