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EDITORIAL COMMENTS

Some thoughts concerning the Draft Treaty on a Reinforced Economic Union

The European Council meeting on 8–9 December 2011 was widely billed as a(nother) "make or break" moment for the single currency – this time with the focus less on dealing with the emergency situation facing countries like Greece or Ireland or Italy,[1] and more on securing the economic stability of the eurozone as a whole, in particular, through plans for a "closer fiscal union" among eurozone States, based upon enhanced commitments to budgetary discipline and economic policy coordination. A "high visibility" plan to further improve the euro's fundamental governance structures was widely seen as vital not just for restoring market confidence but also in persuading key institutional actors – not least the European Central Bank – to support further interventions in favour of financially beleaguered Member States.

Insofar as such a "closer fiscal union" would necessitate changes at the level of primary law, as opposed to the adoption of secondary Union measures or resort to the enhanced cooperation provisions, three main options emerged before political leaders gathered for the European Council meeting proper. The first was to replace Protocol No 12 on the excessive budget procedure, on the basis of the existing revision powers conferred under Article 126(14) TFEU. That option was mooted by the President of the European Council, highlighting the benefits of speed and efficiency, since it would have avoided the need for any national ratifications – though for exactly the same reasons, it met with strong opposition on the grounds of bypassing proper democratic scrutiny and lacking sufficient legitimacy.[2] The second option consisted of amendments to the existing Treaties, using the ordinary or simplified revision procedure contained in Article 48 TEU. That option, which was supported by France and Germany in a joint letter to the President of the European Council, would have opened the possibility of more far-reaching changes to the Union's economic governance structures – but it also carried the risk of certain countries seeking to broaden the scope of negotiations in pursuit of

1. See "Editorial comments, The Greek sovereign debt tragedy: approaching the final act?", 48 CML Rev., 1769.

2. President of the European Council, *Interim Report: Towards a Stronger Economic Union,* 6 Dec 2011.

ulterior agendas, and of sparking off lengthy and difficult ratification processes in various Member States.[3] The final option (flagged up by France and Germany as a less preferable but still valid route) consisted in the eurozone countries, together with any non-eurozone supporters, agreeing upon a new intergovernmental treaty which would stand outside the existing EU legal framework – an option which would avoid the fate of the single currency being held to ransom by a minority of States, but which also stirred concerns over the Union being increasingly divided between an integrated core and a marginalized periphery, as well as about how comfortably the terms of the new agreement would fit with the TEU and TFEU.

Events at the European Council meeting itself were dominated by the drama of the UK's really rather un-splendid self-isolation. The British Prime Minister presented a set of demands, intended to safeguard the interests of the City of London's financial services sector, which were rejected as unreasonable and unacceptable by the French and German leaders. As a result, the UK chose to veto any possibility of amending the existing EU Treaties – though it soon became clear that the British had not been spearheading any sort of broader negotiating strategy in concert with other non-eurozone countries. In the end, every Member State apart from the UK agreed on the desirability of moving towards a stronger economic union between eurozone countries through the medium of a new intergovernmental treaty.[4] In short: "Option 3" won the day.

In terms of content, the deal reached in Brussels (hereinafter: the December deal) included plans for immediate action to tackle the ongoing eurozone crisis: for example, bringing forward the planned entry into force of the new European Stability Mechanism to July 2012; making various adjustments to the ESM Treaty, such as the introduction of an emergency procedure dispensing with the requirement of unanimity; and seeking substantially to increase the resources available to the IMF through the provision of additional bilateral loans. But a blueprint was also adopted for reinforcing the architecture of EMU well into the future. First, a new "fiscal compact" would be implemented, its core elements to include: the commitment to a balanced central government budget, enshrined in national law at a constitutional or equivalent level, subject to automatic correction mechanisms in the event of deviation; and a commitment to support all steps or sanctions proposed or recommended by the Commission, in respect of eurozone countries subject to the excessive deficit procedure under Article 126 TFEU, unless a qualified majority of other eurozone States expressed their opposition. Secondly,

