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Legal opinion

The European TSCG and EU law

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The question at issue

At the European Council meeting in Brussels on 2 March 2012, 25 EU Member States, including 17 States using the euro as their common currency, signed the "Treaty on Stability, Coordination and Governance in the Economic and Monetary Union" (hereinafter referred to as the "TSCG". The TSCG is a treaty between signatory states (and not an EU treaty). This constellation was deemed necessary by the Member State governments, as neither Great Britain nor the Czech Republic would have approved a change to the EU Treaties. The Treaty is subject to ratification in the signatory Member States and to transposition into national legislation. It will come into force on 1 January 2013, insofar as 12 Eurozone countries have presented their instruments of ratification.

In signing the TSCG, the signatory States undertake to transpose the rules set forth in Article 3.1 into national legislation "through provisions of binding force and permanent character, preferably constitutional, or otherwise guaranteed to be fully respected and adhered to throughout the national budgetary processes" (cf. Article 3.2).
The procedure for dealing with so-called "excessive" deficits in EU Member States goes in part far beyond existing Council and Commission regulations, providing in particular for the preferably irrevocable introduction of a balanced budget rule ("*debt brake*" or *Schuldenbremse*"), for an automatic mechanism to take corrective action and adopt sanctions when the provisions regarding debt limits are breached, and for the submission of the budgetary plans of the Member States concerned for endorsement by the European Commission and Council (Article 5).

As a treaty between signatory states, the TSCG is not - from a legal perspective - part of the legal framework of the European Union. Its substance is supposed however to be incorporated into such within five years, at most, of the date of its entry into force. The European Parliament (EP), European legal working groups and the public at large are currently voicing their opinions on whether the TSCG is in breach of EU law, and whether, in this context, it can be legally challenged. The following questions are at the top of the agenda:

A. Do the TSCG rules constitute a breach of EU law?

B. Which concrete options would be available to challenge the Treaty in court, should the answer to the first question be positive?

Contents

A. The legality of the TSCG

When attempting to answer the question whether the TSCG breaches provisions under EU law, a distinction needs to be made between formal and material legality. From a formal perspective, the TSCG could be illegal, as the possibly necessary formal act of consent is missing. From a material perspective, the question needs to be answered as to whether the substantive rules contained in the TSCG are in breach of EU law. Finally, it is not clear what will happen in the case of any incompatibility with the Treaties, as set forth in Article 2.2 TSCG.

1. Formal legality

The TSCG is an international treaty signed by 25 Member States, which makes reference to the procedures already set forth in the TFEU in the field of economic policy and which under certain circumstances would complement it. The TSCG obliges the States to introduce a balanced budget rule and establishes a monitoring procedure for States with budgetary deficits involving, at EU level, the Commission, the Council and the CJEU. Such recourse to these EU institutions is by way of a so-called "borrowed administration" (*Organleihe*) arrangement.

The initial question here is which rule current EU practice has produced with regard to "borrowed administrations" that could apply to the TSCG, and in particular whether EU law can be construed as requiring the unanimous consent of all Member States, including those not participating in the TSCG (see a), for such an arrangement. It is similarly conceivable that the EU can of its own accord give its consent in a legally effective manner to an international treaty between States in the field of economic policy, which makes reference to actions of EU institutions and even assigns them new responsibilities (see b).

a) Member States' action under international law

The TSCG could be formally illegal since not all Member States have given their consent to individual Member States concluding an international treaty outside the EU Treaties.

aa) Competence

The initial question here is whether at all the Member States are authorised to conclude international treaties in the field of economic policy.

An agreement outside the bounds of EU law between Member States in the form of a treaty under international law would be clearly inadmissible when such a treaty applies to one of the areas listed under Article 3 TFEU in which the EU has exclusive competence.

> CJEU, Opinion 1/75 [1975] ECR 1355, (1364) - local costs; CJEU Ruling 1/78 [1978] ECR 2151, paragraph 32 - Convention on Nuclear Materials.

In the majority of areas where the EU shares competence with Member States (Article 4 TFEU), agreements are possible to the extent that the Union has not already exercised its competence (Article 2.2 TFEU 2nd sentence). In the field of economic policy the EU has only a coordinating competence (Article 2.3; Article 5.1 TFEU), with actual competence remaining with the Member States. There is general consensus that Member States may, within the bounds of their competences, conclude international agreements of their own accord.

Bernd Martenczuk, Die differenzierte Integration und die föderale Struktur der Europäischen Union (Differentiated integration and the federal structure of the European Union), in: EuR 2000, 351 ff. (363).

In this sense the formal competence of the 25 Member States signing the TSCG is to be recognised.

Christian Calliess/Christopher Schoenfleisch, Auf dem Weg in die europäische ‚Fiskalunion'? (On the road to a European "Fiscal Union"?), in: JZ 2012, 477 ff. (481).

bb) Requirement for all Member States to give their consent?

A further question is whether it is sufficient for not all EU Member States to have been involved in this treaty. A requirement for all 27 Member States to give their consent could be derived from the fact that in many of its provisions the TSCG refers to EU institutions, assigning them specific tasks.

Cf.: Jean-Claude Piris, The Future of Europe, Towards a Two-Speed EU?, Cambridge 2012, 127.

Applied to the TSCG, this concerns for instance the competences accorded to the Commission with respect to the convergence criteria (Article 3.1.b TSCG, 3rd sentence), the monitoring competences of the Council and Commission with regard to any budgetary and economic partnership programme needing to be put in place (Article 5 TSCG), but also to the Commission's reporting obligation regarding the introduction of balanced budget rules and the corresponding jurisdiction of the Court of Justice of the European Union (Article 8 TSCG).

