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**The Democratic Governance of the Euro**

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**POLICY REPORT**

**The Euro Crisis and the Democratic Governance of the Euro:**

**Legal and Political Issues of a Fiscal Crisis**

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The European financial crisis is not going to be fixed by Council agreements or technical fixes. Instead it also raises profound political questions that affect the future of the European Union as a whole. A first part of the Memo will briefly describe how the fiscal crisis raises fundamental political questions relating to the democratic legitimacy of practices of national as well as European institutions (I). A second part will analyze different ways in which the democratic legitimacy of European institutions can be enhanced within the parameters of the existing institutional framework. In practice, we suggest a constitutional changes but without Treaty amendments (II). A third part discusses in greater detail a number of specific suggestions that concern the implementation of the ESM, the Fiscal pact and the Six-Pack (III).

## I. The Euro Governance and the Democratic Question

We need to discuss not only the governance of the Euro but also the *democratic quality of that governance*. The latter must be at the centre stage of the reforms that are being put in place. First, because many of the problems at the origin of the crisis correspond to democratic failures of the states that the EU needs to help correct. Second, because whatever institutional answers are being proposed at the European level, they will have to be democratically legitimate themselves. In this respect, a fundamental challenge for the future reform will be to overturn the presumption, shared by many that these issues can only be democratically addressed at the national level or, if addressed at the European level, would necessarily have to reproduce the democratic model of the State. Ideally, the governance of the Euro might be used to finally develop a new approach to the democratic challenges of European integration.

The fiscal crisis has highlighted a political gap: the scope and level of politics has not followed the scope and level of political problems in Europe. This is our most important democratic deficit. First, we have not internalized the degree and democratic consequences of the interdependence generated by integration. The financial troubles of a few States - the unintended consequences of seizing opportunities provided by the integrated market - became a problem for all. An immigration influx into Italy spills over into all other States. A wrong assessment by German authorities on the health risk of a particular vegetable leads to high losses for farmers all over the Europe. In all these areas, national policies have important external effects in other Member States. These are European issues but they are in good part still governed at national level and, when governed at EU level, still largely dependent on national politics.

At the same time, the EU is both a source of wealth creation, through market integration, and of redistributive effects, by competition in that market and the increased majoritarian character of its decisions. This requires for democracy to be extended as far as the problems and the interests they affect do. But it also requires some democratic notion of distributive fairness to legitimate the impact of what is done and decided in common.

European integration generates therefore a deep interdependence between national policies that has never translated itself into European politics. But if national politics is not able to incorporate the existing European interdependence on certain issues then it cannot, itself, provide appropriate and legitimate democratic solutions to those issues.

A credible solution to the current crisis depends on addressing this democratic deficit but also provides an opportunity to do so. The crisis started because of a democratic problem: the fiscal

policies adopted by some states had an impact on all other European states and there was no effective mechanism of governance, at the Union level, to hold them accountable for that. Solving that democratic problem requires developing instruments of governance to prevent those externalities and, if necessary, impose particular economic and financial policies on some States. We have taken some necessary steps in that direction. But this, in turn, also needs to be democratically legitimated. Once the EU binds, for example, the financial assistance being given to some states to the adoption of certain policies, a claim emerges for it to be accountable also for the outcome of those policies.

## II. A Constitutional Change Without Treaty Amendments

So how can the democratic legitimacy of European institutions be enhanced within the parameters of the existing institutional framework?

