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A Social Compact for a Social Union?

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ABSTRACT

This paper has a rather explorative nature since it examines how a Social Europe could look like, politically and institutionally. Such a Social Europe is not thought out of the box (i.e. outside the Lisbon Treaty) but based on the current situation of op-outs, asymmetries and institutional novelties (particularly the Fiscal Compact) while at the same time adding a clear normative dimension: making the EU more democratic and accountable to its member states and its citizens.

What will be developed is a EU that has freed itself from the one size fits all but instead leaves room for those member states that want to go further with European integration. This would allow some member states to build a genuine union (financial, economic as well as political and social) while other member states would have the choice not to do so. In other words, member states should be held accountable: either they support further integration or they stay outside of it. This decision should not be Brussels-made but offered to the public in the member states concerned (by elections or referenda). It is then legitimate for a country not to take part in some areas of integration like it is legitimate after public consultation to join at a later stage. In fact the EU is already experienced with such a system. This proposal would make these asymmetries (and the ways in which they are handled by the institutions) official and part of a new institutional and political architecture.

CONTENTS

1. INTRODUCTION

This papers aims to explore the design of a Social Union, both from a political science and a legal point of view. By Social Union we mean, as defined within the Euroforum project, a Union that "would support national welfare states on a systemic level in some of their key functions and guide the substantive development of national welfare states - via general social standards and objectives, leaving the ways and means of social policy to Member States themselves". We try to examine how such a Social Union might look like, thinking 'out of the box'. This means that we develop a model outside the existing political and legal framework, i.e. the Lisbon Treaty.

Developing a design of such a Social Union does not only has to take into account the substance of this particular policy area. In fact this will be left aside. By contrast, most attention will be paid to a political and legal problem that is typical for European integration in the social area: the fact that not all Member States are willing to take further steps to strengthen the social dimension of the European Union (EU). How to overcome this problem of asymmetric integration is central to our paper.

First we will briefly review the literature on asymmetric integration as well as have a look of what it means in reality. After having tackled the democratic problem that lies underneath a lot of examples of asymmetric integration, we will examine how and to what extent lessons can be learned from the Fiscal Compact. The Fiscal Compact is a Treaty concluded in the spring of 2012 between all the EU Member States minus the UK and the Czech Republic. It aims to tackle the structural shortcomings of economic and monetary integration by introducing an enforceable balanced budget rule for the Contracting Parties.

Because the Fiscal Compact is a very recent example of how to solve a problem of asymmetric integration in one particular policy area we will examine whether this model is applicable to the social area. In other words, whether a' Social Compact' would bring a European Social Union any further. In our conclusion we will discuss the legal and political caveats. In other words; whether a Social Compact is possible, feasible and desirable and under what circumstances.

2. LESSONS TO BE LEARNED FROM THE LITERATURE

Since the early 1990s a lot of scholars have thought about ways to explain how European integration proceeds while at the same time taking into account that not all Member States are willing to take further steps. Depending on the scope of the definition these models of asymmetric integration apply to one or more policy areas of the EU. In fact a plethora of terms has become popular, in political science (particularly EU integration theories), as well as among politicians and European think tankers. Some of the more popular terms are:

- Europe à la carte
- variable géometrie
- concentric circles
- multi-speed Europe
- opt-outs (and opt-ins)

- asymmetric federalism
- type 2 multi-level governance
- many Europes
- etc.

The authors of one of the more comprehensive studies to map and to explain this variety of models and practices introduce the concept of 'differentiated integration'[1]. Differentiated integration is a system in which "an organisation and member state core [exists] but with a level of centralisation and territorial extension that vary by function ".[2] In case there is preference convergence between the two levels and institutions and the policy domain is characterised by low or decreased politicisation integration will take place (as has the European integration project proved many times), for instance with regard to the internal market. By contrast, when there is preference divergence and also increased politicisation, mere integration is not possible neither feasible. Instead 'differentiated integration' might a second best solution for those member states that prefer to advance their integration in certain policy areas. Given these two conditions about which not much can be done (in terms of 'solving' this problem), the alternative is not integration but stagnation.