A requirement for all Member States to give their consent to recourse being had to EU institutions is supported by past treaty practice. The most prominent example is the 1991 European Agreement on Social Policy, in which all Member States, including Great Britain, authorise - in a Protocol to the Maastricht Treaty - the 11 States covered by the agreement

"to have recourse to the institutions, procedures and mechanisms of the Treaty for the purpose of taking among themselves and applying as far as they are concerned the acts and decisions required for giving effect to the agreement on social policy attached to the protocol".

For more on this example, see Daniel Thym, Ungleichzeitigkeit und europäisches Verfassungsrecht (Asynchronicity and European Constitutional Law), Baden-Baden 2004, 194 ff.

With regard to the TSCG, the consent of Great Britain and the Czech Republic to recourse being had to EU institutions is missing. This can be construed as a breach of EU law:

"Insofar as such consent is not gained, recourse to EU institutions would be illegal under EU law".

Christian Calliess/Christopher Schoenfleisch, Auf dem Weg in die europäische ‚Fiskalunion'? (On the road to a European "Fiscal Union"?), in: JZ 2012, 477 ff. (484).

It can be further argued that the mere reference to action on the part of EU institutions and the legal consequences associated with such constitute a situation requiring the consent of all Member States. This would imply that the mere reference to the procedure enshrined in the TFEU for handling government deficits with its obligation for the contracting party to take appropriate action to reduce an excessive government deficit (Article 4 TSCG) calls for the consent of all Member States to be gained.

Paul Craig, The Stability, Coordination and Governance Treaty: Principle, Politics and Pragmatism, in: European Law Review, Issue 3, 2012, 231ff. (243).

cc) Procedure for amending the Treaties (Art. 48 TEU)

In contrast to past practice, the Lisbon Treaty provides for a clear procedure (in Article 48 TEU) for cases where a Treaty is to be amended by consensus, as was the case with the 1991 Social Protocol enabling recourse to EU institutions. Even though Member States have fundamental competence in the field of economic policy allowing them to conclude international treaties, this does not mean that they are no longer bound to comply with the procedure set forth in Article 48 TEU when the treaties in question establish rules constituting, for all intents and purposes, an amendment of primary law and provide for recourse to EU institutions.

The TSCG is essentially intended to amend existing primary law. This can be seen by the fact that large parts of the TSCG's regulatory content do not constitute autonomous regulatory substance, but instead are to be seen as a further development of the monitoring procedure already set forth in the TFEU in the context of the Stability and Growth Pact (Article 121 ff. TFEU). In contrast to previous international treaties between Member States (for instance the Schengen Agreement or the Agreement on Social Policy), the TSCG is therefore not a regulatory instrument for a field of policy not or only to a certain extent covered by the EU Treaties. Instead the TSCG's specific intention is "to strengthen the economic pillar of the economic and monetary union" (Article 1.1 TSCG). The TSCG consequently contains, along with a number of provisions regulating areas not previously covered by primary law (in particular the "balanced budget rule" set forth in Article 3.2 TSCG), further provisions explicitly modifying existing procedural rules and monitoring criteria. The latter involves the definition of new thresholds for determining when government deficits become punishable (Article 3.1.b TSCG) and of a new monitoring procedure involving the Council and the Commission (Article 5 TSCG). Moreover a new voting rule commits the contracting parties, in the context of the existing EU excessive deficit procedure, to comply with a new majority provision (Article 7 TSCG).

The specific proximity of the TSCG to the existing regulatory area of primary law in the field of economic coordination can also be seen in the fact that the TSCG was originally supposed to gain the approval of all Member States in the context of a treaty amendment procedure under Article 48 TEU before being adopted. The veto of Great Britain put a stop to this, forcing the Member States wanting to cooperate with each other to take an alternative path in the form of a supplementary treaty under international law.

> Daniel Thym, Ein Bypass, kein Herzinfakt (a bypass, not a heart attack), December 2011, available online on http:// verfassungsblog. de

The missing consent of Great Britain and the Czech Republic cannot therefore be substituted by an ex-post agreement of all Member States under international law, in which they declare their consent to the TSCG having recourse to EU institutions. Instead an amendment of primary law must comply with the standard procedure set forth in Article 48 TEU.

The procedure for enabling recourse to EU institutions in TSCG situations is in breach of the EU law provisions of Article 48 TEU.

> Lukas Oberndorfer, Der Fiskalpakt – ein weiterer Schritt in Richtung Entdemokratisierung (a further step towards dedemocratization), in: infobrief eu & international March/2012, 7 ff.

The consequence of the lack of the consent of all Member States and the non-compliance with the procedural requirements defined for gaining such consent is that recourse to EU institutions cannot be enabled through an agreement between certain Member States supplementing primary law outside of Article 48 TEU.

b) The involvement of the EU under international law

The TSCG could also be illegal since, though no amendment to primary law is involved, but instead a special agreement under international law supplementing primary law, an agreement on recourse to EU institutions can only be effectively agreed when the formal consent of the EU in this matter is forthcoming. Such a requirement for the party involved to give its consent may be derived from the fact that, under Article 35 of the Vienna Convention on the Law of Treaties (VCLT), the chosen form of an international agreement requires the EU's express acceptance (as a third party to the agreement) to such an obligation.

Individual EU institutions like the Commission or the Council may not of their own accord take decisions on assuming duties assigned to them under international agreements without going through a formal procedure. Instead, they must remain within the scope of the responsibilities assigned to them under Article 13 TEU in their external conduct under international law, respecting the principle of sincere cooperation between institutions.

> CJEU, C-65/93 [1995] ECR I-643, § 34 (Parliament v Council).

