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# The European Treaty Amendment for the Creation of a Financial Stability Mechanism

## Abstract

On 25 March 2011, the European Council adopted a decision aiming at the amendment of the Treaty on the Functioning of the European Union by the addition of a new paragraph to Article 136 of that Treaty. The additional paragraph, consisting of two short sentences, runs as follows:

“The Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole. The granting of any required financial assistance under the mechanism will be made subject to strict conditionality.”

This is the first use made of one of the two ‘simplified’ Treaty revision procedures which were created by the Lisbon Treaty. In this paper, the Lisbon reform of the Treaty revision procedures will first be described in general terms. Two other initiatives for post-Lisbon treaty revision will then be mentioned; both relate to the composition of the European Parliament and do not involve the use of the simplified revision procedure. The paper will then explain the reasons why the European Council considered it necessary to amend the TFEU in order to contribute to the smooth functioning of the Economic and Monetary Union. Finally, there will be a discussion of the various steps taken so far in this amendment process which is scheduled to be finished by January 2013, after approval of the amendment from the side of each of the 27 EU states.

## Introduction

On 25 March 2011, the European Council adopted a decision aiming at the amendment of the Treaty on the Functioning of the European Union by the addition of a new paragraph to Article 136 of that Treaty. The additional paragraph, consisting of two short sentences, runs as follows:

“3. *The Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro*

*area as a whole. The granting of any required financial assistance under the mechanism will be made subject to strict conditionality.”<sup>1</sup>*

Further steps at the European level are not required, but the amendment will enter into force only if approved by the 27 member states of the EU according to their own constitutional requirements and procedures. The European Council, in Article 2 of its decision of 25 March, indicates that it shall enter into force on 1 January 2013, provided that all the national approval

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<sup>1</sup> European Council Decision of 25 March 2011 amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro, OJ 2011, L 91/1 of 6 April 2011.

procedures have successfully been accomplished by that time. This amendment constitutes the first use of one of the two so-called *simplified revision procedures* that were introduced by the Lisbon Treaty. It is part of the complex package of legal rules that was put in place by the European Union and by its member states in response to the financial stability crisis that erupted in the spring of 2010 in Greece and threatened to engulf the whole euro area and the other EU countries as well. In this paper, the main emphasis will be on situating this European Council decision within the context of the European Union's evolving Treaty revision regime, whereas the legal and policy framework of Economic and Monetary Union will be discussed only to the extent necessary for explaining why a Treaty amendment was considered necessary - so soon after the last general revision treaty revision, namely the Treaty of Lisbon, had entered into force.<sup>2</sup>

### **The legal context: the post-Lisbon regime of treaty revision**

The Lisbon Treaty was the latest link in the long chain of revisions of the founding Treaties of the European Union. It did not seek to break that chain and the Lisbon Treaty was carefully presented by its authors – the member states of the Union – as ‘just’ another amendment of the *existing* treaties, which was accomplished according to the *existing* rules of change that had remained basically the same ever since the 1950s. Yet, this last revision process took much longer than any of the previous ones – eight full years since it was launched at the Laeken European Council in December 2001 – and the member state governments showed signs of relief mixed with undeniable ‘institutional reform fatigue’ when, on 1 December 2009, ‘their’ revision treaty finally entered into force. They all seemed to agree that the epoch of *major* treaty revisions was over now, at least during the political lifetime of this generation of European leaders. However, nobody wanted to exclude the possibility of making some *piecemeal* treaty amendments in the years

to come. Indeed, the drafters of the Lisbon Treaty (and earlier on, of the Constitutional Treaty) had clearly envisaged this possibility by introducing changes in the revision procedures whose aim was to create simpler ways of modifying some parts of the Treaties in the future.<sup>3</sup>