3. Joint Letter by Germany and France to the President of the European Council, 7 Dec. 2011.

4. Statement by the Euro Area Heads of State or Government, 9 Dec. 2011.

further steps would be taken to ensure closer economic policy coordination among eurozone countries, such as: more active use of the enhanced cooperation provisions on matters essential for the smooth functioning of the single currency; identifying and sharing best practice among eurozone States as regards all plans for major economic policy reforms; and a regular calendar of informal Euro Summits so as to strengthen governance within the single currency area. In terms of form, it was agreed that, insofar as the deal reached in Brussels might require measures other than secondary law adopted within the Union's existing legal framework, those measures would take the form of a new international agreement among the eurozone countries, together with any other Member States (apart from the UK) that wished to participate in the process. However, it was hoped that the provisions of any new extra-EU treaty could be incorporated into the TEU and TFEU as soon as possible.

The immediate aftermath of the December meeting of the European Council witnessed anxious speculation about the consequences of the UK veto and the choice to pursue extra-EU treaty-making, in particular, for the emergence of a "two-speed Europe" and its implications for the integrity of the Union's existing political and legal order. Furthermore, doubts quickly surfaced about whether the adoption of an intergovernmental agreement would avoid any of the ratification problems usually associated with amendments to the Union treaties themselves: on the contrary, several countries soon began to agonize over the need (whether legal or political) to ratify any new treaty by means of a popular referendum.[5] Both sets of concerns were complicated by the swift realization that not just the details but also some very fundamental questions about the terms of the December deal had been fudged by the relevant Heads of State or Government – not least the question of whether the non-eurozone countries (apart from the UK) had merely pledged to support the changes and legal route agreed upon by the eurozone States; or whether some or all of those non-eurozone countries would also actively participate in some or all of the commitments and rules contained in the new intergovernmental agreement.

Unsurprisingly, given the urgency of the economic crisis facing the single currency, but also the uncertainty about the political and legal implications of the December deal, negotiations aimed at clarifying the terms of the proposed treaty got underway almost immediately after the conclusion of the European Council meeting. In fact, the President of the European Council circulated a draft "International Agreement on a Reinforced Economic Union" on 16 December 2011 (hereinafter: the December draft). Following a period of intensive preparatory work during the remainder of December, a revised draft

5. E.g. Austria, Denmark, Ireland and the Netherlands. Political troubles may also be brewing in countries such as the Czech Republic, Finland, France and Hungary.

"International Treaty on a Reinforced Economic Union" was released on 4 January 2011 (hereinafter: the January draft). As one might expect, both versions of the text focus on the primary law required in order to implement the reinforced architecture for EMU agreed under the December deal. Title III contains detailed provisions on the "fiscal compact" aimed at strengthening budgetary discipline among the Contracting Parties – including the constitutional commitment to maintain a balanced central government budget, and the presumption of support for proposals or recommendations in respect of eurozone States subject to the excessive deficit procedure. The provisions which make up Titles IV and V then deal with reinforcing economic policy coordination and governance between the Contracting Parties – including the pursuit of enhanced cooperation, the discussion and coordination of all plans for major economic policy reforms, and the regularization of Euro Summit meetings.[6]

Negotiations are projected to continue, and a series of fresh drafts to be produced, throughout the whole of January. At the time of writing, it is anticipated that the terms of the treaty will be finalized by the relevant Heads of State or Government at a European Council meeting scheduled for 30 January 2012. The end product of this treaty-making process will obviously demand close scrutiny and analysis in due course. In the meantime, we offer some brief comments on a few of the key issues raised by the December deal, organized around four main ideas: law; democracy; solidarity; and the British. We base our comments primarily on the text of the December draft, with appropriate reference to significant amendments contained in the January draft – though we are fully conscious that the terms of discussion will continue to change, perhaps extensively, over the course of the remaining negotiations.