The assumption of the duties foreseen in the TSCG can only take place legally when the EU's decision to assume such TSCG duties is taken in compliance with EU law.

aa) Requirement to gain consent, derived from Article 35 VCLT

A requirement for the consent of the EU could be derived from the application of Article 35 of the Vienna Convention on the Law of Treaties (VCLT).

This is subject first of all to whether international regulations apply to the relationship between the Member States and the EU. For mixed international agreements involving both the EU as the subject of international law and the Member States, such application of treaty provisions is without problem and generally acknowledged.

> Schwartz, Übereinkommen zwischen den EG-Staaten: Völkerrecht oder Gemeinschaftsrecht? (Agreements between EC States: International law or Community law?), in: Kroneck & Oppermann (Hrg.), Im Dienste Deutschlands und des Rechtes: Festschrift für Wilhelm G. Grewe zum 70 Geburtstag am 16. Oktober 1981, Baden-Baden 1981, 551 ff.

As a consequence of the non-federal internal differentiation within the EU, with countries acting as autonomous subjects of international law, international law applies in principle also to international treaties concluded between Member States.

> Jürgen Bast & Julia Heesen, European Community and Union, Supplementary Agreements between Member States, MPEPIL, § 2 ff.

Multilateral treaties concluded between the Treaty States - i.e. treaties agreed to by certain but not all Member States - have repeatedly been a motor for legislative progress in EU law. The most important example here is the Schengen Agreement which has since been incorporated into EU law.

In the case at hand, the question-mark is over the relationship of the EU to the multilateral group of TSCG signatory States, with it being logical that an International Organisation cannot be a third party to its own founding treaty.

> Christine Chinkin, Third Parties in International Law, Oxford 1993, 94 ff.

As an autonomous subject of international law, an International Organisation is however third party to an agreement signed by part of its members, when such agreement has come into existence as a supplementary agreement under international law outside the scope of the founding treaties. As the acting nation states are not identical to the EU Member States, as what is involved is nothing more than a multilateral process, and as the legal enactment method used is a method governed by international law, the EU must, in accordance with the general rules on international agreements, be involved.

The way to involve third parties who are not contracting parties to an international agreement is to be found in the Vienna Convention (VCLT). As the EU has not itself signed the TSCG, even though it is involved in its execution, it is to be considered as a "third State" in the sense of Article 35 VCLT. As the legal norm generally accepted in international agreements and basically applying to the relationship between an International Organisation and States, Article 35 VCLT sets forth the following:

> "An obligation arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State expressly accepts that obligation in writing."

The TSCG assigns the EU monitoring obligations, in particular in its Article 5. This assignment of responsibilities means that the TSCG is to be classified as a treaty at the expense of a third party, in this case the EU as a subject of international law. From an international law perspective, the EU is the "third party", as the Member States concluding the TSCG are only in part identical with the EU Member States. The TSCG is "at the expense of" the EU, as it entrusts the EU with executive tasks. Under the common principles of international law, in such cases the third-party subject of international law, i.e. the EU, must "expressly accept that obligation in writing."

bb) Conditions under which the EU may issue declarations of intent under international law

The conditions under EU law for issuing such an international declaration of intent are to be found in Articles 216 and 218 TFEU. The term "agreement" used there is to be understood in a general sense to indicate

> "any undertaking entered into by entities subject to international law which has binding force, whatever its formal designation."
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> CJEU, Opinion 1/75 [1975] ECR 1355, (1360); CJEU, C-233/02 [2004] ECR I-2759, § 45 (France v Commission).

(1) Consequences of the EU being a subject of international law

The EU has legal personality, meaning that it is a subject of international law in its own right. In this capacity it can enter into international obligations under its own rules, though the functional extent to which it may act as a subject of international law is limited. Under the CJEU's ERTA doctrine,

> Case 22/70 (ERTA) [1971] ECR 263 ff. (Commission v Council)

the competence principles governing the EU's external actions for the most part run parallel to its internal competences.

> Geiger, Vertragsschlußkompetenzen der Europäischen Gemeinschaft und auswärtige Gewalt der Mitgliedstaaten, JZ 1995, 973 ff.

The Lisbon Treaty codifies this doctrine in Article 216.1 TFEU as well as in Article 3.2 TFEU. Within its scope of competence, it is the EU's responsibility as a legal personality to decide whether or not it enters into international obligations and, if so, which.

(2) Competence in the field of economic policy

There is a question-mark over whether the EU can enter into international obligations in the field of fiscal policy. Though EU law does not prohibit the use of such international agreements, it does set limits. For instance, primary law defines how competences are divided up between the EU and Member States. Similarly, EU law also provides for rules governing the relationship of the EU to the contracting Member States. These are summarised in the CJEU opinion on the Lugano Convention:

> "The competence of the Community to conclude international agreements may arise not only from an express conferment by the Treaty but may equally flow implicitly from other provisions of the Treaty and from measures adopted, within the framework of those provisions, by the Community institutions (see ERTA, paragraph 16). The Court has also held that whenever Community law created for those institutions powers within its internal system for the purpose of attaining a specific objective, the Community had authority to undertake international commitments necessary for the attainment of that objective even in the absence of an express provision to that effect".
>
> CJEU, Opinion 1/03 [2006] ECR 1145, (114) (Lugano Convention)

A formal competence of the EU in the field of economic policy can be derived from the coordination competence assigned to it in Articles 2.3 and 5.1 TFEU. The scope of this competence of the EU extends in particular to establishing broad guidelines for economic policy (Article 5.1 TFEU). Included in these guidelines is the regulatory field covered by the TSCG, the purpose of which is to stabilise the budgetary policy of Member States. The EU is consequently authorised, as are the individual Member States, to enter into international agreements which, as is the case with the TSCG, come under the field of economic policy guidelines.

