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European economic governance: challenges for judicial control?

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1. The role of the Court of Justice in EMU: a glance at the past. 2. Recent case-law: the beginning of a new season? 3. New international instruments of economic governance: the role of the Court of justice in the ESM Treaty and in the Fiscal Compact. 4. Compatibility with EU law of the Treaties provisions relating to the Court's jurisdiction. 5. Further developments: towards progressive "jurisdictionalisation" of control over economic policies?

1. The role of the Court of Justice in EMU: a glance at the past

The reform of European economic governance [1] and, in particular, the recent adoption of some international legal instruments constitute a challenge for the Court of Justice, which is taking on a role that previously it did not perform. In the past, the Court of Justice seldom intervened on questions related to EMU. Of these few cases, it is worth mentioning the Court's judgment of 13 July 2004[2]. On that occasion, the Commission brought an action for annulment of the Council decisions of 25 November 2003 not to adopt, in respect of the French Republic and the Federal Republic of Germany, the formal instruments contained in Commission recommendations pursuant to Article 104(8) and (9) EC (now Article 126 TFEU). The Commission also challenged the validity of the Council's decisions which contained a favourable assessment of the measures implemented by the two Member States in the excessive deficit procedure against them (Article 104 (7) EC).

The judgment is of considerable importance and deserves more in-depth analysis than is possible here. However, for the purpose of this paper, it is worth pointing out that this judgment can be read as a first step towards the "jurisdictionalisation" of control over economic policy[3]. The Court underlined that the authors of the Treaty had stressed the urgent need for all Member States to comply with budgetary provisions and to ensure effective interpretation of such rules[4]. The Court also pointed out that no infringement procedure may be brought against any Member State involved in an excessive deficit procedure; this rule remains unaltered even after the Lisbon reform[5]. Responsibility for obliging Member States to observe budgetary regulations lies with the Council, which holds the discretionary power to freely modify Commission recommendations upon majority only if measures adopted by the Member States are re-assessed. However, according to the Court, this power is limited when the Council has already issued a

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[1] Debate on this topic is extensive. See for instance, F. Allen, E. Carletti, S. Simonelli (eds.), *Governance in the Eurozone – Integration or Disintegration*, Policy Report -WP2, FIC Press, Philadelphia, 2012, B. de Witte, A. Héritier & A. H. Trechsel (eds), T*he Euro Crisis and the State of European Democracy-Contributions from the 2012 EUDO Dissemination Conference*, European University Institute, 2013; M. Eugenia Bartoloni, A. Caligiuri, B. Ubertazzi (eds), *L'Unione europea e la riforma del governo economico della zona euro*, Napoli, 2013.

[2] Court of Justice, 13 July 2004, case C-27/04, *Commission v. Council*, ECR p. I-6679 (View of Advocate General Tizzano, p. I-6649).

[3] See, for example, Court of Justice, 10 July 2003, case C-11/00, *Commission c. ECB*, ECR p. I-7147. The Court supported the independence of the European Central Bank, but stated that Economic and Monetary Union is a part of the European system and therefore subject to control by EU institutions. See also the coeval case C-15/00, *Commission v. ECB*, ECR p. I-7281.

[4] G. Tesauro, *Diritto dell'Unione europea*, Padua, 2013, p. 109.

[5] *Infra*, § 3.

recommendation under Article 104 (7) EC (now 126 (7) TFEU), as a further Commission recommendation is needed.

In the end, the Court of Justice declared the action admissible and annulled the decisions adopted by the Council in favour of Germany and France, since they had the effect of suspending the excessive deficit procedure and of amending the Council's decisions previously adopted under Article 126 (7) TFEU.

2. Recent case-law: the beginning of a new season?

As already mentioned, recent instruments related to EMU have given rise to a series of actions for annulment and preliminary rulings, which have led the European Judges to engage with a new scenario.

Two examples are the orders issued by the Court in relation to the actions for annulment[6] brought under Article 263 (4) TFEU [7] against the 7 September and 20 December 2010 Decisions [8]. Both these Decisions, modifying Decision 2010/320 on the strengthening and deepening of budgetary supervision over Greece, required this country to take appropriate measures to remedy its excessive deficit.

The applicants – the trade union confederation ADEY and two officers – argued that the Decisions infringed their property rights, as enshrined by Article 1 of the First Protocol Annexed to the European Convention of Human Rights, by imposing sharp reductions in salaries and pensions.

The General Court declared both actions inadmissible, stating that the applicants had no standing under Article 263 (4) TFEU. The General Court considered that the applicants were not directly and individually concerned by the Decisions. However, they were directly affected by national measures implementing the European Central Bank Decisions and hence they could turn to the national court. Indeed, national judges [9] complement the EU judicial system under Article 19 TFEU and so contribute to ensuring that the principle of effective judicial protection is respected (Article 47 Charter)[10].

A truly remarkable judgment was issued in the *Pringle* case by the plenary session of the Court of Justice, after an accelerated procedure following a reference for a preliminary ruling made by the Irish Supreme Court [11]. In this case, the Court was asked to decide on the validity of European Council Decision 2011/199, amending Article 136 TFEU [12], and on the interpretation of Articles 2, 3, 4 (3), 13 TEU and 2 (3), 3 (1) c) and (2), 119, 123, 125 and 127 TFEU, as well as on the interpretation of the principles of effective judicial

[6] General Court, 27 November 2012, T-541/10, *Anotati Dioikisi Enoseon Dimosion Ypallilon (ADEDY), Sp. Papaspyros et Il. Iliopoulos v. Council*; T-215/11, *Anotati Dioikisi Enoseon Dimosion Ypallilon (ADEDY), Sp. Papaspyros et Il. Iliopoulos v. Council.*

[7] See also Court of Justice, (order), 15 November 2012, case C-102/12 P, *Stefan Städter v. ECB.* The applicant appealed against an order of the General Court of 16 December 2011, (T-532/11, *Städter v. ECB*) qualifying as manifestly inadmissible his actions for the annulment of the ECB Decisions of 6 May 2010, 31 March 2011 and 7 July 2011, on temporary measures relating to the eligibility of marketable debt instruments issued or guaranteed by the Greek, Irish and Portuguese Governments (OJ L 117, p. 102; OJ L 94, p. 33; OJ L 182, p. 31), and of the ECB Decision of 14 May 2010, establishing a plan for financial markets (OJ L 124, p. 8).

