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‘No taxation without representation’ or ‘No representation without taxation’? In search of democratic legitimacy for taxation in the post-crisis EU*

Zusammenfassung

Ausgehend von dem berühmten Wahlspruch des 18. Jahrhunderts: „No taxation without representation“ legt dieser Beitrag das grundlegende Verhältnis zwischen Steuerwesen, Fiskalpolitik und Demokratie dar. In Anbetracht der Transformation der nationalen Steuersysteme in der Europäischen Union (EU), untersucht der Beitrag sodann, ob diese, auf unterschiedliche (unauffällige) Weise durch die EU initiierten Transformationen mit demokratischer Legitimation ausgestattet sind. Wer entwirft, wer entscheidet und wer implementiert Steuergesetzgebung in der EU und ist sie/er dazu demokratisch legitimiert?

In dieser Untersuchung kommt die Autorin zu dem Schluss, dass, obwohl das Steuerwesen vorgeblich in den Händen der Mitgliedstaaten verbleibt, die Finanzkrise diese Zuordnung, nicht nur im Hinblick auf die Anwendung demokratischer Prinzipien durch gewählte und rechenschaftspflichtige Regierungen, sondern auch im Hinblick auf den Respekt der Grundrechte und die sozioökonomische Ordnung als Ganze, umgeworfen hat. Dazu beigetragen hat die Beschneidung der Verteilungskapazitäten und –entscheidungen der „nationalen Steuersysteme“ durch die EU. Wie kann ein Mitgliedsstaat als „steuerlich“ und „fiskalisch“ souverän angesehen werden, wenn es die EU ist, die direkt oder weniger direkt über den Entwurf des Haushalts eines Landes und seine Vereinbarkeit mit den EU-Haushaltsregeln entscheidet? Und wie kann die Entscheidungsfindung über das „Steuerwesen“ demokratisch gewählten Regierungen zugerechnet werden, wenn dessen Gegenspieler, das heißt, die Haushaltsentscheidungen eines Staates, maßgeblich durch Entscheidungen der EU beeinflusst sind?

Résumé

Partant de la célèbre devise prononcée au 18ème siècle : „No taxation without representation“, la contribution suivante présente la relation fondamentale entre la fiscalité, la politique fiscale et la démocratie. Au regard de la transformation des systèmes fiscaux nationaux au sein de l’Union Européenne, l’article ci-dessous examine si ces transformations, plus ou moins initiées par l’Union Européenne, sont revêtues de la légitimation démocratique. Au terme de cette recherche l’auteure aboutit à la conclusion que, bien que la fiscalité reste prétendument entre les mains des Etats membres, la crise financière a bouleversé cet ordre, ceci non seulement du point de vue de l’ap-

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plication des principes démocratiques par des gouvernements élus et responsables, mais encore du point de vue du respect des droits fondamentaux et de l'ordre socio-économique, compris comme étant un tout. Le grignotage par l'Union Européenne de la capacité et du pouvoir de décision des systèmes fiscaux nationaux en matière de redistribution de l'impôt a contribué à cet état de fait. Comment un Etat membre peut-il être considéré comme fiscalement souverain, alors que l'Union Européenne règne plus ou moins directement sur la préparation des budgets nationaux et leur comptabilité avec le budget européen? Et comment la prise de décision en matière fiscale peut-elle incomber à des gouvernements démocratiquement élus, alors que le pendant, c'est-à-dire leur pouvoir de décision en matière budgétaire, se trouve largement influencé par les décisions de l'Union Européenne?

1. Introduction

While the crisis started in 2008 as a financial and sovereign debt crisis, it soon also became a political crisis questioning the legitimacy of the Lisbon Treaty's institutional set-up and democratic accountability.[1] Faced with such unprecedented multiple crises, the EU was caught off-guard. In an effort to both patch things as swiftly as possible as well as to re-design the institutional and legal framework to avoid any future crises, the 'European Economic Constitution' has undergone changes that to others appear as a total overhaul[2] whereas some scholars argue that it has been rather a different institutional practice that complemented the existing rules.[3]

An initial reaction to the crisis was to control the Member States' attempts to rescue banks and to assess national support to private undertakings through the lens of the existing EU state aid rules. As no risk management mechanism existed at the time, the Commission applied looser criteria when assessing requests to grant aid in order to avoid a total failure of the banking sector. At a later stage, legislation passed designed to strengthen financial supervision within the internal market.[4] The newly established banking union is built upon a better monitoring and resolution framework for financial institutions.[5]

1 Throughout this paper, I use the term 'crisis' in a sense encompassing the above terms.

2 Christian Joerges, 'The European Economic Constitution and its Transformation through the Financial Crisis' in Dennis Patterson and Anna Söderstn (eds.), *Blackwell Companion to EU Law and International Law*, (Wiley-Blackwell, 2016), p. 242 – 261 and Christian Joerges, 'The European Economic Constitution in Crisis: Between 'State of Exception' and 'Constitutional Moment' in Miguel Maduro, Bruno De Witte and Mattias Kumm, *The Democratic Governance of the Euro*, RSCAS Policy Paper 2012/08 (2012), p. 39.

3 B. De Witte, ' Euro Crisis Responses and the EU Legal Order: Increased Institutional Variation or Constitutional Mutation?', (2015) Constitutional Law Review, 11, 434 – 457, at 436.

4 See for instance, Communication from the Commission, 'European Financial Supervision' COM(2009) 252 final; Regulation (EU) No 1092/2010 on European Union macro-prudential oversight of the financial system and establishing a European Systemic Risk Board.

5 Regulation (EU) No 806/2014 establishing the Single Resolution Mechanism (SRM); Council Regulation (EU) No 1024/2013 establishes the Single Supervisory Mechanism as a system to supervise banks in the euro area and other participating EU countries and Regulation

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However, as one of the alleged reasons that led to the crisis was the Member States' fiscal profligacy and non-compliance with the Stability and Growth Pact,[6] the EU had to proceed to a reform of the *economic governance* legal grid. The new measures introduced as a response to the crisis were premised on two grounds: at a first level, on ensuring the possibility of quasi 'fiscal transfers' among the Member States or, in other words, the 'bail – out' of the Member States in need, and secondly on enhancing the fiscal discipline of the Member States by allowing the 'supranational' (the EU) to exercise increased supervising powers to the budgets of the Member States.

This article will argue that the post-crisis legal framework on the new economic governance of the EU has led to an encroachment of the already impinged upon 'tax and fiscal' sovereignty of the Member States. This surrender of fiscal and budgetary powers by the Member States to the EU has resulted in tax integration from the 'back door' that has not been vested with democratic legitimacy.

The article sets out by providing an overview of the pre-crisis EU economic governance legal framework in order to explain the structural deficiencies of the EU and the EMU. It continues by explaining the inherent links between tax and fiscal policies which constitute the basis of the argument. It then proceeds to examine the new 'crisis' economic governance legal framework and the repercussions it has for the tax and fiscal sovereignty of the Member States. Finally, it examines the democratic deficit with regard to tax and fiscal policies this new legal set up has brought about in conjunction with the prospects towards further fiscal and tax integration.

2. The pre-crisis legal framework

One of the main sources of problems that 'contributed' to the crisis can be traced to the only partial legal integration of the economic (and fiscal) policies of the Member States, as opposed to the total monetary integration for the Eurozone members.

(EU) No 1022/2013 aligns the existing legislation on the establishment of the European Banking Authority (EBA) to the modified framework for banking supervision.

6 The SGP consisted of two Council regulations relating to the EDP and surveillance, and a European Council Resolution; Council Regulation (EC) 1466/97 of 7 July 1997 on the strengthening of the surveillance and co-ordination of budgetary positions [1997] OJ L209/1, and Council Regulation (EC) 1467/97 of 7 July 1997 on speeding up and clarifying the implementation of the Excessive Deficit Procedure [1997] OJ L 209/6. The SGP incorporated the view that a currency union with a decentralized fiscal policy *could* work if fiscal policy was coordinated effectively. Accordingly, fiscal policy coordination would be based on two prongs that apply to all EU members. Regulation 1466/97 laid down the preventive arm which was designed to encourage governments to avoid excessive deficits. This safeguard of fiscal discipline relied on a country-specific medium term budgetary objective (MTO) 'close to balance or in surplus' over the course of a business cycle. Member States should not, therefore, have an excessive deficit defined as more than 3% of GDP (which would trigger the corrective mechanism), except in severe recessions. The corrective arm mainly prescribed how governments should react in case the deficit limit was breached. Such a breach would trigger the Excessive Deficit Procedure (EDP) a step-by-step procedure for correcting excessive deficits that occur when one or both of the rules that the deficit must not exceed 3% of GDP and public debt must not exceed 60% of GDP, as described in Article 104 TEC (now 126 TFEU) and Regulation 1467/1997.

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This 'deficiency' of the system, made economic scholarship to contest most of the features of the back then, newly established EMU, placing particular emphasis on the EMU's: a) *asymmetrical* character, namely the lack of mechanism to redistribute a considerable part of the gross national product across the "federal" territory, as happens in federal structures like the U.S., Canada and Germany;[7] b) its *differentiated* character premised on the non-participation of some Member States as well as the big discrepancies and differentiations between the participant Member States (which were not taken into account when designing the Monetary Union); c) its *imperfect character*, namely its non-compliance with the requirements of an Optimal Currency Area, and in particular labour and capital mobility, fiscal transfer mechanisms and synchronized business cycles.

The discourse as to the EMU's desirability departed from the fact that the EMU is *not* an Optimal Currency Area.[8] The economic theory of the Optimum Currency Area (OCA) developed in the 60 s by *Mundell*,[9] 'the intellectual father of the euro',[10] analyses, in principle, whether one single currency would be the most economically efficient choice for a specific region. In different words, it is a cost-benefit analysis of a currency union. In his first model, based on OCA with stationary expectations, *Mundell* argued that having an independent national monetary policy with exchange rate flexibility is the most efficient way to deal with asymmetric shocks. In slight contrast, in his second and most analytical model, based on OCA with international risk sharing,[11] *Mundell* suggested that if a common money can be managed so that its general purchasing power remains stable, then the larger the currency area—even one encompassing diverse regions or nations subject to "asymmetric shocks"—the better.[12] In the debate about the best way to deal with asymmetric shocks, *Peter Kenen* argued that fiscal integration – a large "federal" component to spending at the regional or local level – can help a lot in dealing with asymmetric shocks.[13]

Following this debate, it was inevitable that the EMU would evoke a reconsideration of the fiscal powers configuration within the EU. Although already in 1989 the

7 S. Gustavson, 'What Makes a European Monetary Union Without Parallel Fiscal Union Politically Sustainable?' in S. Dosenrode (ed.) *Political Aspects of the Economic and Monetary Union, The European Challenge* (Ashgate, Aldershot 2002), p. 119.

