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Italy

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Economic policy

EU legal order

Question 1

Under the Lisbon Treaty even for the euro zone states the competence of the Union is basically a competence of coordination and surveillance of their budgetary strategy, as well as of setting out economic policy guidelines (Article 2(3) TEU). Certainly, that coordination can be enhanced since special primary law provisions apply to the members whose currency is the euro (Articles 5(1) TEU and 136 TFEU). However, by and large, even after the Treaty of Lisbon member states retained the power to govern economic policy and national budget, subject to oversight and coordination from the EU which has the ultimate possibility of sanctions. This original picture has been revised in depth since then: the space left to national parliaments to deviate from objectives provided for in the relevant excessive deficit procedure, even in terms of debt criterion, is extremely tiny, if any (see *infra*).

As to non euro area countries the legal framework is quite different. United Kingdom and Denmark do not participate in the third stage of economic and monetary union and thus enjoy several exemptions (respectively Protocols No 15 and 16). Further, there are member states *with a derogation*, having not fulfilled the necessary conditions for the adoption of the euro. They enjoy a transitional status pursuant to Article 139 TFEU which in principle should lead those states to accede to the euro area. That explains why they submit convergence programmes to the European institutions (Article 140 TFEU). Basically, the preservation of national power for fiscal authority is balanced by EU oversight and coordination.

The strengthening of fiscal surveillance on euro zone states, through mainly the approval of *Six-Pack* and *Two-Pack* (see *infra*), has contributed to set a divide between euro and non euro countries, making more asymmetric the original division set out by the treaties.

If, as already noted, euro zone states are allowed to strengthen the coordination and surveillance of their budgetary discipline, even in terms of ministerial meetings, *i.e*. the Euro Group (Article 137 TFEU and Protocol No 14), it remains to be seen whether they retain the power of *drawing up international agreements among themselves outside the EU legal framework.* The treaty of Lisbon deleted Article 293 of the European Community Treaty (which concerned agreements between member states in some fields). On the contrary, Article 273 TFUE – which allows member states to submit disputes to the ECJ related "to the subject matter of the Treaties … under a special agreement between the parties" – does not stop some member states stipulating agreements somehow concerning fields covered by the European integration process. In short, it seems that the mandatory condition to comply with is that the agreement must respect the Treaties, the institutional framework of the EU and its *acquis*[1]. However, arguing from *Defrenne*[2], member states, while respecting primary law, are prevented from resorting to a revision procedure different from the ones provided for in Article 48 TEU. Prohibition to recourse to other international law procedures to modify the treaties is the obvious consequence of respecting primary law and fits in the broad logic of the EU legal order and its *specificity*. Unsurprisingly, Opinion 1/09 stopped member states (and institutions) from concluding an international (mixed) agreement because it infringed the founding structural principles of the EU judicial system[3].

[1] Rulings 31 January 2006, C-503/03, Commission v. Spain, ECJ Report 2006, I-1122, para. 34 concerning the compatibility of Schengen *Acquis* with Community law; and tellingly 27 November 2012, C-370/12, Pringle, nyr, paras. 68-69, 72.

[2] In *Defrenne* the ECJ made it clear that "apart from any specific provision, the Treaty can only be modified by means of the amendment procedure carried out in accordance with Article 236 (now 48 TEU)", 8 April 1976, 43/75, ECJ Report, 1976, 455, para. 58.

[3] Baratta, National Courts as 'Guardians' and 'Ordinary Courts'of EU Law: Opinion 1/09 of the ECJ, 38 Legal Issues of Economic Integration (2011), 297.

The practice of members states confirms that conclusion. For instance, the Unified Patent Court Agreement, signed by 25 EU member states on February 2013, entails some amendments to the so called Brussels I regime (Regulation No 1215/2012). That explains the reason why the entry into force of the UPC Agreement is subject to the previous entry into force of the amendments to that Regulation (Article 89(1) UPC Agreement): contracting member states are aware that they cannot disregard secondary law provisions. Further, the issues concerning the *Fiscal compact*'s coherence with primary law are addressed in the several paragraphs of the preamble and in the many references to the EU rules embedded in the Treaty (see in particular Article 3, 7 and 10, as well as several *subordination calls* included in the preamble). Namely, Article 2, in line with ECJ case law[4], sets out the principle of conformity with EU law in applying and interpreting the *Fiscal compact*, and implicitly recognizes the primacy of EU law over the treaty itself. In the same vein, the commitment, to bring the *Fiscal compact* treaty in the wake of the European legal framework "within five years, at most" (Article 16), should be considered. Finally, the grant of financial assistance through the ESM is worth to mention: the new paragraph 3 of Article 136 TFEU aims to ensure that that mechanism operates in compliance with the EU law, namely with regard to measures adopted by the Union in the context of coordination of the member states' economic policies[5].

That being said, the conclusion of an international agreement, instead of a treaty revision, is sometimes due to the impossibility to achieve unanimity among member states. The history of the *Fiscal compact* makes it quite clear. Unlike the Unified Patent Court Agreement, which has been construed as an international instruments though a EU way out was available, the history of the *Fiscal compact* is different. Indeed, the adoption of an instrument of pure international law, concluded by a limited number of states, outside the architecture of the EU legal order, was the only one solution being available. It is worth reminding, that at the outset it was conceived as a EU revision treaty. At the European Council of 29th October 2011, a 'limited' revision of primary law was envisaged as a key action since further strengthening of economic convergence within the euro area

[4] Matteucci case (27 September 1988, case C-235/87, ECJ Report 1988, 5589, para. 19.

[5] For a critical approach S. Josso, 'Réflections sur la première révision du TFUE. Un nouvel accroc à la légitimité démocratique de l'Union', RUE, 2012, 584.

was needed. Although the main concern of this debate was related to specific problems of the euro zone states, it was plain that any revision of primary law had to be done without affecting the position of the non euro states, whose consent had to be acquired pursuant to the revision procedures laid down in Article 48 TEU. That requirement, however, soon proved hard to achieve. In the first part of December 2011 it became definitively clear that the United Kingdom would have prevented any resort to Article 48 TEU.

In that context, some issues raised as to whether it was possible to pursue other paths such as secondary law instruments, while considering the limits imposed by EU legal order. Of course other paths were conceivable, such as measures adopted under Article 136 TFEU, and revisions of Protocol No 12 (as suggested by the President of the European Council in his *Interim Report* of 6th December 2011) or through enhanced cooperation acts. However, it was debatable whether a balanced budget rule, implying at that very moment amendments to national constitutions, as informally agreed during the Summit of October 26th, 2011, could have been adopted through secondary law acts. Even considering the peculiarities of Article 136 TFEU, this legal basis may not be used as a tool to modify Protocol No 12: in that respect, pursuant to Article 136(1), it is necessary to apply Article 126(14), second subpara. Therefore, one may ask whether such a competence includes an obligation implemented at a constitutional level touching upon the autonomy of executive powers and national parliaments to define domestic budgets. In addition, a balanced budget rule may affect a constitutional value of some member state as long as it poses relevant constraints in terms of determining public revenue and expenditure. After all, the Union is deemed to respect the constitutional identity of its members states (Article 4, para. 2 TEU). Although the concept of 'national identity' as embedded in domestic Constitutions is rather vague, at that very moment one could not avoid recalling two lengthy rulings of the German Constitutional Court that shaped the limits of European integration rather narrowly under that national constitution. In particular, the *LissabonUrteil* held that revenue and expenditure including external financing were included in the domestic jurisdiction of Germany (paras. 248 et seq., 252, 256), likely to be respected by the EU as a part of its national identity, for they belong to identified core areas of national competence. In the end, it can reasonably be advocated that a balance budget rule entailed a strong interference in the constitutional identity of some member states. In that respect, the direct involvement of national parliaments through their constitutional processes of ratification is a far better solution, instead of using secondary law tools.