[8] OJ L 26, p. 15.

[9] O. Porchia, *La dinamica dei rapporti tra norme interne e dell'Unione nel dialogo tra giudici nazionali e Corte di giustizia*, in *Studi sull'integrazione europea*, 2013. See also *infra*, par. 4.

[10] See, among others, G. Tesauro, *Art. 19*, in A. Tizzano (ed.), *Trattati dell'Unione europea*, Milano, 2014.

[11] Court of Justice, 27 November 2012, case C-370/12, *Pringle*. See, B. de Witte, T. Beukers, Editorial- The Court of Justice approves the creation of the European Stability Mechanism outside the EU legal order: *Pringle*, in CMLR 2013, 50, p. 805 ss.; E. Fahey, S. Bardutzky, *Judicial Review of Eurozone Law: The Adjudication of Postnational Norms in EU Courts, Plural – A case study of the European Stability Mechanism*, Amsterdam Law School Legal Studies Research Paper No 2013-35; P. A. Van Malleghem, *Pringle: A Paradigm shift in the European Union's Monetary Constitution*, in *German Law Journal*, 2013, 14 n. 1, p. 141 ss.

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

protection and legal certainty, in relation to adoption by Eurozone Member States of the ESM Treaty of 2 February 2012 [13].

The Court upheld the validity of the Decision in question, declared the signing of the ESM Treaty by the Euro Area Member States compatible with EU law, and stated that the right of a Member State to sign and ratify the Treaty was not subordinated to entry into force of the Decision amending Article 136 TFEU[14].

Among many interesting aspects, the ruling also deals with the question of the role conferred on the Court of Justice by the ESM Treaty, a matter we will consider in greater depth in the next section.

In conclusion, the above-mentioned judgments suggest a growing role for the Court of Justice in economic and monetary affairs. This trend may become more evident as a result of the direct or indirect effect of newly-adopted instruments of international economic governance.

3. New international instruments of economic governance: the role of the Court of Justice in the ESM Treaty and in the Fiscal Compact

The ESM Treaty confers upon the Court of Justice jurisdiction on any dispute arising from the Decisions of the Governing Council concerning the interpretation and application of the Treaty, as well as on claims regarding compatibility of ESM Decisions with the Treaty (Article 37). The legal basis for conferral of this competence on the Court is Article 273 TFEU, as the Preamble of the ESM Treaty provides.

The Court of Justice is also given a significant role by the Fiscal Compact [15]. Both Treaties are closely intertwined, because they are both intended to promote budgetary liability and solidarity within Economic and Monetary Union. Indeed, their complementarity is expressly mentioned in the ESM Treaty and confirmed in the Fiscal Compact. The former, in particular, imposes ratification of the latter as one of the mandatory conditions to be respected in order for States in difficulty to receive ESM financial assistance.

Regarding the Court's role in the Fiscal Compact, the Treaty Preamble states that "compliance with the obligation to transpose the "Balanced Budget Rule" into national legal systems through binding and permanent provisions, preferably constitutional, shall be subject to the jurisdiction of the Court of Justice of the European Union, in accordance with Article 273 of the Treaty on the Functioning of the European Union". The Preamble also refers to the power of the Court of Justice to impose a lump sum or penalty payment in the event that it finds that a previous judgment has not been complied with.

According to the Treaty, moreover, the States agreed, on the basis of Article 273 TFEU, to entitle the Court of Justice to verify compliance with the duty to include the "balanced budget rule" in national legal orders preferably through constitutional provisions.

[13] Treaty establishing the European Stability Mechanism (ESM), signed on 2 February 2012 by the States whose currency is the euro, entered into force on 27 September 2012.
[14] Court of Justice, 27 November 2012, *Pringle*, par.183.
[15] Treaty on the stability, the coordination and the governance of Economic and Monetary Union, signed on 2 March 2012 by the Member States of the EU, with the exception of the United Kingdom and the Chech Republic (*Fiscal compact*). The Treaty entered into force on 1 January 2013. See G. Bonvicini, F. Brugnoli (eds.), *Il Fiscal compact*, *Quaderni IAI*, 2012.

Article 8(1) invites the European Commission to submit to the contracting parties a report on the provisions adopted by the States in order to implement Article 3(2) of the Treaty. If the Commission finds that a State has infringed this Article, one or more parties may bring the matter to the Court of Justice. However, each of the contracting parties is entitled to bring the proceedings before the Court when it considers that another State has failed to fulfil Article 3(2), independently of the Commission's Report and even if the Commission has expressed a different view.

As already mentioned, the Fiscal Compact also sets out the consequences of failure to comply with the first judgment of the Court, as Article 260 TFEU does. In particular, any contracting party, taking into account either the assessment of the Commission or its own evaluation, can ask the Court to impose a lump sum or a penalty payment, whose amount must be quantified on the basis of the criteria identified by the Commission with regard to Article 260 TFEU (Article 8(2)). If infringement is ascertained, the Court of Justice can order payment of a lump sum or of a penalty, which must be proportionate to the circumstances and cannot exceed 0.1% of the Member State's Gross National Product.

This provision was much debated during negotiations and is flanked by six Arrangements annexed to the Minutes of the Signing of the Treaty. These Arrangements, which are not formally binding [16], are intended to strengthen the effectiveness of judicial control. They solve some procedural issues, such as identification of the State in charge of bringing the matter to the Court of Justice. Specifically, it was agreed that "the applicants will be the contracting Parties bound by Articles 3 and 8 of the Treaty that are Member States forming the pre-established group of three Member States holding the Presidency of the Council of the European Union in accordance with Article 1(4) of the Council's Rules of Procedure (Trio of Presidencies [17]) at the date of publication of the Commission's report, to the extent that at that date i) they have not been found to be in breach of their obligations under Article 3(2) of the Treaty by a Commission report, ii) they are not otherwise the subject of proceedings before the Court of Justice under Article 8(1) or (2) of the Treaty, and iii) they are not unable to act on other justifiable grounds of an overarching nature, in accordance with the general principles of international law. If none of the three Member States concerned meets these criteria, the duty to bring the matter to the Court of Justice will be supported by the members of the former Trio of Presidencies, under the same conditions".