In reality 'differentiated integration' is more common practice than one thinks. Despite the official discourse of 'one size fits all' and the fact that for instance in membership negotiations applicant states have to subscribe to the whole acquis communautaire, there exist a lot of policy areas in which 'differentiated integration' is applied. Most known is the Economic and Monetary Union (EMU) and the Schengen Area but also in defence matters and the Area of Freedom, Security and Justice there are a lot of examples of 'differentiated integration'.

Compared to 'integration', however, 'differentiated integration' has one clear disadvantage. It does not take into account the so-called 'throughput legitimacy'. At times the decision to transfer competences at the European level is taken in a democratic way, even if it applies to 'differentiated integration'. In other words, the decision to integrate in a certain policy area is taken in a democratic way (input legitimacy). What is often at stake is the question whether this decision will deliver (for the member states involved). This is the so-called output legitimacy. What is at the same time equally lacking is attention to the way decisions will be taken once certain competences have been transferred. In other words: throughput legitimacy (accountability, transparency, participation) is often a problem since the normal democratic procedures (with for instance a specific role for the European Parliament in terms of controlling the executive) are simply not in place.

Therefore, in order to solve this 'democratic deficit', we propose to add a third condition. Next to preference divergence and increased politicisation in the social area, a Social Union should also be

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[1] D. Leuffen, B. Rittberger & F. Schimmelfennig, *Differentiated Integration: Explaining Variation in the European Union*, Palgrave/Macmillan, 2013.

[2] Ibid., p. 10.

democratic in its decision-making once it comes into force. If not, a system which is faily democratic at the national level is replaced by a European system that has a clear democratic deficit.

3. LESSONS TO BE LEARNED FROM THE FISCAL COMPACT

A. THE SOCIAL COMPACT IN ITS LEGAL PERSPECTIVE

When no unanimity exists among the Member States, those willing to 'move on' with a core group have roughly three options available. The first option is the enhanced cooperation mechanism.[3] This option limits integration to existing union competences, since no new competences may be established through enhanced cooperation. Since this paper starts from the assumption that enhanced cooperation might limit the social policy of the EU to an unsatisfying process of peace meal engineering, this option is not further considered. A second option is what we could call the 'Schengen option': a treaty amendment in conformity with art. 48 TEU, which would contain only legal obligations for some of the MS. A third option would be the conclusion of an international treaty between some, though not all, EU MS outside the EU's framework. The recent Fiscal Compact is an example of this last option.[4]

Although our proposal has the intention of thinking outside of the institutional box, it is instructive to take into account the debate surrounding the Fiscal Compact. If a Social Compact modelled after the Fiscal Compact would be concluded, some important lessons might be learned from discussions surrounding the latter.

B. FACTUAL DIFFERENCES BETWEEN THE FISCAL COMPACT AND A SOCIAL COMPACT

It is important to first consider the factual differences between the conclusion of the Fiscal Compact and the potential adoption of a Social Compact. First, whereas the Fiscal Compact is merely a symbolic confirmation or a tightening version of existing EU law measures,[5] a Social Compact would substantively change the European constitutional order. By adding social policy objectives, it would add a whole new layer to the European Union that is up to now rather economically focussed. A second difference might lie in the support of non-participating Member States. Although the UK and the Czech Republic decided not to sign the Fiscal Compact Treaty, both countries were very much in favour of its conclusion, as they wanted the Euro area countries to tackle the structural problems underlying the EMU. By stabilizing the Eurozone, the Fiscal Compact was to the advantage of all MS,

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[3] See: art. 20 TEU and arts. 326-334 TFEU.

[4] Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, http://european-council.europa.eu/media/639235/st00tscg26_en12.pdf (12.02.2014) (hereafter: Fiscal Compact).