That being said, a '17 plus' *inter se* agreement immediately raised several legal questions, since it was supposed to touch upon a subject matter covered by EU Treaties, as well as secondary legislation, entailing the risk of inconsistencies. Indeed, late 2011 the envisaged plan of a fiscal rule in order to attain a domestic balanced budget, coupled with stronger institutions surveillance over national budgets, including additional powers conferred to the Commission and to the Court of Justice, as well as new provisions on economic policy coordination and governance, posed a serious challenge in terms of legality. Admittedly, a customary rule of the law of treaties (Article 41 of the Vienna Convention on the law of treaties) lays down a technique for modifying a multilateral treaty by only two or more parties to it. But a modification limited to some parties *inter se* posed several legal constraints, one of which being that the envisaged revision ought not be prohibited by the EU law.

Further, a *17 plus* treaty could not encroach upon the institutions' attributions since, evidently, Article 5(2) and 13(2) TEU imply that the institutions act within the limit of the powers conferred to them and pursuing the objectives laid down by the treaties only. As long as those powers and objectives are neither altered, nor undermined, these rules do not prevent a vast majority of member states from providing for additional tasks with respect to some institutions. It is worth recalling that in the *Bangladesh* case the ECJ, as well as the Advocate General Jacobs, stated that member states may confer tasks to the Commission aimed at coordinating their activities outside the treaties[6].

Undoubtedly, in that context the room for action appeared tiny from an EU law standpoint. For, according to Article 41 of the Vienna convention, a *17 plus* treaty could affect neither the enjoyment of the rights of the non-euro zone countries under EU law, nor the performance of their obligations on the one hand, and could not amount to affect the effective ex-

[6] 30 June 1993, joined cases C-181/91 and C-248/91, European Parliament v. Council and Commission, ECJ Report 1993, I-3713 et seq. Likewise, in *EDF* case the ECJ accepted without objections the fact that the administration of the European Development Fund established by member states outside the Community budget, had been entrusted to Community institutions (2 March 1994, C-316/91, European Parliament v. Council, ECJ Report 1994, I-625).

ecution of the object and purpose of EU law as a whole, on the other hand. However, one could argue that should a *17 plus* instrument enhance the existing EU mechanisms of national budget surveillance, that outcome would be consistent with the object and purpose of the EU treaties and, ultimately, consistent with the condition laid down in Article 41(1) ii of the Vienna Convention.

Even considering the approval of a soft-law instrument, the "Euro Plus Pact"[7], as well as the so-called *Six Pack*, all these measures hardly amounted to re-establishing international market confidence on the euro zone. In essence, this is why the *Fiscal compact* has been concluded. Further strengthening of economic convergence within the euro area was needed, much in the way suggested by Mr. Delors when the EMU was conceived. The main political purpose was to tackle risks of spill-over effects of the crisis from some euro zone states to other states of the same area, their mutual destinies being interwoven. A set of comprehensive rules, ensuring sustainability of national fiscal policies in the long run, was considered one of the levers in order to rebuild market confidence on both the euro currency and the related economies.

Use of Union institutions outside Union framework. As argued above, under certain conditions additional tasks may be attributed to EU institutions outside Union framework[8]. Particularly in the case of *Fiscal compact*, that approach was in principle considered viable, provided that the future treaty would have avoided inconsistencies with the law and related principles of the EU (*contra legem* provisions)[9]. Further, we have elsewhere argued that, if needed, the provisions aimed at supplementing EU legislation (*praeter legem* provisions) could be enacted through the usual legislative procedures based on a Commission initiative, while respecting its auto-

[7] "The Euro Plus Pact. Stronger Economic Policy Coordination for Competitiveness and Convergence" is a political agreement concluded by the euro area heads of state or government (and joined by Bulgaria, Denmark, Latvia, Lithuania, Poland and Romania) on 24- 25 March 2011. It is annexed to the European Council Conclusions adopted on the same days (see T*he European Council in 2011,* Publications Office of the EU, Luxembourg, 2012, 40 et seq.

[8] 27 November 2012, C-370/12, Pringle, nyr, para. 74.

[9] The ECJ jurisprudence is clearly oriented in the sense that the effects of multilateral mixed agreement on the bilateral relations between Member States cannot affect primary law, as well as the allocation of responsibilities defined in the treaties (see, in that regard, ruling 30 May 2006, C-459/06, MOX Plant, ECJ Report 2006, I-4635, para. 123; Opinion 1/91, ECJ Report, 1991, I-6079, para. 35, and Opinion 1/00, ECJ Report 2002, I-3493, paras. 11 and 12.

nomous power of initiative. Basically, it has been advocated that attributing some additional tasks to both the Commission and the ECJ could not affect the rights of the states not participating in the *17 plus* Treaty, since the institutions would have continued to work in the general interest in accordance with the EU treaties. After all, the history of the EU had experienced some precedents of *pragmatic flexibility*, such as the Schengen Agreement and the Prüm Treaty, albeit regarding subject-matters relatively addressed by EU law and having a less important impact. Moreover, in *Parfums Christian Dior* even the ECJ held that three member states could establish, through an international agreement, a common judge able to refer preliminary rulings in the field of trademark covered by the *acquis* [10].

As to the *Fiscal compact*, an *inter se* international agreement was perceived as the ultimate resort. It is a matter of course that the proper role of the EU institutions outside the EU legal framework was and remains debatable. For instance, the ESM treaty showed that such a use was possible with the consent of all Member States, whilst the draft agreement on the unified patent litigation system is quite a counterexample. The argument according to which Article 13(2) precludes allocation of new tasks to the institutions outside the EU legal framework unless a unanimous will to the contrary, goes too far. A treaty rule may not actually be derogated with the blessing of the 27 governments. So it is not clear that a unanimous will is required in order to attribute additional tasks to the institutions, provided that their role and nature are not altered[11]. In any case, the implied assumption was that the non-participating States, having recognized the need for the euro zone to have a proper fiscal discipline and taking part in the negotiations, as observers, could ultimately acquiesce or reduce their objections to the use of the institutions on the basis of a pure international instrument, provided that the EU treaties would be respected and the functioning of the single market would not be undermined. The Prime Minister of United Kingdom has clearly indicated that his Government would not raise objections to the recourse to EU institutions under the *Fiscal compact*, provided that the interests of the United Kingdom are not threat-

[10] 4 November 1997, C-337/95, *Parfums Christian Dior*, ECJ Report 1997, I-6013, para. 21.
[11] Opinion 1/92 ECJ Report 1992, I-2821, paras. 32 and 41; and Opinion 1/00, ECJ Report 2002, I-3493, para. 20; see also Opinion 1/09, not yet reported, paras. 74-76.

ened[12]. Thus, it can *ex post* be argued that UK Government acquiesced to the use of institutions outside the EU legal framework[13].