The first concerns the politics of European elections. It is important to make the elections for the European Parliament genuine European elections for the choice of the President of the European executive. For this, it would be sufficient for the different European political groups to present competing candidates before the next election. If the election campaign would focus on this, the European Council would, in practice, have to appoint the winning candidate. Of course there are obvious risks with this approach. The politicization of the Commission is bound to affect its perceived neutrality and the authority it derives from being conceived as a semi-technocratic body. Some in the group were understandably deeply concerned with this risk. But we believe that such a shift is important for a wide range of reasons. First, it is already the case that the position of President of the Council is limiting the influence of the Commission as an honest broker between Member States, while simultaneously the Commission has to engage with an increasingly assertive European Parliament. In this context, the Commission needs to acquire new political capital in order to preserve (and perhaps strengthen) its position in the EU institutional system. But more importantly, and somehow paradoxically, under the Fiscal Treaty and other fiscal crisis related legislation like the six-pack the Commission gains considerable powers to intervene in the budgetary processes of Member States, once they have shown themselves unable to meet the strict budgetary requirements imposed on them. For those powers and the discretion that comes with these powers to be exercised effectively and legitimately, the Commission must be able to rely on the kind of legitimacy that comes with direct link to the outcome of European elections. Budgetary questions were at the heart of the historical parliamentary struggles for control over a democratically unaccountable executive – they are the inner sanctum of parliamentary prerogatives – and it is unlikely that national Parliaments will give much weight to a Commission that is seen as the instrument of the collective executives of Member States.

The effects of such a shift would be profound: In a democratic Europe we should not be surprised to see that European citizens disagree about the kind of policy measures that are the best response to the financial crisis and other political issues that the EU rightly addresses through legislation. It is a mistake to insist, as national politicians invariably do, when they defend the measures taken at late night Council meetings, that there is no alternative to the decision they have made. For many citizens that is the reason why they turn their back on Europe: They do not like the policy choices generated on the European level, and there is no alternative personnel and menu of policy options present to engage with on the European level, so they associate Europe with those policy choices they deem undesirable. If faced with a genuine choice in personnel, programmes and policies, disgruntled citizens would be able to articulate their dissent not by turning away from Europe and seeking refuge in populist recipes. They might instead, as European citizens, vote or mobilize for an alternative Europe, personified in a different President, committed to different policies. It is revealing, the extent to which European

citizens from different Member States increasingly feel engaged in national elections in other Member States, particularly those understood as playing a key role in EU policies. This signals the extent to which European citizens perceive the EU as shaping their lives and need to believe that they have options as to what determines those lives. But it also highlights the increase risk that they will see those lives being determined by national politics in which they have no voice. The only viable alternative is to offer such politics at European level. Tying the outcome of the European elections to the determination who will be the next Commission President will lead not only to a surge of interest in European parliamentary elections and allow the Commission to more effectively fulfil the functions assigned to it, it is also likely to be the best antidote to the spread of nationalist populism and Euroscepticism.

On a second level the European Union can increase its democratic legitimacy by more closely aligning its policy priorities to the problems that, given the ineffectiveness of Member State solutions, it should address. The European Union is widely believed to be an institution that enables Member States collectively to reap the benefits of greater market integration, both on the European and global level, while at the same time ensuring political control over markets to ensure through appropriate regulation that mobile market actors can't exploit the freedoms offered by transnational markets to undermine public goods.

The financial crisis is a case in point. It illustrates clearly that financial institutions have not been regulated sufficiently to ensure that the highly dynamic global financial markets effectively serve as the infrastructure of an efficient market economy. To the extent the crisis in Europe is described as a sovereign debt crisis, this is, in large part, of a result of states bailing out financial institutions, fearing the contagion effects of financial institutions failure. To a good extent the sovereign debt crisis is just a knock-on crisis to the 2008 financial crisis, as the example of Ireland and Spain illustrate. Meanwhile financial institutions, often invoke global competition and exit options in globalized financial markets to oppose regulations that burden or restrict financial transactions, . This is the type of blackmail that challenges the European Union to prove that it can actually do what it has promised: To make use of Europe's considerable regulatory capacities and market clout to tame the forces empowered by otherwise unfettered global markets. There is no reason why Europe should not follow through on this: The enhanced cooperation procedure can be used to overcome the lack of consensus among Member States and an aggressive interpretation of the jurisdiction of the EU can ensure that exit options are effectively closed or minimalized. The EU is becoming a victim of the crisis when it should be perceived as the solution for the crisis. We understand well the difficulties of articulating and making concrete such message. But it is precisely because of these difficulties that it is even more important to structure a series of initiatives around this narrative. A narrative that presents the Union as protecting the European model of social markets both by being a reformer of the States but also by protecting and empowering them at the global level.