In addition, the Arrangements aim to ensure the automaticity of the Court's control, under Article 8(2), in case of non-compliance with the first judgment. In order to achieve this goal, the Contracting Parties express their determination "to make full use of the procedure established by Article 8(2) to bring the case before the Court of Justice".

[16] On the legal status of these Arrangements in the International Law, see R. Baratta, *Legal Issues of the 'Fiscal Compact'. Searching for a Mature Democratic Governance of the Euro*, B. de Witte, A. Héritier & A. H. Trechsel (eds), T*he Euro Crisis and the State of European Democracy…*, p. 31-49 Regarding more recent decisions of the International Court of Justice, Baratta considers "that the lack ratification does not necessarily entail that the Arrangements in questions are deprived of any legal status. As a minimum, they should be at least considered as a means of interpretation of the treaty in accordance with Article 31(2) of the Vienna Convention. As a collateral consequence, when applying the rules of procedure of the ECJ, the Arrangements should presumably be communicated to it, in case Article 8 of the fiscal compact is triggered".

[17] Decision 2009/908/UE of the Council, of 1 December 2009, laying down measures for the implementation of the European Council Decision on the exercise of the Presidency of the Council, and on the chairmanship of preparatory bodies of the Council (Annexed I, OJ L 322, p. 28, corrected in OJ L 344, p. 56).

4. *Compatibility with EU law of the Treaties' provisions relating to the Court's jurisdiction.*

As already stated, the provisions of the ESM and the Fiscal Compact conferring competences on the Court of Justice are expressly grounded on Article 273 TFEU. According to this Article, the Court has jurisdiction in any controversy between Member States which relates to the subject matter of the Treaties, if the dispute is submitted to it under a special agreement between the parties. Hence, it is necessary to verify the compatibility of the Treaties' clauses with Article 273 TFEU, which up to now has been largely neglected [18].

First of all, the notion of "controversy" must be interpreted broadly, according to its meaning in international law[19]. The ESM Treaty, however, leaves a certain margin of uncertainty, since it confers jurisdiction on the Court in controversies between the international organization (the ESM) and the Member States. This provision appears to be incompatible with Article 273 TFEU which only refers to controversies between Member States. In the *Pringle* judgment, the Court deals with this issue concisely, pointing out that any controversy within the ESM can be considered a conflict between Member States, because only Member States are parties to the Mechanism[20].

As regards the Fiscal Compact, only Member States are entitled, as parties, to bring a matter before the Court[21]. Nevertheless it should be remembered that the Commission, even though it is not formally a party, enjoys an important procedural role[22]; indeed it is called to issue a report which allows the Member States to express their observations.

Article 273 TFEU aims at ensuring the unity and exclusivity of the Court's jurisdiction in any situation connected with EU law[23]. In this way, the Court's jurisdiction is intended to complement the EU judicial system, bearing in mind that, by virtue of Article 344 TFEU, disputes on the application of the Treaties cannot be brought before the Court on the basis of Article 273 TFEU [24].

[18] See, on Article 273 TFEU, M. Condinanzi, R. Mastroianni, *Il contenzioso dell'Unione europea*, Turin, 2009, p. 326, footnote no 14. For example, see also the double taxation treaty between Austria and Germany 'EC Law and Tax Treaties' (Doc. TAXUD E1/FR DOC (05) 2306, 9 June 2005), online at: <http://ec.europa.eu/taxation_customs/resources/documents/taxation/personal_tax/double_tax_conventions/eclawtaxtreaties_en.pdf>, n. 54. Implicitly the EFSF treaty and the Greek loans treaties also grant the Court jurisdiction on the basis of Article 273 TFEU, S. Peers, *Towards a New Form of EU Law?: the Use of EU Institutions outside the EU Legal Framework*, *EuConst*, 2013, 1, p. 37, especially, p. 62. See also A. Cannone, *Su alcune recenti clausole giurisdizionali relative alla Corte di giustizia dell'Unione europea*, in *Studi sull'integrazione europea*, 2013, p. 469 et seq., especially, p. 471, p. 481 et seq. On the interpretation of Article 273, prior to the Pringle case, see the Opinions of Advocates-General, specifically, in joined Cases 9 and 10/77 Bavaria Fluggesellschaft [1977] ECR 1517 (para. 4 of the opinion) and in Case C-459/03 Commission v. Ireland [2006] ECR I-4635 (para. 9 of the Opinion).

[19] On this point, M. Condinanzi, R. Mastroianni, *ibidem*, p. 326.

[20] Court of Justice, 27 November 2012, *Pringle*, par. 175. See also Advocate General Kokott, *View*, 26 October 2012, par. 189: "A dispute between an ESM Member and the ESM is in fact, or at least can be assimilated to, a dispute between the ESM Member and the other ESM Members, who within the ESM have adopted a majority decision". For criticism, see R. Adam, *La riforma del governo economico dell'Unione europea*, in M. Eugenia Bartoloni, A. Caligiuri, B. Ubertazzi (eds), *L'Unione europea e la riforma del governo economico della zona euro…*, p. 5, especially, p. 38, footnote 118; for a more nuanced assessment, A. Cannone, *Su alcune recenti clausole…*, p. 483 et seq.

[21] Paul Craig supports a different view: "Even though the Commission would not bring a case in name, the provisions meant that it might do so in effect, and there is no provision under the EU treaties for the Commission to bring such a case" (House of Lords-European Union Committee, *The euro area crisis*, 25th Report of Session 2010-2012, p. 32).

[22] Council of the European Union, Opinion of the Legal Service, *Article 8 of the Draft Treaty on Stability, Coordination and Governance in the Economic and Monetary Union*, 5788/12, Brussels 26 January 2012.