Finally, the use of an international instrument concluded among a limited number of member states raises a *repatriation problem*. As the *sunset clause* in Article 16 of the *Fiscal compact* recognizes, the great majority of member states already considered the need to bring back to the EU system at least that exceptional instrument which was conceived in the middle of the crisis. Therefore, the juxtaposition of the EU legal framework and an international instrument ratified by a limited number of member states is accepted on a temporary basis only. To say the least, that mixture may reinforce the fragmentation and uncertainty of the legal framework and also the divide between the euro area and non-euro area States.

Question 2

As indicated above, the competence of the Union in the area of economic governance (Articles 120 to 126 TFEU) is basically a competence of coordination and surveillance of their budgetary strategy, as well as of setting out economic policy guidelines[14].

However, Regulations 1466/97 and 1467/97 have been thoroughly revised and strengthened by the so-called *Six-Pack* and *Two-Pack*. In short, the *Six-Pack* reform focuses on national debts and macroeconomics imbalances, impacting on states with *earlier* sanctions, whilst the *Two-Pack* includes, on the one hand, a Regulation enhancing the surveillance

[12] "Cameron U-turn over policing of tough new euro zone rules", *The Guardian*, 28 January 2012.

[13] On 31st January the Prime Minister explained to the House of Commons that "The new intergovernmental agreement is absolutely explicit and clear that it cannot encroach on the competencies of the European Union and that measures must not be taken that in any way undermine the EU single market. Nevertheless, I made it clear that we will watch this matter closely and that, if necessary, we will take action, including legal action, if our national interests are threatened by the misuse of the institutions" (House of Lords, *The euro area crisis*, HL paper 260, 30, point 89). The Deputy Prime Minister took the view that the Government had agreed to co-operate with the EU by allowing euro zone countries to use the EU institutions to enforce the fiscal agreement (House of Commons, *The Treaty on Stability, Coordination and Governance in the Economic and Monetary Union: Political Issues*, 23). That being said, after the signature of the *Fiscal compact*, UK could, but did not actually challenged, its compatibility with the "unanimity rule" being violated. It could have indeed lodged an application against the 25 member states pursuant to Article 259 TFEU.

[14] 27 November 2012, C-370/12, Pringle, nyr, point 64.

for euro area states benefiting from financial assistance or threatened by serious financial instability, and on the other hand a Regulation which creates a reinforced European Semester for euro area countries with a revised timetable for the submission of national documents so to ensure the correction of excessive deficit: they are obliged to submit national draft budgets by 15 October every year. So in some cases even before they are submitted to national authorities.

Integrity of the internal market regime that applies to all EU Member States. See answer to questions No 1 and 3.

Question 3
Re-shaping the process of the EU integration. The current (democratic and financial) crisis surrounding the process of European integration has revealed the need of reforms. In the foreseeable future one may reasonably expect that the member states would shape some way out of the crisis, enacting both a revision of the treaties and of secondary law in order to achieve a workable and stable legal framework for the centralized monetary policy[15]. In that perspective, the *Six-pack* and the *Two-pack*, as well as the ESM treaty and the *Fiscal compact* were conceived just as provisional (though necessary) measures. Therefore, new powers and responsibilities for the EU in economic and fiscal policies appear indispensable objectives to pursue, assuming that the existing structures are not capable to achieve a sound economic governance in the EU. A centralized banking supervision is being established. Arguably that could turn out to be a first step towards a Fiscal Union that almost inevitably implies more Economic Union and ultimately more Political Union[16]. So far there is no clear path to pursue.

Reforms could points towards more differentiated integration in relation to measures not supported by unanimity. For instance, it has been

[15] Indeed, the President of the European Commission, José Manuel Barroso, said in his speech on the State of the Union on 12 September in the European Parliament: “We must complete the economic and monetary union.” On the same vain the German Chancellor stated that “we now need to find the right way forward to stabilize economic and monetary union in the long term by rectifying the design flaws. We need to be ambitious here and must not shy away from changing the treaty basis of economic and monetary union if this should prove necessary. This process of deepening the European Union is indispensable”.

[16] Louis, ’Institutional Dilemmas of the Economic and Monetary Union’, Challenges of multi-tier governance in the EU. Effectiveness, efficiency and legitimacy, Brussesl, 2013, 51.

suggested to inject *at primary law level* some forms of enhanced cooperation or partial exit-clauses in order to achieve more flexibility. That is debatable. On the one hand, that approach could add more complexity in the functioning of the Union and its institutions. It is not by chance that the enhanced cooperation has been used *cum grano salis* in the history of the EU. By way of example, the European patent and the FTT (see *infra*) examples show not only the political conflict that may accompany the use of the instrument of enhanced cooperation, but also the extreme level of legal complexity that it may entail. All in all, it would be quite interesting to explore how the forms of enhanced cooperation already adopted by the institutions (the law applicable to divorce, European patent with its mixture of international treaties as well as EU sources of law) are deemed to work in order to evaluate their impact on the functioning of the internal market and namely on *real economy*. On the other hand and perhaps mostly, to provide forms of differentiated integration implies some risks in terms of legitimacy and transparency. The legal complexity of the economic governance system is remarkable, though somehow unavoidable. The different forms of integration (provided for by *inter se* agreements, rules of primary law, enhanced cooperation etc) add more complexity. That system is hardly manageable and sometimes lacks transparency. In the near future it may be difficult to simplify the functioning of the current system of multi-tier governance. At the same time to inject through treaties' revision new forms of differentiated integration could ultimately affect the legitimacy of the EU. For that path could lead to more complexity and less transparency in the decision making, widening the skeptical attitude of the citizens towards Europe. In addition, the participation in the Union has historically produced a set of advantages and disadvantages for each member state in a game that, in political and economical terms, is most likely a positive sum game. Is it fair to pick and choose, exacerbating the concept of differentiated integration? A feeling of uncertainty is not misplaced.

The ESM treaty and the *Fiscal compact* may already be considered as exceptional forms of differentiated integration. Certainly, requiring international treaties the national constitutional processes of ratification to be observed, they enjoy quite an evident standard of democratic legitimacy. Admittedly, however, a revision process under Article 48 TEU entails a greater level of democracy and transparency, since it involves in addition the European Parliament.

Besides, the conclusion of above mentioned treaties dramatically shows that the EU legal order lacks the capacity of a swift self-amendment. The legal and political implications concerning a treaty revision without unanimity (similarly to the UN Treaty) deserve to be explored. The *Fiscal compact* experience shows that an international instrument poses inevitably some issues of inconsistencies with the law and principles of the EU, which usually need, to say the least, interpretative solutions. So it seems preferable to avoid in future other forms of international instruments which require, sooner or later, measures of *repatriation* in order to terminate possible incoherencies. International agreements may be tolerable in time of crisis but cannot, on their own, be a lasting solution and *a fortiori* cannot be a new form of EU law, as argued above (see answer question No 1)[17].