The idea of creating a more flexible regime of treaty revision had often been discussed in the past. In 1999, a ‘Group of Wise Men’ chaired by the former Belgian prime minister Dehaene, had been called by the Commission to shed their light on the upcoming post-Amsterdam IGC, and among other things they suggested to consider splitting up the European Treaties in a ‘fundamental’ and a ‘less fundamental’ part, and to possibly combine this distinction with a differentiation in the Treaty *amendment procedure*: the fundamental provisions would continue to be revised according to the rigid and cumbersome procedure of Article 48 EU Treaty, whereas the more technical provisions would be amendable according to a more flexible and less time-consuming procedure.<sup>4</sup> On a further request by the Commission, the Robert Schuman Centre at the European University Institute then examined the question in greater technical detail. It submitted two separate, though related, reports in the year 2000: one on reorganisation of the treaties, and one on the reform of the treaty amendment procedures which proposed rather radical changes in treaty revision, including the abolition of the single country veto<sup>5</sup>. Later on, the Franco-German Declaration of Nantes of November 2001 proposed the idea of ‘*une division des traités en une partie constitutionnelle et une partie infra-constitutionnelle plus facile à faire évoluer*.’ One month later, the issue was officially put on the Union reform agenda in the form of a few among the many questions contained in the Laeken Declaration, namely whether the existing Treaties should be merged, whether this merged document should then be split into a basic treaty and a rest treaty, and whether there should be a ‘distinction between the amendment and ratification procedures for the basic treaty and for the other treaty provisions’.

<sup>2</sup> On the broader economic policy issues, see for example N. Jabko, *Which Economic Governance for the European Union? Facing up to the Problem of Divided Sovereignty*, SIEPS Report 2011, no. 2; and *The Future of Economic Governance in the EU*, House of Lords European Union Committee, 12<sup>th</sup> Report of Session 2010-11, March 2011.

<sup>3</sup> See also, on the new revision procedures after Lisbon, Peadar ó Broin, *How to Change the EU Treaties – An Overview of Revision Procedures under the Treaty of Lisbon*, CEPS Policy Brief No. 215, October 2010

<sup>4</sup> Von Weizsäcker, Dehaene and Simon, *The Institutional Implications of Enlargement*, 18 October 1999, at 12-13..

<sup>5</sup> The report proposed to replace the consensus rule by some kind of super-qualified majority decision rule for amending the Treaties, combined with the possibility for reluctant member states to opt out from the non-institutional amendments (EUI, Robert Schuman Centre, *Reforming the Treaties' Amendment Procedures. Second Report on Reorganization of the European Union Treaties*, July 2000).

When the Treaty reform process came to an end, eight years after the Laeken Declaration, the idea of making a clear subdivision between a ‘basic treaty’ and a ‘rest treaty’ had been abandoned, although traces of that idea can be found in the fact that the Lisbon Treaty (following the Constitutional Treaty on this point) introduced a distinction between an ‘ordinary’ rigid treaty revision procedure and two separate ‘simplified’ revision procedures. The latter happen to apply mainly to the provisions of the Treaty on the Functioning of the European Union, which – to some extent at least – can be considered as the ‘less fundamental’ of the two founding Treaties, even though its legal value is the same.

The Lisbon Treaty thus alters the Union’s ‘rules of change’ for the future. This ‘revision of the revision’ denotes the will of the governments to differentiate the rules on treaty amendment so as to make them more flexible in some circumstances. The new Article 48 TEU does not remotely look like the old Article 48 TEU; its text is much longer and it introduces some new modes of amending the Treaties.

Paragraphs 2 to 5 of Article 48 TEU (as amended by the Lisbon Treaty)<sup>6</sup> are entitled *Ordinary revision procedure*. The word ‘ordinary’ does not signify that this procedure will be the one that is most commonly used, but rather that it is the default procedure which must be used when the conditions for using the simplified procedures are not met. The ordinary procedure largely corresponds to the previously existing treaty revision rules contained in Article 48 EU Treaty (pre-Lisbon version) which were used in all the previous reform rounds, but with two significant additions: the European Parliament is included among the actors that may initiate a treaty revision process (although subject to the approval by the European Council acting by simple majority), and the Convention method is integrated as a normal feature for future revisions. However, it is clearly confirmed that the Convention will not affect the formal power of treaty conclusion that will be entrusted, as before, to an intergovernmental conference, and will be followed, as before, by ratifications of each state separately. It is made possible for the European Council to propose that revisions should be decided directly by an IGC without a prior Convention, if the nature of the revision does not justify the setting-up of a cumbersome Convention. The European Council can decide such a

change of track by a simple majority but subject to the consent of the European Parliament, which is of course an effective means of ensuring that the European Council will not abuse this possibility of acting ‘quickly’, without calling a Convention.