[23] M. Condinanzi, R. Mastroianni, *Il contenzioso*, p. 326.

[24] House of Commons- European Scrutiny Committee, *Economic and Monetary Union*, Twenty-fourth Report of Session 2012-13. In favour of a broad interpretation, S. Peers, *Towards a New Form of EU Law?* cited above, p. 65: "The best interpretation of Article 273 is therefore that it can apply whenever an issue falls within the scope of the EU's competence, but it cannot apply to areas of law which the EU cannot harmonise."

As to the link with the subject matter of the Treaties, the provisions under consideration are aimed at strengthening the pillar of Economic and Monetary Union. In the *Pringle* case, with regard to the ESM Treaty, the Court ruled that “the stability mechanism whose establishment is envisaged by Article 1 of Decision 2011/199 serves to complement the new regulatory framework for strengthened economic governance of the Union”[25]. Part of the rules of the Fiscal Compact make budgetary constraints stricter, to enhance the coordination of economic policies and to improve governance in the Eurozone, thereby promoting achievement of the EU’s objectives on sustainable development, occupation, competitiveness and social cohesion.

The relationship between the Fiscal Compact and EU law is further highlighted by the obligations, undertaken by the parties, to interpret and apply the former “in conformity with the Treaties on which the European Union is founded, in particular Article 4(3) of the Treaty on European Union” and to support its “communitarization” within 5 years after its entry into force (Article 16).

On this point, the legal service of the Council acknowledged that questions, which can be submitted to the Court by virtue of Article 8, “are both conceptually and practically inseparable from the operation of the Economic and Monetary Union as it is established by the EU Treaties”. Moreover, assessment of the adequacy of national orders necessarily involves analysis of EU law problems.

Article 37 of the ESM Treaty and Artice 8 of the Fiscal Compact provide for the “special agreement” expressed in Article 273 TFEU. More specifically, these are “compromissory clauses”, aimed at identifying the categories of controversies which can be submitted to the Court.

As for the ESM, the extent of the compromissory clause is rather undefined, since the Court rules on any controversy deriving from any decision by the Board of Governors, whose competence also involves assessment of the compatibility of any ESM decisions with the Treaty. This broad wording may raise concerns about the conformity of this provision with Article 273 TFEU [26].

As regards the Fiscal compact, only failure to transpose the balanced budget rule into national legal orders can be pursued before the Court[27]. However, the question is still open as to whether the adequacy and completeness of national measures of implementation can be submitted to the same scrutiny: if it is possibile, this could have significant consequences at national level [28]. Infringement of the rule of balanced budgetary provision can be sanctioned by the political institutions, since the “revised Stability and Growth Pact”[29] excludes the enactment of an infringement procedure[30].

[25] Court of Justice, 27 November 2012, *Pringle*, par. 58. See also Advocate general Kokott’s *View* of 26 October 2012, par. 187: “Because the second paragraph of Article 13 (3) provides that the conditions attached to financial assistance instruments are to be consistent with the measures of economic policy coordination provided for in the TFEU. Moreover disputes on the interpretation of Article 125 TFEU (the no “bail-out clause”) might arise with regard to specific grants of financial assistance instruments”.

[26] It is currently difficult to foresee any possible controversy deriving from the acts adopted under the ESM Treaty.

[27] According to the first and the second versions of the agreement, the jurisdiction of the Court of Justice included any conflict regarding title III in general. On the various steps opf the negotiation process, V. Kreillinger, *Le “making of” d’un nouveau traité: six étapes de négociations politiques, Notre Europe, Les Brefs*, No 32, 2012, p. 4.

[28] *Infra*, par. 4.

[29] Regulation (CE) No 1466/97 of the Council, of 7 July 1997, on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies, as amended by (UE) No 1175/2011 of the European Parliament and the Council, of 16 November 2011 ("*Revised Stability and Growth Pact*"), in OJ L 306, 23 November 2011, p. 12.

[30] *Supra*, par. 1. J. Ziller, *Diritto delle politiche e delle istituzioni dell’Unione europea*, Bologna, 2013, p. 609; according to the Author, Article 8 is aimed at eluding Article 126 (10). A different opinion is expressed by S. Peers, *Towards a New Form of EU Law* cited above, p. 64 : “*A fortiori*, Article 273 can also be used where the treaties provide for a derogation as regards Article 259, but cannot be used where the treaties expressly rule out any jurisdiction for the Court of Justice at all, or set out an explicit limitation on its jurisdiction”.

Failure to comply with the duties prescribed by the Fiscal Compact may lead to the international liability of the State and can be sanctioned by national judges or even by the European Court of Human Rights in case of violation of fundamental rights.

The supervisory mechanism provided for by Article 8 of the Fiscal Compact is based on the model of Articles 258-260 TFEU and deserves further consideration. First of all, the mechanism refers to the infringement procedure launched by a Member State under Article 259 TFEU (which still remains a parallel option if conditions for its application are fulfilled).

A crucial element lies in the relationship between Article 8 (1) and the procedure under Article 8 (2). The question is whether it consists of two distinct and autonomous procedures or a single procedure divided into two phases. Only an integrated reading of the two provisions, capable of identifying a uniform system of resolution of controversies, would be compatible with the Treaty. On the basis of a broad interpretation of Article 273 TFEU, it would be possible to confer on the Court the power to impose sanctions. This reading is supported by the legal service of the Council, according to which the similarity of the wording of Articles 260 TFEU and 8 (2) of the *Fiscal Compact* does not affect the duties and the functions of the Court under the EU Treaties[31].

The procedure under Article 8 (2) of the *Fiscal Compact* has two remarkable differences with Article 260 TFEU. As already mentioned, it applies to the infringement of an international obligation linked to EU law, exclusively on the basis of an initiative of a Member State. As to quantification of the penalty, the *Fiscal Compact* refers to the criteria defined by the EU Commission. Moreover, the Court, by virtue of its competence under Article 273 TFEU, is endowed with its own powers and is not formally bound by the Commission's report, which it can disregard.