(3) The procedure set forth in Article 218 TFEU

There is a question-mark over which rules of procedure must be complied with for gaining such consent. This is dependent on Article 216 in combination with Article 218 TFEU. The EU has no explicit rules governing unilateral declarations of intent. The wording of Articles 216 ff. TFEU makes it seem that these only apply to agreements under international law. In the past the CJEU has however given a broad interpretation to the term "agreement" in the sense of Articles 216 and 218 TFEU, including unilateral declarations of intent.

> CJEU, Opinion 1/75 [1975] ECR 1355, (1360); CJEU, C-233/02 [2004] ECR I-2759, § 45 (France v Commission).

It is possible that under Article 218.6 the EU institutions may have had to have been involved. This Article requires the European Parliament, dependent on the subject matter, to be consulted and even to give its consent. The Article specifically states the following:

> "The Council, on a proposal by the negotiator, shall adopt a decision concluding the agreement. Except where agreements relate exclusively to the common foreign and security policy, the Council shall adopt the decision concluding the agreement:
>
> (a) after obtaining the consent of the European Parliament in the following cases:
>
> (i) association agreements;
>
> (ii) agreement on Union accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms;
>
> (iii) agreements establishing a specific institutional framework by organising cooperation procedures;
>
> (iv) agreements with important budgetary implications for the Union;

(v) agreements covering fields to which either the ordinary legislative procedure applies, or the special legislative procedure where consent by the European Parliament is required.

The European Parliament and the Council may, in an urgent situation, agree upon a time-limit for consent.

(b) after consulting the European Parliament in other cases. The European Parliament shall deliver its opinion within a time-limit which the Council may set depending on the urgency of the matter. In the absence of an opinion within that time-limit, the Council may act."

The European Parliament thus has the right to be informed at all stages of the procedure (§ 10) and participative rights under §6, whereby the latter are dependent on the subject matter. For all cases under a) the consent of the Parliament is required, whereas under b) the Parliament is only to be consulted. In the case of the TSCG, European Parliament consent is necessary.

This requirement is derived from Article 218.6 a) v) TFEU, which states that the consent of the European Parliament is required in fields to which the ordinary legislative procedure applies, also in the context of a declaration of intent under international law. From a subject matter perspective, the scope of the TSCG come under the Union's competence for coordinating the economic policies of Member States enshrined in Article 120ff TFEU. This competence has two dimensions: a preventive one (Article 121) and a monitoring and corrective one (Article 126 TFEU). The admissibility of the scope of sanctions is to be measured against Article 136 TFEU. For shaping the multilateral surveillance procedure, as foreseen in the TSCG, Article 121.6 prescribes the ordinary legislative procedure. It follows that internationally binding declarations of the EU in this context also require the prior consent of the European Parliament.

The requirement for parliamentary consent is also derived from Article 218.6 a) iii), under which the establishment of a specific institutional framework on the introduction of cooperation procedures also requires consent, whereby it is not a prerequisite that the institutions established are to gain binding decisional competence.

Kirsten Schmalenbach, in: Calliess/Ruffert, EUV/AEUV (TEU/TFEU), 4. Aufl., 2011, Art. 218 AEUV § 18.

In its Article 12, the TSCG establishes "Euro Summit" meetings, thereby creating such a specific institutional framework. This again evokes the necessity to gain parliamentary consent.

(4) Interim result

The EU, in its capacity of a subject of international law, has the external competence to give its consent to the TSCG under Article 35 VCLT. The procedure for gaining such consent is set forth under Article 216 TFEU in connection with Article 218, and requires the involvement of the European Parliament.

cc) Dispensability of consent?

It may under certain circumstances be possible to dispense with consent needing to be given to the use of EU institutions agreed under an international agreement. A distinction needs to be made here between use of the CJEU and use of other EU institutions.

(1) CJEU

Article 273 TFEU gives the CJEU "jurisdiction in any dispute between Member States which relates to the subject matter of the Treaties if the dispute is submitted to it under a special agreement between the parties".

Article 8 TSCG, which involves the CJEU in monitoring the TSCG, could therefore be admissible on the basis of Article 273 TFEU.

See for instance: Christian Calliess/Christopher Schoenfleisch, Auf dem Weg in die europäische ‚Fiskalunion'?, in: JZ 2012, 477 ff. (484).

However this view is rightly criticised, as the powers of the CJEU accorded to it under Article 8 TSCG go beyond the scope of Article 260.1 TFEU, giving the CJEU the possibility of setting a time-limit - something that is not foreseen under primary law:

> „Giving the ECJ the power to impose fines in analogy to Article 260 TFEU would not be covered by Article 273 TFEU."

Ingolf Pernice, International Agreement on a reinforced Economic Union, Opinion 2012, 14 Fn. 4.

In addition, Article 273 TFEU only foresees CJEU jurisdiction in disputes between Member States. It would therefore be inadmissible to accord the Commission a right to take legal action under Article 273 TFEU.

Christian Calliess/Christopher Schoenfleisch, Auf dem Weg in die europäische ‚Fiskalunion'?, in: JZ 2012, 477 ff. (483).

Though Article 8 TSCG formally makes only Member States parties in the surveillance procedure for the introduction of national "balanced budget rules", this procedure is subject to prior reporting by the Commission. In cases where the latter deems a Contracting Party to not comply with TSCG rules, one or more Contracting Parties are obliged to initiate proceedings before the CJEU (Article 8.1 TSCG). This mechanism, which ultimately makes the initiation of legal proceedings subject to Commission discretion and from which the Contracting Parties can only deviate on a positive assessment of the Commission (Article 8.2 TSCG), constitutes an inadmissible circumvention of the scope of Article 273 TFEU.

Paul Craig, The Stability, Coordination and Governance Treaty: Principle, Politics and Pragmatism, in: European Law Review, Issue 3, 2012, 231ff. (245f.).