8 The theory of optimum currency area, as developed by *Mundel*, suggested two big things to look at – labor mobility and fiscal integration. And on both counts it was obvious that Europe fell far short of the U.S. example, with limited labor mobility and virtually no fiscal integration.

9 R. A. Mundell, '*A Theory of Optimum Currency Areas*' (1961) 51 The American Economic Review, p. 657-665.

10 See R. A. Mundell, 'A Plan for a European Currency' (1969) Paper Prepared for Discussion at the American Management Association Conference on Future of the International Monetary System (Madrid, December 1969).

11 R. A. Mundell, *Ibid.*

12 R. McKinnon, 'Mundell, the Euro and Optimum Currency Areas', (2000) Working Paper, accessed at: http://www-siepr.stanford.edu/workp/swp00009.pdf.

13 P. Kenen, 'The Theory of Optimum Currency Areas: An Eclectic View' in R. Mundell and A. Swoboda (eds) *Monetary Problems of the International Economy* (The University of Chicago Press 1969).

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Delors report[14] had expressed the need for the establishment of an EC-wide fiscal policy that would coordinate the Member States' budgetary policies,[15] this suggestion was very distantly echoed in the Maastricht Treaty and the Maastricht convergence criteria.[16] Four years after the Treaty entered into force, the European Council reached a final agreement on the Stability and Growth Pact (SGP) on the basis of art. 104c TEC (now 126 TFEU) in conjunction with the Protocol on the excessive deficit procedure annexed to the Treaty.

The Stability and Growth Pact (SGP) incorporates the view that a currency union with a decentralized fiscal policy can work if fiscal policy is coordinated effectively. Accordingly, fiscal policy coordination would be based on two prongs that apply to all EU members. Regulation 1466/97 laid down the preventive arm which is designed to encourage governments to avoid excessive deficits. This safeguard of fiscal discipline relies on a country-specific medium term budgetary objective (MTO) 'close to balance or in surplus' over the course of a business cycle. Member States should not, therefore, have an excessive deficit defined as more than 3% of GDP (which would trigger the corrective mechanism), except in severe recessions. The corrective arm mainly prescribes how governments should react in case the deficit limit is breached. Such a breach would trigger the Excessive Deficit Procedure (EDP) a step-by-step procedure for correcting excessive deficits that occur when one or both of the rules that the deficit must not exceed 3% of GDP and public debt must not exceed 60% of GDP, as described in Article 104 TEC (now 126 TFEU) and Regulation 1467/1997.

Partly because of its hybrid legal nature, partly because of political unwillingness, the SGP rules remained unenforceable through time.[17] The advent of the EMU, besi-

14 Committee for the Study of Economic and Monetary Union (presided by Jacques Delors), Report on Economic and Monetary Union in the European Community, 17 April 1989.

15 The 'Delors Report': "[…] a single currency. This, in turn, would imply a common monetary policy and require a high degree of compatibility of economic policies and consistency in a number of other policy areas*, particularly in the fiscal field*. These policies should be geared to price stability, balanced growth, converging standards of living, high employment and external equilibrium. Economic and monetary union would represent the final result of the process of progressive economic integration in Europe.[…]"
Moreover, the fact that the centrally managed Community budget is likely to remain a very small part of total public – sector spending and that much of this budget will not be available for cyclical adjustments *will mean that the task of setting a Community-wide fiscal policy stance will have to be performed through the coordination of national budgetary policies*.".

16 Article 109 j of the Maastricht Treaty, Article 121 TEU.

17 See for instance the examples of France and Germany when in November 2003, the ECOFIN Council found that the two countries had incurred excessive budgetary deficits, yet, it decided not to impose any sanctions but only issue recommendations. The Commission brought the case before the Court of Justice of the EU (CJEU) which decided that the Council did not have the right to make such recommendations to initiate the EDP, a prerogative strictly reserved to the Commission. However, France and Germany colluded in order to block the strict implementation of the corrective arm provisions and to reject a Commission recommendation to move a step further in the direction of sanctions under the EDP.

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des coming together with a new moderate institutional framework of fiscal/economic governance for the Member States,[18] did not leave intact their national tax policies.

On the one hand, since the MacDougall Report of 1977,[19] it was widely believed by many lawyers and economists that the complete transfer of 'monetary policy-making' powers and the partial transfer of fiscal powers would result in an inevitable loss of sovereignty in other areas, including taxation, as "collateral damage".[20] In the same line of argument, some commentators saw the possibility of tax harmonisation as an inevitable result of the more general growing degree of policy coordination in political and economic matters, the EMU would bring about.[21] Alongside this inevitable 'powers' drift', economic theories developed already in the '60 s and focusing on the budgetary and monetary interrelations, like the Optimal Currency Area and the theory of spatial differences[22] also advocated tax harmonisation, not as an optimal solution but for functional reasons. In line with the theory of second-best, which when applied to the EMU suggests that removing monetary barriers in a market in which other barriers were still present, like withholding taxes, could decrease the degree of economic welfare,[23] some scholars were reporting that, it was essential to (at least) coordinate the national systems of loss compensation and establish an international loss carry over system.[24]

Tax lawyers and experts, building on what the economists' anticipated, i.e. the 'drift' of the centralisation of taxation as a potential result of the EMU, started considering the possibility of tax harmonisation and the likelihood of a substantial transfer of taxing and spending powers from the Member States to the EU, as a (necessary or desirable) result of the EMU.[25] Such a transfer would take place, tax lawyers warned, either by positive integration and a certain degree of tax harmonization,

18 See Arts. 102 a and 103 EC. Multilateral surveillance formally began in 1990 and was subsequently governed by Council Decision 90/141/EEC of 12 March 1990 on the attainment of progressive convergence of economic policies and performance during stage one of economic and monetary union**,** 24.3.1990 L78/3. See also Art. 104 c EC and the Protocol on the Excessive Deficit Procedure.

19 European Commission, Study Group on the Role of Public Finance in European Integration, 'The MacDougall Report – General Report' (Brussels, April 1977).

20 B. Cash, 'EMU and the handover of tax-raising powers' (1998) EC Tax Review, p. 127-128; contra Vanistendael F., 'Redistribution of tax law making power in EMU' (1998) EC Tax Review, p. 74-75.

21 O. Ruding, 'After the euro: corporation tax harmonization?' (1998) EC Tax Review, p. 72.

22 R. Prud'homme, 'The potential role of the EC budget in the reduction of spatial disparities in a European economic and monetary union' in H. Reichenbach (ed.) *Stable Money, Sound Finances* (Brussels: Commission, DG for Economic and Financial Affairs, 1993) p. 317 – 351.

23 J. A. Frenkel, A. Razin and E. Sadka, *International Taxation in an Integrated World* (CUP, Cambridge MA 1991).

24 G. De Bont (et al.), 'The influence of taxation on the completion and functioning of the EMU' (1997) EC Tax Review, pp. 178-181.

25 O. Ruding, 'After the Euro, Corporate Tax Harmonization?' (1998) Editorial EC Tax Review, p. 72 – 73, F. Vanistendael, 'Redistribution of tax law making power in EMU? EC Tax Review' (1998), p. 74, B. Cash, 'EMU and the handover of tax raising powers' (1998) EC Tax Review, p. 128, W. De Clercq, 'Yes to the Euro, but watch out for challenges ahead' (1998) EC Tax Review, p. 129-130.

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or in the hope of negative integration, or finally, by tax cooperation. Opponents to tax harmonisation, however, argued that, despite the existence of a 'monetary anchor', the absence of a 'tax anchor', a centre of tax gravity, and common 'tax preferences' around which national systems could converge, did not prescribe tax harmonisation as an optimal solution for the EU.[26]

Unlike the wording of the Treaty that distinguishes on several grounds between economic policy and monetary policy,[27] the two policies are connected, in economic theory, via a 'subordinate' relationship. Once monetary policy is centralised,[28] the burden falls on its substitute tool, fiscal policy, to respond to asymmetric shocks. For fiscal policy, changes in spending and/or taxes impact on the budget balance, which further affect the financing of the public debt.[29] At the same time, changes in the budgetary policies of the Member States will heavily impact on their tax systems, because of the inherent interrelation between the two (the money that forms the budgets, comes, to a great extent, from taxation).[30] Such an elementary finding, however, raises the question of the repercussions a change in the delineations of powers between the Member States and the EU with regard to fiscal policies, might bring about to taxation – a question this article aims to address. Although a quasi 'federalised' fiscal system does not necessitate tax raising powers by the EU, it is paradoxical and also highly unlikely that while the EU can control to a large extent the national budgets, it cannot indirectly control the national tax systems.

3. The relationship between fiscal and tax policy

In view of the financial crisis, the EU's response and literature on fiscal integration has focused on the 'fiscal', including the 'budgetary', branch as a solution to the sustainability of the Euro and as a result to the crisis, while ignoring the inextricably related 'tax' prong of it. However, fiscal integration based on fiscal transfers between Member States is only one facet of the fiscal integration *lato sensu*. In particular in

26 C. Radaelli, *The Politics of Corporate Taxation in the European Union, Knowledge and international policy agendas*, (Routledge Research in European Public Policy 1997), where the author compares the lack of a 'tax anchor' to the existence of a 'monetary anchor' in the EU, bringing Germany as an example.

27 See the different chapters in the Treaty: Chapter 1 on Economic Policy, Articles 120-126 TFEU, and Article 2 on Monetary Policy, Articles 127-133 TFEU. But most importantly see the distinction of competences: Monetary policy constitutes an exclusive to the EU competence (Article 3 (c) TFEU), whereas economic policy is, arguably, a 'shared' competence between the Member States and the EU, which (the latter) has competence to coordinate the economic policies of the Member States (Article 5 TFEU).

28 Monetary policy constitutes according to Article 3(C) TFEU an exclusive competence of the EU. According to Art. 127 (2) TFEU, one of the basic tasks to be carried out through the European System of Central Banks shall be to define and implement the monetary policy of the Union. The primary objective of the ECB's monetary policy is to maintain price stability (Article 127 (1) TFEU).