Let's begin with the legal perspective.[7] Needless to say, the substantive provisions of the December draft raise some interesting issues of interpretation: for example, about what count as national provisions of a "constitutional or equivalent nature" for the purposes of embedding the balanced budget rule into domestic law; or about who should define, and within what timescale, the "commonly agreed principles" that will underpin the national correction mechanism to be triggered in the event of significant deviations from that balanced budget rule.[8] But perhaps the most important legal concern raised by the draft treaty lies in its relationship with EU law.

6. In the December draft: consisting of the Heads of State or Government of the eurozone countries together with the President of the European Commission. In the January draft: including also the President of the Euro Group and the Commissioner responsible for economic and monetary affairs.

7. Cf. Ruffert, "The European Debt Crisis and European Union Law", 48 CML Rev. (2011), 1777.

8. Both provisions are contained in Art. 3(2) of the December (and January) draft.

The preamble to the December draft expresses the intention of the Contracting Parties to incorporate its provisions, as soon as possible, into the EU legal order. The January draft goes even further: a new Article 14(6) promises, within five years of the treaty's entry into force, an initiative aimed at incorporating the agreement's substance into the Union legal order. In the meantime, the draft treaty is envisaged as an agreement concluded under ordinary international law and formally separate from the EU Treaties. Nevertheless, given the very close relationship between its subject matter and a core part of Union business, there is inevitably a significant degree of overlap between the terms of the draft treaty and the EU's own competences – not only the primary provisions of the TEU and TFEU,[9] but also secondary legislation such as the "Six Pack" on improving economic governance which was adopted in November 2011,[10] as well as the "Euro Plus Pact" signed in March 2011.[11] Given such a degree of overlap, there are legitimate concerns about the need to prevent unhelpful duplication: many of the measures on budgetary discipline and economic convergence envisaged by the December draft could (and therefore should) be achieved through the medium of the existing Treaties.[12] Beyond that, there are also worries about the possibility of inconsistencies arising between the terms of the draft treaty and the current / future state of Union law itself: it would surely do more harm than good if certain commitments accepted by the Contracting Parties under the draft treaty were to contradict their binding obligations under the Treaties.[13] No doubt in response to those worries, the December draft was already at pains to stress its own subservience: Title II alone, for example, proclaims that the agreement will be applied in conformity with EU law, shall only apply insofar as compatible with EU law, shall not encroach upon the EU's own competences, and shall give way to the precedence of EU law. Again, the January draft goes one step further: many of its amendments seek precisely to align (or even define) the commitments set out in the draft treaty with (or by

9. Especially Arts 5(1), 121, 126 and 136 TFEU; as well as Protocol No 12 on the Excessive Deficit Procedure.

10. Reg. 1173/2011, O.J. 2011, L 306/1; Reg. 1174/2011, O.J. 2011, L 306/8; Reg. 1175/2011, O.J. 2011, L 306/12; Reg. 1176/2011, O.J. 2011, L 306/25; Reg. 1177/2011, O.J. 2011, L 306/33; Dir. 2011/85, O.J. 2011, L 306/41.

11. See the Conclusions of the Heads of State or Government of the Euro Area of 11 March 2011; together with the European Council Conclusions of 24–25 March 2011.

12. Indeed, it is arguable that only the balanced central government budget rule, and the presumption of support for proposals / recommendations against eurozone States under Art. 126 TFEU, go beyond what is already possible under the TEU and TFEU.

13. Concerns raised especially by the relatively precise obligations set out in Arts 3 and 4 of the December draft.

reference to) those imposed under Union law;[14] and more generally, to reinforce the message that this new treaty complements and builds upon, rather than bypasses or challenges, the EU Treaties.[15]