Our point here is not theoretical or communicational. It requires restructuring key European policies in light of this European narrative and the need for European politics. This narrative should be mainstreamed into different policy proposals. Let us exemplify with a couple of proposals that could be pushed for in the context of the upcoming debate on the financial perspectives post-2014.

Let us start by noting that this debate should be used as an opportunity to democratize EU politics along another dimension: The Union should be made accountable not only for what it spends but also for the wealth it generates. It must distribute 'its' money and not that of the States. The democratic argument requires a clear connection of the Union's financial resources with the wealth it generates and with the economic activities of a state that have important externalities for other states. The recent

Commission proposals for EU own resources are a step in the right direction. But it is important to clearly highlight the link between own resources and either economic activity that is made possible by the EU or economic activities with substantial cross-border externalities. Both VAT and a financial transactions tax are susceptible of being presented as such. Of the two, the financial transaction tax may be the one more susceptible of success. In this respect, though this has not been discussed between all of us, some believe it is possible to introduce a EU financial transactions tax through enhanced cooperation.

There is nothing in the enhanced cooperation provisions themselves that prevents a group of states to adopt a common tax to fund their contributions to the EU budget. This is how such a proposal could be conceived to be compatible with the existing EU Treaties. Naturally, nothing in the enhanced cooperation regime may affect the rights and obligations of non-participating Member States (Article 327 TFEU). Furthermore, such a new tax would have to respect the Council Decision on own resources that can only be amended by unanimity (Article 311). What needs to be done then is for participating states to adopt a new own resource under enhanced cooperation that will be, at the same time, compatible with the Decision on own resources and the rights and obligations of non-participating states under the Treaty and that Decision. There is a way to do this: The new common tax could be used to pay for the GNI contribution of participating Member States. So long as there would be a clause stating that those States would commit themselves to transfer, if necessary, any part of their GNI contribution not covered by the new European tax, this tax would not affect the rights and obligations of other Member States under the Treaties and the Decision on own resources. In effect, it would basically be a new way for some member States to comply with their obligations within the existing own resources Decision. One may question why not leave that to the Member States. But the advantages and reasons to move to such a system are several. First, it would be a first step towards genuine EU own resources (if there can be no taxation without representation it is arguable that there also cannot be any representation without taxation since any democratic system requires some principle of distributive justice). Second, it would be a first link between the Union's resources and its role as a regional regulator of cross-border externalities, in particular, in this case, those generated by mobile financial institutions. Third, it would relieve the national budgets of participating States (from their GNI contributions) and, in this way, it would also put pressure on non-participating Member States to adhere to the system (it would, in fact, become difficult for these States to justify to their citizens why they would still have to transfer funds from their national budgets when other States are relying on a EU tax). Fourth, it will also be a first step in detaching the EU budget from national contributions, a step that we consider fundamental to later be able to have a more constructive discussion on the EU budget itself.

The second proposal is to use such opportunity to restructure and represent the nature of EU policies. One possible lesson of the current crisis is the failure of the foundations supporting the political and social contract underpinning the European Union. Poorer countries would open their markets and in return would get funds and cheaper credits in the expectation that such money would reform their economies. It does not seem to have worked this way and the main reason may have to be found in the lack of capacity of EU policies to provide incentives for reform. This is another of the structural unbalances affecting the nature of the EU relationship with the Member States. On the one hand it has a growing number of regulatory and "disciplinary" powers upon the States. On other hand, its purse power is not only limited but moreover, apparently, largely ineffective in reforming the states. The Union financial arm, no matter how limited, should be much better used for reform purposes in the States. More than being concerned with goals, EU funds should be concerned with institutional change at the level of the States. On example, to make this more concrete: In the area of

education and research, instead of defining themes of research for which the Union will provide funds to national institutions, the EU should fund institutional changes in those higher education and research centres. In other words, it should make the award of those funds conditional on certain institutional criteria to be fulfilled, determined in light of what can promote systemic change at national level (such as, in this case, mobility, internationalisation of faculty and student bodies etc. etc.).