29 R. Baldwin and C. Wyplosz, *The Economics of European Integration* (McGran-Hill Higher Education 2009), p. 520.

30 The second biggest 'financing' source of the state budget is based on loans.

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crisis times, attempts to solve budgetary problems (both at national or supranational levels) rely inter alia on increasing one's tax revenues and this usually happens through direct and/or indirect taxation.[31]

This article attempts to show how the recent 'fiscal' and economic governance measures have impacted on the tax and fiscal sovereignty of the Member States. Already in the first years of the crisis, the Euromemorandum Group had noted that 'the effective crisis management at the EU level was substantially thwarted by the failure of the EU to coordinate, or even harmonize tax matters.'[32] This quite evident observation and the inextricable interrelationship between tax and fiscal policies, can be easily demonstrated. As already explained, it can be easily seen how fiscal transfers between Member States are eventually based on taxation redistribution between the Member States, a point that already illustrates the relationship between the 'budgetary' aspect of fiscal integration and the 'tax' one. To explain the interdependency between taxation and 'budgetary' integration, let us consider the following example: Assuming that eventually the EU becomes fiscally integrated and is attributed a fiscal capacity in the commonly understood sense of a common fiscal budget where all Member States contribute money that to a large extent originate from the taxes (direct and indirect) they impose. It is quite difficult to imagine such a scenario without any adjustments or alterations to the national tax systems, including the tax rates or the tax base. For fiscal policy, changes in spending and/or taxes impact on the budget balance, which immediately raises the question of the financing of public debt. For instance, a cut in income taxes, all else being equal, will create a budget deficit, which will further create a need for borrowing by the government, generating a new public debt which will have to be, eventually, reimbursed. Such reimbursement will probably result from a later increase in taxation, setting off the initial cut. Such a connection and need for a common approach between the management of public finance and direct taxation has been reflected in the Commission's blueprint for a deep and genuine economic and monetary union and the discussion of the fiscal capacity of the EMU.[33] This interrelation of the two policies has led the Commission to argue that a 'fiscal 'Union' would require Treaty amendments, providing, *inter alia,* the legal basis for '*a new taxation power at the EU level, or a power to raise revenue by indebting itself on the markets (presently barred by Articles 310 and 311 TFEU*'.[34] The discus-

31 Jeremy Leaman, 'The Fiscal Lessons of the Global Crisis for the European Union: The Destructive Consequences of Tax Competition' in Jeremy Leaman and Attiya Waris (eds.) *Tax Justice and the Political Economy of Global Capitalism, 1945 to the Present* (Berghahn, New York 2013), p. 87.

32 Euromemo Group, 'Confronting the crisis: Austerity or Solidarity' EuroMemorandum 2010/2011, available at: http://www.euromemo.eu/euromemorandum/euromemorandum_2010_11/ (last accessed 28 January 2015).

33 European Commission, Communication 'A blueprint for a deep and genuine economic and monetary union Launching a European Debate', COM(2012) 777 final/2 (30 November 2012) and Van Rompuy (et al.) Report: Towards a Genuine Economic and Monetary Union, 5 December 2012, both advocating a fiscal Union or at least the introduction of a 'fiscal capacity' of the EMU.

34 European Commission, Communication 'A blueprint for a deep and genuine economic and monetary union Launching a European Debate', COM(2012) 777 final/2 (30 November 2012), p. 33.

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sion on the possibility of a 'crisis induced' fiscal Union was spurred by the published Report by the ex-President of the European Council, Herman Van Rompuy, 'Towards a Genuine Economic and Monetary Union'.[35] The report argued, *inter alia* that: '*The smooth functioning of the EMU requires not only the swift and vigorous implementation of the measures already agreed under the reinforced economic governance framework (notably the Stability and Growth Pact and the Treaty on Stability, Coordination and Governance), but also a qualitative move towards a fiscal union.'*

4. The new legal instruments as a response to the crisis

The pre-crisis design of the EMU, despite the warnings, was believed to be sustainable to asymmetric shocks via the SGP and the monitoring of the Member States' fiscal policies that would ensure fiscal discipline, as well as the economic surveillance in an intensely integrated trading area. The public finances of the Member States were not the sole drivers of the crisis, but instead property bubbles and imbalances originating mostly from rising private sector expenditures, which were in turn financed by the banking sectors of the lending and borrowing countries, certainly played a crucial role in the crisis.[36] As such, it was not surprising that the rebuilding of the legal framework began from the banking and the financial sector as well as the institutional (re-) design of the EMU.

Temporary, emergency and long term measures were adopted on both the preventative and the managing side of the crisis. These measures can be distinguished on grounds of two broad purviews, inextricably linked with each other.[37] The legal 'back- up' of the provision of financial assistance between the Euro area Member States (bail out)[38] and the transformation of the 'economic governance' set up.[39] Both types of measures deal directly or indirectly with fiscal transfers between Member States or with transfers of fiscal powers between Member States and the EU. Both types, thus, raise issues of fiscal integration and centralisation, seemingly only on the 'budgetary' side of fiscal policies, but likely and indirectly also on the 'taxes' aspect.

35 See the Van Rompuy (et al.), Towards a Genuine Economic and Monetary Union, 26 June 2012, EUCO 120/12, PRESSE 296.

36 See also speech by V. Constancio, 'The crisis in the euro area', Athens 23 May 2013. While from the PIIGS countries, Greece was mostly suffering from a public finance mismanagemt, countries like France were also running on huge debts amounting to 91 % of the French GDP for the year 2012. In contrast, the reason for Ireland's, and to a great extent Spain's recourse to the troika was mostly the property bubble that was growing since the mid- 90 s.

37 See D. Adamski, 'National power games and structural failures in the European macroeconomic governance', (2012) 49 CML Rev.,pp. 1319–1364.

38 See for instance the ESM, EFSF, ESM.

39 See for instance, the 'European Semester', the 'Euro Plus Pact, the 'Six-Pack' Agreement and the 'Fiscal Compact'.

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4.1. Financial Assistance among Member States

4.1.1. Pre-ESM legal instruments: Memoranda of Understanding

Before the establishment of the ESM and before the attestation of its constitutionality by the CJEU, the bail-outs of Greece were based on private law instruments and in specific, Memoranda of Understanding (MoU). The first aid to Greece came together with its 'strict conditionality' that required the implementation, amongst other conditions, of better fiscal surveillance that would guarantee fiscal discipline. The measures were imposed via three MoU[40] that were meant to prevent Greece from defaulting.[41] The first Greek package aid was based on diverging legal instruments: a *sui generis* decision on 2 May by the Ecofin Council meeting in its Euro Group composition;[42] a *Loan Facility Agreement* between Greece and the other euro-area states, settling the availability of credit in the form of pooled bilateral loans for Greece; an *Intercreditor Agreement* among the creditor states;[43] and a *Memorandum of Understanding* (MoU) signed by Greece and the Commission, on behalf of the Member States belonging to the Euro Group, and spelling out the adjustment programme to which Greece committed itself as a condition for the loans. In order to ensure that the Greek MoU would fall under EU law (and thus, would be vested with supremacy against national laws and the national Constitution), the MoU's provisions were incorporated in the Council

40 The MoU has since been reviewed five times. The present MoU is available as an annex to *The Economic Adjustment Programme for Greece – Fifth Review* (European Economy Occasional Papers, Brussels 2011), available at <http://ec.europa.eu/economy_finance/publications/occasional_paper/2011/op82_en.htm> accessed 19 October 2012. The main contents of the MoUs have been reiterated in Council Decisions taken in the excessive debt procedure under Art 126(9). A further element complicating legal implementation of the rescue package consisted of an Agreement between Greece and the IMF in the form of Exchange of Letters, where the Greek government undertook to fully implement the agreed measures, including the MoU.

41 Note here the difference between the 'Greek package' and the Irish and Portuguese ones. In the latter case, it was the EFSM adopted under Regulation 407/2010 and in particular art. 3 (2) thereof, that allowed for the "disposal" of financial assistance to the two countries under financial and budgetary distress: See Council Decision 2011/344/EU on granting financial assistance to Portugal and Council Decision 2011/77/EU on granting Union financial assistance to Ireland.

42 'Draft Statement by the Eurogroup', 2 May 2010, Brussels, available at <http://www.consilium.europa.eu/media/6977/100502-%20eurogroup_statement%20greece.pdf> accessed 19 October 2012. Euro-area Member States had already agreed upon the terms of financial support on 11 April 2010. This agreement was based on statements issued by the Heads of State or Government of the euro area on 11 February and 25 March, where the Euro area member states affirmed 'their willingness to take determined and coordinated action, if needed, to safeguard financial stability in the euro area as a whole'. (European Council, 'Statement by Heads of State and Government of the euro area', 25-26 March 2010, Brussels available at <http://ec.europa.eu/economy_finance/focuson/crisis/2010-03_en.htm> accessed 19 October 2012).

43 <http://www.oireachtas.ie/documents/bills28/bills/2010/2210/b2210 d.pdf> accessed 19 October 2012.

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Decision 2010/320/EU,[44] which was based on Art. 126 (9) and 136 TFEU. A series of additional or amending Decisions followed that were founded directly on Art. 121 (4),[45] 126 (8), (9) and (13)[46] and 136 TFEU.[47]

While MoU in a strictly legal sense belong in the 'soft law' realm, the Irish, Greek and Cypriot MoU certainly did not 'feel' like soft law.[48] The plethora of measures provided in the aforementioned Decisions, very often went much further than simply laying out the framework for better fiscal supervision and 'giving notice to the Member States to take, within a specified time limit, measures for the deficit reduction which is judged necessary by the Council in order to remedy the situation'.[49] Although, the wording of the Decision of 10 May 2010 stipulates that the Decision is 'addressed to Greece with a view to reinforcing and deepening fiscal surveillance and giving notice to Greece to take measures for the deficit reduction judged necessary to remedy the situation of excessive deficit', Article 2 seems to lay down a very specific list of measures to be undertaken by Greece: 'Greece shall adopt the following measures before the end of June 2010: (a) a law introducing a *progressive tax scale* for all sources of income and a horizontally unified treatment of income generated by labour and capital assets; (b) a law *repealing all exemptions and autonomous taxation provisions in the tax system*, including income from special allowances paid to civil servants; (c) the cancellation of the budgetary appropriations in the contingency reserve, with the aim of saving EUR 700 million; (d) the abolition of most of the budgetary appropriation for the solidarity allowance (except a part for poverty relief) with the aim of saving EUR 400 million;(e) a reduction of the highest pensions with the aim of saving EUR 500 million for a full year (EUR 350 million for 2010); (f) a reduction of the Easter, summer and Christmas bonuses and allowances paid to civil servants with the aim of saving EUR 1 500 million for a full year (EUR 1 100 million in 2010); (g) the abolition of the Easter, summer and Christmas bonuses paid to pensioners, though protecting those receiving low pensions, with the aim of saving EUR 1 900 million for a full year (EUR 1 500 million in 2010) […]'.[50]

These issues as well as the constitutionality of the First MoU were scrutinised by the Greek Council of State,[51] where the Greek Supreme Administrative Court found the Memorandum constitutional, dismissing the appeal that had been lodged by the GSEE, ADEDY and other institutions. The Council of State also noted by its deci-

44 See Council Decision 2010/320/EU of 20 December 2010 addressed to Greece with a view to reinforcing and deepening fiscal surveillance and giving notice to Greece to take measures for the deficit reduction judged necessary to remedy the situation of excessive deficit, as amended by Council Decisions 2011/57/EU of 7 March 2011.