Although the risk of duplication or inconsistency with the EU Treaties may thus have been legally neutered, one can still anticipate the persistence of nagging doubts about the lawfulness of the draft treaty from the perspective of the Union legal order. Take three examples. First, some commentators might question the propriety of the Contracting Parties agreeing to pre-structure the exercise of their voting rights in the Council, when dealing with Commission proposals or recommendations in respect of eurozone countries subject to the excessive deficit procedure, on the grounds that that provision seeks effectively to reverse the voting requirements set out in the Treaties themselves.[16] But perhaps one should not be too quick to condemn the Member States simply for agreeing to coordinate the casting of their votes in the Council on a given issue, when the building of policy alliances and determination of voting positions is part and parcel of the ordinary life of Union decision-making, and is nowhere prohibited by the Treaties. It is also worth observing that the phenomenon of "reverse qualified majority voting" is already provided for under Union secondary law itself; indeed, it is a centrepiece of the "Six Pack" plan to facilitate more efficient and effective economic governance by the Union institutions.[17]

Secondly, objections were raised, at the time of the December deal itself, to the prospect of using the Union institutions for the purposes of a non-Union agreement without the involvement, or at least the explicit consent, of all 27 Member States. Again, however, there is little in the actual text of the draft treaty to contradict the integrity of the Union's institutional framework as provided for under Article 13 TEU. Indeed, the text has been carefully designed so as to involve the Union institutions only in procedures and actions they would already participate in and undertake pursuant to the EU Treaties.[18] Consider, in particular, the provisions concerning the submission by Contracting Parties subject to an excessive deficit procedure of economic partnership programmes,[19] and the ex ante reporting by Contracting Parties of

14. Consider, in particular, the amendments contained in the January draft to Art. 3(1)(b); Art. 3(1)(c); Art. 3(2); Art. 4; and Art. 5(1).

15. Consider, in particular, the amendments contained in the January draft to Art. 9 and Art. 10.

16. See Art. 7 of the December (and January) draft.

17. In particular: Reg. 1173/2011, Reg. 1174/2011, Reg. 1175/2011, and Reg. 1176/2011, all cited *supra* note 10.

18. Though see our comments (below) on the proposal to involve the Court of Justice, and possibly also the Commission, in enforcement of the new treaty.

19. See Art. 5 of the December (and January) draft.

their national debt issuance plans,[20] to the Commission and the Council. For those purposes, it is clear that the Union institutions are not being co-opted into a new procedure or exercising new powers to be created by the draft treaty, but will continue to act within the existing parameters laid down for them in the relevant provisions of the TEU and TFEU.[21] It is worth noting that the preamble to the draft treaty specifically records the Commission's intention to bring forward proposals for future Union legislation on precisely those issues.[22]

Thirdly, consider the proposal under the December draft to confer jurisdiction upon the Court of Justice as regards compliance with the Contracting Parties' obligation to enshrine the commitment to a balanced central government budget into national law at a constitutional or equivalent level.[23] The preamble to the December draft specifically states that that provision is based upon Article 273 TFEU, according to which the ECJ shall have jurisdiction "in any dispute between Member States which relates to the subject matter of the Treaties if the dispute is submitted to it under a special agreement between the parties". The relevant provisions of the draft agreement do indeed relate to the subject matter of the Treaties, in the sense that they share a policy relationship with the system of economic coordination provided for under the TEU and TFEU (even if those provisions do not themselves have the character of Union law, and therefore cannot be considered to fall directly within the subject matter of the Treaties). That broad understanding of the scope of Article 273 TFEU follows the precedent already set by other international agreements where Member States have voluntarily accepted the Court's jurisdiction.[24] Given the stress placed throughout the draft treaty on its reinforcement of and indeed subordination to EU law, one might expect that the Court, in actions based upon Article 273 TFEU, would

20. See Art. 6 of the December (and January) draft.

21. In that regard, the preamble to the December (and January) draft specifically refers to Arts. 121, 126 and 136 TFEU.

22. As well as on the coordination between eurozone States of major economic policy reform plans (an issue dealt with under Art. 11 of the December (and January) draft). Note also Commission participation in informal Euro Summit meetings (an issue dealt with under Art. 13 of the December draft / Art. 12 of the January draft); such meetings had already been agreed upon in principle by the relevant Member States on 26 Oct. 2011.