Article 48 TEU now also provides for alternatives to the mainstream revision procedure. Those alternatives are listed and described in paragraphs 6 and 7 of Article 48 TEU under the heading ‘simplified revision procedures’, which – as we will see – is perhaps an unduly optimistic way of presenting them.

The two simplified revision procedures are to be used for two separate purposes. The procedure of *paragraph 7* is to be used for building the so-called *passerelles*, that is, for allowing a passage from unanimous to qualified majority voting by the Council in a given area or a given case, and a passage from a special to the ordinary legislative procedure in a given area or case. Thus, a further deepening of integration will be possible without calling an IGC and a Convention, but simply by means of a unanimous decision of the European Council adopted with the consent of the European Parliament. There is no need for formal ratification of the amending decision by all the member states separately, but each national parliament will be able to stop any such amendment by expressing its opposition within a six-month period following the European Council decision (that decision will, obviously, not enter into force during this period). In this simplified revision procedure, the two-step approach is thus not entirely abandoned. The difference with the ordinary revision mechanism is that national parliaments, instead of being required to give their positive approval to proposed amendments, will have the option of expressing their negative opinion by vetoing a proposed amendment. The original version of this mechanism, as submitted by the Italian Presidency during the 2003 IGC, provided that a revision decision could be stopped if ‘X’ national parliaments expressed their opposition, whereby ‘X’ stood for an unspecified number higher than one. However, the single parliament veto appeared in an IGC document of 5 December 2003 and remained there until the end of the negotiations of the Constitutional Treaty. It was put there on the insistence, above all, of the British government.

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<sup>6</sup> Note that article 48 TEU is one of the very few Treaty articles that kept the same number as in the pre-Lisbon version.

The second simplified revision procedure introduced by the Treaty of Lisbon, that of Article 48 *paragraph 6*, has a broader scope. It is applicable to all amendments of ‘Part Three of the Treaty on the Functioning of the European Union relating to the internal policies and action of the Union’, which means all together some 171 treaty articles – but subject to one major exception: if the proposed amendment of an internal policy provision leads to an increase in the European Union’s competences, then the ordinary revision procedure will have to be used instead. So, for example, if the member states wanted to modify Article 153 (5) TFEU and remove the sentence which currently excludes the use of the Union’s social policy competences with regard to the right of association and the right to strike, they could not do so according to the simplified procedure, because that amendment would involve an indirect increase of EU competences. It might not always be clear, though, whether a proposed amendment will increase the Union’s competences, so there might be some contestation in the future on whether the use of this procedure is appropriate.

Upon a closer examination of the procedure prescribed by paragraph 6, it soon appears that this is not really a simplified procedure at all. As in the paragraph 7 procedure, discussed above, there will be no need for a Convention or an IGC; the amendment will rather be adopted directly by the European Council acting by unanimity of its members. But - and here is the crucial difference with paragraph 7 - that decision will be subject to ‘approval’ by each member state under its own constitutional requirements. One may expect these constitutional requirements to involve, in most if not all member states, a consultation of the national parliament and probably also a positive vote of approval by the parliament, and nothing prevents the states from also calling a referendum on the proposed treaty change. If, furthermore, one considers that adopting a unanimous European Council decision is not necessarily a simpler feat than reaching an agreement at an IGC (the actors

being essentially the same...),<sup>7</sup> one may well wonder whether the paragraph 6 procedure is really any simpler than the ordinary revision procedure.

### **Two other post-Lisbon treaty amendment projects**

Before considering in more detail the European Council’s amendment decision of 25 March 2011, we should briefly mention two other initiatives for Treaty revision that are currently under way, since they help to cast doubt on the prediction that, after the difficult entry into force of the Treaty of Lisbon, the text of the Treaties would be left untouched for a long time.