45 Council Decision 2010/190/EU.

46 Council Decision 2010/29/EU.

47 Council Decision 2010/182/EU.

48 Similarly, the Commission's 'Economic Adjustment Programme for Greece', May 2010 which aims at imposing fiscal stability and a quick reduction in the fiscal deficit, includes immediate increases of VAT and excise taxes, cuts to public sector wages, pensions, social expenditures and public investments.

49 Article 126 (9) TFEU.

50 See Article 2 Council Decision 2010/320/EU, 10 May 2010.

51 Council of State (Grand Chamber) (Συμβούλιο της Επικρατείας) 668/2012, 20 February 2012.

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sion, that the memorandum does not violate the Constitution,[52] the European Convention of Human Rights and the international conventions, justifying their restrictive terms on the exceptional economic situation that the country experienced.[53] The Council of State further held that 'the fact that the text of the Memorandum was signed on May 3, 2010 between Greece and the Commission does not grant it the character of an international convention. This is because there are no mutual obligations undertaken between the parties, *neither are there any legal means for Greece to be forced to comply or any other legal sanctions to this end*, *neither does it seem that the parties intended to give it legally binding effect*. The fact that the parties did not consider the Memorandum to be of legal binding character is inferred from the fact […] that the 320/2010/EU Council Decision was issued pursuant to articles 126(9) and 136 TFEU, which defined the measures that Greece has to take in order to fulfil its obligation as a Eurozone Member State to limit its excessive deficit according to EU law.' (*emphasis added*)

The judgment has been criticised on several grounds such as its failure to address the legal link of the Memorandum with the Loan Facility or the Council Decision, and for reviewing the constitutionality of the MoU only by reference to the Greek Constitution and not to EU Law.[54] Instead, it confined itself in holding that any obligation or any consequences from no compliance do not derive from the Memorandum as such but, possibly, from the Loan Facility Agreement or the 320/2010/EU Council Decision. In this way, it cautiously diverged with the opinion expressed by the Judge *rapporteur* to the Court, which dismissed the unconstitutionality claims, declaring *inter alia* that the obligation of the Greek State to take the suggested measures flows from the Council Decision, i.e. the membership of the country in the European Union and the EMU.[55] It follows that, despite, the very critical constitutional issues and the legitimacy deficits[56] that were raised because of the MoU and the Council Decision, the

52 The relevant Articles of the Constitution the MoU was found to comply with were: Article 2 on the protection of human dignity, Article 4 on the principle of equality, Article 17 on the protection of property, which includes the concept of salary, Article 25 concerning the principle of proportionality and Article 28 which states that international treaties are ratified by a majority of 180 members.

53 It is worth noting that the Court justified the cuts as serving serious aims of public interest which 'at the same time constitute aims of common interest to the Member States of Eurozone, given the obligation of fiscal diligence imposed by European Union Law and the need to secure the stability of the Eurozone overall'. Paras. 34, 35. See however dissenting opinion para. 36.

54 With the exception of an extensive citation of provisions of the Lisbon Treaty and the Stability and Growth Pact, as well as Greece's course – in a rather historic way – which led to the activation of the European support mechanism, par. 6-8 of the Judgment. In addition, the Council of State rejected the claim of the applicants for a reference for preliminary ruling to the Court of Justice of the EU pursuant to article 267 TFEU regarding the questions whether the country's obligations result from the Council Decision and whether the latter complies with EU law.

55 Report of the Counselor Erene Sarp before the plenary session of the Council of State, 23.11.2010.

56 On issues of (democratic) legitimacy see G. Katrougalos, 'The para-constitution of the Memorandum and the alternative route' [in Greek] (2011) 59 Legal Bema (Nomiko Vima), p.

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Council of State, being an administrative Court, and not a constitutional one,[57] based its decision on the 'non-legal nature' of the restrictions of sovereignty, even if, as it happens, they 'shatter the democratic foundations of the Constitution'.[58] In essence, the Court's reasoning was premised on the *de facto* erosion of the national sovereignty, whose character renders it a non-legal issue, which the Court cannot judge upon.[59]

In September 2011 the German Constitutional Court,[60] when asked to deliver its ruling on the 'Greek bailout package', it examined the case from the other flip of the coin. It held that Germany's participation in the financial aid to Greece did not impede the German Parliament's constitutionally protected right to adopt the budget and control its implementation by the government. In support of this argument, the Court stated that under the German Constitution: "*the decision on revenue and expenditure of the public sector [must] remain in the hands of the German Bundestag as a fundamental part of the ability of a constitutional state to democratically shape itself.* As elected representatives of the people, the Members of Parliament must remain in control of fundamental budget policy decisions in a system of intergovernmental governance as well." (*emphasis added)*

Since MoU constitute 'on the face' and in strictly legal terms soft law measures, despite their 'hard law' fashioning, they can escape the judicial review by the CJEU. Even if their 'hard law' character were to prevail, it is highly unlikely that the Court would feel comfortable to touch upon economic policy issues, as clearly happened in the Pringle judgment.[61] The national measures implementing the MoU can, however, be challenged at the national level as was the case in Portugal, where the constitutionality of the MoU 'crisis' measures was scrutinised by the 'Tribunal Constitucional'

232, K. Trakas, 'What is legally the Memorandum?'[in Greek] (2011) 65 Bulletin of tax legislation, 178; arguing that since the Government was appointed under a diametrically different pre-election program –thus in disharmony with the will of the Greek people that all powers derive from(article 1(3) of the Constitution) – it lacked legitimacy to adopt the austerity policies reflected in the MoU.

57 According to Article 95 (1) of the Constitution of Greece the Council of State is an administrative and not a Constitutional Court, therefore only indirectly can it judge on the constitutionality of a law.

58 For a critical analysis see *inter alia* K. Botopoulos, 'Common Mind and gaps on the Memorandum's Judgment'; A. Kaidagis, 'Big policy and limited judicial review. Constitutional issues and issues of constitutionality in the Memorandum', available at www.constitutionalism.gr, 10 September 2012.

59 Under par. 32 of the judgment, the Court did not consider the loan agreement as a restriction of the national sovereignty (as that understood under Art. 28 (3) of the Constitution) on grounds that the imposed fiscal conditions for the release of the trenches is reasonable for the security of the lenders' rights. It is irrelevant for the Court whether a de facto restriction of the national sovereignty arises because of the MoU, as this issue is not legal and does not fall within the Court's competence. See the convergent opinion of Counsellors Vilaras, Tsimekas and Pispirigos, para. 32 of the Judgment.

60 Judgment of the Second Senate of 7 September 2011, 2 BvR 987/10, 2 BvR 1485/10, 2 BvR 1099/10, press release in English; www.bundesverfassungsgericht.de/pressemitteilungen/bvg11-055en.html (29.2.2012).

61 Case C-370/12 Pringle [2012] ECR I-0000.

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of Portugal.[62] The Portuguese supreme Court found unconstitutional both the severe cuts in bonuses for civil servants and pensioners because they violated the constitutionally enshrined principle of equality that requires the just distribution of public costs,[63] as well as four out of nine austerity measures included in the 2013 Budget the Parliament had approved, excluding however, what the government described as 'enormous' tax increases, aimed at meeting deficit targets required under Portugal's bailout agreement.[64]

The (pre-ESM) 'emergency' response to the crisis has, thus, allowed encroachment upon the fiscal powers of the Member States. This, at first sight is not *a priori* illegal as the Treaty articles (in the framework of economic policies' coordination) encourage fiscal discipline, tightening of public finance and even sanctions in case of excessive deficits.[65] The inherent relationship, however, of the legally curtailed power of a Member 'to spend' and the power of a Member State to tax -- in particular, as the Greek example demonstrates, what types of taxes to levy and at what rates -- which belong in the core of a State's sovereignty and require increased democratic legitimisation allows us to conclude that there is a drift of 'fiscal and tax making' powers to the EU, at least for the Member States that have benefited from the financial assistance mechanisms. The German Constitutional Court in its Lisbon judgment, and even more so in the Greek bailout judgment clearly suggests that *both budgetary and tax policies* belong in the core areas of the concept of self-government and cannot be dislocated from the nation-state,[66] and as such, issues revolving around these policy areas have to be nationally decided, which was has not been the case in either of the financially assisted states.

4.1.2. The ESM bailouts

Following the MoU, the European Financial Stability Facility (EFSF), a *private* company under Luxembourg law with the Member States as shareholders functioned as a temporary crisis resolution mechanism by issuing bonds and other debt instruments

62 Portuguese Constitutional Court, Ruling No. 353/2012, 5 July 2012.

63 Portuguese Constitutional Court, Ruling No. 353/2012, 5 July 2012. With regard to the 'exceptional character' of the measures, the Court, ruled, *inter alia* that: 'The extremely serious economic/financial situation and the need for the measures that are adopted to deal with it to be effective *cannot serve as grounds for dispensing the legislator from being subject to the fundamental rights and key structural principles of the state based on the rule of law, and this is true namely with regard to parameters such as the principle of proportional equality*. The Constitution clearly cannot distance itself from economic and financial reality, but it does possess a specific normative autonomy that prevents economic or financial objectives from prevailing in an unlimited way over parameters such as that of equality, which the Constitution defends and with which it must ensure compliance'. [*emphasis added*].

64 Portuguese Constitutional Court, Ruling No. 187/2013, 5 April 2013.

65 Articles 125 TFEU, 126 TFEU, 1466/1997 and 1467/1997 (The Stability and Growth Pact).

66 GCC, para 249: 'Essential areas of democratic formative action comprise, inter alia, citizenship, the civil and the military monopoly on the use of force, revenue and expenditure including external financing and all elements of encroachment that are decisive for the realisation of fundamental rights.