23. See Art. 8 of the December draft; which also states that the actual implementation of the balanced budget commitment would be subject to the review of the domestic (not Union) courts – though there is no further detail in the draft agreement about the expected nature or scope of such judicial review powers.

24. Consider, e.g. the Protocol of 3 June 1971 on the interpretation by the Court of Justice of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters. And more recently, e.g. the jurisdictional provisions of the European Financial Stability Facility Framework Agreement.

adopt an interpretative approach to the relevant provisions which was very closely aligned to that of Union law itself.

However, it is on this issue of enforcement that the January draft contains some of its most important, and potentially more tricky, suggested amendments. In the first place, the revised text proposes to extend the Court's jurisdiction so as to cover not only the obligation to enshrine the balanced budget rule in constitutional or equivalent form, but indeed any failure by a Contracting Party to comply with the provisions contained in Title III on the "fiscal compact" more generally.[25] How significant is that extension? On the one hand, some of the commitments contained in Title III seem inherently ill-suited to judicial enforcement at all: for example, the undertaking to practise a form of "reverse qualified majority voting" in the Council as regards aspects of the excessive deficit procedure.[26] On the other hand, it would be necessary to distinguish those obligations under Title III that are genuinely novel, in the sense that they are not already imposed under Union law,[27] from those provisions under Title III which directly overlap with or are defined by reference to existing Union law.[28] After all, insofar as ECJ jurisdiction over a joint Title III-EU law issue already exists in the form of Article 259 TFEU enforcement proceedings, one would expect such jurisdiction to be exercised as such (rather than through the medium of the new intergovernmental treaty). By contrast, insofar as the exercise of ECJ jurisdiction under Article 259 TFEU, in respect of a joint Title III-EU law issue, might be expressly excluded pursuant to the special provisions limiting judicial enforcement of the excessive deficit procedure contained in Article 126(10) TFEU,[29] the idea of one Contracting Party nonetheless bringing proceedings against another, based on the new treaty, would have to rely on the argument that the relevant Member States' voluntary conferral of jurisdiction on the ECJ pursuant to Article 273 TFEU seeks positively to reinforce the enforcement mechanisms provided for under Union law (rather than having the effect of contradicting an essential element in the scheme of the existing Treaties).

In the second place, the January draft further proposes that the Commission itself may, on behalf of Contracting Parties, bring an action for an alleged infringement of Title III before the Court of Justice. At first glance, that

25. See Art. 8 of the January draft; which nevertheless retains the qualification that implementation of the balanced budget commitment would be subject to review (only) by the national courts.

26. See Art. 7 of the January draft.

27. Such as the balanced budget rule contained in Art. 3 of the January draft.

28. Such as the obligation to reduce the ratio of general government debt to GDP contained in Art. 4 of the January draft.

29. "The rights to bring actions provided for in Articles 258 and 259 may not be exercised within the framework of paragraphs 1 to 9 of this Article [126]."

amendment seems to go significantly further than the terms allowed under Article 273 TFEU, which envisages only actions between Member States and might thus appear to exclude the possibility of standing, under voluntary jurisdictional agreements, for other institutional actors; it also seems to furnish the only real example, within the draft treaty, of the Commission being called upon to participate in proceedings above and beyond those which already exist under the Treaties. However, further reflection might suggest the need to bring greater nuance to bear upon that intuitive response. On the one hand, one should again separate out those provisions under Title III which directly overlap with or are defined by reference to existing Union law, and in respect of which the Commission's competence to invoke the ECJ's jurisdiction already exists in the form of Article 258 TFEU enforcement proceedings. In such situations, the proposal contained in the January draft actually adds nothing of significance. On the other hand, that leaves those obligations under Title III which either are genuinely novel as compared to existing Union law, or in respect of which the theoretical possibility of bringing Article 258 TFEU enforcement proceedings (based on the corresponding provisions of Union law per se) has been excluded in practice pursuant to Article 126(10) TFEU. In such situations, the issue otherwise carefully avoided in the draft treaty – of certain Member States making use of the common Union institutions for non-Treaty purposes – would indeed have to be addressed head on. Some might find it difficult to square the Commission's extra-Union enforcement role, as envisaged by the January draft, with the fundamental principle of conferral as defined under Article 5(2) TEU. But it should be recalled that the Court has already recognized the right of Member States to associate the Union institutions with procedures established outside the framework of the Treaties;[30] though the precise conditions under which such an association will be judged compatible with Union law remain rather sketchy (for example, as to whether indeed all the Member States must at least consent to the association, even if they do not directly participate in the relevant agreement).[31]