In this respect, one may also envision to clearly differentiate the funds awarding conditions and priorities between Member States so as to link them to the structural reforms needed in each Member State (again, funding of projects should be largely complemented or even replaced by funding of institutional changes, including in national administrations). One may even imagine that a sort of structural reform contract could be entered into with some states for the use of certain funds. This would be particularly important in the case of states that are currently subject to adjustment programs or others to be subject to sanctions in the future. May be a contract For the mechanisms of Euro governance to be democratically legitimate it is important for the intervention of EU institutions to take not only the form of sanctions but also the form of incentives.

### **III. Improving the Democratic Quality of Economic Governance**

We will now, in the remainder of this paper, move to a more specific consideration of the way in which macro-economic governance currently works in the European Union, and the ways in which this poses the question of democratic accountability. In our search for ‘more democracy’, we consider the various dimensions of the democratic ideal: strengthening parliamentary control of governments and independent agencies; improving transparency of decision-making; creating channels of accountability and financial and judicial control; promoting the direct involvement of citizens and responsiveness to civil society. We emphasize that most of the improvements suggested below (like those already suggested above) do not require a formal revision of the European Treaties, which, in the current political circumstances, would be a very hazardous enterprise.

#### ***A Fragmented Institutional Landscape of Economic Governance***

As a result of the many political initiatives and legal reforms that have been adopted in the past years, both inside and outside the institutional framework of the European Union, we are faced with a very fragmented institutional landscape where the macro-economic governance of Europe is concerned. A reflection on the improvement of the democratic quality of decision-making must, therefore, take account of the great diversity of institutional sites within which that reflection must take place, both at the national level and at the European level.

At the *national level*, those questions will arise during the parliamentary debates on the approval of the ‘stability amendment’ of the TFEU (approved by all 27 governments in 2011), the ratification of the European Stability Mechanism treaty (signed by 17 states) and of the Fiscal Compact (signed by 25 states). They will also arise during the debates on how to implement in national (possibly constitutional) law the ‘golden rule’ and other requirements imposed by the Fiscal Compact and the ESM treaty. Finally, macro-economic and budgetary policies and procedures of the EU member states must be adapted to the new requirements of the EU legislation (‘six-pack’) adopted in 2011.

At the *European level*, there are many different institutional sites within which democratic challenges can and must be addressed:

- The application by the EU institutions of the EU's revised legislative framework on excessive deficits and macro-economic imbalances, as resulting from the adoption of the 'six-pack' in 2011.
- The functioning of the financial services supervision system introduced in 2010 (although this is not macro-economic governance strictly speaking, it is of course closely related to it)
- The common governance of the extra-EU stability mechanisms (EFSF today; ESM in the future, once it enters into force)
- The common governance under the Fiscal Compact, once it enters into force
- The co-decision procedure in which the additional economic governance proposals of the Commission (the 'second package' of November 2011) are being discussed
- The follow-up of the Euro Plus Pact by the European Council
- The debate about launching new EU policies and measures (Eurobonds, financial transaction tax, new European social model, reformed cohesion policy, etc.)

This is not a complete picture of all the macro-economic governance sites, and it leaves aside the 'no go areas' for democratic control constituted by the activities of the ECB and the central banks of the non-euro countries, as well as the international sites of monetary and economic governance such as the IMF.

Identification of the various elements of democracy and of the different institutional sites allows for the development of targeted reforms, which aim at strengthening the democratic character of each of those institutional sites in accordance with its own characteristics. In addition to the overall "constitutional" reforms discussed above, we also *targeted improvements* that take account of the nature of the democracy deficit of each site, and the feasibility of the proposed remedies. For example: whereas parliamentary control is present in the discussion of the Commission's 'second package', because of the fact that it must be approved through the EU's ordinary legislative procedure, the governance of the EFSF and future ESM is mainly in the hands of the participating governments and (national) parliaments will have difficulties in exercising their control powers.