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on capital markets, in order to provide financial assistance to Greece, Ireland and Spain, while the European Financial Stabilisation Mechanism (EFSM), enabled the Commission to borrow in the financial market up to a total of €60 billion on behalf of the Union and then lend the proceeds to the Member States in need.

The ratification of the ESM Treaty was first challenged before the German Constitutional Court (GCC).[67] The main concerns before the GCC were the preservation of the budgetary autonomy of the German Parliament, which was allegedly at stake by both the ESM and the Fiscal Compact and the extent of Germany's financial obligations to the financial assistance mechanisms.[68] One of the main issues in the GCC's view was whether Article 125 TFEU, providing for the bail out clause, was compatible with Article 136 (3) TFEU. The main argument in favour of their compatibility was that Article 125 TFEU does not prevent the *voluntary grant* of assistance. Instead, the argument goes, Article 136 (3) TFEU "serves to safeguard the stability of the monetary union and specifically does *not make it possible to introduce a comprehensive liability and transfer union*, but instead gives selective authorization, in a situation which is sufficiently clearly discernible, for assistance measures for a limited period of time; in addition, it contains strict conditionality."[69]

Once the *Bundesverfassungsgericht* obstacle was surmounted, the compatibility of the ESM Treaty with the EU Economic Constitution was brought before the Grand Chamber of the CJEU.[70] A lot has been written on the Pringle judgment, but there seems to be consensus that regardless whether one agrees or not with the Court's reasoning, the outcome was a one-way road. The main question to be answered by the Court was whether a (hybrid) supranational organization, such as the EU, or other Member States, could finance another Member State, and if so under what conditions? To this question, part of the literature[71] backed up by the CJEU[72] as well as (partly) by the German Constitutional Court[73] perceived this provision as allowing the financial assistance granted to some Member States (in the auspices of the ESM, EFSF and EFSM), on the basis of Art. 125 TFEU systematic and teleological interpre-

67 Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], Case No. 2 BvR 1390/12, 2 BvR 1421/12, 2 BvR 1438/12, 2 BvR 1439/12, 2 BvR 1440/12, 2 BvE 6/12-Sept. 12, 2012, 2012 NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 3145,.

68 For a detailed analysis in English see: Schmidt, "A sense of *déja vu*? The FCC's Preliminary European Stability Mechanism Verdict", (2013) 14 German Law Journal, 1-20;Wendel, "Judicial restraint and the return to openness: The Decision of the German Federal Constitutional Court on the ESM and the Fiscal Treaty of 12 September 2012", (2013)14 German Law Journal, 21-52.

69 See footnote 67, para. 178.

70 Case C-370/12 *Pringle* [27 November 2012] ECR I-0000.

71 See for instance, De Gregorio Merino, "Legal Developments in the Economic and Monetary Union During the Debt Crisis" (2012) 49 C.M.L. Rev. 1613, 1625–1635; J.-V. Louis, "Guest Editorial: The No-Bailout Clause and Rescue Packages" (2011) 48 C.M.L. Rev. 971, 984; Ph. Athanassiou, "Of Past Measures and Future Plans for Europe's Exit from the Sovereign Debt Crisis: What Is Legally Possible (and What Is Not)", (2011) 36 EUR. L. REV. 558, 561.

72 Case C-370/12 *Pringle* [2012] ECR I-0000.

73 Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], Case No. 2 BvR 1390/12, 2 BvR 1421/12, 2 BvR 1438/12, 2 BvR 1439/12, 2 BvR 1440/12, 2 BvE 6/12-Sept. 12, 2012, 2012 NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 3145.

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tation. Another part of legal academic literature, however, based on a strict literal interpretation of the provision contested the compatibility of this assistance, or in the least its magnitude, with primary EU Law.[74] This controversy related both to the scope and magnitude of the (possible) conditions attached to the 'bailout' of the Member States in need, their implications, as well as to the content and the form of this aid. In this regard, voluntary financial assistance was often considered as not being covered by the 'no bailout clause'.[75]

The CJ in the Pringle case seemed to direct its interpretation towards a politically expected outcome. Through a teleological interpretation[76] the Court held that *the strict conditionality* imposed by the ESM Treaty[77] in exchange for financial assistance was 'intended to ensure that the activities of the ESM are compatible with, *inter alia*, Article 125 TFEU and the coordinating measures adopted by the Union[78] and that the granting of financial assistance will be compatible with the wording, systematic interpretation and *telos* of Art. 125 TFEU, when the Member States remain responsible to their creditors for their commitments;[79] the granted financial assistance is indispensable for the safeguarding of the financial stability of the euro area as a whole;[80] and is further, subject to strict conditionality.[81]

The CJEU, in its Pringle judgment, interpreted Art. 125 TFEU under the prism of the objectives pursued in Articles 123-125 TFEU*; that is the attainment of sound public finances* for the Member States. In the Court's understanding, consequently, the requirement to comply with the 'logic of the market', as predicated in these provisions, appears as the means that will lead to the ultimate purpose, the monetary stability in the Eurozone.[82]

The 'strict conditionality' that legitimizes, according to the Court, the operation of the ESM, raises two issues; its effectiveness with regard to the budgetary discipline of

74 See for instance, Ruffert, "The European Debt Crisis and European Union Law" (2011) 48 C.M.L. Rev. 1777,1785; R. Palmstorfer, "To bail out or not to bail out? The current framework of financial assistance for euro area Member States measured against the requirements of EU primary law" (2012) 37 E.L. Rev., 771-784; J.-V. Louis, "The no-bailout clause and rescue packages" (2010) 47 C.M.L. Rev. 971, 977; J Pipkorn, 'Legal arrangements in the Treaty of Maastricht for the effectiveness of the economic and monetary union' (1994) 31 CML Rev 275; H. Hofmeister 'To Bail Out Or Not to Bail Out?—Legal Aspects of the Greek Crisis, (2010-2011) 13 Cambridge Yearbook of European Legal Studies, 113 – 134.

75 C. Calliess, "The Future of the Eurozone and the Role of the German Federal Constitutional Court" (2012) 31 Yearbook of European Law, 402–415, 408.

76 *Ibid*, par. 129 *et seq*., especially paras. 136 – 137.

77 Article 3, Article 12(1) and the first subparagraph of Article 13(3) of the ESM Treaty.

78 Case C-370/12 *Pringle* [2012] par. 111. See also A. Stanislas and M. Parras, "The European stability Mechanism through the legal meanderings of the Union's Constitutionalism: comment on Pringle" ELR 2013 848-86, S. Thomas, "Commentaire de l'arret Pringle", R.DU.E 2013, 198 seq.

79 Ibid. para. 137.

80 Ibid. para. 136.

81 Ibid. para. 136.

82 See N. Scandamis, The Paradigm of the European Governance: Between Sovereignty and Market, (Ant. N. Sakkoulas, 2006), p. 119 seq.

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the Member States and secondly, the limitation of the fiscal, and by implication tax sovereignty of the Member States.

If we accept that the no bail out clause, as articulated in Article 125 TFEU, is inextricably linked to the Member States' forced (by the capital/financial markets) fiscal discipline, then the creation of an instrument like the ESM, would possibly nullify the beneficiary States' fiscal liability. That is, the guarantee of no default by a mechanism like the ESM and the possibility of other Member States' coming to the rescue in case of a threatening insolvency, would possibly increase the moral hazard ESM Members would engage in, and could lead to excessive lending and fiscal profligacy.

Consequently, a strict principle of Member State fiscal liability, in the sense that each Member State is responsible for the (bad) fiscal/spending choices it makes, seems to be impossible to reconcile with a common, Europeanized monetary policy and the financial stability this requires.[83] The attached strict conditionality to financial assistance, although it mitigates the fiscal liability of the Member States, still leaves much space for an encroachment of all the participating States based not only on the transfers that take place, but also on the possibility of the default of the assisted State.

By reference to the limitation of the fiscal and tax sovereignty of the Member States, the example of Cyprus is telling of the many dangers the ESM 'conditionality' entails. The ESM Financial Assistance Facility Agreement (FFA) provides that the financial assistance to be provided to the beneficiary Member State, shall be dependent upon compliance by the beneficiary State with the measures set out in the Memorandum of Understanding, as signed by the 'Troika' [the European Commission, the European Central Bank and the International Monetary Fund (IMF)] and Cyprus. The commitments Cyprus undertook in the MoU framework include *inter alia*: 'On the revenue side, we increased excise taxes and VAT rates, extended the existing extraordinary contributions on wages scheduled to expire in 2014, and further increased the contribution rate to the general pension system by both employees and employers. [...] At the onset of the program, we will implement measures amounting to 2.2 percent of GDP through the adoption of legislation and Council of Minister decisions, as needed (prior action). *On the revenue side, these measures will include: (i) increasing the corporate income tax rate from 10 to 12.5 percent; (ii) raising the bank levy rate from 0.11 to 0.15 percent; (iii) raising the withholding tax rate on interest received to 30 percent; and (iv) reforming the property tax;* and (v) other. These measures are expected to yield 2 percent of GDP. On the expenditure side, we will rationalize housing benefits, which will save 0.2 percent of GDP' [*emphasis added*].[84]

As the Financial Facility Agreement (FFA) shows, Cyprus and its tax competitive scheme together with the low corporate tax rates have been in the lens of the 'strong' Euro Member States, notably Germany and France, for a long time now. The low tax rates Cyprus provided to attract capital and investment have been identified as a 'risk' the investors have to bear for their choices, according to Schäuble.[85] Despite, howe-

83 K. Tuori, 'The European Financial Crisis- Constitutional Aspects and Implications' (2012/28) EUI Law Working Paper.

84 Paragraphs 22 and 24 of the Memorandum of Understanding between the 'Troika' and Cyprus, 29 April 2013.

85 Q. Peel, Germany senses unfairness over Cyprus plan, Financial Times, 2 April 2013, http://www.ft.com/intl/cms/s/0/31a5505c-f8ed-11df-99ed-00144feab49 a.html#axzz2ZVz9nZbf.

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ver, being legally a low tax jurisdiction, Cyprus' FFA and Memorandum of Understanding demand an increase of its corporate tax rates from 10% to 12.5% in order to qualify for the financial assistance by the ESM.

Ireland, another Member State that has benefited from financial assistance and one of the main beneficiaries of tax competition was 'attacked' by reason of the crisis and the financial assistance it received. The main contributors to the EU pool of funds, such as Germany, have traditionally been hostile to low tax jurisdictions such as Ireland and Cyprus.[86] France and Germany, before Ireland resorted to financial assistance, were persistently calling on the Irish prime minister to increase its low corporate tax rates of 12.5 %, as a condition for any bail-out.[87] This requirement was, however, not included in the official bailout agreement, possibly by virtue of the British support of Ireland and the successful negotiations of Ireland with the troika.