The tenet here is that consent under Article 218.6 TFEU for recourse to be taken to the CJEU cannot be dispensed with on the basis of Article 273 TFEU.

(2) Other EU institutions

A further issue is the relationship between the requirement for consent and the competences of the Commission and Council in monitoring the TSCG.

The literature attempts to a certain extent to mitigate the consequences of delegating tasks, purporting that the TSCG does not delegate any new tasks, instead giving European secondary law international treaty character.

As argued by Christian Calliess/Christopher Schoenfleisch, Auf dem Weg in die europäische ‚Fiskalunion'?, in: JZ 2012, 477 ff. (484 f.).

This view is however too simplistic for analysing the problems associated with this construction. On the one hand, such a view can only refer to secondary law in the course of being drafted, with a particular focus on the proposed regulation COM (2011) 821 of 23.11.2011 (Proposal for a Regulation of the European Parliament and of the Council on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area). It cannot refer to EU law already in force. On the other hand the view does not take enough account of the fact that secondary law can be overruled in the EU legislative process. Whereas the regulations concerned may be changed by the EU legislator, the duties arising from the TSCG under international law may only be terminated on very limited grounds under the Vienna Convention on the Law of Treaties, continuing to exist independently of EU law constellations. Other than the TSCG, the assignment of duties will have, insofar as COM (2011) 821 is adopted, at

best, a further rationale in EU secondary legislation. The rationale behind the TSCG would however continue to exist, even if the assignment of duties found in COM (2011) 821 does not come into force, or should the "Regulation Sixpack" be changed.

The view that the parallelism of Commission duties between the TSCG and EU law obsoletes recourse to EU institutions,

> Christian Calliess/Christopher Schoenfleisch, Auf dem Weg in die europäische ‚Fiskalunion'?, in: JZ 2012, 477 ff. (485)

represents a problem, not just because such a parallelism does not exist, but also because the secondary law on which this view is based is in itself ridden with problems with regard to the question of sanctions.

The foreseen legal base for sanctions is Article 136 TFEU in connection with Article 121.4. This does not however take into account the fact these legal consequences are not foreseen to this extent in the primary law currently in force. The highest sanction foreseen by the procedure set forth in Article 121.4 TFEU is the publication of the Council's recommendations to the Member State in long-term breach of the policy principles. Under current primary and secondary law, the imposition of financial sanctions and deposit obligations is only possible in the context of the corrective components of the Stability and Growth Pact under Article 126.11 TFEU. In accordance with the principle of negative legality, the EU may however only take action within the bounds of the competences assigned to it.

> Jürgen Bast/Armin v. Bogdandy (2011), in: Grabitz/Hilf/Nettesheim (Hrg.), Art. 5 EUV, 43. Auflage 2011, Rn. 11.

Article 121.6 TFEU is not available as a legal base, as this only authorises "the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, to adopt detailed rules for the multilateral surveillance procedure referred to in paragraphs 3 and 4"

> For more details, see Jürgen Bast/Florian Rödl, Die Unionskompetenz zur Durchsetzung von Korrekturen makroökonomischer Ungleichgewichte, Rechtsgutachten 2012, 10 ff.

The establishment of new sanction mechanisms is not just a "detailed rule", instead constituting a major tightening of the existing mechanism. Article 136.1 a) TFEU is similarly not a suitable base for introducing "hard" sanctions in the field of preventive instruments and the surveillance of macroeconomic imbalances. Under this Article, the Eurozone states may, "in accordance with the relevant provisions of the Treaties", strengthen the coordination and surveillance of their budgetary discipline. This means not just that there is no explicit authorisation to impose sanctions. The wording "in accordance with the relevant provisions of the Treaties" in Article 136.1 TFEU also underlines the requirement that agreements within the framework of the Article must harmonise with the rest of primary law, and in particular with Articles 121 and 126 TFEU.

> Ulrich Häde, Art. 136 AEUV – eine neue Generalklausel für die Wirtschafts- und Währungsunion? JZ 2011, 334 ff.

From an overall perspective therefore, consent to the TSCG under Article 218 TFEU cannot be dispensed with through application of secondary law.

c) Interim result

Legally effective consent to the TSCG having recourse to EU institutions must be gained either through all EU Member States consenting to such recourse under international law and in accordance with Article 48 TEU or through the EU itself, in its capacity as a subject of international law, expressly accepting to take over executive obligations in writing under Article 35 VCLT. The latter

procedure would mean that the European Parliament would have to give its consent under Article 218.6 a) TFEU.

2. Material legality

A further question is whether the TSCG complies with EU law from a material perspective.

a) Fiscal primacy

One particular issue is what needs to be done to ensure that the principle of sincere cooperation (Article 4.3 TEU), needed to protect the functioning of the EU institutions, is upheld. Pursuant to this principle, the functioning of EU institutions may not be negatively influenced by the activities of individual Member States under international law, as for example the adoption of the TSCG. Further cooperation obligations concern maintaining accession opportunities and the obligation of the states involved to suspend their codification work should the EU start enacting legislation.

> See CJEU, C-44/84, [1986], 29 ff. (§ 39) (Hurd); C-141/78 France v. Great Britain; and C-804/79, Commission v. Great Britain.

This question arises on the one hand in respect of agreements made in the context of TSCG Euro Summit meetings, which may in individual cases constitute a breach of Article 4.3 TEU.

> Christian Calliess/Christopher Schoenfleisch, Auf dem Weg in die europäische ‚Fiskalunion'?, in: JZ 2012, 477 ff. (483).