At the same time, the institutional landscape is characterised by a large degree of overlap (for example: between the obligations under the Fiscal Compact and the obligations under existing EU legislation), and a great degree of confusion on 'who does what and within which institutional framework'. Therefore, reconstituting democratic governance should not only aim at proposing targeted responses for each of the existing institutional sites but should also try to counteract this fragmentation and help in the emergence of a *comprehensive* democratic discussion on the future of macro-economic governance, both at the national and at the European level.

One practical way in which the European Commission could stimulate this is by creating an independent *Euro Governance Forum* which could:

- Combat confusion and improve transparency by collecting and presenting legal and economic data and political opinions in a rigorous and objective manner; at present, there is no single (web) site that provides a reliable gate to the whole Euro governance landscape.
- Promote deliberation by organising regular debates in which the main governance actors would confront their views with members of European national parliaments and representatives of civil society. Those debates could deal with the overall direction of euro governance, but also with particular questions within that overall debate, such as: the introduction of Eurobonds, the

recourse to enhanced cooperation for the creation of a financial transaction tax, the performance of the financial services supervisors, etc.

- A more ambitious version of the latter would be the organisation, in each national parliament, of a debate on the state of the State in the Union, in parallel with the EP debate on the state of the Union. This debate should count with the presence of at least a European Commissioner presenting an overall view of the different reports, recommendations and assessments that the Unions is now supposed to produce for each State. It would be an opportunity for the Commission to be responsive to national politics in the exercise of that role but also for that role to shape national political debates.

### ***Improving the Operation of the Reformed Economic Surveillance Regime***

We are currently in the first year of effective application of the reformed economic surveillance regime that was introduced by five EU Regulations and one EU Directive commonly known as the Six-Pack. The reforms were primarily inspired by the wish to make the existing surveillance mechanism – as introduced, in its basic features, by the Maastricht Treaty – more effective in preventing and addressing macro-economic imbalances that may destabilize the euro area and the Union as a whole. As those reforms were made under the ‘Community method’, with a crucial input from both the Commission and the European Parliament in addition to that of the national governments represented in the Council, the regime which was put in place also seeks to respect the democratic achievements of the European Union and to make economic governance a policy area which is ‘as democratic’ as other areas of EU policy, whilst acknowledging, of course, the particular and independent role played by the ECB in the monetary domain. Nevertheless, we think that further improvements are needed to enhance the democratic quality of this governance mechanism, if anything because this will improve the acceptance, by national politics and public opinion, of the ‘bitter pills’ that the new regime will ask the member states to swallow from time to time.

Art. 121 TFEU sets forth a procedure for the coordination of the economic policies of the Member States, which is based on a Council recommendation, setting out broad guidelines for the economic policies of the Member States and of the Union, on the basis of the conclusions of the European Council. No role in the broad guidelines decision-making process is provided for the European Parliament, which is merely informed of the Council recommendation adopting the broad guidelines. The Council, on the basis of reports submitted by the Commission, carries out surveillance on the consistency of the implementation of economic policies of Member States with the broad guidelines. In case of inadequate performance, recommendations may be addressed to the Member State concerned by the Council, on the basis of a recommendation by the Commission. The European Parliament is simply informed of the results of multilateral surveillance. The Regulation n. 1175/2011 of the European Parliament and of the Council has now introduced an ‘economic dialogue’, whereby the competent committee of the European Parliament may invite the President of the Council, the Commission and, where appropriate, the President of the European Council or the President of the Euro Summit to appear before the committee to discuss measures adopted for the coordination of the economic policies of the member States. The economic dialogue, anyhow, provides no duty of the Commission and of the Council to report to the European Parliament. In addition, Parliament has not been granted any effective involvement in the adoption of the measures within the process of multilateral surveillance under Article 121 TFEU. In addition, the national parliaments do not participate in that dialogue despite the fact that they are the ones that will eventually decide how to comply with the European recommendations. Some suggestions put forward in our group include:

- Integrate the specialized committees of the national parliaments in the economic dialogue established by Regulation n. 1175/2011.
- Establish a public debate in the Council before the adoption of the “broad guidelines” (Article 121, 3<sup>rd</sup> subparagraph). This can be introduced by an amendment to Article 8 of the Council’s Rules of Procedure.
- Before the discussion in the European Council, the “conclusion” (Article 121 (2), subparagraph 2 TFEU), could be transmitted to the European Parliament for debate by analogy with voluntary consultation.
- The draft « conclusion » on the broad guidelines should be transmitted to national parliaments by analogy to the procedure laid down in Article 2, Protocol n° 1 TEU.
- The “broad guidelines” should be formally presented to the national parliaments (preferably by a Member of the Commission). This could, in fact, be part of the debate of the state of the State in the Union mentioned above.

### ***The Entrenchment of National Budget Discipline by the Fiscal Compact: How to Preserve Democratic Decision-Making?***

The short period in which the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (commonly nicknamed as ‘Fiscal Compact’) was negotiated and concluded left little time for the participation of national and European Parliaments, a circumstance that may render its effective implementation more difficult.

This Treaty intends to reinforce the financial stability of the Euro Area through an enhanced coordination of the Member States’ budget policies, the provision of benchmarks for structural deficit and debt-to-GDP ratio, as well as an enforcement mechanism for non-compliance to such benchmarks.

There was, arguably, no strict need to adopt a new *treaty* to implement what is contained in its final text. Certainly, most of what it contains in terms of economic governance at the European level could have been adopted through enhanced cooperation within the EU or by means of a modification of Protocol No. 12 on the excessive deficit procedure. The treaty confirms the creation of the Euro Summit and also provides for a new body, the Meeting of the Heads of State or Government of the Contracting Parties, whose membership will reflect the number of states that will eventually ratify the Fiscal Compact, but whose role is limited to loosely monitor the implementation of the Fiscal Compact. Those bodies will operate in an informal manner. No new hard governance mechanisms are introduced at the European level, and therefore there also arises no additional need to improve democratic accountability at the European level beyond what is written in Article 13, namely the creation of a conference of members of the EP and of the national parliaments of the Fiscal Compact countries to discuss together the issues arising from the implementation of the treaty. However, to the extent that the coordination mechanism of the Fiscal compact builds upon the existing EU economic coordination regime, the misgivings about the latter’s democratic quality – noted in the previous section - indirectly apply here as well.

### ***The European Stability Mechanism: A New Public Authority Lacking Constitutional Quality***

The establishment of the European Stability Mechanism, by means of a treaty signed on 1 February 2012 between the 17 euro area states, represents an important step in the European integration process. Its permanent nature transforms the Union into a community of risks, not only of benefits. As a

collective insurance device against future damages that could affect a country or a people, it is a properly constitutional mechanism.

The legal status and some fundamental rules of the ESM, unfortunately, seem unable to meet the challenges raised by such an ambitious program. Transparency and accountability needs are not satisfied. And the day by day effectiveness of the Mechanism could be seriously undermined by failings in its institutional design. Indeed, this Treaty – in contrast with the Fiscal Compact – does create its own institutional regime in the margin of the ‘mainstream’ institutional framework of the European Union, and the question of its democratic quality is therefore of prime importance.

The Treaty defines the ESM as an ‘international financial institution’. The term ‘international’ is correct in so far as the Mechanism is established by means of a separate international agreement; it is not an agency of the European Union, but a separate organization under public international law, even though its operation is, of course, narrowly linked to the EU’s economic governance regime. The term ‘financial’ might be misleading in conveying the impression that this is a commercial entity. In reality, however, its subscribers are member states of the Union. The governance is in the hands of ministries of finances. Its purpose is to give aid to member states, not to earn money or raise revenues. The definition as an international financial institution may therefore hide the fact that the Mechanism will be a European public institution which should, because of its nature, be subject to norms of transparency and accountability that are similar to those applying to the functioning of the EU institutions.