Furthermore, the future integration of the Fiscal Compact into the EU legal order appears problematic. The rules on judicial scrutiny will need to be adapted to the Treaties[32]. At the same time, as underlined by a number of scholars[33], in the next five years this mechanism of control may have exhausted its effects, thereby depriving this issue of any relevance.

Judgments issued under the ESM system bind the parties to the case, compelling them to adopt any measure needed to comply with it, within the deadline indicated by the Court (Article 37 ESM Treaty). Judgments in the context of both systems could display their effects beyond the objective and subjective limits established by the two Treaties. In essence, if the Court interpreted notions of EU law on the basis of these Treaties, its judgments could have effect even outside their formal boundaries but within the EU legal order.

In the past other agreements between Member States - namely the Schengen and Prüm Treaties[34] - were incorporated into the EU legal order. Despite the absence of compatibility clauses, the Treaties passed the judicial scrutiny of the Court of Justice [35], as long as they fully respected EU law. This general rule also applies to the treaties on economic

[31] Critically, J. Ziller, *Diritto delle politiche*, cit., p. 609.

[32] See, Resolution of the European Parliament of 18 January 2012 on the conclusions of the European Council of 8 and 9 December 2011, on a draft international agreement on a Fiscal Stability Union. The Court might be given jurisdiction over infringement of budgetary rules under Articles 258-260 TFEU, only if Article 126 TFEU were reformed.

[33] G. Tosato, *Il Fiscal compact*, in Astrid, *Prove di Europa unita: le istituzioni europee di fronte alla crisi*, Florence, 2013, p. 4. The Treaty does not lay down specific consequences for failure to comply with these clauses.

[34] Schengen Agreement of 14 June 1985 (Protocol No 19 on the Schengen acquis integrated into the framework of the European Union) and Treaty of Prüm of 27 May 2005 on the stepping-up of cross-border cooperation, particularly in combating terrorism, cross-border crime and illegal migration (integrated, at least in its essential elements, with two Council decisions of 23 June 2008/165/JHA and 2008/616/JHA).

governance, although only the Fiscal Compact expressly acknowledges the primacy of EU law (Article 2 (2)) [36]. Many scholars consider these treaties as compatible with the EU legal order [37], even though some criticism has been raised regarding improper use of EU institutions and of the Commission in particular [38]. This problem appears to have been solved, at least as far as the EMS Treaty is concerned, with the *Pringle* judgment [39], since the Court stated that "the Member States are entitled, in areas which do not fall under the exclusive competence of the Union [40], to entrust tasks to the institutions, outside the framework of the Union, such as the task of coordinating a collective action undertaken by the Member States or managing financial assistance provided that those tasks do not alter the essential character of the powers conferred on those institutions by the EU and FEU Treaties [41]".

5. Further developments: towards progressive jurisdictionalization of control on economic policies?

National judges inevitably face the challenge of the new dimension of economic governance as well, since they are an essential part of the EU judicial system, as confirmed by Article 19 TEU. The question arises as to which role and functions they may play in the future.

One of the key issues relates to the need to clarify which judge should be responsible for the guaranteeing of rights conferred by the treaties and subsequent acts. Among the various questions raised in the *Pringle* case, the Court was asked to verify whether the clause on jurisdiction under Article 273 TFEU would protect the principle of effective judicial protection, enshrined in Article 47 of the Charter of Fundamental Rights. The Court denied the applicability of the Charter, since the question at stake fell outside the scope of application of EU law (Article 51 of the Charter). In conclusion, the Court stated that the principle of effective judicial protection does not preclude Member States, whose currency is the euro, from reaching agreements such as the Treaty establishing the European Stability Mechanism.

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[35] Court of Justice, 31 January 2006, case C-503/03, *Commission v. Spain*, ECR p. I-1097. See B. De Witte, European Stability Mechanism and Treaty on stability coordination and governance: role of the EU institutions and consistency with EU legal order, *Challenges of Multi-tier Governance in the EU*, European Parliament, p. 14 ss.

[36] Since the *Fiscal compact* and the balanced budget rule (Article 3) are outside the EU system, they have no direct effects and do not enjoy primacy over national law.

[37] R. Dehousse, *Inter-institutional Balance in the EU: Is the Community Method Still Relevant?*, p. 22. See also the opinion – to a certain extent favourable – of the House of Commons, European Scrutiny Committee, *Economic Monetary Union* cit.

[38] P. Craig, *The Stability, Coordination and Governance Treaty: Principle, Politics and Pragmatism*, in *ELR*, 2012, p. 231, spec. p. 245. In support of use of EU institutions within the two Treaties, B. De Witte, *European Stability Mechanism*, cited above, p. 16. The author proposes a clear distinction between 'competences' and 'tasks': "What Article 13 TEU seeks to convey is that the competences of the institutions are fixed by the treaties; it does not exclude that extra tasks may be given to the institutions as long as those tasks fit within their competences". For further support, also provided for by Article 4 TEU, S. Peers, *Towards a New Form of EU Law?* cited above, espec. p. 71 "To the extent that a treaty among member states is the only way or the best way to support a policy of the European Union. Article 4(3) might even entail an obligation to enter into such agreement in the first place. Finally, … , the use of the Court of Justice is certainly mandatory to the extent that a treaty creates an international court which replaces national courts".

[39] Court of Justice, 27 November 2012, *Pringle*, par. 158.

[40] Court of Justice, 30 June 1993, joined cases C-181/91 and C-248/91, *Parliament v. Council and Commission*, ECR p. I-3685, par. 16; Court of Justice, 2 March 1994, case C-316/91, *Parliamento v. Conuncil*, ECR p. I-625, par. 26, 34 and 41.

[41] Opinions of 10 April 1992, case 1/92, ECR p. I-2821, par. 32 and 41; of 18 April 2002, case 1/00, ECR p. I-3493, par. 20, and case 1/09, of 8 March 2011, par. 75.

The inapplicability of Article 47 of the Charter in this case means that national judges [42] and the European Court of Human Rights are entitled to apply their respective rules.