But the question also goes beyond individual cases in a fundamental respect. Article 7 of the TSCG introduces the "reverse voting procedure":

> "While fully respecting the procedural requirements of the Treaties on which the European Union is founded, the Contracting Parties whose currency is the euro commit to supporting the proposals or recommendations submitted by the European Commission where it considers that a Member State of the European Union whose currency is the euro is in breach of the deficit criterion in the framework of an excessive deficit procedure. This obligation shall not apply where it is established among the Contracting Parties whose currency is the euro that a qualified majority of them, calculated by analogy with the relevant provisions of the Treaties on which the European Union is founded, without taking into account the position of the Contracting Party concerned, is opposed to the decision proposed or recommended."

The reversal of the qualified majority requirement constitutes a major restriction to successfully defending political interests outside the TSCG yet protected under EU primary law. Through this mechanism enshrined in Article 8 TSCG, voting behaviour is unilaterally tied to fiscal rationale, without respect to the proportionality of possible colliding interests, such as achieving social rights, full employment or social policy. Instead, this coordination of voting behaviour under Article 7 TSCG implies primacy being given to enforcing austerity policy.

> See in this sense also Lukas Oberndorfer, Der Fiskalpakt – ein weiterer Schritt in Richtung Entdemokratisierung, in: infobrief eu & international March/2012, 7 ff.

The "reverse voting" decision-making model is not compatible with either Art 121 TFEU or with Article 126 TFEU, with both these articles giving the prerogative to impose the highest level of penalty to the Council (cf. Article 121.4 3rd sentence and Article 126.11 TFEU). Even if the reverse qualified majority rule leaves the ultimate decision with the Council, thereby preventing an automatic procedure, it still means a reversal of voting requirements. A qualified majority is no longer needed to impose sanctions. A qualified majority can instead only be used to prevent the imposition of the sanction. This reversal of voting weights is also no "detailed rule" in the sense of Article 121.6 which could be adopted under secondary law. With the power to decide on the imposition of sanctions already enshrined in primary law, any reversal of these rules would entail changing the Treaties. Moreover enhanced cooperation, as foreseen under Article 136 TFEU, cannot be used to water down procedural requirements already existing in primary law. Article 136 expressly makes this subject to compatibility with primary law. In this respect it is not just the TSCG which is illegal. The imposition of the reversed voting procedure via secondary law is similarly illegal in the light of existing primary law.

> For more details, see Andreas Fischer-Lescano/Steffen Kommer, EU in der Finanzkrise. Zur Leistungsfähigkeit des Verfahrens der verstärkten Zusammenarbeit für eine Intensivierung der Wirtschafts- und Sozialpolitik (The EU in the financial crisis. The effectiveness of enhanced cooperation in intensifying economic and social policy), in: Kritische Justiz 44 (2011), 412 ff.

The reverse voting procedure endangers the enforcement of social and economic policy objectives going beyond austerity policy, thereby making it a problem to achieve social democratic principles in Europe,

> On the principles of social democracy in Europe, see: Hans-Jürgen Bieling, Europäische Integration und die Krise der „sozialen Demokratie“ (in: Fischer-Lescano/Rödl/Schmid(Hrg.), Europäische Gesellschaftsverfassung. Zur Konstitutionalisierung sozialer Demokratie in Europa, 2009, 229 ff.

Through the reversed voting procedure, the EU's social dimension, which has "gained in importance with every reform of the legal framework of European integration and has been correspondingly strengthened in primary law" and in the context of which EU citizenship is understood by the CJEU as a nucleus of "European solidarity",

> cf. the wording of the German Constitutional Court's Lisbon ruling, BVerfGE 123, 267/426 ff.

is made structurally subordinate to austerity policy. This reversal of necessary majority requirements contradicts EU law.

b) Contempt of the European Parliament

A further point is that the TSCG needs to comply with the principle of representative democracy enshrined in Article 10 TEU.

The Commission is however not democratically involved in the execution of the TSCG.

> See the justified criticism of Mattias Kumm, Ein Signal für Europa, FAZ vom 09.08.2012, 6.

Here as well, the TSCG does not meet up to the requirements of EU law. Regulation 1177/2011 of 08.11.2011, which is based on Article 126.14 TFEU and amends Regulation (EC) No 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure, provides for the participation of the European Parliament via the "Economic Dialogue" set forth in Article 2a:

> 1. In order to enhance the dialogue between the institutions of the Union, in particular the European Parliament, the Council and the Commission, and to ensure greater transparency and accountability, the competent committee of the European Parliament may invite the President of the Council, the Commission and, where appropriate, the President of the European Council or the President of the Eurogroup, to appear before the committee to discuss Council decisions under Article 126(6) TFEU, Council recommendations under Article 126(7) TFEU, notices under Article 126(9) TFEU, or Council decisions under Article 126(11) TFEU.
>
> The Council is, as a rule, expected to follow the recommendations and proposals of the Commission or explain its position publicly.
>
> The competent committee of the European Parliament may offer the opportunity to the Member State concerned by such decisions, recommendations or notices to participate in an exchange of views.
>
> 2. The Council and the Commission shall regularly inform the European Parliament of the application of this Regulation.

This procedure is no longer mentioned in the TSCG. Instead the European Parliament and the national Parliaments are to hold a conference for the purpose of discussing budgetary policies and other issues covered by the TSCG (Article 13 TSCG). It follows that the European Parliament is not involved in the decisive implementation of the TSCG, for instance through monitoring the budgetary and economic partnership programmes under Article 5 TSCG. The lack of a mention of the Economic Dialogue and the explicit reduction of the competences of the European Parliament to nothing more than being informed by the President of the Euro Summit of the results of each Summit meeting (Article 12.5 TSCG) represents a breach of the participative rights of the European Parliament.

c) Illegality of the powers of sanction

The powers of sanction foreseen in the TSCG contradict the requirements set forth in Article 13.2 TEU, pursuant to which each institution "shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them". The Article thereby prohibits *ultra vires* actions on the part of the EU institutions. The EU institutions may not make use of international agreements to gain competences unavailable to them under primary law.