So much for the law. Let's turn next to the idea of democracy. In the first place, consider the process of negotiating and adopting the draft treaty. Many will find it unfortunate that, instead of following the relatively transparent and inclusive process of Treaty revision laid down in Article 48 TEU, the new rules

30. See, in particular, Cases C-181 & 248/91, *Parliament* v. *Council and Commission,* [1993] ECR I-3713; Case C-316/91, *Parliament* v. *Council,* [1994] ECR I-653.

31. A problem which would only materialize if the UK makes a formal objection to the proposal: see further below. In any case, even if the January draft's proposal survives into the final treaty text, there would be no possibility (when acting specifically under the jurisdiction recognized through Art. 273 TFEU) of the Commission seeking the imposition upon a Contracting Party of fines / penalties pursuant to Art. 260 TFEU.

on a reinforced economic union are now being agreed through the more traditional vehicle of intergovernmental bargaining. But to their credit, the relevant Member States do seem to have taken heed of warnings about the legitimacy of this treaty-making process: for example, the December draft was made widely available after its initial circulation to the Heads of State or Government by the President of the European Council; moreover, despite lacking any right of involvement, the European Parliament was invited to send three MEPs to participate in the negotiations over the final agreement. Of course, there remains the future challenge of securing national approval for the new treaty, in the face of strong parliamentary and potentially even popular opposition to the "fiscal compact" within several Member States. But the December draft deftly sought to neutralize the threat of non-ratification by a minority of Contracting Parties: it provided that the agreement would enter into force after successful ratification by just nine eurozone countries; from that time, the provisions relating to Euro Summit meetings would apply to all eurozone States, while the remainder of the provisions would apply to eurozone States as and from when they complete their own domestic ratification process.[32] That proposal nevertheless gave cause for concern that the price of driving forward with the "fiscal compact" might well be to dent the legal and political unity hitherto displayed by the eurozone countries. Perhaps so as to reduce that risk, the January draft suggests raising the threshold of successful ratifications required for the treaty to enter into force from 9 up to 15 eurozone countries – thus maximizing the cohesion of the eurozone, while still allowing for the risk that one or two countries might eventually reject the deal.

In the second place, consider the implications of the December deal for economic governance within the eurozone. To take one example: the Member States who signed up to the package promised to examine swiftly the Commission's proposals of 23 November 2011, concerning the enhanced monitoring and assessment of draft eurozone budgetary plans, as well as plans for much stronger surveillance over eurozone countries facing the prospect of financial instability.[33] Of course, those proposals would help to rebuild market confidence in the long term security of the Union economy in general and of the single currency in particular. But it is also fair to observe that the Commission's plans, and indeed the December deal more broadly, raise important issues about how far national (especially parliamentary) control over and accountability for fundamental fiscal and economic policy choices should become subject to the increasing influence and even direct intrusion of European (especially executive) institutions. Those are issues which one