To sum up, three way forward may be envisaged for reshaping the EU integration process. First of all, a renewed economic and monetary union needs greater fiscal policy integration. The progress towards strengthening budgetary discipline already achieved by adopting the *Fiscal compact* – one could expect – may be further enhanced, for example, through granting the European level real rights to intervene in national budgets when the agreed ceilings of the Stability and Growth Pact have not been observed. Moreover, a renewed economic and monetary union needs greater financial market policy integration. In that perspective, the creation of an effective European supervisory mechanism for European banks is essential to better avert systemic risks to the EU economic order.

Second, a renewed economic and monetary union needs greater economic policy integration. Experience demonstrated dramatically that the current economic coordination did not suffice. The importance of the two pillars of economic and monetary union is a truism: a monetary union without a sufficient degree of convergence of economic policies is not likely going to last. The risk of spill-over effect if one country's loss of competitiveness is a problem of democracy as well. The issue is that greater economic policy coordination will also perhaps affect some core spheres of national sovereignty such as labor market or tax policy. As noted previously, national constitutional constraints need to be addressed, with the aim to find out a sensible balance between necessary

[17] Seee however Peers, 'Towards a New Form of EU Law?: The Use of EU Institutions outside the EU Legal Framework' EuConst 9 (2013) 37-72.

new intervention rights at European level and the scope for action of member states and their parliaments, which in principle should be preserved.

Third and most important, the normative instruments adopted to tackle the financial crisis, as well as the related constraints, do not flow from a mature democratic political process. Though confirming the paradigm of the supranational model of the Union, these measures show structural shortcomings if one considers the limited role reserved to the European Parliament in the economic governance of the EU. In this scenario, more democratic legitimacy has to be injected. Initially it could be done by means of the national systems. In the long run a real political union would be desirable. Conferring a normative role to the Commission would hardly be a proper solution, unless its nature is deeply changed. Likewise, increasing the role of the Council would not help too much in terms of democracy. Democratic legitimacy of the EU could be enhanced by injecting more accountability of the decision-making towards the EP (see answer to next question). In other words, the multilevel democratic nature of the EU system needs somehow to be reinforced focusing more on its own direct source of democratic accountability, the EP. Searching for a more mature governance of the euro zone that enhances its democratic accountability, will be the challenge of the future steps of economic integration.

Question 4

In the complex scenario of the new economic governance partially stepping outside the EU framework, national budgetary autonomy is going to be affected all the more in terms both of a duty to reduce government debt and to enact programs of structural reforms to ensure an effective correction of excessive deficits. These obligations affect the national autonomy to determine the level and distribution of public spending, as well as its funding. Although the adoption of national budgets pertains to national parliaments, the Commission and the Council have the competence to review the obligations of the *pays sous programme* and to monitor their correct implementation. As a matter of fact, the space left to national parliaments to deviate from objectives provided for in the relevant excessive deficit procedure, even in terms of debt criterion, is extremely tiny, if any. To say the least, governments of indebted states will be prevented from exercising expansionary fiscal policies. This is a problem both of democratic legitimacy and national sovereignty.

As to the former, it is worth noting that these constraints do not flow from a mature democratic political process. Indeed, the normative instruments adopted to tackle the financial crisis – while confirming the paradigm of the supranational model of the Union – show structural shortcomings in terms of democratic legitimacy. This seems all the more so if one considers the limited role reserved to the European Parliament in the economic governance of the EU.

It has been argued that the *Fiscal compact* seems also to widen the democratic deficit of the EU economic governance. On the one hand, in concrete terms, the margin of manoeuvre for national authorities facing budgetary problems is quite reduced. Also the Commission proposal aimed at reforming the CSF Funds (Common Strategic Framework) provides for ‘macroeconomic conditionalities’. In other words, all these economic, social and territorial cohesion instruments will be closely linked to the respect of fiscal discipline[18]. As a result, if a member state fails to comply with its own macroeconomic obligations, the Commission would have the right to suspend all or part of the commitments undertaken under the functioning of the CFS Funds.

On the other hand, the Commission role is enhanced, conferring to that institution a normative role and facilitating the adoption of the measures proposed by it, making it *semiautomatic* under the functioning of the new economic governance through the means of the reverse qualified majority rule in the decision making process[19]. One may wonder whether the Commission enjoys a full-fledged democratic mandate to play such a prominent role, being it still a semi-technocratic institution.

A democracy issue arises also from the fact that, first, the EP has no substantial say in the formulation of policy decisions according to Articles 121(2)TFEU (the EP is informed of the recommendations adopted by the Council), 121(5)TFEU (EP has the right to invite the President of the Council to appear before the relevant Committee), 148TFEU (which requires for a consultation of the EP) and 126 TFEU (the Council inform the EP of the decisions taken as to fiscal surveillance). The same is true as to the Economic dialogue approved with the *Six-Pack*: the Macroeconomic

[18] See COM(2012) 496 final, recital 19 and Article 21.

[19] R. Baratta, ‘Legal Issues of the ‘Fiscal Compact’: Searching for a mature democratic governance of the euro’, *The Euro Crisis and the State of European Democracy*, European University Institute, RSCAS, EUDO, Florence, Italy, 2012, 31, 51; W., van Aken, L. Artige, ’Reverse Majority Voting in Comparative Perspective: Implications for Fiscal Governance in the EU’, ivi, 129.

Imbalance Regulation (No 1176/2011, and No 1174/2011), as well as the fiscal Regulations (N0 1175/2011, 1177/2011 and 1173/2011), aim to foster the economic dialogue between the institutions. Ultimately, the involvement of the EP does not fully provide parliamentary legitimacy to the decision taken at the EU level.

Moreover, as to the *Fiscal compact*, the EP is hardly involved in the Euro Summits since its President may be invited to be heard, whilst the institution representing the European citizens receives *ex post* a report by the President of the Euro Summit. This is not to say that the governments are deprived of democratic legitimacy, but that their legitimacy depends upon effective accountability to their national parliaments. In the meantime the EP, representing the European citizens directly, does not emerge as a net beneficiary both in the current EU law framework (primary and secondary law, as revised by the *Six-pack* and *Two-pack*) and in the *Fiscal compact*, whereas the decision-making power of governments is reinforced. The EP is not involved in the shaping of the decision concerning the duty to reduce public debt pursuant to Article 4 of the *Fiscal compact* and the relevant decision of the corrective arm (the excessive deficit procedure) of the Stability and Growth Pact under Regulation 1177/2011. Even assuming that the Commission constantly pursues the general interests of the euro zone populations, that is not enough. In addition, the full implementation of the rule regarding the *joint discussion* between the national and European Parliaments (through a “Conference”) of budgetary policies and other issues covered by the *Fiscal compact*, would not be the panacea for recovering democratic accountability if one adopts the idea of deliberative democracy through deliberation of citizens’ elected representatives.

In this scenario, more democratic legitimacy has to be injected by means of the national systems, as the *Bundeverfassungsgericht* rightly demanded with regard to the rescue funds instruments recently adopted by the euro zone states. However, this is true only if national parliaments have the strength to effectively scrutinize the respective governments. The advantage of this perspective is that it does not entail far-reaching treaty changes, and would not raise in principle major national constitutional limits with regard to the transferral other portions of sovereignty to the EU.