The first of those initiatives aims at modifying the composition of the European Parliament by adding 18 additional members. The last elections to the European Parliament took place in June 2009 according to the Nice Treaty rules on the composition of the Parliament. Since the Lisbon Treaty had not yet entered into force in June 2009, the new rules on the composition of the EP which were agreed as part of the Final Act of the Lisbon IGC could not yet be applied. This was resented by those countries that would have had more MEPs according to the Lisbon-based rules and particularly by Spain that ‘lacked’ four seats in the Parliament that was elected in 2009. Under the impulse of the Spanish Presidency of the Council during the first semester of 2010, all the member state governments agreed not to wait for the next elections of 2014, which will be held according to the Lisbon-based rules, but to correct this ‘intolerable’ situation immediately.<sup>8</sup> They decided to temporarily add 18 seats, to be distributed over 12 EU states in accordance with the Lisbon-based composition, and without yet taking away any of the three seats which Germany will lose in 2014 when the ‘real’ Lisbon-based composition will kick in. The treaty amendment, which was in fact an amendment of a Protocol attached to the Treaties,<sup>9</sup> was signed on 23 June 2010 after a mini-IGC that took just a few days, and after the European Parliament had consented to use the ‘light version’ of the ordinary

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<sup>7</sup> The fact that an Intergovernmental Conference can act as rapidly as the European Council if there are no serious divergences between the EU countries is illustrated by the first post-Lisbon Treaty amendment, mentioned below, which took only six days between the convening of the IGC and the signature of the amendment.

<sup>8</sup> See the second recital of the amending Protocol which is very candid about the reasons for treaty amendment: ‘to allow those Member States whose number of members of the European Parliament would have been higher if the Treaty of Lisbon had been in force at the time of the European Parliament elections in June 2009 to be given the appropriate number of additional seats and to fill them.’

<sup>9</sup> Protocol amending the Protocol on Transitional Provisions annexed to the Treaty on European Union, to the Treaty on the Functioning of the European Union and to the Treaty establishing the European Atomic Energy Community, signed on 23 June 2010, OJ 2010, C 263/1.

revision procedure, that is, without a Convention.<sup>10</sup> The treaty amendment must now be ratified by all the 27 member states. At the end of March 2011, only eight ratifications were missing, and the governments hope that the 18 new MPs will be able to enter the Parliament after the summer of 2011.<sup>11</sup>

A further initiative for treaty revision may soon emerge which also relates to the composition of the European Parliament. In a report prepared for the Constitutional Affairs Committee of the EP, *rapporteur* Andrew Duff proposed a number of amendments to the Act on the Elections to the European Parliament but also proposes the election of 25 additional members of the EP from a single Europe-wide constituency.<sup>12</sup> For the latter purpose, an amendment of Article 14 TEU is needed since that article, in its current version, seems to imply that MEPs are elected on a state-by-state basis and, anyway, limits their total number to 751. The Constitutional Affairs Committee approved the proposal at its April 2011 meeting, and the EP as a whole will consider it at its July session. This could then be the basis for a formal initiative by the European Parliament to start the ordinary revision procedure. The formal right to launch a treaty revision process is indeed granted to the EP by the new post-Lisbon text of Article 48(2) TEU.

### **The legal reasons for the financial stability amendment**

The treaty amendment relating to the financial stability mechanism is of a very different political and legal nature. It originated against the complex background of the measures taken, since the spring of 2010, to deal with the sovereign debt crisis that first emerged in Greece, later spread to Ireland and Portugal and

generally affected the entire euro area. The treaty amendment itself<sup>13</sup> was adopted by the European Council at its meeting of 24-25 March 2011, as part of a comprehensive package of measures to ensure long-term budgetary stability of the euro area, including in particular the Euro Plus Pact on stronger economic policy coordination agreed by the euro area heads of government together with those of six non-euro countries.<sup>14</sup>