32. See Art. 14 of the December draft.
33. See COM(2011)821 and COM(2011)819.

would prefer to be the subject of a wide public debate and support within all the eurozone countries. After all, the eurozone crisis has already inflicted multiple challenges upon European democracy: from questions about the extent of Franco-German dominance, or the emasculation of "peripheral" economies, within the governance of the single currency; to worries about the apparent preference for reliable technocrats over elected politicians when it comes to running the ship of State through such economically troubled waters; and (perhaps most disturbing of all) fears about the unaccountable power of globalized financial markets and far-from-infallible credit rating agencies over the economic, social and political future of an entire continent. It would be a comfort in these dark days to see the European Council identifying not only what steps are needed to save the single currency and promote economic growth – but also how to ensure the continuing relevance and indeed fundamental importance, throughout and beyond this crisis, of the democratic values which should lie at the heart of our society.[34]

Let's now consider the idea of solidarity. The eurozone crisis has proven a rich testing ground for theories about European togetherness: from those who argue that the rush to xenophobic stereotyping in mass discourse, or legally dubious protectionism in public policymaking, has revealed the shallow and fragile character of our commitment to the sharing of a collective fate; to those who see the crisis as a moment of opportunity through which to forge more meaningful popular and psychological (as well as legal or political) ties between the eurozone nations. More specifically, the December deal focuses our attention on the dangers facing the cohesion of the EU as a whole – not least the threat of the Union breaking down into a "two-speed Europe". Of course, flexible integration is far from being a new phenomenon under EU law: EMU demonstrated that from its very outset, even besides other large scale manifestations of "variable geometry" in fields such as the AFSJ. Yet many observers sense that the eurozone crisis has set us on the trajectory towards an altogether more significant division between "fast lane" versus "slow lane" Member States. True: it seems inevitable that new layers of substantive rules and decision-making structures, designed to bind the single currency States ever closer together, will to some degree create a relative distancing of the other Member States from the "reinforced economic

34. Note that the December / January drafts make only limited reference to democratic scrutiny: e.g. Art. 3(2) on respect for the responsibilities of national parliaments within the context of corrective mechanisms in the event of deviations from the commitment to a balanced budget; e.g. Art 12. (December) / Art 13. (January) on regular discussions on economic and budgetary policies between representatives from the national parliamentary committees (in close association with their counterparts from the European Parliament); e.g. Art. 13(4) (December) / Art. 12(4) (January) on informing the European Parliament of the outcome of Euro Summit meetings.

union".[34] But just how far such distancing need or will go is far from obvious or self-fulfilling.

For example, much will depend on the degree to which the relevant non-eurozone countries merely express their political support for the terms of the December deal, which might also include putting their sovereign names to the draft treaty, or go further by actively participating in some or all of the new commitments for themselves.[35] In that regard, the draft treaty provisions are marked by significant flexibility: it is envisaged that the new agreement would apply to the relevant non-eurozone States which have successfully ratified it, only from the day when they join the single currency for themselves, unless they declare their intention to be bound at an earlier date by all or part of the provisions contained in Title III (the "fiscal compact") and Title IV (on closer economic policy coordination).[36] Another important factor relates to just how far the eurozone countries eventually seek to extend their broader and deeper policy coordination – not just via Article 136 TFEU, but also through the enhanced cooperation regime.[37] If put seriously into practice, increased recourse to enhanced cooperation on matters essential to the smooth functioning of the single currency could imply the emergence of a bifurcated Union in all manner of fields related to economic policy – not only the regulation of specific sectors or markets, but also employment protection, consumer rights, taxation and social security. That would pose interesting legal questions about how far enhanced cooperation may properly proceed before its scope and scale begin to threaten the integrity of the single market.[38] But it also raises important political prospects: if the eurozone were to break itself free from any sense of commitment to the pursuit of common Union policies in fields closely linked to the smooth functioning of the single currency, might it also begin to see the benefits of forging its own approach to more far-flung policy areas such as the environment or discrimination or public health? Whereas flexibility in fields such as EMU or the AFSJ was once seen as a temporary aberration or a minority fetish, the eurozone crisis might yet provide the stimulus for flexibility to emerge as a much more entrenched and systematic phenomenon – with all the risks that implies for the legal coherence and political solidarity of the Union.

34. Though note the risk of divisions arising within the eurozone itself in the event of non-ratification by certain countries (as provided for under Art. 14 of the draft treaty, generously so by the December draft, much less so by the January version): see above.