The crisis thus demonstrated that there is a possibility of a *forced* increase of tax rates for the lowest tax jurisdictions in need, not emanating from a stricter legal framework but rather from the traditional 'losers' of tax competition pressures, like Germany and France. The possibility that we are driven towards a politically initiated *de facto* curtailment of tax competition is not impossible, in particular since the traditional 'beneficiaries' of tax competition are States with vulnerable economies in need of financial assistance.[88] It is likely that had not Ireland had the support of the UK, it would have preceded Cyprus in a forced increase of its corporate tax rates, towards less harmful competitive policies.

The strict conditionality imposed to the 'assisted' Member States, for the release of the loan *tranches* both in the pre- and post-ESM era, imposes, thus, in most cases substantial tax reforms. The importance of these loans for the sustainability of the States at issue, together with the strict conditionality imposed under the terms of the respective MoU or the EFSF and ESM agreements, attach to these commitments a *de facto* binding character. The example of Cyprus, and to a lesser extent of the other 'recipient Member States, is telling of the importance the troika has acquired in the shaping of national tax systems. In fact, in contrast to the many unsuccessful hard law and coordinative efforts undertaken in the framework of the fight against harmful tax competition, the Troika and the MoU, EFSF and ESM agreements emerge as a new *de facto* coercive actor and mechanism, capable of adapting even the hard core of the direct tax laws of the Member States (the tax rates) to the levels of the less competitive and more powerful Member States.

86 The corporate tax rate applicable to companies resident in Ireland as well as to non-resident companies which carry on a trade in Ireland through a branch or a subsidiary, was 12.5% since 2003. Indicatively the arithmetic average of the adjusted top statutory tax rateon corporate income for 2008 in the EU 27 was 23.6%, with the only countries offering lower tax rates than Ireland being Bulgaria and Cyprus, with a corporate tax rate of 10%.

87 See for instance P. Davies, 'Lobbies say Ireland's 12.5% rate is secure', Financial Times, 26 November 2010, http://www.ft.com/intl/cms/s/0/31a5505c-f8ed-11df-99ed-00144feab49 a.html#axzz2ZVz9nZbf; Charlemagne, 'Tax Torment', The Economist, 17 March 2011.

88 This finding does not overlook the BEPS developments in the international and European arenas that aim to curb, inter alia, harmful tax competition.

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5. Issues of democratic legitimacy

Control of and accountability for fiscal profligacy was one of the many institutional and constitutional imperfections that arguably led to the crisis. This was partly a democratic problem in the sense that the liberal state — as enforcer of market discipline — might be regarded to have succumbed in many places to the democratic state which did not wish to implement any fiscal consolidation measures in order for the national governments to be re-elected.[89]

While the new design was largely premised on voluntary policy coordination, international treaties, and 'inter-governmental private law', highlighting thus, the *intergovernmental character* of the new 'Economic Constitution', democratically deliberative decision-making and judicial accountability are still lacking in a matter which has become central for the definition of economic policies within the Union and its Member States – fiscal policies. This is a problem of 'democratic oversight' in the development of the EU's macro- economic constitutional model. It raises persistently fundamental constitutional questions for the Union pertaining to issues of legality, (social and democratic) legitimacy and compliance with the rule of law principles.

Next to the immediate disbursement of funds to avoid a potential default of Greece, the economic governance re-design was the second step to address the crisis. But as both components of crises-prevention and crises-resistance measures provided for a stronger EU and an increased use of EU 'institutions' into the realms of national sovereignty, increasing concerns were raised on the part of national governments, citizens and national courts as to the Member States' encroachment of sovereignty. Taking into account that the GCC had already seen a transfer of too many or inadequately defined competences from the Member States to the EU and had expressed its concerns on what was perceived as an expansion of power by the Commission and the European Court of Justice in 2009,[90] it was to be expected that the renewed pressure stemming from the external shock of the financial crisis to 'communitarise' additional areas of economic and fiscal policy-making would not be very well received by all Member States. In the first reference for a preliminary ruling by the GCC, the Gauweiler case[91] and the subsequent Weiss case,[92] Germany's budgetary and constitutio-

89 Huw Macartney, 'The paradox of integration? European democracy and the debt crisis' (2014) Cambridge Review of International Affairs, 12.

90 Lisbon Case, BVerfG, 2 BvE 2/08 from 30 June 2009, available at: http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208.html. For a comment, see, Christian Wohlfahrt, ,'The Lisbon Case: A Critical Summary' (2009) 10 German Law Journal, 1277-1286 and P. Becker and A. Maurer 'German Brakes on Integration – Consequences and Dangers of the Federal Constitutional Court Judgment for Germany and the EU' in Stiftung Wissenschaft und Politik (SWP) Comments (15 August 2009).

91 Case C-62/14 Gauweiler and Others v. Deutscher Bundestag, EU:C:2015:400. Opinion of Advocate
General Cruz Villalón in Case C-62/14 Gauweiler and Others v. Deutscher Bundestag, EU:C:2015:7.

92 Case C- 493/17. The Public Sector Purchase Programme (PSPP) is a programme adopted by the ECB on 15 January 2015 which provides for an expanded programme of purchase of assets made up of Eurozonegovernment bonds and securities from European institutions and (some) national agencies.

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nal preoccupations as to the legality of quasi fiscal transfers measures, such as bond buying by the ECB in secondary markets and the Public Sector Purchase Programme (PSPP) respectively, were demonstrated. Yet, Germany's very recent agreement to the long-standing French proposal of the establishment of an EU budget whose purpose would be 'fiscal transfers' from the 'strongest' states to the 'weakest' ones appears to wipe out the hesitations towards the EU's federalisation.[93] While there seems to be consensus that this agreement is more of a political compromise without much ambition, it at least a declaration of the two main players of the Eurozone to move forward.[94]

One of the reasons why this 'communitarisation' of tax and fiscal policies has not popular among many Member States is because it falls short of democratic legitimacy. As under the new economic governance system the problems of distributive justice became more visible, the need for higher democratic legitimization rose and the requirement for a deliberative, political debate about economic policies increased.

This higher democratic legitimization was, however, not fulfilled. Its absence can be traced on three different interlinked elements of the new European economic Constitution; the degree of the measures' intrusion to sensitive policy areas such as fiscal, social and tax policies; the procedures under which these measures were decided and the (lack of) democratic legitimation and accountability of the decision-making institutions.

With regard to the first point, the aforementioned section showed how both the bail-out terms as well as the very precise prescriptions as to the national budgets' management and the requirements for increased budgetary discipline have increased tremendously the involvement of the EU in tax and fiscal decisions. Conditionalities or Country Specific Recommendations in the context of the European Semester, pertaining for instance to employment, social security and taxation issues require 'higher' democratic legitimacy than a strongly inter-governmental approach can deliver.

In order to achieve this, the design of decision making procedures in the EMU and the EU economic governance need to ensure that the views and interests of those affected by these decisions can potentially influence the policy choices made. Leaving aside the theories about the EU's increasing democratic deficit, such a democratic legitimization could only be safeguarded by the increased, if not sole, participation of the European Parliament (EP) in these deliberations and decisions. The EP's role seems, however, extremely undermined in these decision-making procedures. *Trichet's* suggestion regarding the creation of an Economic and Fiscal Union by Exception had tried to tackle this democratic legitimacy problem by establishing an empowered European Parliament, the members of which are the only directly elected

93 The 'Meseberg Declaration' signed on 19 June 2018 between Germany and France, proposes, inter alia, establishing a Eurozone budget within the framework of the European Union to promote competitiveness, convergence and stabilization in the euro area, starting in 2021..

94 For an overview of the opinions on the Meseberg Declaration, see S. Merler, ' The Meseberg declaration and euro-zone reform', Bruegel blogpost published on 25 June 2018 available at: http://bruegel.org/2018/06/the-meseberg-declaration-and-euro-zone-reform/.

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members by the EU citizens.[95] Nevertheless, even the attribution of extensive decision-making powers to the EP does not seem enough to justify the deeply intrusive nature of the 'new' crisis measures. In order to counter the democratic and political accountability of the central authority, *Vanistendael* suggests, in the same 'fiscal Union by exception' framework, the creation of a new mechanism either under the enhanced cooperation procedure or the setup of a new Treaty between the Eurozone States that would postulate the transfer of precisely defined and enumerated *taxing and spending decisions* in times of crisis to the designated centralized institution, and a reorganization of the European Parliament to enable it to exercise effective and democratic political control over this institution. Both theories, however, fall short both in terms of feasibility as well as competence and legitimacy, as there is currently no democratically elected, institutionally competent and effectively capable institution in the EU to assume and handle these powers. *Trichet's* view purports the setting up of a ministry of Finance of the Euro area, which would have the responsibility of the activation of the economic and fiscal federation when and where necessary, while it would be responsible for the handling of the crisis management tools like the ESM.[96] Another suggestion advances the ECB as the optimal solution -- an institution that certainly does not meet the democratic legitimacy criterion, or a new institution to be created within the Euro group that would fulfil the political legitimacy and accountability criteria.[97]

The most recent proposal to overcome the shortcomings of the Eurozone governance is the creation of a European Monetary Fund (EMF) that would allow for financial aid to countries hit by economic shocks. The EMF would replace the ESM and would have extensive competences, including acting as a lender of last resort in banking crises. The main characteristics of the EMF would be that the European Council would be given the possibility to approve or reject bail-out programmes, the disposition of more instruments and more money to support crisis-afflicted states and banks and the obligation to report regularly to the European Parliament and national parliaments on its activities, with a view to achieving greater democratic control. If materialised, it would present the ultimate, so far, 'fiscal transfers' mechanism as it would provide for grants and loans to countries in need. This proposal was linked to

95 J.C.Trichet, 'Reflections on Unconventional Monetary Policy Measures and on European Economic Governance: Towards an Economic and Fiscal Union by Exception', Mandeville Lecture 2012- Erasmus University, Rotterdam 6 June 2012, argues in favour of a strong democratic anchoring of the 'federation by exception' concept: 'That is the reason why the European Parliament should be called to play a fundamental role in the decision, on top of the traditional role played by the Commission and the Council. More precisely, for the decisions to be effective, the European Parliament would have to approve by a majority vote the measures proposed by the Commission and already approved by the Council. Naturally, as long as the Euro area does not coincide with the European Union as a whole, only the members of Parliament elected in the countries members of the Euro area would vote.'.