The European stability mechanism (ESM) envisaged by the treaty amendment is intended to replace in 2013 the currently existing and curious mix of legal instruments that were adopted to deal with the sovereign debt crisis and which used the various legal toolboxes of public international law, European Union law and private law. We will now sketch the bare bones of that current regime of anti-crisis measures which have raised a number of unprecedented issues of legal interpretation.<sup>15</sup>

In early May 2010, the euro area countries (except Greece) concluded an Agreement with Greece to coordinate a series of bilateral loans to that country. The European Union was not formally involved in the agreement except that the Commission was charged by the euro countries to coordinate the lending operation. Immediately afterwards, the Council adopted a Regulation establishing a European financial stabilization mechanism (EFSM) based on Article 122(2) TFEU, which could be used in future situations similar to that of Greece.<sup>16</sup> Article 122(5), whose text dates from the Maastricht Treaty, allows the Union to grant financial assistance to a Member State that 'is in difficulties or seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control.' At the

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<sup>10</sup> The mini-IGC that adopted this amendment was convened by a European Council decision of 17 June 2010 (OJ 2010, L 160/5) which refers, in its recital 4, to the European Parliament's consent on the choice of not convening a Convention.

<sup>11</sup> Source: *Europolitics*, 21 March 2011.

<sup>12</sup> Draft report on a proposal for a modification of the Act concerning the election of the members of the European Parliament by direct universal suffrage of 20 September 1976 (Committee on Constitutional Affairs, *Rapporteur*: Andrew Duff), 2009/2134(INI) of 5 November 2010. Note that the title of the draft report does not indicate that Treaty amendments are also being proposed, alongside the amendments of the Act on the election of the EP.

<sup>13</sup> See the text of the amendment in the introduction of this paper.

<sup>14</sup> See the Conclusions of the European Council meeting of 24-25 March 2011, EUCO 10/11, pp. 13-20. The Euro Plus Pact, although approved during a European Council meeting, is therefore not a decision of the European Council but an instrument of enhanced cooperation grouping the euro area countries and some, but not all, other member states of the EU.

<sup>15</sup> For a full treatment of those legal issues, see in particular J.V. Louis, 'The No-Bailout Clause and Rescue Packages', *Common Market Law Review* (2010) 971-986; R. Smits, 'L'Euro(pe) à l'épreuve', *Cahiers de droit européen* (2010) 7-15; U. Häde, 'Die europäische Währungsunion in der internationalen Finanzkrise – An den Grenzen europäischer Solidarität', *Europarecht* (2010) 854-866; and A. Viterbo & R. Cisotta, 'La crisi della Grecia, l'attacco speculativo all'euro e le risposte dell'Unione europea'. *Il Diritto dell'Unione Europea* (2010) 961-993.

<sup>16</sup> Council Regulation 407/2010 of 11 May 2010 establishing a European financial stabilization mechanism, OJ 2010, L 118/1.

same Council session of 9 May, the ministers of the euro area countries, wearing their intergovernmental hats, adopted a Decision in which they committed themselves to support a separate and additional loan and credit mechanism.<sup>17</sup> That mechanism, which is called the European Financial Stability Facility (EFSF), was established soon after as a so-called Special Purpose Vehicle - in legal terms a private company established in Luxembourg but jointly controlled by the euro area states. In terms of its lending and guarantee capacity, the EFSF, with a total amount of 440 billion euro, far outstrips the EFSM which has an EU budget guarantee amounting to only 60 billion euro. The operation of the EFSF was limited by the founders to a period of three years, whereas the EFSM has no fixed sunset clause, although its operation must be reviewed every six months so as to respect the exceptional character of the measure.