Nevertheless, as a result of the broad compromissory clause contained in the ESM Treaty [43], the Court of Justice, in its arbitral functions [44], could be competent to assess whether fundamental rights by ESM decisions is respected on the basis of international law (ECHR) and even of the EU Charter [45] even outside its scope of application defined by Article 51[46]. It is foreseeable that such a situation may give rise to conflict with national jurisdictions, especially constitutional courts, or with the European Court of Human Rights, regardless of the future accession of the EU to the Convention on Human Rights [47].

Further conflict may also occur in relation to the Fiscal Compact. We have seen that the jurisdiction of the Court under Article 8 is limited to scrutiny of inclusion of the balanced budget rule in national legal orders. On the one hand, no issues would arise in the case of total lack of transposition by the State; on the other hand, incomplete or incorrect transposition would cause a problematic situation [48]. If the State opted for a constitutional rule, the possible control of the Court over the conformity of this choice with the aims of the Fiscal Compact could lead to a delicate conflict with the constitutional courts. Indeed, this kind of control causes concern about a possible influence by the Court of Justice on the "exercise of the constituent power of a state to amend its constitution" [49], which may clash with crucial elements of national constitutional systems [50].

These considerations may result in mere theoretical conjecture, given that judicial oversight of the conduct of the States is unlikely. More concretely, in the case of transposition at constitutional level – as occurred in Italy [51] – it would be for the national constitutional court to assess the national or regional rules and to declare them unconstitutional under Article 117(1) of the Constitution, with regard to the international

[42] In some cases, the Court stated that it is for the national judge to find a solution in case of a conflict between the rights protected by the Convention and national law, outside the scope of application of the Treaties (Court of Justice, 24 April 2012, case C-571/10, *Kamberaj,* EU:C:2012:233, par. 62-63). If the situation is only partly touched upon by EU law, according to the Court it is for national judges and authorities to protect fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised (Court of Justice, 26 February 2013, case C-399/11, *Melloni*, EU:C:2013:107, par. 60; Court of Justice, 26 February 2013, case C-617/10, *Åklagaren v. Hans Åkerberg Fransson*, EU:C:2013:105). More recently, Court of Justice, 27 March 2014, case C-265/13, *Torralbo Marcos*, EU:C:2014:187, para. 30-32). See also Court of Justice, 30 April 2014, case C-390/13, *Pfleger*, ECLI:EU:C:2014:531, para. 31-36).

[43] *Supra*, par. 3.

[44] On the freedom of the State to define the rules applicable to controversies brought before the Court by virtue of a comrpomissory clause, see V. Louis, *Un traité vite fait, bient fait? Le traité du 2 mars 2012 sur la stabilité, la coordination et la gouvernance au sein de l'Union économique et monétaire*, in *RTDE*, 2012. On the corresponding Article of the EEC Treaty, A. Tizzano, *Art. 182*, in R. Quadri, R. Monaco, A. Trabucchi, *Trattato istitutivo della Comunità economica europea. Commentario*, Milan, 1965.

[45] This position was supported by Ireland but was strongly contested by many States in their written observations in the *Pringle* case. For instance, Germany was in favour of protection at national level. According to Advocate General Kokott, scrutiny on compatibility with EU law of acts adopted by Member States in the context of the ESM should be conferred on the Court of Justice, on the basis of the preliminary ruling mechanism under Article 267 TFEU, and to national judges, under Article 19 TEU.

[46] On the limits of application of the Charter, under Article 51, see Court of Justice, 15 November 2011, case C-256/11, *Dereci and others*, par. 71; Court of Justice, 12 July 2012, case C-466/11, *Currà and others v. Germany*, par. 25.

[47] See, on accession to the European Convention on Human Rights, *Draft Explanatory Report to the Agreement on the Accession of the EU to the Convention for the Protection of Human Rights Freedoms*, Strasbourg, 2 April 2013.

[48] France, for instance, preferred to adopt programmatic provisions instead of constitutional rules, a solution which the *Conseil Constitutionnel Français* considered compatible with the second option offered by the Fiscal Compact (Dec. 2012-653 DC du 9 aout 2012). Therefore, an action against France is difficult to imagine, since if it was found to be in infringement, French ratification as a whole would be undermined, because it would occur after the favourable opinion of the *Conseil Constitutionnel*, which is based on the considerantion that "l'article 8 ne porte pas atteinte aux conditions essentielles d'exercice de la souveraineté nationale".

[49] F. Fabbrini, *The Fiscal Compact, the Golden Rule and the Paradox of European Federalism*, p. 19, in http://ssrn.com/abstract=2096227.

[50] M. Maduro, in A. Kocharov (ed.), *Another Legal Monster? An EUI Debate on the Fiscal Compact Treaty*, EUI WP Law, 2012/09, p. 5.

[51] On reform of Article 81 of the Constitution and subsequent constitutional law, see N. Lupo, *La revisione costituzionale della disciplina di bilancio e il sistema delle fonti*, in *Il Filangieri. Quaderno 2011*, Naples, 2012; F. Angelini, M. Benvenuti (eds), *Il diritto costituzionale alla prova della crisi economica*, Napoli, 2012.

duty prescribed by the Fiscal compact. However, this would be a highly demanding task for the constitutional judges, considering the delicacy and complexity of the subject [52].

National judges may also refer to the Court of Justice for a preliminary ruling [53], in order to ask for the correct interpretation of EU law provisions mentioned by the Fiscal Compact [54]. According to Luxembourg case-law, in fact, a reference for a preliminary ruling is admissible even if the case *a quo* falls outside the field of application of the Treaties, if an EU law is referred to by national legislation [55] and its uniform application could be compromised.

In this context, the principle of loyal cooperation (Article 4(3) TEU) plays an essential role. The strengthening of reciprocal and open judicial cooperation may enable an evolution of the judicial system established by the ESM and the Fiscal Compact. National and European judges may be required to face new challenges, as they try to reconcile national constitutional balance, protection of fundamental values and control over economic policies[56].

In brief, the crucial role of national and European judges in EU economic governance beyond the limits fixed by the new international treaties may lead to a jurisdictionalization of control over economic policies, despite the intergovernmental nature of political cooperation.