[5] The Fiscal Compact does not seem to advance matters very much from what is determined in the Stability and Growth Pact, in art. 126(1) TFEU, in the so called six-pack and two-pack of EU legislation enacted in November 2011 and May 2013 (P. CRAIG, "The Stability, Coordination and Governance Treaty: principle, politics and pragmatism", *European Law Review* 2012, vol. 37, afl. 3, 234; I. PERNICE, M. WENDEL, L.S. OTTO*, et al.*, *A Democratic Solution to the Crisis. Reform Steps towards a Democratically Based Economic and Financial Constitution for Europe*, Baden-Baden, Nomos, 2012, 101).

including the non-participating ones. This might be different with regard to a Social Compact, which is less of direct concern to non-participating Member States. Furthermore it does not seem to be an unrealistic prophecy that non-participating Member States would feel uncomfortable with the idea of being partly excluded from the decision-making table,[6] a problem to which we will come back later on. A last difference might be found in the events leading towards the conclusion of the Fiscal Compact. Without the heightening pressure from the markets and from "principal paymaster" Germany, the EU might have limited itself to the existing measures or to secondary EU law.[7]

C. LESSON 1: RESPECT FOR THE UNION'S COMPETENCES

An international treaty concluded between some of the MS must respect the competences of the EU.[8] This means that in fields where the Union enjoys exclusive competences according to art. 3 TFEU, a 'Compact' would be in violation of art. 2(1) TFEU. Due to the exclusive Union competence over monetary policy, the provisions of the Fiscal Compact could not and did not touch upon that field.

As regards a Social Compact, art. 4(2)(b) TFEU provides "*social policy, for the aspects defined in this Treaty*" to be a shared competence. To the extent that a Social Compact would touch upon aspects *not* defined in the TFEU, no specific limitation seems to be provided for in the TFEU.[9] Where the measures taken in a Social Compact would touch upon aspects of social policy defined in the TFEU, the MS can only "*exercise their competence to the extent that the Union has not exercised its competence.*"[10] Since the inability or unwillingness of the EU to develop a real social (security) policy is exactly why MS would opt for a Compact, these provisions will not likely hinder its adoption.

D. LESSONS 2 AND 3: THE USE OF EU INSTITUTIONS

With a Social Compact aiming to add a new layer of integration to the existing EU structure, it seems desirable to use the existing institutional structure of the Union for the operationalisation of the social measures. The alternative would be to create a Social Union apart from the European Union, with its own Court, Commission and other bodies.

In the doctrinal debate about the Fiscal Compact, specific attention was paid to the delegation of tasks by an international treaty concluded outside of the EU framework to the EU institutions. In this respect, a distinction should be made between the delegation of tasks to the Court of Justice on the one hand, and the European Commission on the other hand. Although delegation of tasks to the

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[6] See: J.-C. PIRIS, *The Future of Europe: Towards a Two-Speed EU?*, Cambridge, Cambridge University Press, 2012, 63.

[7] P. CRAIG, "The Stability, Coordination and Governance Treaty: principle, politics and pragmatism", *European Law Review* 2012, vol. 37, afl. 3, 332.

[8] See also S. PEERS, "Towards a New Form of EU Law?: The Use of EU Institutions outside the EU Legal Framework", *European Constitutional Law Review* 2013, vol. 9, 48.

[9] See also art. 4(1) TEU.

[10] Art. 2(2) TFEU.

European Parliament was limited, if not non-existent, under the Fiscal Compact, it is interesting to also explore the possibilities of delegation to this third European institution in the light of democratic legitimacy of the measures taken under the new Compact. We will consider these three scenario's in turn.