However, another path, more consistent with the ideals of founding a European federation, might be pursued. Assuming that legitimacy is a concept with variable intensity *per se*, it may be enhanced by injecting more accountability of the decision-making towards the EP, though this perspective implies treaty changes and faces some national constitutional limits. Legal instruments to address the euro zone financial crisis have shaped new opportunities for the European integration process. Some deficiencies still deserve to be corrected. The democratic legitimacy and accountability of the EU, as long as the decisions on national budgets are more and more affected by European institutions, seem to be perceived as an issue to be tackled in the future developments of the EU legal order[20]. The multilevel democratic nature of the EU system needs to be reinforced so that it will rely less on national legitimacy inputs and more on its own direct source of democratic accountability. A genuine European political democracy is needed in order to pursue a sense of collective identity when the citizens evaluate the output side of the measures adopted under the economic policy-making.

Question 5
See answer No 12

Legal orders of the Member States

Question 6
The degree of legal challenges for euro area member states and other countries stemming from the primary and secondary law, as well as the *Fiscal compact* and ESM treaty, varies according to their respective participation to the economic and monetary union. Its fragmentation and the limited space of this paper prevent from dwelling on them. Besides, some points have already been addressed in previous answers. Therefore, the balanced budget rule has been chosen as an illustrative and significant legal challenge, at least for Italy.

The failure to achieve a balanced budget may be presented as a problem of democracy which plays a role larger than is currently acknowledged[21]. A balanced budget obligation tackles member states which adopt irresponsible fiscal policies , while their systems lack of economic competitiveness. It is also important for other members states which may be affected by contagious effects, given the interdependence of respective

[20] See *Towards a Genuine Economic and Monetary Union*, Report by President of the European Council Herman Van Rompuy, Brussels, 26 June 2012 EUCO 120/12, at 6-7.
[21] Baratta, 'Legal Issues of the 'Fiscal Compact', cit., 60.

economies, notably within the euro zone and to certain extent within the EU. Indeed the balanced budget obligation prevents the elites governing a country, and their policy autonomy, from adopting unethical debt-creating policies which will be paid by the future generations. Limits on national budget deficits may, as a consequence, protect democracies from intergenerational conflicts. Hence, the benefit for a democratic society since a fiscal discipline is one of the basic elements of a social pact among generations. After the *Six Pack*, the *Fiscal compact* is to be considered another clear signal that the euro zone states are giving up the laxity of the Maastricht Treaty and its related practice.

The balanced (or in surplus) budget constraints may be viewed as one of the major legal challenge euro zone member states faced since the beginning of the economic crisis. Introduced by the *Fiscal compact* (see answer No 8), it plays a key role in its architecture by posing constraints on its implementation at national level, as well as by attributing to the ECJ the power to adjudicate over the proper implementation pursuant to Article 8. Some member states started a process of introducing a balanced budget rules even before the *Fiscal compact* treaty was negotiated. In 2011, the Italian Parliament approved a first round of a constitutional reform incorporating a balanced budget obligation into Article 81 of the Italian Charter. The Constitutional reform of Article 81 was finalized on 17 April 2012, when the Senate approved it with a majority superior to two thirds of the Parliament, which prevented the holding of a referendum (provided for by the Italian Constitution in cases where reforms are adopted under a simple majority). The new Article 81, which takes effect from 2014, obliges the State as a whole to ensure the balance between budget revenue and expenditure, taking into account situations of adversity and favorable phases of the economic cycle[22]. Moreover, the borrowing is permitted for the purpose of considering the effects of the economic cycle only, and with the approval of both Houses by absolute majority if exceptional events occur[23]. Finally, the reform gives the ordinary law the task to define the exceptional events that allow the state to exceed the ba-

[22] "L'equilibrio tra le entrate e le spese del proprio bilancio, tenendo conto delle fasi avverse e delle fasi favorevoli del ciclo economico".

[23] "Il ricorso all'indebitamento è consentito solo al fine di considerare gli effetti del ciclo economico e, previa autorizzazione delle Camere adottata a maggioranza assoluta, al verificarsi di eventi eccezionali".

lanced budget rule. In these cases, the Government shall however present a readjustment plan so that a deficit spending must be redressed or recovered in the subsequent year, without turning out in a new public debt. An ordinary law, adopted by the absolute majority of the Parliament, will set up the basic rules and criteria to ensure that the balanced budget rule is implemented, as well as the sustainability of the public debt. The Italian constitutional reform has been considered as a "further major improvement in fiscal governance" and "another sign of Italy's commitment to sound public finances"[24].

It seems worth recalling that the *Fiscal compact* requires to implement the budget rule via binding provisions of permanent character, 'prefereby constitutional'. Article 81 of the Italian Charter goes beyond that requirement.

Question 7

In 2012 Italy has approved a new Bill No 234/2012 setting out comprehensive provisions on the participation of national authorities to the creation and implementation of the EU's political and normative institutions, in full coherence, on the one hand, with the Italian Charter, and on the other hand with EU principles of conferral, subsidiarity, proportionality, sincere cooperation, efficiency, transparency and participatory democracy[25]. One of the most innovative part of Law 24 December 2012 No 234 is indeed Part II which provides a thorough involvement of the Italian Parliament in the legislative process of the EU. The new Bill provides obligations to consult and inform the Parliament (Article 4), including the international agreements concluded among member states in financial, economic and monetary areas (Article 5). The objective is to involve effectively the Italian Parliament in the decision making process of secondary law before the Government adopt a position within the EU institutions (Article 6). In the same vein, the Italian Chambers may adopt formal instructions addressed to the Government, as well as parliamentary scrutiny reservations (Article 10). To put it shortly, any political and normative activity of the EU, namely in the economic governance area, is currently

[24] *Commission staff working document. Assessment of the 2012 national reform programme and stability programme for Italy*, SWD(2012) 318 final, Brussels 30.5.2012, 4.

[25] C. Favilli, 'Ancora una riforma delle norme sulla partecipazione dell'Italia alla formazione all'attuazione delle politiche dell'Unione europea', Rivista di diritto internazionale, 2013, 701.

subject to a serious scrutiny control by the Italian Parliament. Implicitly the new Bill is also meant to inject in the EU system more democratic legitimacy through Italian national system. However, this will be true only if the Italian Parliament has the strength to effectively scrutinize the government. The Bill goes exactly in that direction providing all the necessary normative tools.

Question 8

The core of the *Fiscal compact* is laid down in Articles 3 and 4 of the treaty, as they respectively establish the 'balanced budget rule' and the obligation to reduce a 'public debt' at the ratio of 60% – *i.e*. the same level provided for since the Maastricht Treaty[26]. The parties facing an excessive deficit procedure are expected to set up a budgetary and economic partnership plan (including a detailed description of structural reforms) to ensure an effective and durable correction of their excessive deficit (Article 5). As indicated in point 8 of the preamble, the Commission is meant to present further legislative proposals for the euro zone in order to implement Articles 5 and 6 within the EU legal order. Secondary law acts would likely solve any issue of potential friction between those provisions and the EU normative framework.