96 J.C. Trichet, 'Reflections on Unconventional Monetary Policy Measures and on European Economic Governance: Towards an Economic and Fiscal Union by Exception', Mandeville Lecture 2012- Erasmus University, Rotterdam 6 June 2012.

97 F. Vanistendael, 'The Crisis: A Window of Necessity for EU Taxation' (2010) European Taxation, p. 397.

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the re-consideration of the introduction of a European minister of economy and finance for the Eurozone.

However, Member States' reactions to the Commission's blueprint for the fund have been lukewarm.[98] The main fear has been that the Fund would be controlled by EU institutions and would lack the necessary additional democratic guarantees that would come with such extensive fiscal powers. The EMF, has been criticised, in addition to its democratic illegitimacy and un-accountability, for its effectiveness on grounds of a potential moral hazard and an uneven burden – sharing that would certainly not function as a future crises' preventive mechanism; 'Investors should certainly not be encouraged to grant states easy access to credit in the knowledge that taxpayers of other countries will meet the costs of an excessive debt burden either. Democratic control over and participation in European institutions is desirable, but the latter must remain able to respond fast to crises. Control should ultimately remain with those who are responsible for funding the bail-out policy. To date that means national parliaments, not European institutions.'[99]

A focus on the conditions to be fulfilled by the financially assisted states shows that the (vertical) transfer from the national to the supranational that incorporated *inter alia* fiscal-, tax-, employment- and social policy making powers has rendered the European Council into a decision-maker with budgetary implications for the Member States. The result, in terms of institutional balance, is a more political administration in the Union consisting of the European Council setting the main policy orientations; the Council coordinating EU economic policy mostly within the ECOFIN and Eurogroup constellations which are becoming increasingly institutionalized as *loci* where eminently political decisions, such as the design of the rescue plans, are taken under political bargaining.[100]

But even in the European Council, where 'sensitive' policy areas are taken to be discussed[101] and where a democratic representation of the Member States and their citizens can be claimed, the democratic representation benefit is eradicated by the fact that not all states have in practice an 'equal say'. Similarly, in the other executive configurations, the ECOFIN Council and the Eurogroup, not all ministers appear to have the same bargaining power. Even within this allegedly rather homogeneous group of countries, Member States can be divided between 'donors' and 'recipients', as it happens with the EU structural and investment funds. The recipients need not necessarily be under financial assistance but their exorbitant debt or deficit levels make them weak actors in the political bargaining.

98 Jim Brunsden and Mehreen Khan, Brussels calls for creation of European Monetary Fund, Financial Times (6 December 2017), available at: https://www.ft.com/content/3dc16660-da8a-11e7-a039-c64b1c09b482.

99 C. Fuest, 'A three-step plan for a better European Monetary Fund', EurActiv (5 January 2018), available at: https://www.euractiv.com/section/economic-governance/opinion/a-three-step-plan-for-a-better-european-monetary-fund/.

100 C. Callies, 'From Fiscal Compact to Fiscal Union? New Rules for the Eurozone,' (2011-2012) 14 Cambridge Yearbook of European Legal Studies, p. 114-115. See also Joseph H. H. Weiler, Speech 'The Legitimacy Credit Crunch of the European Union' Keynote Speech at the Opening of the XXV 2012 FIDE Congress in Tallinn.

101 U. Puetter, *The European Council and the Council: New Intergovernmentalism and Institutional Change,* (Oxford, OUP 2014), p. 57.

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Instead, at the EU level the 'Community method' and the political power restraint it entails, have been 'increasingly overshadowed by a hardnosed and German-dominated intergovernmentalism'.[102] Given the discrepancy between powerful and less powerful Member States in the European Council and the Council, the dominance of Germany in all 'executive' policy-making institutions (with the exception of the Commission) comes with the implication of the enforcement of the most powerful states' or the German archetypal ideas, which are reflected, for instance, in the MoU, such as 'more economic liberalism', budgetary consolidation and the curtailment of tax competition for all other Member States.

The role of the Commission has been reinforced in that it now plays a central role in monitoring implementation, and thus disciplining Member States and making detailed proposals for measures in EMU matters;[103] the ECB has also been upgraded with its role in monetary policy.

This institutional overhaul has implications for whether sovereignty resides exclusively within the Member States or whether it is exercised as shared "competence" at the EU level. It also has effects as to how these policy decisions are taken – by democratically elected and accountable office holders or by experts who are not subject to answer to democratic accountability in case of failure of their policy approaches. The effect is particularly felt in those countries under financial aid.

The first evident finding is that the EU has always suffered and continues to suffer from an increasing democratic deficit and relating structural deficiencies that stem partly from the lack of political integration. But in order to address the increasingly democratically un-legitimized curtailment of the national sovereignty, all the more so in 'sensitive' policies, such as tax, fiscal and social policies, conditions have to be created that would allow the transfer of these issues from a technocratic 'expert' driven approach in the Council towards a more political, deliberative discourse about the best way forward and for a self-correcting political process of public debate in place.[104] The result is the need for a stronger political debate and politicized legitimization of Union policies.[105]

On the European level, a first step of strengthening the political responsibility of the Commission has been made by linking the nomination of the Commission president to the majorities in the European Parliament. Thereby, a transfer from a quasi intergovernmental presidential system towards a system infused with a more parliamentary approach has been achieved.

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102 N. Scicluna, 'Politicization without democratization: How the Eurozone crisis is transforming EU law and politics', (2014) 12 International Journal of Constitutional Law, 545, 553.

103 See Peter Spiegel, 'France faces possible sanctions from Brussels on budget' *Financial Times* (London, 28 November 2014), available at: http://www.ft.com/intl/cms/s/0/d5ccf3d4-76e2-11e4-944f-00144feabdc0.html#axzz3RAffq4Du (last accessed 9 February 2015).

104 Jürgen Habermas, 'Europe's post-democratic era – The monopolisation of the EU by political elites risks reducing a sense of civic solidarity that's crucial to the European project', the Guardian 11 November 2011.

105 Sergio Fabbrini, 'After the Euro Crisis: The President of Europe, A new paradigm for increasing legitimacy and effectiveness in the EU', EuropEos Commentary, CEPS Paper No. 12/ 1 June 2012, p. 2.

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6. The crisis as a springboard towards further tax integration?

Despite the unpopularity of the indirect 'communitarisation' of the Member States' tax and fiscal policy-making, among the citizens of the EU, the EU remains far from a tax and fiscal Union. In sharp contrast to the rise of 'Euro scepticism' in many Member States, politicians,[106] policy makers,[107] EU executives,[108] academics[109] and Nobel Prize laureates[110] seem to consent over the advantages of moving towards greater fiscal integration.[111] Such fiscal integration could progress or be built on several layers; for instance by the introduction of fiscal transfers from national budgets towards the creation of a common budget as a long term response to the debt crisis (fiscal integration *stricto sensu*); or towards more fiscal integration and 'direct tax integration' (fiscal integration *lato sensu*); or it could proceed in terms of an 'intensity' scale, i.e. we can aim to 'less fiscal integration', 'more fiscal integration' or even a 'fiscal union'.

Fiscal integration in its minimal form, would most likely take the form of fiscal cooperation whereas a 'fiscal union' would possibly imply not only an EU fiscal budget and fiscal transfers between Member States with a redistributive purpose, but also a common tax rate, tax base and tax system in general. A fully-fledged fiscal union would, consequently, necessitate the development of a stronger capacity at the European level, capable to manage economic interdependencies, and ultimately the development at the euro area level of a fiscal body, such as a treasury office. Such a suggestion has, so far, failed on grounds of the selection of an institution that would combine all rule of law characteristics. Elements of a fiscal Union already exist in the current framework. Such elements comprise a) a set of rules for the fiscal policy coordination and supervision of the Member States, similar to the ones existing in the new Six Pack, Two Pack and the Fiscal Compact, b) a crisis resolution mechanism, along the lines of ESM, c) fiscal equalisation and other mechanisms for transfers between countries, including major transfers by the Member States to the EU budget, on top of the structural and regional funds, as well as the funds destined to agricultural policy.[112]

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106 J.C.Trichet, 'Reflexions on Unconventional Monetary Policy Measures and on European Economic Governance: Towards an Economic and Fiscal Union by Exception', Mandeville Lecture 2012- Erasmus University, Rotterdam 6 June 2012.

107 European Commission, Communication 'A blueprint for a deep and genuine economic and monetary union Launching a European Debate', COM(2012) 777 final/2 (30 November 2012);'Tomasso Padoa Schioppa Group', 'Completing the Euro: A road map towards a fiscal Union in Europe' Report Notre Europe- Jacques Delors Institute, 26 June 2012.

108 Van Rompuy (et al.) Report: Towards a Genuine Economic and Monetary Union (5 December 2012).

109 F. Vanistendael, 'The European Union' in G. Bizzioli and C. Sacchetto (eds) *Tax Aspects of Fiscal Federalism: A comparative analysis* (IBFD, Amsterdam 2011).

110 2011 Nobel laureates in economics Christopher Sims and Thomas Sargent made a point at a press conference held at Princeton University in October 2011 that "If the euro is to survive, the euro area will have to work out a way to share fiscal burdens".

111 With the exception of the traditionally Eurosceptic Member States and their executives, like the UK, and the Member States that benefit from tax competition, like Ireland.

112 See C. Fuest and A. Peichl, 'What is it? Does it Work? And are there really 'no alternatives'?' CESifo Forum paper 1/2012.

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The Commission's recently launched discussion on the fiscal capacity of the EMU, suggesting, among other solutions, a Treaty amendment to include a legal basis attributing tax raising powers to the EU, seems highly unlikely in view of the unanimity required under the ordinary legislative procedure in order to proceed to such a conferral of a new competence.[113] The merits of such an unrealistic proposal were listed by the Commission in the same document: 'In contrast, that problem [the fundamental accountability problem in case of joint and several guarantees of all euro area Member States] would no longer arise in a full fiscal and economic union which would itself dispose of a substantial central budget, the resources for which would be derived, in due part, from a targeted, autonomous power of taxation and from the possibility to issue the EU's own sovereign debt, concomitant with a large-scale pooling of sovereignty over the conduct of economic policy at EU level. The European Parliament would then have reinforced powers to co-legislate on such autonomous taxation and provide the necessary democratic scrutiny for all decisions taken by the EU's executive. Member States would not be jointly and severally liable for each other's sovereign debt but at most for that of the EU'.[114]

Space prevents me from addressing all the legality issues pertaining to the introduction of a fiscal capacity of the EMU. However, and while leaving all the normativity issues aside, even if we assume that the relevant Art. 113 and/or Art. 311 TFEU are meant to give the Eurozone tax raising powers -- a statement the Commission and many scholars do not endorse – the (unfeasible or not very probable to be attained) unanimity required under both provisions should not be neglected. This unlikelihood in conjunction with the unlikelihood, to say the least, of a Treaty amendment, suggests only one possibly (more) tenable solution; building the tax raising or tax policy making power of the EMU on the legitimacy-shaky grounds of the enhanced cooperation, as was eventually employed for the introduction of the – failed- Financial Transaction Tax. Recourse to the *passerelle clause*,[115] if accepted at the Council level, would enhance the democratic legitimacy of such a decision but would certainly add to the unfeasibility of such an undertaking.[116]

113 The creation of a new taxation power at the EU level, or a power to raise revenue by indebting itself on the markets (presently arguably barred by Articles 310 and 311 TFEU) would require unanimity as provided under the ordinary revision procedure in Article 48 TEU.