> Paul Craig, The Stability, Coordination and Governance Treaty: Principle, Politics and Pragmatism, in: European Law Review 2012, 231ff. (241f.).

The tasks set forth in Articles 5 and 6 TSCG are therefore illegal under primary law. Recourse to EU institutions under an international agreement cannot entail the acceptance of tasks not covered by primary law. By way of recourse to EU institutions under international law, only existing resources can be made available by way of international agreement for new subjects of international law.

d) Illegality of the "balanced budget rule".

Similarly, the introduction of a legally binding national balanced budget rule through the TSCG represents a problem under the principle of subsidiarity (Article 5.3 TEU). The EU institutions are not authorised to implement regulations under international law, whose adoption cannot be founded on a competence established under primary law.

> For a critical analysis of the competence problem, see House of Lords, European Union Committee, 25th Report of Session 2010–2012, The euro area crisis, 14 February 2012, 34, § 104.

3. Legal consequences

Under the provisions of Article 2.2 TSCG, the TSCG shall only apply "insofar as it is compatible with the Treaties on which the European Union is founded and with European Union law". Whereas this priority rule could, in cases where the TSCG is in breach of material law, lead to the illegal provisions being substituted by provisions already available under EU law, the formal illegality of the TSCG means that the TSCG cannot be implemented by the EU institutions until the procedural deficits have been removed. Until such a point in time, the TSCG does not comply with EU law.

B. Review of the TSCG by the CJEU

A further question is whether and under which conditions the CJEU can be called on to clarify the legal questions referred to above.

1. Referral procedure

A referral procedure is one conceivable way. Parallel to the C-370/12 referral for a preliminary ruling, in which an Irish court is requesting the European Court of First Instance to give a preliminary ruling on the validity of the ESM Treaty under EU law and where the hearing is scheduled to take place on 23.10.12, a court of a Member State could refer the above-mentioned legal points to the CJEU via the referral procedure, requesting a preliminary ruling under Article 267 TFEU. A precondition is the relevance of EU legal conformity to the national court case.

2. Subsidiarity control

A second conceivable way is to initiate legal action under Article 8 of the Subsidiarity Protocol. The subject of such legal action has to be an infringement of the principle of subsidiarity as defined under Article 5.3 TFEU. It could be construed that this principle is infringed through EU institutions acting outside their scope of competence.

> Robert Uerpmann-Wittzack, Frühwarnsystem und Subsidiaritätsklage im deutschen Verfassungssystem, EuGRZ 2009, 461 ff.

Such an action can be brought by Member State Parliaments. In Germany even a minority is authorised to initiate such action, with the German Constitution (Article 93 I.2 Grundgesetz) prescribing a quorum of a quarter of Bundestag members. Up to now no such act of the EU institutions has occurred. This would however be the case for instance, should an act of sanction based on the TSCG be adopted.

3. Action for nullification

Also conceivable is an action of nullification in the form of a plea of illegality under Article 263 TFEU in connection with Article 277. As with an action pleading infringement of subsidiarity, this also requires an act of an EU institution, as yet not forthcoming.

4. Action for non-compliance with the Treaties

A further conceivable legal path is an action for non-compliance. It is deemed unlikely that the Commission would initiate such action. Under Article 259 TFEU, an action for non-compliance can however also be brought by an EU Member State. The action would in such a case be directed against the Member States concluding the TSCG. The objective here would be to have the non-compliance of the TSCG with EU law ascertained.

5. Obtaining a CJEU opinion

A final conceivable path involves obtaining the opinion of the CJEU under Article 218.11 TFEU.

a) Applicant

Under Article 218.11 TFEU, a Member State, the European Parliament, the Council or the Commission may apply for an opinion of the Court of Justice as to whether an agreement envisaged

is compatible with the Treaties.

There is however a question-mark here over whether a minority of the European Parliament can submit such an application as a representative action (*Prozesstandschaft*). There is as yet no experience of such practice. There are however good grounds - as with representative action on competence disputes in German constitutional law proceedings - to found this option of representative action on the objective function and preventive character of a CJEU opinion. Whether such reasoning would convince the CJEU is however another matter.

b) The subject of the application for a CJEU opinion

The subject of the application for a CJEU opinion could either be the TSCG itself or the EU's conceivable declaration of consent to the treaty,

aa) The TSCG as the subject

The question here is whether Article 218.11 TFEU can apply in the case of special agreements between Member States under international law. This is reflected in the literature on this subject:

> "Article 218.11 TFEU states that the CJEU only has jurisdiction over agreements concluded by the EU ..... A substantive review of an agreement concluded by Member States is not possible - otherwise the CJEU would have to be able - via Article 218.11 TFEU - to review the whole body of primary law (as this is law agreed to by all Member States)."
>
> Matthias Ruffert, commentary, 05 July 2012, available on http://verfassungsblog.de/das-europäische-parlament-sollte-den-fiskalvertrag-vor-den-eugh-bringen/

This view is first of all correct in pointing out that it is not the function of Article 218.11 TFEU to open the whole body of EU primary law to review via CJEU opinions. The restrictive comment that law must be involved that "has been agreed to by all Member States" already points to the fact that the TSCG does not belong to the body of primary law, being instead a special agreement between states in an EU context. It is therefore nothing more than a treaty under international law concluded by a number of Member States.

The CJEU has however in the past already issued opinions on international treaties of Member States.

> CJEU, opinion 2/91, 19.03.1993 – ILO.