LESSON 2: DELEGATION OF TASKS TO THE COURT OF JUSTICE OF THE EUROPEAN UNION THROUGH ART. 273 TFEU

The Fiscal Compact delegates control over the Contracting Parties' obligation to transpose the so called "balanced budget rule"[11] into their national legal systems to the Court of Justice of the European Union in accordance with art. 273 TFEU.[12] This article allows for the delegation of jurisdiction to the Court of Justice "*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.*"

Since art. 259 TFEU already provides the CJEU with jurisdiction in conflicts *about* EU law between MS, art. 273 TFEU seems to allow for some kind of jurisdiction *outside* the scope of EU law.[13] Nevertheless, three conditions must be fulfilled. Firstly, disputes must be submitted to the CJEU under *a special agreement* between the parties. Secondly, disputes must *relate to the subject matter of the Treaties*. Lastly, art. 273 TFEU only relates to disputes *between Member States*.

CONDITION 1: A SPECIAL AGREEMENT BETWEEN THE PARTIES

In the case of the Fiscal Compact, this condition was met since it referred very specifically to the alleged violation of one specific obligation: the obligation of art. 3(2) Fiscal Compact which orders the Contracting Parties to transpose the so called "balanced budget rule" into national provisions "of binding force and permanent character."

The Council Legal Service in its justification of this referral stated the following: "*Thus, [art. 8 of the Fiscal Compact] may be regarded as "special", by opposition to "general" which would imply an arrangement applicable to a whole range of previously undefined cases.*"[14] It therefore seems impossible to provide for a *general* delegation of control over the provisions of a Social Compact to the CJEU.

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[11] Art. 3 Fiscal Compact.
[12] Art. 8 Fiscal Compact.
[13] See written evidence provided by STEVE PEERS in House of Lords, Select Committee on the European Union, *The Euro Area Crisis. Oral and written evidence* (2012), 83, §18.
[14] *Council of the European Union 5788/12* (Brussels, January 26, 2012), 5-6.

The delegation of jurisdiction under a Social Compact would thus be limited. As the Court of Justice made clear in *Pringle*, there is nevertheless no reason why the special agreement required by article 273 TFEU "*could not be given in advance, with reference to a whole class of pre-defined disputes*."[15]

CONDITION 2: DISPUTES RELATING TO THE SUBJECT-MATTER OF THE EU TREATIES

This requirement was fulfilled in the case of the Fiscal Compact, due to the close connection between the Fiscal Compact and the Lisbon Treaty. The Fiscal Compact deals with aspects of economic union and its article 3 can be considered as a successor of the Stability and Growth Pact.[16]

As for the Social Compact the, fulfilment of this condition will depend on the precise content of the treaty.

The precise meaning of this second condition has been blurred by the Opinion of Advocate-General KOKOTT in the *Pringle* case. She stated that it would be sufficient for the subject-matter of a *treaty* to be related to the subject-matter of the EU treaties. A link between each and every dispute and the EU treaties would not be required.[17] This interpretation contrasts with the wording of article 273 TFEU requiring every referred *dispute* to relate to the subject-matter of the EU treaties. Unfortunately the Court has not commented on this matter in the *Pringle* judgment. PEERS states that not the Advocate-General but the wording of the treaty should be followed.[18] Only those provisions within the Social Compact that could be linked to the subject-matter of the EU treaties would then qualify for referral to the Court of Justice under article 273 TFEU.

CONDITION 3: DISPUTES BETWEEN MEMBER STATES

Art. 273 TFEU only allows for the submission to the CJEU of disputes between Member State, excluding the possibilities of a reference for a preliminary ruling on the initiative of national courts and judicial control through an infringement action on the initiative of the Commission.

Although formally the Fiscal Compact respects this condition by leaving it to the Contracting Parties to bring cases before the CJEU, the role of the Commission has been questioned.[19] Art. 8(1) Fiscal Compact *invites* the Commission to present a report on the compliance of the Contracting Parties with art. 3(2). In case the Commission concludes in its report that one of the Contracting Party has failed to comply with art. 3(2), another Contracting Party will be obliged to bring a case before the court. Although formally this arrangement might be defended as being in conformity with art. 273

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[15] CJEU 27 November 2012, *Pringle*, C-370/12, § 172 (emphasis added).