114 European Commission, Communication from the Commission, 'A blueprint for a deep and genuine economic and monetary union: Launching a European Debate', COM(2012) 777 final, 30 November 2012.

115 The Treaty of Lisbon has introduced passerelle clauses in order to be able to apply the ordinary legislative procedure to areas for which the Treaties had laid down a special legislative procedure. Furthermore, these clauses also allow voting by qualified majority to be applied to acts that are to be adopted unanimously. There are two types of passerelle clause: the general passerelle clause applying to all European policies whose activation of this clause must be authorized by a Decision of the European Council acting unanimously and the specific passerelle clauses relating to certain European policies.

116 The enhanced cooperation mechanism does not attribute to the European Parliament the requisite role for the fulfilment of the principle 'no taxation without representation'. Instead, the Parliament's role could only be upgraded through the use of the '*passerelle* clause*'* as provided in Art. 333 (2) TFEU. On the '*passerelle* clause' see Giuliano Ama-

https://doi.org/10.5771/2193-7869-2016-3-236 - Generiert durch IP 216.73.216.147, am 28.01.2026, 10:51:32. © Urheberrechtlich geschützter Inhalt. Ohne gesonderte Erlaubnis ist jede urheberrechtliche Nutzung untersagt, insbesondere die Nutzung des Inhalts im Zusammenhang mit, für oder in KI-Systemen, KI-Modellen oder Generativen Sprachmodellen.

A fiscal Union *lato sensu*, that is one encompassing both fiscal and tax competences would entail, thus, the transfer of taxing competences from the Member States to the EU, a very unlikely prospect at least in the near future, despite its discussion at a political level.[117] Despite the Commission's urging, the idea of granting the EU a genuine power to tax has attracted a lot of opposition.[118] Such a vehement reaction seems an odd one first, because the contributions from Member States to the EU budget, even to a limited extent, were established already in the founding Treaties of the EC.[119] Currently, this 'redistributive idea' is embedded in the 'EU cohesion' policy which stems from the intuitively reasonable assumption that the 'less favoured' regions are in need of 'EU funding' in order to be able to compete in the common market against the more favoured ones.[120] Secondly, the idea of granting the Union tax powers was reintroduced before and during the negotiations of the 'failed' Constitutional Treaty and as a result of the Laeken Declaration.[121] Although this suggestion did not come free of opposition,[122] the establishment of a genuine European power to tax was advocated at different stages of the Convention on the Future of the Union.[123] Evidently, the Constitutional Treaty was not adopted but the voices in favor of the

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to 'Future prospects for a European Constitution' in G. Amato et al. (eds.) *Genesis and Destiny of the European Constitution* (Brussels, Bruylant 2007), 1271, 1272. On the use of the '*passerelle* clause' in the EU's tax raising powers, see Federico Fabbrini, 'Taxing and spending in the Eurozone: legal and political challenges related to the adoption of the financial transaction tax' (2014) 39 (2) E.L.Rev. 2014, 155, 173-174.

117 European Commission, Communication 'A blueprint for a deep and genuine economic and monetary union Launching a European Debate', COM(2012) 777 final/2 (30 November 2012);'Tomasso Padoa Schioppa Group', 'Completing the Euro: A road map towards a fiscal Union in Europe' Report Notre Europe- Jacques Delors Institute, 26 June 2012; Van Rompuy (et al.) Report, Towards a Genuine Economic and Monetary Union, 26 June 2012, EUCO 120/12, PRESSE 296.

118 A *maiore ad minus* see for instance all those opposing any steps towards further harmonization of direct taxation.

119 See Art. 200 and 201 EEC Treaty and Art. 172 Euratom Treaty. For a thorough analysis see, Agustin José Menéndez, 'Taxing Europe: Two Cases for a European Power to Tax (with some comparative observations' (2004) 10 Columbia Journal of European Law, 297, 301 *et seq*.

120 The largest source of revenue for the EU budget, which, in turn, funds cohesion objectives, remains the 'own resources based on GNI'. According to this model, each Member State transfers a standard percentage of its GNI to the EU. The other two sources of 'funding' for the EU budget are customs duties on imports from outside the EU and revenues arising from the VAT.

121 For a thorough analysis of the 'bargaining' for the introduction of an 'EU power to tax' in the framework of the Constitutional Treaty see, Agustin José Menéndez, 'Taxing Europe: Two Cases for a European Power to Tax (with some comparative observations' (2004) 10 Columbia Journal of European Law, 297, 298-300.

122 *See Eurotax call axed from EU blueprint,* Eur. Voice (London), Jun. 28, 2001; *Reynders told not to talk up EU-wide tax,* Eur. Voice (London), Jul. 5, 2001.

123 See for instance the contribution from Diego López Garrido, José Borrell and Carlos Carnero, (CONV 329/02) available at: http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0CB4QFjAA&url=http%3A%2F%2Feuropean-convention.europa.eu%2Fpdf%2Freg%2Fen%2F02%2Fcv 00%2Fcv 00329.en02.pdf&ei=I77IVLrPH4f9UszSg5gI&usg=AFQjCNHh_WClkC7DX4pyG6bNC6TL4gQFMA&bvm=bv. 84607526,d.d24 (last accessed 28 January 2015), where the members of the Eu-

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need for the introduction of an EU tax were echoed in the Commission's Communication on the financial perspectives for 2007-2013.[124]

Although, thus, the establishment of a fully-fletched tax and fiscal Union seems rather far-fetched, we already observe that the fiscal policies 'crisis packages' will 'drag' or 'drift' the tax policies, leading the emergence of a *de facto* tax integration. This is certainly reinforced by the international developments in the context of the Base Erosion and Profit Shifting (BEPS) Actions initiated by the OECD,[125] which have been implemented, to a certain extent, at EU level.[126] In the economic governance limb, the prescribed consolidated budgetary policies come together with, besides expenditure restraints, specific direct tax policy requirements. Balanced budget provisions, as the ones included in the 'Six-Pack' and the European Semester, require national governments to adopt budgets that raise enough revenue to cover expenditure. The changes in the national tax systems, in particular the biggest 'sufferers' from the crisis, need not necessarily consist only in an increase in tax rates but also on a review of 'tax expenditure' and the improvement of the efficiency of tax collection and administration.[127] In this regard, the encroachment of fiscal policies presumably, might have a "domino" effect to the very closely related field of direct taxation, since direct taxation constitutes an instrument of the implementation of fiscal policies. The establishment of a bigger and more elaborate 'fiscal transfers' mechanism for countries in need, such as the EMF, will also have repercussions to the use of the taxpayers' money by the Member States. Therefore, it is possible that secondary legislation is introduced, targeted to regulate issues that relate directly or indirectly to the 'direct taxation' competence of the Member States. This 'conversion' as a result of the need for fiscal consolidation has already been observed in the increase of the overall tax burden in the majority of Member States and the narrowing of the tax base in corporate income taxation.[128]

Besides the institutional fiscal consolidation trends, the conditionalities that have come with the MoU and ESM bailouts point towards a coercion of the 'recipient' of financial assistance Member States to change their tax systems in light of the crisis, in particular with regard to competitive tax rates. This supranational intervention can be

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ropean Convention argue that: 'The EU's new missions and its enlargement process will require a profound transformation of its financial resources system to make it more solid, more stable and more sufficient […]For this reason, the EU should make constitutional provision for the following fiscal priorities […] b) the *creation of a European tax* (without increasing the total tax burden on the taxpayer) to finance the community budget.' (emphasis added).

124 Communication from the Commission: 'Financial Perspectives 2007-2013' COM(2004) 487 final: 'Where a euro spent through the EU Budget will bring more return than a euro spent at national level, this is the best way to offer value for money to the taxpayer. Pooling national resources at EU level can bring major savings for national budgets', p. 5.

125 http://www.oecd.org/tax/beps/.

126 See for instance the administrative cooperation in tax matters Directives and the Anti-Tax Avoidance Directives.

127 European Commission, 'Taxation Papers: Monitoring tax revenues and tax reforms in EU Member States 2010 – Tax policy after the crisis', Working Paper 24/2010, p. 9.

128 European Commission, 'Tax Reforms in EU Member States: Tax policy challenges for economic growth and fiscal sustainability', Report 6/2014.

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twofold: As the example of Ireland and Cyprus showed, the most powerful Member States have pushed for a curtailment of ‘competitive tax rates’. In the Greek example, the ‘Troika’ has imposed higher tax rates in both VAT and personal and corporate income taxes. It has further introduced new taxes in an attempt to raise revenue.

This paper concludes with the finding that although democratic legitimization at the EU level in terms of taxation is limited, the ongoing financial crisis has reduced it to a big extent. This has happened not only in terms of the absence of the application of democratic principles by elected and accountable governments, but also by reference to the respect of fundamental rights and the socio-economic order as a whole. To this has contributed the curtailment of the distributional capacities and choices of the ‘national tax systems’ by the EU. How can a Member State be considered ‘tax’ and ‘fiscally’ sovereign when it is the EU that in direct or less direct ways decides on the drafting of one country’s budget and its compliance with EU budgetary rules? And how can decision-making on ‘taxation’ be attributed to democratically elected governments when taxation’s counter-party, that is, the budgetary decisions of a state are heavily influenced by the EU’s choices?

One way to improve democratic legitimacy and accountability in the EU in the area of taxation would be to allow the EU to raise taxes and be outspokenly responsible for an EU tax policy. Attributing, however, to the EU tax raising and tax decision-making powers in *a democratic manner* remains unrealistic for two interrelated reasons: Political consensus by all or by Eurozone States and the burdensome process of a Treaty amendment.

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