From a legal point of view, there were two potential 'constitutional' problems with the package adopted in May 2010. On the one hand, it is not entirely certain whether the *intergovernmental measures* taken by the euro countries comply with the TFEU rule that prohibits EU states from giving financial support to each other (the so-called 'no-bailout' rule of Article 125 TFEU). It can be argued that a mechanism of lending money subject to severe conditionality, as was put in place for Greece and through the EFSF, is not caught by the Treaty prohibition on giving (direct) financial support, but there are some remaining doubts. On the other hand, it is not entirely certain that the *EU Regulation* is within the scope of Article 122(2). In particular, it might be argued that Greece and Ireland were not facing exceptional occurrences *beyond their control* (as the text of Art 122 requires), since their governments had contributed to create the sovereign debt crises which they were facing. This latter controversy seemed to be the most worrying, at least from the perspective of the German government, since complaints had been lodged before the German Constitutional Court arguing that this Council Regulation of 11 May 2010 was an *ultra vires* action of the European Union which should be declared

contrary to the German Constitution. Given the erratic record of the court in Karlsruhe, the government did not feel entirely confident about the outcome of those complaints.<sup>18</sup> So, it is above all the controversial legal basis of the (comparatively small) EU law pillar of the financial stability regime created in May 2010 which prompted the member states, later in that same year, to envisage a treaty amendment for creating a permanent crisis mechanism that would replace the exceptional and legally uncertain EFSM and EFSF.

Indeed, a treaty amendment could seem to solve both legal problems mentioned above. By inserting an explicit provision in the TFEU which authorizes the euro area member states to put in place a financial support mechanism for countries in budgetary and financial trouble, the effect of the bail-out prohibition of Article 125 TFEU would be neutralized by a complementary norm with the same treaty rank. At the same time, the intergovernmental nature of the future mechanism means that the legally 'risky' EU Regulation can be discontinued after 2013, thus cutting short the possible constitutional challenges before the German Constitutional Court or elsewhere in Europe. In addition, the choice for the intergovernmental route had the interesting consequence that the simplified revision procedure of Article 48 (6) could be chosen, as will be explained below.

### **The amendment process so far**

The hypothesis of a limited treaty amendment had first been mooted by the German chancellor Merkel in March 2010 but had been greeted with much skepticism by the other EU governments who were rather horrified by the prospect of engaging in a new Treaty revision process only a few months after the Lisbon Treaty had finally come in operation. However, in the autumn of 2010, the German government managed to convince the French government, as emerged from a joint Franco-German declaration made in Deauville, on 18 October 2010, in which the two countries considered 'that an amendment of the treaties is needed and that the President of the European Council should be asked to present (...)

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<sup>17</sup> The Decision has the following baroque denomination: Decision of the Representatives of the Governments of the Euro Area Member States Meeting Within the Council of the European Union. See Council document 9614/10 of 10 May 2010, accessible on the public register of Council documents. There is a long standing practice of government representatives 'switching hats' during a Council meeting and adopting decisions *qua states* rather than *qua Council members*, but this phenomenon is quite unusual in a context of enhanced cooperation such as this one, namely limited to the euro area countries.

<sup>18</sup> For a discussion of the German constitutional law perspective, see D. Thym, 'Euro-Rettungsschirm: zwischenstaatliche Rechtskonstruktion und verfassungsgerichtliche Kontrolle', *Europäische Zeitschrift für Wirtschaftsrecht* (2011) 167-171.

concrete options allowing the establishment of a robust crisis resolution framework before (...) March 2011.<sup>19</sup>

At the European Council meeting of 28-29 October 2010, some days later, general agreement was found on 'the need for Member States to establish a permanent crisis mechanism to safeguard the financial stability of the euro area as a whole' and the President of the European Council was invited 'to undertake consultations with the members of the European Council on a limited treaty change required to that effect, not modifying article 125 TFEU ('no bail-out' clause).<sup>20</sup> The last part of the sentence resulted from the discussions among the EU governments, and meant that the treaty amendment rather than deleting the no-bail out clause would take the form of a *lex specialis* regime put alongside that clause.

Most importantly, the formulation adopted by the European Council expressed a preference for a crisis mechanism to be established by the *member states* of the euro area rather than by the *European Union* itself. This choice paved the way for the use of the simplified revision procedure of Art 48(6). Since the amendment would relate to the 'internal policies' part of the TFEU and since it would not increase the competences of the Union, the conditions for the use of the simplified procedure of Article 48(6) TEU were met.