[16] *Council of the European Union 5788/12* (Brussels, January 26, 2012), partly inaccessible to the public, as discussed in P. CRAIG, "The Stability, Coordination and Governance Treaty: principle, politics and pragmatism", *European Law Review* 2012, vol. 37, afl. 3, 243.

[17] Opinion AG KOKOTT 26 October 2012 in Case C-370/12, *Pringle*, §186.

[18] S. PEERS, "Towards a New Form of EU Law?: The Use of EU Institutions outside the EU Legal Framework", *European Constitutional Law Review* 2013, vol. 9, 65.

[19] P. CRAIG, "The Stability, Coordination and Governance Treaty: principle, politics and pragmatism", *European Law Review* 2012, vol. 37, afl. 3, 244.

TFEU, in substance it gives the Commission the key to judicial proceedings outside the EU Framework in contradiction of art. 273 TFEU. The Fiscal Compact thus seems to offer a practice of 'expansion' of the third condition of art. 273 TFEU. It nevertheless appears as a rather clumsy construction from a legal point of view.

More generally, this third condition of art. 273 TFEU seems to provide another important limitation to the possibility of judicial enforcement of a Social Compact by the CJEU. The question could be asked whether purely interstate jurisdiction would suffice for the enforcement of a Social Compact. Without solid Commission control and/or a supranational preliminary jurisdiction, the Social Union risks to end up as a dog without teeth: cute to cuddle when it suits, unable to bite when you step on its tale.

INTERMEDIARY CONCLUSION

It is not easy to formulate a general conclusion about the possibility of the delegation of tasks to the Court of Justice of the European Union, as much would depend on the precise content of a potential Social Compact. It is nevertheless clear that art. 273 TFEU poses a number of legal obstacles for CJEU jurisdiction.

Three clear alternatives seem possible. A first alternative is the establishment of a separate Social Union Court. Second, the Social Compact could rely on national court jurisdiction. This is also part of the Fiscal Compact system, in so far as it obliges MS to introduce a constitutional balanced budget rule into their domestic legal system. This of course could never completely replace the harmonising role of a European court. A last alternative would be to simply change the European treaties in order to allow for CJEU jurisdiction over Social Compact matters.

The question remains if there is no alternative to art. 273 TFEU to confer jurisdiction to the CJEU over a treaty concluded outside of the EU system. This question seems to be part of the broader issue of whether delegation of tasks to EU institutions is possible in general. In what follows the potential delegation of tasks on the Commission will be considered. The same reasoning can be applied to a delegation to the CJEU.

LESSON 3: WE ARE IN THIS TOGETHER (DELEGATION OF TASKS TO THE EUROPEAN COMMISSION)

The question we are thus confronted with is whether delegation of tasks to the Commission is possible.

In *Pringle*, the CJEU's judgment on the ESM Treaty, the Luxembourg Court confirmed the possibility to delegate tasks to the EU institutions in a treaty concluded outside of the EU legislative framework.[20] However, this ESM Treaty cannot be placed on the same footing with the Fiscal

[20] CJEU 27 November 2012, *Pringle*, C-370/12.

Compact or a potential Social Compact, since delegation of tasks within the framework of the former was based on collective action of representatives of all Member States.[21] The problem of a Social Compact lies exactly in the lack of unanimous support.

PIRIS points out that if MS wish to rely on EU institutions in a process of differentiated integration, they need the support of all MS, since EU institutions can be considered "common property" of the MS.[22] In a similar vein, CRAIG signals some serious concerns about the use of EU institutions without the proper consent of all the MS.[23] He nevertheless suggests that the use of EU institutions in the case of the Fiscal Compact might pass without problems since no explicit objection was formulated by the UK Prime Minister on the use of EU institutions.[24] Although in theory unanimity might be required to confer extra powers upon EU institutions, in practice an abstention, or a lack of objection, would not preclude the use of EU institutions.[25]