35. In which regard, consider the precedent already set by the "Euro Plus Pact" which was signed not only by the eurozone countries but also by several other Member States as well (specifically: Bulgaria, Denmark, Latvia, Lithuania, Poland and Romania).

36. See Arts. 1(2) and 14(5) of the December (and January) draft.

37. Cf. Art. 10 of the January draft.

38. Cf. Art. 10 of the December (and January) draft; and also Art. 326 TFEU.

Let's end with the position of the United Kingdom. For complex reasons that have already filled many published volumes, the British relationship with the Union has always been an ambivalent one. But many observers have sensed that ambivalence change into more open antagonism under the leadership of David Cameron: whether it concerned the withdrawal of the Conservatives from the European People's Party, or the far-reaching referendum provisions of the European Union Act 2011,[39] there is widespread suspicion that Cameron's policy on Europe is intended primarily for domestic consumption and, in particular, for the appeasement of an increasingly virulent Europhobia among his own backbenchers. Cameron's behaviour at the December meeting of the European Council certainly played to such suspicions: many felt that (at best) he poorly prepared then handled the negotiations; or that (at worst) he never really intended to reach any deal in the first place. Perhaps Cameron felt that he had effectively dissipated his capacity to sign up to *any* Treaty change, without either fulfilling the expectation that he would deliver some significant "repatriation of powers" in accordance with party and government policy, or holding a national plebiscite on whatever deal was done in Brussels (regardless of whether such a referendum would be strictly necessary under the 2011 Act) – neither alternative seemed politically palatable, such that it was better for the UK simply to walk away empty-handed. Whatever the rationale, it was small wonder to see emotions running high on both sides, in the immediate aftermath of the British veto. Cameron's single-minded focus on the UK's "national interest", which for many seemed to be equated simply with "the City's interests", came as a bitter disappointment to those who felt that the primary aim of the summit was to save the eurozone from disaster by projecting to the world the unity and determination of the whole Union. Cue threats to the UK's beloved budget rebate, calls for the credit rating agencies to focus their attention on British banks rather than Continental budgets, and speculation that the controversy might even bring down the Coalition Government by testing too far the patience of the (pro-EU) Liberal Democrats… In the UK itself, Cameron was fêted among his own backbenchers and in the rightwing press for finally showing some "bulldog spirit" by standing up to the abominable Brussels steamroller; meanwhile, the rest of us were wryly entertained by the spectacle of Cameron promising to protect the unity of the EU and the purity of the single market from the disintegrative forces unleashed by France and Germany.

Thankfully, such mutual antagonism seems to have given way to a more sober resolve to meet the immediate challenges ahead. The UK was offered

39. Cf. Craig, "The European Union Act 2011: Locks, Limits and Legality", 48 CML Rev. (2011), 1915.

observer status at the negotiations over the draft treaty, and has also softened its threats to challenge the legality of using the common institutions in the service of the December deal. But beyond that, Whitehall eyes will surely be watching for signs of whether the British veto has damaged the UK's capacity for participation in important decisions concerning the future economic and political development of Europe – and more broadly, the UK's ability to exercise leadership and influence within the Union and indeed on the global stage. How will other countries now react to British diplomacy – not just on highly pertinent issues such as proposals for Union legislation affecting the financial services sector, or future UK attempts to renegotiate the repatriation of certain powers back from Brussels; but also in a more diffuse sense, when it comes to issues such as the environment or energy or foreign relations, where the UK might well seek to provide a distinctive and persuasive policy vision but still needs to convince the rest of the Union to follow? Whatever happens, let's hope that Cameron is not now so captive to the more extreme elements in his own party and the tabloid press, that he panders to their ever bolder calls for the UK's outright withdrawal from the EU. At the same time, let's also hope that the other major British political actors soon wake up to the serious threat posed to the UK's *true* national interests by the increasingly mainstream nature of ideological Europhobia.