The procedures to grant financial assistance, under the ESM Treaty, are ill conceived. On the one hand, they are complicated and slow. On the other hand, they depend on the request for help by an ESM member state. But if the state concerned does not make the request – for internal political reasons – the financial stability of all the Eurozone could be threatened. This is why it would be important to introduce a third-party trigger of ESM support: the power to start the procedure should be conferred also to a qualified number of other member states, or perhaps to the European Systemic Risk Board, even though this is an EU agency and not a specific ESM body.

In the decision-making system of the ESM, too much discretion is given to the Board of Governors (composed of the ministers of finance of the ESM member states). The Board has been vested with the power to grant support to a member state. In order to foster the efficiency of the financial assistance, it can also allow the states to allot the subsidy to the re-capitalisation of a financial institution. Finally, it can decide to purchase bonds of a member state both on the primary and the secondary market. While adopting such measures, the Board of Governors seems to enjoy a broad discretion, as suggested by the fact that it ‘may decide’ to adopt the measures mentioned above. Indeed, the Treaty does not set any general goal or set of objectives that would constrain the exercise of those powers. Although the appraisal by the Commission shall be taken into account, it is not binding on the Board and the Board does not have a duty to state its reasons. It seems that such a duty to give reasons (which is imposed on all *EU institutions* under Article 296 TFEU) should be introduced, especially for all those cases in which the Board sets aside the advice of a European institution.

The dispute resolution mechanism of the ESM violates the principle of *nemo iudex in causa propria*. Indeed, the Treaty entrusts the Board of Governors itself with the settlement of disputes arising on the interpretation and application of the ESM Treaty between the ESM and one of its member states. The creation of an independent Board of Appeal – like those foreseen for some European Union agencies – would be more appropriate.

Finally, the ESM Treaty does not provide any of the accountability tools that are usually made available in the structure of European Union agencies. There are no consultation procedures with either general stakeholders or specialized parties, such as institutional investors and creditors. There are no transparency duties, nor are there rules about access to information. The Board of Governors does not have to report to the European Parliament, and there are no procedures to assess the ESM's operation. Only the financial administration of ESM is subject to a specific set of rules. Every four months, the member states shall receive a report on financial administration. The Treaty also provides for two levels of audit, internal and external. In this view, the Board of Governors also appoints a Board of Auditors, which, nonetheless, shall be independent. The only document released by the Board of Auditors is its annual report. The latter is submitted to the Board of Governors, which makes it accessible to the national parliaments and supreme audit institutions of the member states, as well as to the European Court of Auditors. Oddly enough, the report does not have to be made available to the European Parliament.

Finally, we must realize that the ministers of finance who compose the Board of Governors remain, each of them, accountable to their national parliaments. In some cases, they will need the prior approval of their parliaments for their decisions. The German Constitutional Court, in its judgment of 7 September 2011, held that the budgetary responsibility of the Bundestag is an essential constitutional principle. The Bundestag must 'retain control of fundamental budgetary decisions even in a system of intergovernmental administration'. The same approach may be adopted by the constitutional courts of other ESM countries, or their national parliaments may simply insist on a prior consent to funding decisions taken by their country's representative in the Board of Governors.

We conclude that, in order to increase the legitimacy and the accountability of the ESM, it is highly recommendable to set up a regular consultation process, to increase transparency, to allow access to data and records, to introduce reporting obligations towards the European Parliament, and to agree on a common approach for all national parliaments. Those reforms could provisionally be introduced by means of a memorandum of understanding between the ESM member states, but should subsequently be introduced in the Treaty by means of its amendment. It must be noted, in this respect, that the ESM Treaty has no special revision clause, so that its future amendment will be subject to the general rules of public international law, that is, amendments will have to be approved by means of a new treaty between all the ESM member states.<sup>1</sup>

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<sup>1</sup> In principle, all 17 euro states should become parties to the ESM Treaty, but Article 48 provides that it will already enter into force upon ratification by signatory states representing at least 90% of the total subscriptions; thus, the non-ratification by (a number of) smaller countries would not prevent the start of the ESM. The number of ESM member states can also fluctuate upwards by accession of EU Member States other than the current Euro area countries (Article 44).