Ironically, where the conclusion of a Compact is meant to circumvent the unanimity requirement necessary for treaty change, unanimity seems still required within the Compact option. Although the lack of clear objections by the UK and the Czech Republic has allowed the Fiscal Compact to rely on EU institutions, it remains to be seen whether non-participating states will take a similar stance with respect to a Social Compact. It is not unthinkable that the non-participating MS would protest against the use of EU institutions, for instance because they might fear to be marginalised within the EU.[26] They might fear that in a multispeed Europe, only nationals from the 'core group', participating in all forms of integration, are eligible to be appointed as president of the European Parliament, the European Commission, the European Council and the Eurozone. It seems essential to take the wishes

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[21] See Opinion AG KOKOTT 26 October 2012 in Case C-370/12, *Pringle*, §§172-175.

[22] J.-C. PIRIS, *The Future of Europe: Towards a Two-Speed EU?*, Cambridge, Cambridge University Press, 2012, 65. *Contra* S. PEERS, "Towards a New Form of EU Law?: The Use of EU Institutions outside the EU Legal Framework", *European Constitutional Law Review* 2013, vol. 9, 54 who derives from the Opinion of the Advocate-General in *Pringle* that possibly only the approval of the *participating* member states' representatives would be necessary.

[23] P. CRAIG, "The Stability, Coordination and Governance Treaty: principle, politics and pragmatism", *European Law Review* 2012, vol. 37, afl. 3, 237-245. See in the same sense the British point of view expressed in House of Lords, European Union Committee, *The Euro Area Crisis* (2012), §89.

[24] P. CRAIG, "The Stability, Coordination and Governance Treaty: principle, politics and pragmatism", *European Law Review* 2012, vol. 37, afl. 3, 238, footnote 27, with referral to House of Lords, European Union Committee, *The Euro Area Crisis* (2012), §89.

[25] Compare with arts. 235(1) and 238(4) TFEU about the unanimity requirement within the European Council and the Council respectively.

[26] Although STEVE PEERS agrees that already in the case of the Fiscal Compact the UK could have legally challenged the delegation of tasks to EU institutions, he does not agree that the approval of all Member States is required. (S. PEERS, "Towards a New Form of EU Law?: The Use of EU Institutions outside the EU Legal Framework", *European Constitutional Law Review* 2013, vol. 9, 54).

of non-participating MS into account so as to keep them involved[27] in developing paths of differentiated integration.[28]

DELEGATION TO THE EUROPEAN PARLIAMENT?

The same problem arises with respect to the involvement of the European Parliament. Roughly three options for parliamentary involvement within a context of differentiated integration appear to be available.[29] A first option is to rely on the European Parliament as a whole, including MEP's from non-participating MS. A second option would be to organise a special session of the European Parliament, involving only MEP's from participating MS. Not only is it unclear whether parliamentary involvement could be limited to the participating MS, since also nationals from non-participating MS are part of the European Parliament,[30] it also seems unlikely that non-participating MS would support the creation of a parliamentary session, excluding their MEP's.[31] Hence, the first two options clearly reflect the 'we are in this together'-lesson drawn above. Only the third option, i.e. the creation of a new parliamentary institution outside the existing EU framework, allows to exclude the involvement of non-participating MS.

In the Fiscal Compact, parliamentary involvement was limited to the attendance by three Members of the European Parliament of the final round of negotiations, and the involvement of national parliaments in the (national) ratification procedure.[32] Although article 13 of the Fiscal Compact refers to both the European Parliament and national parliaments, it does only rephrase the ambition of Title II of Protocol (No 1) on the role of national Parliaments in the European Union, to organise effective and regular interparliamentary cooperation with regard to budgetary policies. It limits the role of parliaments to 'discussing' the issues covered by the Fiscal Compact. This limitation should not, however, be automatically transposed to a potential Social Compact. As critical legal doctrine suggests, more parliamentary involvement is possible within the current framework.[33]

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[27] Like this is the case within the procedure of enhanced cooperation which allows all members of the Council to participate in deliberations about enhanced cooperation policy (arts. 20(4) TEU and 330 TFEU).