As to the core of the fiscal discipline, Article 4 states that if the ratio of the general government debt to GDP exceeds 60%, the difference between the actual ratio and 60% should be reduced by an average of one-twentieth per year. The final provision reflects what is already laid down in secondary law, despite some attempts to enhance the obligation to reduce public debt pending negotiation. For it contains a mere *renvoi* to Article 2 of Council Regulation (EC) No 1467/97, as amended by Council Regulation (EU) No 1177/2011. This legislative measure reformed the corrective arm of the Stability and Growth Pact, which is applicable to all member states (except the United Kingdom and Denmark), aside from financial sanction addressed to euro zone states only. It was assumed that the former corrective arm of the Stability and Growth Pact, while referring mainly to the excessive deficit procedure being triggered if a member state deficit went above 3% GDP threshold, did not focus

[26] Unsurprisingly, given the political atmosphere, the *Fiscal compact* rules do not contain any reference either to the issue regarding the pooling of national debt, or to any form of euro-bonds or project-bonds. In that respect, it merely engages the parties to improve the reporting of their national debt issuance both to the Council and the Commission in order to coordinate their respective plans (Article 6).

enough on the excessive debt criterion, allowing therefore a member state to run up debts of well above 60% without being sanctioned[27]. On the contrary, Regulation No 1177 deters both *excessive deficit* and *excessive debt* and, if they occur, provides for prompt correction. In short, as to the ratio of government debt to GDP, Article 2 of the Regulation states that the Council and the Commission take into account all the relevant factors and the economic and budgetary situation of the member state concerned, whilst considering the level and evolution of the debt and its overall sustainability, as well as the business cycle. Broadly speaking, this evaluation of the ratio of the government debt requires that the latter be sufficiently diminishing and approaching the reference value at a satisfactory pace, whilst providing a transitional period of three years. Article 4 of the *Fiscal compact* endorses these normative elements of secondary law.

The other key provision of the *Fiscal compact* is the *balanced (or in surplus) budget rule*, set out in Article 3(1)(a), which is essentially based on the model of *debt brake* laid down in the German Constitution. Pending the negotiation of the *Fiscal compact*, the requirement to implement that rule at national level has been downgraded to a "preferably" constitutional level (from "constitutional or equivalent level"). It refers directly to the general government budget, but it is clear that the practice of accumulating debt outside the general government account undermines the attainment of the Union's objectives in the framework of the EMU and amounts to a violation of the treaty rules, and in particular of Article 4(3) TFEU. The balanced budget rule indicates a common will of the parties to embrace serious constraints on their sovereign rights when adopting the annual budgetary laws by limiting public indebtedness at an early stage. Despite the fact that this rule is a clear "addition" to the existing rules of EU law, not addressed by the *Six pack*, it pursues and enhances the fulfillment of the general goals of the Union. Clearly, that rule entails no inconsistency with the 3% GDP threshold laid down in Protocol N° 12. The latter is a *ceiling* which does not prevent states to commit themselves in a stricter way. In other words, they are not conflicting provisions, the compliance with the former implying no violation of primary law and vice versa. As a result, there is no need to apply the coordination clause provided for in Article 2(2) of the *Fiscal compact*.

[27] However, it seems worth reminding that the excessive deficit procedure set out in Article 126(11) TFUE provided for sanctions, which have never been enforced.

Being somewhat different from the *Golden Rule*, the balanced budget rule also seems to provide for four elements of flexibility. First, it is worth considering the presumption according to which the obligation is deemed to be respected if the annual structural balance has a deficit of 0,5%. This figure is raised to 1% for states having a public debt significantly below 60%. However, this provision is defined in terms of the rapid convergence towards the medium-term objective (MTO), pursuant to Regulation N° 1466/97 as amended by Regulation N° 1175/2011. The convergence process entails the consideration of the country-specific sustainability risks, whilst the relevant progress towards the MTO is subject to evaluation in line with the Stability and Growth Pact.

Second, the time-frame for such convergence, as proposed by the Commission, takes into account the relevant "sustainability risks" for each party. The time for convergence (and the "progress" towards the MTO) is evaluated on the basis of an overall assessment with the structural balance as a reference, including an analysis of expenditure net of discretionary revenue measures.

Third, in exceptional circumstances states may temporarily deviate from their respective medium-term objective or the adjustment path towards it. Exceptional circumstances include an "unusual event outside the control of the Contracting Party concerned which has a major impact on the financial position of the general government", as well as "periods of severe economic downturn", causing a temporary deviation in the budget that "does not endanger fiscal sustainability in the medium term". As a result, the treaty does not seem to prevent a party hit by a natural disaster, or a severe economic blow, to adopt some measures of fiscal stimulus.

Fourth, the rule provides for a sort of a *de minimis* principle since only *significant* deviations – that is to say, having an appreciable effect on the commitment undertaken by the relevant state – from the virtuous budgetary conducts entail the automatic triggering of a correction mechanism aimed at implementing measures to correct the deviations over a period of time. It is worth noting that the correction mechanism shall be put in place by states at national level in accordance with the principles established by the Commission. As a consequence, this institution acquires a relevant normative power to guide national legislation in terms of common principles regarding "in particular" (the list is thus not exhaustive) the nature, the size and time-frame of the corrective action to be automatically undertaken, also in cases of exceptional circumstances, and the role and independence of the national institution to monitor the compliance with the balanced budget rule. This normative power is institutionally quite delicate and should be carefully evaluated when transposing the *Fiscal compact* into the EU legal framework.

Question 9
The answer is negative.

Question 10
First, there is a risk of a legal and political fragmentation of the EU framework. Tellingly, for instance, the *Fiscal compact* tries to build a bridge between euro zone member States and those outside the euro area. So it comes as no surprise that, under certain conditions, even the non-euro zone states may accept being bound by it. In particular, as long as they enjoy either a derogation or an exemption from participation in the single currency, they would be bound only by the selected provisions of titles III (which represents the core provisions of the treaty) and IV (economic policy coordination and convergence) to which they declare their adhesion at the moment of depositing their instrument of ratification. As a consequence, for them only the accession to the treaty can be selective (à la carte). Eight non-euro countries (Bulgaria, Denmark, Hungary, Latvia, Lithuania, Poland, Romania and Sweden) showed their interest to be aligned to the fiscal compact by signing it. In the same vein, the *repatriation provision*[28] (see also *supra* answer to Question No 2), as well as the Euro Summit regulation[29], should be considered.