The CJEU therefore interprets Article 218.11 TFEU and the question of "whether an agreement envisaged is compatible with the Treaties" broadly, considering the agreements of Member States to also be covered. Similarly, the clarifying Article 107.2 of the CJEU Rules of Procedure states that the "The Opinion may deal not only with the question whether the envisaged agreement is compatible which the provisions of the EEC Treaty but also with the question whether the Community or any Community institution has the power to enter into that agreement." From a legal policy perspective, this broad interpretation is to be welcomed, as it has a preventive function, helping to avoid irreversible infringements of the law.

> Explicitly stated by Rudolf Geiger, in: Außenbeziehungen der Europäischen Wirtschaftsgemeinschafft und auswärtige Gewalt der Mitgliedstaaten, ZaöRV 1977, 640 ff. (646, Fn. 21).

Where this CJEU jurisprudence is criticised in the literature as going too far,

> see Kirsten Schmalenbach, in: Calliess/Ruffert, EUV/AEUV (TEU/TFEU), 4. Aufl., 2011, Art. 218 AEUV § 34,

such an opinion ignores the *telos* of Article 218.11 TFEU, with its focus on a preventive control of legal norms aimed at identifying and remedying contradictions between norms at an early stage.

> Christian Tomuschat, in: GS, EU-/EGV, 6. Aufl., 2004, Art. 300, Rn. 93.

Not being in the category of EU primary law but instead belonging to that of special agreements under international law, the TSCG constitutes a suitable subject for CJEU review.

bb) The declaration of consent by the EU

A suitable subject for a CJEU opinion could also be the question of an (announced) declaration of consent to the TSCG by the EU under Article 216 in connection with Article 218 TFEU.

As already discussed, though in its wording Article 216 ff. TFEU can be seen as applying solely to international agreements, the Articles also apply to unilaterally binding declarations of intent.

> CJEU, Opinion 1/75 [1975] ECR 1355, (1360); CJEU, C-233/02 [2004] ECR I-2759, § 45 (France v Commission).

Similarly, the question whether a binding declaration of consent of the EU under international law as a third party to the TSCG complies with EU law constitutes a further subject for a CJEU opinion under Article 218.11 TFEU.

c) Time-limit

The CJEU may be called upon to state its opinion at any time before the EU's consent to be bound by the agreement is finally expressed.

> CJEU, Opinion 3/94, [1995] ECR I-4577, §14 (GATT(WTO/Framework agreement on bananas).

The application can be submitted even before the start of negotiations on the agreement. For material compliance to be reviewed, the agreement must already contain concrete provisions.

> CJEU, Opinion 2/94, [1996] ECR I-1759, § 19 (ECHR).

No time-limit problem is therefore to be seen, whether the proposed subject of the CJEU opinion is the TSCG itself or whether it is the EU's declaration of consent to the TSCG.

6. Interim result

Applying for a CJEU opinion is admissible under Article 218.11 TFEU in the sense of the interest in objectively clarifying whether the TSCG is compliant with EU law and whether it is necessary for the EU to declare its consent to the TSCG, thereby preventing a clash of norms.

Applying for a CJEU opinion does not rule out having the CJEU review the TSCG in the context of an action for nullification, an action for infringement of subsidiarity, a referral for a preliminary ruling or an action for non-compliance with the Treaties when the time comes. Applying for a CJEU opinion does not preclude recourse to the other procedures.

> CJEU, Opinion 1/75 [1975] ECR 1355, (1361) - local costs).

C. Summary

1. From a formal perspective the TSCG is in breach of EU law.

    a. No effective consent has been obtained for recourse to EU institutions. Neither have all Member States given their consent for recourse to be had to EU institutions nor has the EU given its consent to its being involved in the execution of the TSCG within the context of Article 218 TFEU

    b. Without such consent, neither the CJEU nor the Commission and the Council can be involved in the execution of the treaty.

    c. The EU institutions must not execute the TSCG as it is formally in breach of EU law

2. The TSCG is similarly in breach of EU law from a material perspective.

    a. The "reverse voting procedure" set forth in Article 7 TSCG is in breach of EU law. The TSCG gives the execution of austerity policy structural primacy over other competing objectives. The reversal of majority requirements is in breach of primary law.

    b. The Commission is not democratically controlled to a sufficient extent in the execution of the TSCG. The rights of the European Parliament in deficit procedures are not upheld. Regulation 1177/2011 of 08.11.2011 which is based on Article 126.14 TFEU and amends Regulation (EC) No 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure, provides for participation of the European Parliament via the "Economic Dialogue" set forth in Article 2a. The TSCG violates these participation rights.

    c. The sanction options provided for in Articles 5 and 8 TSCG are in breach of EU law.

    d. The binding balanced budget rule set forth in Article 3 TSCG is in breach of EU law.

3. The CJEU has the competence to decide on the legality of the TSCG.

    a. Through applying for a CJEU opinion under Article 218.11 TFEU, the European Parliament can have the TSCG reviewed with regard to whether it complies with EU law and whether it is necessary for the EU to issue a declaration of consent (thereby requiring the involvement of the European Parliament under Article 218.6 a) TFEU) before the TSCG actually comes into force. A preventive legal control procedure is used, with the aim of avoiding a clash of norms.

    b. Suitable subjects for a CJEU opinion are on the one hand the TSCG as an international treaty between Member States and thereby not belonging to the body of primary law, but instead constituting a special agreement under international law; and on the other hand the legality of a declaration of consent of the EU in its capacity as a third-party subject of international law under Article 35 VCLT.

    c. Applying for a CJEU opinion does not rule out having the CJEU review the TSCG in the context of an action for nullification, an action for infringement of subsidiarity, a referral for a preliminary ruling or an action for non-compliance with the Treaties when the time comes. Applying for a CJEU opinion does not preclude recourse to the other procedures.