Following the political agreement of 28-29 October, a draft text of the amending Decision was prepared for adoption by the next European Council meeting on 16-17 December.<sup>21</sup> This draft Decision then formed the basis for the consultation of the European Parliament, the Commission and the European Central Bank, as prescribed by the text of Article 48(6).<sup>22</sup> Although prior consultation of the national parliaments is not foreseen by Art 48(6), the single countries are free to provide for it, as is the case for example in the United Kingdom

under the EU (Amendment) Act of 2008 which was adopted in view of the ratification of the Lisbon Treaty.

When examining the draft European Council decision, the European Parliament proposed some changes which aimed at inscribing a complementary role for the European Union institutions in the text of the new Article 136, in particular by stating that the principles and rules for the conditionality of financial assistance under the mechanism should be determined by an EU regulation adopted under co-decision.<sup>23</sup> This, however, would have implied that the Treaty amendment would have conferred new competences on the European Union and, hence, the simplified revision procedure would no longer have been available. The European Council, at its March 2011 meeting, decided not to modify a word of the draft decision which it had adopted in December 2010 and not to mention the EU institutions at all, but instead the European Council adopted 'further particulars' relating to the future ESM<sup>24</sup> which provide for a close involvement of the Commission in the ESM's eventual operation. The Commission would be called to act once again (as in the current Greek and EFSF regimes) as an 'agent' of an intergovernmental cooperation system.

The amendment decision must now be approved by the 27 member states, even though the stability mechanism itself will be operated by the euro area states only. Article 48 TEU does not specify how this 'approval' must be given and, as argued above, the internal procedures leading to such an approval may look very similar to those needed for the ratification of a traditional European treaty amendment. In particular, it is not excluded that states organize a popular referendum on the matter, although the 'simplified revision' rhetoric will certainly be employed by the governments to minimize the constitutional importance of the change and to reject possible demands for a referendum. If all member states can indeed avoid

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<sup>19</sup> See P.M. Kaczynski and P. ó Broin, *From Lisbon to Deauville: Practicalities of the Lisbon Treaty Revision(s)*, CEPS Policy Brief no.216, October 2010.

<sup>20</sup> Conclusions of the European Council of 28-29 October 2010, EUCO 25/10, p.2.

<sup>21</sup> Conclusions of the European Council of 16-17 December 2010, EUCO 30/10, Annex 1.

<sup>22</sup> Consultation of the Commission and the EP is required in all cases of recourse to the procedure of Art 48(6). Consultation of the ECB is required by Art 48(6) only 'in the case of institutional changes in the monetary area.' One may wonder whether this amendment is situated 'in the monetary area' but the ECB was anyway consulted.

<sup>23</sup> For the text of the amendments proposed by the EP, see the annex to the Resolution of the European Parliament of 23 March 2011, *Amendment of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro*.

<sup>24</sup> Those further particulars are called the 'Term sheet on the ESM' and are published in Annex II of the European Council Conclusions of 24-25 March 2011.

the organization of a referendum, and assuming there is no change of heart which would lead a member state to refuse its approval of an amendment which was adopted unanimously by the European Council, it is well possible indeed that the amendment will enter into force on 1 January 2013. One important reason why the considerable rigidity which characterizes even the simplified procedures, in particular through the single country veto, may be overcome in this case is that countries such as the United Kingdom, Denmark and Sweden will not be part of the ESM and therefore have no particular reason to object to this Treaty amendment. If all goes well, the new European Stability Mechanism will then enter into

operation on 1 July 2013, and replace the ad hoc crisis instruments which were put in place in 2010. In legal terms, the ESM will be established by a treaty among the euro-area Member states as an intergovernmental organization under public international law with its seat in Luxembourg.<sup>25</sup> Once again, international law is being used as a tool for the development of the European integration process. The implication of this is that the future operation of the ESM will not be subject to the normal constraints of the EU legal order, as regards for example decision-making procedures, subsidiarity control and judicial review.

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<sup>25</sup> Conclusions of the European Council meeting of 24-25 March 2011, p.22.