The Court of Justice, first of all, will have to pursue its twofold mission to ensure inter-institutional balances are respected and to protect individual rights. In this regard, the Court will have to consider the need for a balance between economic and non-economic values, now equally recognized by the EU (Article 3 TEU). Moreover, it will also have to

[52] G. Scaccia, *La giustiziabilità della regola di bilancio*, in *il Filangieri. Quaderno 2011*, Naples, 2012, p. 211, spec., p. 239. The author considers the effects and the consequences that could derive from a possible annulment: “Per salvaguardare l’interesse costituzionale primario alla complessiva tenuta delle finanze pubbliche ….è inevitabile che la legge di bilancio, pur incompatibile con la Costituzione, resti nondimento efficace almeno fino a quando non sia stata approvata una nuova legge di bilancio”.

[53] The constitutional courts of a number of Member States have already referred to the Court of Justice for a preliminary ruling (see Advocate General Kokott, Conclusions of 2 July 2009, case C-169/08, *Presidente del Consiglio*, ECR p. I-10821, par. 21). Among the judgments issued after a reference from constitutional courts, see: Italy, Court of Justice, 17 November 2009, case C-168/09, *Presidente del Consiglio dei Ministri e Regione Sardegna*, ECR p. I-10821; Belgium, Court of Justice, 16 July 1988, case C-93/97, *Fédération belge des chambres syndicales de médecins ASBL v. Flemish Government*, *Government of the French Community*, *Council of Ministers*, ECR p. I-4837 and Court of Justice, 3 May 2007, case C-303/05, *v.z.w. Advocatenvoor de Wereld v. Leden van de Ministerraad*, ECR p. I-3633; Austria, Court of Justice, 8 November 2001, case C-243/99, *Adria-Wien Pipeline*, ECR p. I-8365 and, recently, Court of Justice, 1st March 2011, case C-457/09, *Chartry v. Belgium*; Lithuania, Court of Justice, 9 October 2008, case C-239/07, *Sabatauskas and others*, ECR p. I-7523; Spain, Court of Justice, 26 February 2013, case C-399/11, *Melloni*; recently also the French Conseil Constitutionnel: Court of Justice, 30 May 2013, case C-168/13 PPU, *Jeremy F.* The possibility of raising preliminary questions was acknowledged by the German Federal Constitutional Court (BVerfG, Judgment of 2 March 2010, 63 NJW (2010) (*Data Retention*), par. 833 and 835, BVerfGE, judgment of 6 July 2010, NJW (*Honeywell*) par. 60 (for the English version, http://www.bverfg.de/entscheidungen/rs2010706_2bvr266106en.html). And recently, it occurred in BVerfG, 14 January 2014, ESM/ECB-OMT, http://www.bverfg.de/entscheidungen/rs20140114_2bvr272813en.html, concerning the Outright Monetary Transactions (OMT) system (Peter Gauweiler and Others, Case C-62/14). This preliminary ruling does not seem to be a good example of sincere cooperation. Indeed, the German Federal Tribunal suggested to the Court of Justice the interpretation of the OMT Decision to allow conformity with primary law and with German Basic Law, which would permit the OMT Decision not to be qualified as a “Ultra vires act” according to German case law. On the German Federal Constitutional Court decision see the comments published in the 2/2014 issue of the *German Law Journal*.

[54] It is also difficult to predict all the consequences of the judgments that the Court could issue under Article 37 ESM or Article 8 of the Fiscal compact.

[55] On the possibility of raising interpretative preliminary questions on rules entirely reproducing EU provisions, see Court of Justice, 12 November 1992, case C-73/89, *Fournier*, ECR p. I-5621. As to the case of national rules referring to EU law, Court of Justice, 18 October 1990, cases C-297/88 and C-197/89, *Dzodzi*, ECR p. I-3763; Court of Justice, 8 November 1990, case C-231/89, *Gmurzynska-Bscher*, ECR p. I-4003. As regards the Italian legal order, Court of Justice, 21 December 2011, case C-482/10, *Teresa Cicala v. Regione Siciliana*.

[56] A. Manzella, *Il governo democratico della crisi* (proceedings of the 58th Meeting on administrative studies, Varenna, 20-22 September 2012), p. 5. According to the author, the involvment of the Court of Justice reveals that national judges are not only guardians of individual rights, but also of constitutional balances.

decide whether and how to apply the Charter of Fundamental Rights to economic governance [57] and whether to introduce categories different from those applied so far [58].

Due to the significant range of hard law and soft law instruments adopted by EU institutions in the field of economic policy, the Court may have increasing opportunities to intervene [59]. As already noted[60], crucial issues in this area have not yet been resolved as the first cases brought to the Court were declared inadmissable on grounds of the plantiff's lack of standing under Article 273 TFEU.

Further development will largely depend on the activism of the national judges and the various other actors involved. A key role will also be played by the European Parliament[61], which could ask, as a privileged applicant within the meaning of Article 263(2) TFEU, for review of acts adopted in the Economic area. More specifically, the European Parliament, as the body representing EU citizens, could bring actions against the Council's decisions if they negatively affect or endanger social values enshrined in the Treaties. Likewise, national parliaments too [62] could make use of the opportunities provided by Protocol No 2 on the application of the principles of subsidiarity and proportionality (Article 8) and by its implementation mechanisms at national level [63], and urge their governments to bring an action of annullment, thereby fulfilling their political responsibilities towards citizens. Once again, the increasingly important role of the judicial system entails that the principle of sincere cooperation between national and European bodies be fully respected, at both political and judicial levels. In such an evolving context, besides the procedural issue of

[57] See, J. Drexl, *La Constitution économique européenne- l'actualité du modèle ordolibèral*, in *Revue internationale de droit économique*, 2011, p. 419, spec., p. 439: "La question qui se pose maintenant par rapport à la Constitution économique européenne est de savoir si la CJUE appliquera aussi la Charte et surtout les droits fondamentaux pour développer le droit économique".