Second and more generally, the new economic governance regime entails not only relevant implications namely for Member States with de-

[28] That is to say the commitment, to bring the F*iscal compact* treaty in the wake of the European legal framework "within five years, at most" (Article 16).
[29] In short, according to Article 12, all heads of state or government of the euro zone – having no regard to their ratification of the *fiscal compact* – "meet informally", together with the Commission and the President of the ECB. The participation in discussion is also open to the Contracting states not being party of the euro zone, if the agenda touches upon some defined items, *i.e*. the competitiveness, the modification of the global architecture of the euro area and the related fundamental rules, as well as "when ap propriate and at least once a year" some "issues of implementation" of the *Fiscal compact*. This wording clearly shows the need to reach a compromise between, on the one side, the euro zone states pursuing the establishment of a new body tailored for the objectives for which they only bear responsibility, and on the other side, the non euro zone states which feared being put on the outside when discussing the core of the future economic governance.

rogation seeking to meet the convergence criteria pursuant to article 141(1) TFEU, but also that the euro zone states could move towards a more integrated process, leaving the others to the periphery of the Union. A sort of *Two-Speed Europe* may take shape, and that for a several reasons. Let's take for instance the first experience of enhanced cooperation limited to euro area states in the field of taxation (the so-called Tobin tax). The UK Government challenged the legality of the decision authorizing eleven Member States to enhanced cooperation in the area of FTT, before the ECJ (case C-209/13), pleading that a specific part of it (the *counterparty principle* encapsulated in Article 4(1), point f) of the Commission's proposal) infringes inter alia customary international law since it has extraterritorial effects and, as a result, Article 327 TFEU as regards the obligation to respect the competences of non participating Member States. Those plea in law are unconvincing[30]. However, it is true that the more eu-

[30] Under international law one may reasonably advocate a *protective principle approach* when dealing with the extra-territorial use of national legislation. In this perspective, an international law subject *may assert* its authority over matters which produce a deleterious effect on another entity irrespective of where the acts take place or by whom they are committed, notably in respect of situations that take place wholly outside its territory, provided that it has an objective *domestic interest deserving protection*. It may be worth noting that such a head of jurisdiction does not entail the exercise of *universal* jurisdiction – though, as is known, States sometimes legitimately adopt grounds of jurisdiction which operate universally (Belgium did it for war crimes and so forth) – since the protective approach presupposes the existence of a subject-matter or a situation which is directly harmful to the State exercising jurisdiction. Stemming from several cases of States' practice that the protective principle can be regarded as an accepted ground of jurisdiction under customary international law. This approach could amount to being a useful guide to solve the problem of international fiscal jurisdiction. In addition, the ECJ endorsed that approach when applying EU anti-trust law to conducts restricting competition adopted by companies located outside the territory of the Union, but indeed having repercussions within the EU since their activities were directed to affect the EU market (see *Wood pulp case*, joined cases 89/85 and others, *Ahlstrom*, judgment of 27 September 1988). It is here submitted that the aim to protect the internal market from conducts affecting it, is one of the most convincing rationale of that ruling. It is hardly necessary to add that financial transactions targeted by Article 4(1) point f) of the Directive as proposed by the Commission, caused harm to the euro zone and its market, so that a *proportionate legislative reaction* even having some limited extra-territorial effects, can be reasonably advocated and justified by the participating Member States. It is worth reminding that that piece of draft legislation squarely addresses the *fundamental need* to protect one of the major achievements of the European integration and the significant integration results achieved through the EMU since the Maastricht Treaty. Indeed, the Commission's initiative falls precisely within the financial crisis of *the common currency* that involved no less than five states.. As the Commission clearly stated in its proposal, there is a strong need to protect that major achievement: "*The recent global economic and financial crisis had a serious impact on our economies and the public finances. The financial sector has played a major role*

ro zone states endorse new forms of integration, the more contentious this process may become unless there is no clear acceptance of the principle of solidarity which permeates the Treaty on European Union. In an ideal world, the FTT proposal would better fit into a solidarity scheme should its revenue benefit the process of European integration as a whole, becoming a new own resource of the EU[31]. In practice, however, that is just a wishful thinking given the current legal basis (Article 311 TFEU): unanimity requirement is not being met, so far at least.

Monetary policy

Question 11

This question refers to the bond buying programmes of the ECB and their consistency with Article 123 TFEU[32]. At the time of writing both the ECJ and national courts did not touch upon it, though cases against the Outright Monetary Transactions (OMT) are pending before the General Court as well as the German *Bundesverfassungsgericht*[33]. In *obiter dictum* of the ruling not to grant interim relief against the ratification of the ESM and *Fiscal compact*, the German Constitutional Court has already cast doubts over the OMT's consistency with the treaties[34]. In that respect, there are some points relatively clear in law that can be summarized as follows:

1. Under Articles 123 TFUE and 18(1) Statute ESCB and ECB, the prohibition of monetary financing concerns only the purchase of bonds directly from member states, whilst the ECB still enjoys the power to intervene on the secondary market, the latter being a necessary monetary policy instrument for any central banker.

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in causing the economic crisis whilst governments and European citizens at large have borne the cost. There is a strong consensus within Europe and internationally that the financial sector should contribute more fairly given the costs of dealing with the crisis and the current under-taxation of the sector".

31 Poiares Maduro, 'A new Governance for the EU and the Euro: Democracy and Justice', Challenges of multi-tier governance in the EU. Effectiveness, efficiency and legitimacy, Brussesl, 2013, 27, 41-42.

32 See ECB Decision 2010/281 of 14 May 2010 establishing a securities markets programme (2010) OJ L 124/8 whihc terminated in September 2012.

33 See T-492/12 *Von Storch and others v. ECB*. The German Constitutional Court announced that it would rule on the compatibility of OMT with the German Constitution (BVerfG, 2 BvR 1390/12, 12 Sept. 2012, para. 202).

34 Ruling of the German Constitutional Court (12 September 2012, 2 BvR 1390/12, 2 BvR 1421/12, 2 BvR 1438/12, 2 BvR 1439/12, 2 BvR 1440/12, 2 BvE 6/12, paras. 276-278).

2. Bond buying programmes establish no direct link with member states.
3. ECB interventions pursue the objectives set out by the treaties, and namely the price stability throughout all the euro zone. While protecting one of the most important achievement of the European integration, *i.e*. the common currency, ECB ensures the stability of the euro and, albeit indirectly, the functioning of the internal market. For nobody knows what kind of possible disruptive consequences (in terms of contagious and spill-over effects) may have the failure to establish an economic and monetary Union whose currency is the euro (Article 3(4) TEU). The opposite opinion would imply that the ECB should not intervene at all even if the collapse of the common currency is at stake.
4. Under the OMT, interventions are strictly conditioned to a request for a stability support by the relevant member state which must meanwhile commit itself to an adjustment program (*strict conditionality*).
5. OMT interventions cover only one to three years bonds. Thus the risk for the ECB is quite reduced.
6. Should the beneficiary member state fail to meet the program's objectives, EBC would terminate the intervention (for conditionality may be impossible to enforce). That would prove the ECB's sovereignty and independence, as set out by primary law.
7. All that being considered, ECB programmes and notably the OMT neither overstep its authority, nor are means to fund member states. So in principle they do not circumvent the objective to prohibit monetary financing of euro zone states (in the sense stated by 7th recital of Council Regulation No. 3693/93: "purchases made on the secondary market must not be used to circumvent the objective" of Article 123 TFEU)[35].
8. As a matter of fact, OMT have not been used so far since no country has applied for an OMT program. Arguably, there is no effective risk for the ECB to print money, risking hyperinflation.
9. Finally, a serious issue arises which concerns the relationship between a national supreme court and the ECJ: to avoid any risk of

[35] Contra, P. Craig, *The Lisbon Treaty. Law, Politics and Treaty Reforms*, OUP, Oxford, 2013, 472.

conflicting decisions the *Bundesverfassungsgericht* should consider to refer the case to the ECJ.