[28] See also: J.-C. PIRIS, *The Future of Europe: Towards a Two-Speed EU?*, Cambridge, Cambridge University Press, 2012, 140-142 and B. FOX, "'Reform or we leave EU,' warns British chancellor", *EUobserver*, 15 January 2014, http://euobserver.com/news/122734.

[29] See: I. PERNICE, M. WENDEL, L.S. OTTO*, et al.*, *A Democratic Solution to the Crisis. Reform Steps towards a Democratically Based Economic and Financial Constitution for Europe*, Baden-Baden, Nomos, 2012, 122-123.

[30] A. KOCHAROV (ed.), "Another legal monster? An EUI debate on the Fiscal Compact Treaty", *European University Institute Working Papers*, Law 2012/09, 14.

[31] See e.g. the reaction of British conservatives to proposals of creating an economic and monetary union subcommittee within the European Parliament: "UK Conservatives balk at plans for Eurozone parliament", *EurActiv*, 28 January 2014, http://www.euractiv.com/uk-europe/uk-conservatives-balk-plans-euro-news-533273.

[32] I. PERNICE, M. WENDEL, L.S. OTTO*, et al.*, *A Democratic Solution to the Crisis. Reform Steps towards a Democratically Based Economic and Financial Constitution for Europe*, Baden-Baden, Nomos, 2012, 100-101.

[33] I. PERNICE, M. WENDEL, L.S. OTTO*, et al.*, *A Democratic Solution to the Crisis. Reform Steps towards a Democratically Based Economic and Financial Constitution for Europe*, Baden-Baden, Nomos, 2012, 119.

E. LESSON 4: THE DISADVANTAGES OF INTERNATIONALIZATION

In addition to the abovementioned lessons that can be learned from the Fiscal Compact saga, the Fiscal Compact also proves exemplary of the disadvantages of an intergovernmental approach. Internationalisation (as opposed to supranationalisation) can both adversely affect the efficacy of the legal framework and lead to an enforced de-democratisation.

INTERNATIONALISATION = WEAKENED EFFICACY

PAUL CRAIG notes that in terms of efficacy, the Fiscal Compact offers "*an object lesson as to how tough talk at the outset can be watered down through successive changes to its wording.*"[34] Although it might be too pessimistic to conclude from the experience with the Fiscal Compact that the intergovernmental bargaining process of detailed measures *automatically* results in the watering down of the content, it does offer an example of how this can be the case if the Member States appropriate the rule making process, excluding both the European Parliament and the European Commission.[35]

FABBRINI goes even further, stating that intergovernmentalism decreases the rule of law.[36] To underpin this claim he refers to the lack of compliance with the Stability and Growth Pact.

However, things might be more nuanced. STEVE PEERS for example suggests that under certain conditions intergovernmentalism might be the best way to achieve supranational cooperation.[37] If member states are able to use the institutions of the European Union those can function as "ready-made 'motors of integration'". The member states will then be saved from having to build up parallel mechanisms "from scratch".

INTERNATIONALISATION = DE-DEMOCRATISATION

The process of international bargaining might not only water down the content of the measures concerned, it also suffers from a lack of democratic legitimacy, excluding parliamentary involvement and dialogue with civil society.[38] International bargaining leads to decisions determined by political imperatives, leaving no room for political discussion at the parliamentary level.

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[34] P. CRAIG, "The Stability, Coordination and Governance Treaty: principle, politics and pragmatism", *European Law Review* 2012, vol. 37, afl. 3, 235.

[35] See also: I. PERNICE, M. WENDEL, L.S. OTTO*, et al.*, *A Democratic Solution to the Crisis. Reform Steps towards a Democratically Based Economic and Financial Constitution for Europe*, Baden-Baden, Nomos, 2012, 98 and 129.