[58] It is worth questioning how proportionality - a key principle for the construction of the internal market - will be used in this field. For critical comment on this topic, see N. Reich, *How Proportionate is the Proportionality Principle?,* Paper presented at an Oslo conference on the "Reach of Free Movement", 18-19 May 2011, in http://www.jus.uio.no/ifp/forskning/prosjekter/markedsstaten/arrangementer/2011/free-movement-oslo/speakers-papers/norbert-reich.pdf. As regards the internal market, for further interesting considerations,see C. Kaupa, *Maybe not activist enough? On the Court's alleged neoliberal bias in its recent labor cases*, in M. Dawson, B. de Witte, *Judicial Activism at the European Court of Justice*, Edward Elgar, Cheltenham, 2013, p. 56 ss. The author argues that it is misleading only to refer to a conflict between economic and social goals: proposing this framework "ignores the fact that there is no agreement about the economic field itself. …. The balancing exercise between individual economic rights and public regulation… will therefore be performed differently, depending on the economic assumption employed."

[59] Although in relation to the powers of intervention conferred on the European Securities and Markets Authority (ESMA), see, recently, Court of Justice, 22 January 2014, case C-270/12, *United Kingdom v. Council* (EU:C:2014:18). In this case, the Court dismissed the two countries' request and confirmed the validity of the ESMA Regulation. See also, Court of Justice, 30 April 2014, case C-209/13, *United Kingdom v. Council*, EU:C:2014:283. In this case the Court dismissed the request of the two countries to annul Council Decision 2013/52/EU of 22 January 2013 authorising enhanced cooperation in the area of financial transaction tax (OJ 2013 L 22, p. 11).

[60] *Supra*, par. 2.

[61] The participation of the European Parliament in the new system of governance, although limited, is more substantial than in the previous regime. See C. Fasone, *The Struggle of the European Parliament to Participate in the New Economic Governance*, EUI WP/RSCAS 2012/45. On the role of EU Parliament within the economic governance, A. Maurer, *From EMU to DEMU: The Democratic Legitimacy of the EU and the European Parliament*, IAI Working Paper 1311 (April 2013); W. Wessels O. Rozenberg, M. Van den Berge, C. Hefftler, V. Kreilinger, L. Ventura, *Democratic Control in the Member States of the European Council and the Euro zone Summits*, Study for the European Parliament, Brussels, 2013.

[62] The Fiscal Compact expressly encourages interparliamentary cooperation (Article 13), still just in its early days (see the first meeting of the interparlamentary Conference in Vilnius, 16-17 October 2013: V. Kreilinger, *La nouvelle conférence interparlementaire pour la gouvernance économique et financière*, Notre Europe, Institut Jacques Delors -Policy Paper 100, Octobre 2013).

[63] As regards the Italian legal order, Article 42 No 4 of Law No 234/2012 provides that the Government is bound to bring an action to the Court of Justice if requested by one of the chambers of the Parliament, in case of infringement of the principle of subsidiarity. Since this mechanism only regards legislative acts, Article 42 cannot be applied in the situation mentioned above (on the subsidiarity control, O. Porchia, *Le competenze dell'Unione, il Protocollo sul principio di sussidiarietà e il potenziamento del ruolo delle assemblee legislative*, WP *Instituto de Derecho Público of Barcelona*, 2/2011). In addition, every region is entitled to ask the Government to bring proceedings against an act affecting their fields of competence. According to Article 5 of Law 131/2003, the Government must proceed if the request is presented by the majority of the regions (see O. Porchia, *Le regioni dinanzi al giudice comunitario: la scelta del legislatore italiano*, in G. Cataldi, A. Papa (a cura di), *Formazione del diritto comunitario e internazionale e sua applicazione interna: ruolo delle Regioni e dello Stato nelle esperienze italiana e spagnola*, Naples, 2005, p. 85). Particularly, in the field of economic governance Regions may urge the Government to bring an action against EU acts regarding the social and territorial spheres.

the standing of applicants, the Court cannot escape the challenge posed by the need to reconcile conflicting values and to ensure the coexistence of primary objectives pursued by the EU, namely economic and social cohesion and financial stability [64]. Inevitably, the Court will have to engage with the issue of whether and how – and on the basis of which tools and categories – to adapt its "traditional activism" [65] in the field of economic governance.

[64] The balance betweeen the values at stake is also a responsibility of national judges. Indeed, national constitutional courts have already been called to review the legitimacy of some economic measures, with regard to the principle of equality. In this regard, see Judgment 223/2012, through which the Italian Constitutional Court acknowledged that the current economic situation is particularly worrying and allowed for the adoption of exceptional tools, in order to pursue the difficult objective of balancing financial interests and accessibility to services of general interest. However, it is for the State to ensure, even in such difficult circumstances, that the fundamental principles of the constitutional order are respected. See the recent judgment by the Portuguese Constitutional Acórdão No 187/2013, D. Gallo, R. Cisotta, *Il Tribunale costituzionale portoghese, i risvolti sociali delle misure di austerità ed il rispetto dei vincoli internazionali ed europei*, in *Diritti umani e diritto internazionale*, p. 465-480.

[65] On the activism of the Court, T. Tridimas, *The Court of Justice and Judicial Activism*, in *ELR*, 1996, p. 199; Idem, *The General Principles of EU Law*, Oxford, 2006, p. 6. For more positive opinions, R. Adam, A. Tizzano, *Lineamenti di diritto dell'Unione europea*, Turin, 2010, p. 256; P. Craig, *ECJ and Ultra Vires Action: A Conceptual Analysis*, in *CMLR,* 2011, p. 395, spec. p. 396. On different meanings of judicial activism, M. Dawson, B. de Witte, *Judicial activism at the European Court of Justice* above cited, pages 2 ss. See among others, Dawson's chapter: the author considers judicial activism as the product of a wide imbalance in the EU between the Union's legal and political spheres, more specifically of the absence of regular dialogue between political and legals actors. It remains to be seen in the years to come if, even in the field of economic governance, the absence or rather the difficult nature of dialogue between Judges and legislatures will lead to greater activism on the part of the Court.