Question 12

Started in 2008, the financial crisis has shown several inadequacies of the system founded in the Seventies on the mere harmonization of banking supervision under the principle of *home country control*. At the time of negotiating the Maastricht Treaty member states were not eager to lose control on their own banks. A sort of *competition in laxity*, aimed at attracting banking business where the applicable rules were softer or weaker, has occurred. As the euro area Summit held on 29 June 2012, the 'vicious circle between banks and sovereign' that is weakening the finances of euro zone needs to be cut. This necessarily implies additional financial market regulations, but not necessarily, at least in principle, further differentiation between euro area and other member states as long as the latter accept the new financial instruments and, as a consequence, an additional loss of sovereignty.

The treaties provided for a partial remedy: Article 127(6) TFEU is a legal basis having the very precise objective to center on the European level 'specific tasks' relating to the prudential supervisions of other financial credit institutions. As is known, the European institutions have definitively opted for this way out with a view to creating a real *Banking Union*. Although the system is still being under discussion, it ultimately would lead to an architecture based on two concentric circles: the larger one (including namely, the *SEFIV* rules and *CRV IV package*) is applicable to all member states, the smaller (*i.e*. SSM, SRM and the *Single Bank Resolution Fund*) concerns the *special* regime applicable to euro zone states aimed at creating an integrated system of European *supervision*. The mere coordination of national banking control, though enhanced it may be, is not enough for euro zone states, as the crisis of the financial sector clearly proved since 2008. On 12 September 2013, the EP endorsed a political agreement on draft legislation to introduce a single bank supervision system in the euro zone under the aegis of the European Central Bank. It will change the way that the European Banking Authority (EBA) functions.

At the time of writing, two key elements compose the new banking union: the *centralization of banking supervision* and a *single resolution* *system*. The former is based on the assumption that fragmentation on banking control should be over in order to ensure that the financial markets have full confidence in the quality and independence of the banking supervision. Based on two Commission proposals, the Single Supervisory Mechanism (SSM) and the amendments to 2010 Regulation establishing the European Banking Authority (EBA) are being finalized by the institutions.

In essence, under the framework proposed by the Commission, the SSM is based on the ECB which will be responsible for supervising banks within the banking union, while relying on the specific know-how of national authorities. In close cooperation with them, the ECB will be responsible for the supervision of around 6,000 credit institutions in the euro area. The SSM would involve in particular banks with assets of more than €30 billion, representing total assets (share of GDP) of the host country of more than 20% (except where below €5 billion), along with national banks in the euro zone. Thus, in principle ECB would supervise the 130 biggest banks in the euro zone, while the other credit institutions would be under the control of a mixed system (EU and national supervision). Although the SSM is based on Article 127(6) TFEU, it is open to non euro states that have established a close cooperation in accordance with Article 7 of the SSM proposal.

The Single Resolution System – the second key complement of the Banking Union – is being under discussion since the Commission proposal presented on 10 July 2013 (Com(2013) 520 final, alongside with the harmonization of national bank resolution rules (the BRRD Directive). It is essentially founded on two pillars. First, a SRM (Single Resolution Mechanism) which is charged to apply uniform rules. Powers of resolution are conferred upon the Commission and the Board (a new EU body with full legal personality). National authorities are expected to execute resolution actions adopted by both the Commission and the Board. Second, a *Single Resolution Fund* is provided for. The Fund would be fed by contributions to be paid by the entities covered by the proposal. It is to note that the proposal would apply only to defined entities established in the euro area MS, and those that have established a close cooperation arrangement with the SSM. Two of the main legal issues concern whether the Commission proposal may be correctly based on Article 114 TFEU and whether the delegation of powers to the Board are compatible with the Treaties and namely with the *Meroni Doctrine*. It remains to be seen whether the SRM, being based on Article 114 TFEU, may be applied to entities established in certain Member States only. Given the limited space of this report, these issues cannot here be dealt with.

Question 13

In principle the ECB is expected to fulfill multiple objectives pursuant to the treaties (price stability is, so to say, the *primus inter pares* goal, alongside with the support for the general economic policies in the Union). The core task of maintaining price stability in the euro area will be complemented by supervision tasks on credit institutions. Impliedly but necessarily the role conferred to the EBC should involve the power to carry out some prudential supervision's tasks of the EU banking system. For (i) to restore confidence in the banking system is functional to the euro's purchasing power, and (ii) Article 127(6) would be otherwise deprived of any *effet utile*. That being said, if, as it is likely, a SSM is going to be established, it will be *inter alia* necessary to separate monetary policy under the treaties and banking supervisory tasks in order to prevent potential conflict of interests and ensure autonomous decision-making for the performance of these tasks.

Nevertheless, the current treaties do not allow the ECB to act as a lender of last resort for member states (clearly the so-called bond buying programmes of the ECB are quite different, as argued above). It is not within the ECB's mandate. In addition, to say the least, the 'no bail-out clause' in Article 125 TFEU, and the prohibition of direct financial facilities in Article 123 TFEU, require to be revised and, as a result, new tasks for the ECB being given. Overall, the monetary union was construed in the way to subject member states to the logic of the market when they enter public debt. They only remain responsible for commitments to their international creditors. In the logic of the current economic and monetary union, the obligation to pursue a sound fiscal discipline is necessary to maintain the financial stability of the common currency as a whole.

Question 14

To put it very shortly, the independence of the ECB does not necessarily imply that its activity is outside the judicial control of the ECJ. Under the well-established ECJ case-law, the EU is founded on the 'Rule of Law' so that effective legal protection in the fields covered by Union law is ensured[36]. However, it is to be noted that it is also settled case-law that whenever an institution enjoys a certain or a fortiori wide degree of discretion the judicial control is restricted to considering whether the exercise of that discretion contains a manifest error or constitute a misuse of power or whether the institution clearly exceeded the bounds of its discretion. Arguably, *la justiciabilité* of both monetary policy decisions and open market operations could follow the same self-restraint approach.

Open question

Question 15

The EU has started focusing more on economic growth. That issue was addressed by the European Council of 28th/29th June 2012[37]. The ultimate objective is to enhance the social dimension of the EU in order to stimulate more popular support in a period of acute economic recession and the related social crisis faced in several euro zone states[38]. It cannot be overlooked that, according to its founding principles[39], the Union's aim is to promote the well-being of European peoples and that democracy is naturally related to the idea of economic development and social welfare, and ultimately to justice[40].

36 Rulings 294/83 *Les Verts* and C-50/00 P, *Unión de Pequeños Agricultores*, para. 40; Opinion 1/09, para. 66; Article 19(1) TFEU.

37 See the *Compact for Growth and Jobs*, Annex to the European Council Conclusions of 28/29 June 2012.

38 For instance, more emphasis on growth seems necessary to tackle the risk of condemning the euro zone to austerity, as several MEPs argued (see the arguments raised by EMPs Sylvie Goulard, Daniel Cohn-Bendit, Guy Verhofstadt and Pervenche Berès, as reported by Agence Europe N° 10565, 2 March 2012).

39 Articles 3(1) TEU and 9 TFEU (as to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health): B. de Witte, A.H. Trechsel et al., *Legislating After Lisbon. New Opportunities for the European Parliament*, EUDO Report 2010/1, 58 et seq.

40 A. Sen, *The Idea of Justice*, Allen Lane –Penguin Books, London, 2009, 345 et seq.