[36] A. KOCHAROV (ed.), "Another legal monster? An EUI debate on the Fiscal Compact Treaty", *European University Institute Working Papers*, Law 2012/09, 17.

[37] S. PEERS, "Towards a New Form of EU Law?: The Use of EU Institutions outside the EU Legal Framework", *European Constitutional Law Review* 2013, vol. 9, 40.

[38] See: S. PEERS, "Towards a New Form of EU Law?: The Use of EU Institutions outside the EU Legal Framework", *European Constitutional Law Review* 2013, vol. 9, 40; Editorial Comments, "Some thoughts concerning the

The lack of democratic legitimacy is all the more striking if one realises that the alternative options would have allowed for more democratic support. In this regard, FABBRINI points out that the measures taken in the Fiscal Compact could also have been adopted through the enhanced cooperation procedure, which would have provided for a higher degree of democratic legitimacy.[39] Also a reform of the treaties by way of art. 48 TEU would imply a higher degree of parliamentary involvement, both by the European Parliament and the national parliaments.[40]

F. INTERMEDIARY CONCLUSIONS:

As the foregoing shows, the second option of a Treaty amendment, affecting only certain MS ('the Schengen option') might be preferable from the point of view of efficiency and democratic legitimacy. Nevertheless, when this scenario would appear to be impossible, as was the case with the Fiscal Compact, a separate treaty may be concluded outside of the EU framework. The main advantage of this option seems to be of a symbolic nature. Although the support of the MS is still needed to rely on the EU institutions, this support can be given more subtly by abstaining from objecting, whereas a treaty change would require express consent. Nevertheless, it seems important to allow non-participating MS to remain involved in developments of differentiated integration.

4. CONCLUSION

The previous section has clearly showed that the Fiscal Compact might be a model for our Social Union, therefore the reference in the title of the paper to 'A Social Compact', but not without a number of serious legal considerations. Also at the political level, one should raise the question whether a Social Compact is feasible. As with EMU a difficult decision to make is establishing the criteria for participation (also in terms of the basic levels of convergence), which Member States will be able to join and how many will be willing. One might end up with a Social Union of two or three member states but for obvious reasons this is not what we have in mind neither how social policies in the EU will easily and rapidly advance. Another issue to tackle is the question whether Member States that do not wish to join have political reasons (policy preferences) or strategic reasons (non-participation avoids the costs without being totally excluded from the benefits).

These problems will need to be explored further as well as the substance of such a Social Union. Moreover, also the throughput legitimacy question needs to be answered. In others words: do we

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Draft Treaty on a Reinforced Economic Union", *Common Market Law Review* 2012 (49), no. 1, 9 f; I. PERNICE, M. WENDEL, L.S. OTTO*, et al.*, *A Democratic Solution to the Crisis. Reform Steps towards a Democratically Based Economic and Financial Constitution for Europe*, Baden-Baden, Nomos, 2012, 101, 131 and 135; J. HABERMAS, *Zur Verfassung Europas – Ein Essay*, 2011, 8.

[39] F. FABBRINI, "The Euro-Crisis and the Courts: Judicial Review and the Political Process in Comparative Perspective", *Berkeley Journal of International Law (forthcoming)* 2014, vol. 32, afl. 1, 1 and 65.

[40] I. PERNICE, M. WENDEL, L.S. OTTO*, et al.*, *A Democratic Solution to the Crisis. Reform Steps towards a Democratically Based Economic and Financial Constitution for Europe*, Baden-Baden, Nomos, 2012, 103 and 135.

need separate institutions and procedures for a Social Union (similar to the question whether EMU needs its own parliament, summitry etc.)?

The social crisis within the euro zone has not only showed the need for more integration at the social areas, if not per se than to consolidate the EMU and the way our welfare states within the EU have been developed and proceed to be relatively successful. It has also triggered new thinking about how such a Social Union might look like. We hope this paper has contributed to this intellectual exercise.