Towards a New Form of EU Law?: The Use of EU Institutions outside the EU Legal Framework

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Economic governance – Financial assistance – Economic and monetary union – Patent litigation – Treaties between member states – Jurisdiction of the Court of Justice – Powers of the EU institutions – Enhanced cooperation

Introduction

History does not always repeat itself. In December 1991, the negotiations on the Maastricht Treaty (the original Treaty on European Union) were deadlocked when a British Conservative Prime Minister would not agree to a greater European Community (EC) role over social policy. The impasse was ultimately broken with the agreement on a new Protocol to the EC Treaty that provided for other member states to participate in EC social policy measures, without the United Kingdom (UK). This Protocol – along with parallel opt-outs for the UK and Denmark from Economic and Monetary Union (EMU) launched a process of ever-increasing differentiation within the framework of European Union (EU) law.[1]

But twenty years later, in December 2011, things were different. On this occasion, negotiations on a possible new treaty amendment reached a stalemate when a British Conservative Prime Minister wanted guarantees in return for the UK's financial services industry, which other member states were not willing to offer. This time, drafting another protocol to the treaties would not have solved the problem, since the planned treaty amendments would only have been relevant to the member states applying the single currency (the 'eurozone states') in the first place. Instead, the large majority of member states decided to draft a treaty between themselves – the 'Treaty on Stability, Coordination and Governance in the Eco-

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[1] *See* generally S. Peers, *The Unravelling of EU Law: Differentiated Integration within the EU Legal Order* (Hart, forthcoming).

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nomic and Monetary Union' (the 'stability treaty')[2] – which was formally outside the EU legal order, but which was nonetheless closely linked to the substance of EU law and used many of the EU's institutions to apply it. Since this treaty incorporated some of the key points that would have been the subject of the proposed amendments to the EU treaties (changes to Council voting rules, jurisdiction of the Court of Justice, automatic deficit correction rules), it *de facto* effected an amendment to EU primary law despite the lack of approval of all member states.

With the current British Prime Minister now insisting that the UK's membership of the EU must be renegotiated fundamentally as a condition of British consent to further treaty amendments, this solution may again appear attractive in future. In any event, there has already recently been a significant move toward negotiating other treaties to which some (but not all) EU member states are parties, which are closely linked to EU substantive law and which confer powers upon the EU institutions – most notably the treaties establishing the European Financial Stability Facility (EFSF)[3] and the European Stabilisation Mechanism (ESM),[4] both of which (like the stability treaty) aim to supplement the EU law measures

[2] For the text, *see*: <www.european-council.europa.eu/media/639235/st00tscg26_en12.pdf>. Twenty-five member states signed it (all except the United Kingdom and the Czech Republic). The treaty entered into force on 1 Jan. 2013, as it had been ratified by 12 states with the euro as their currency (Art. 14(2) of the treaty). At time of writing (20 Feb. 2013), 17 member states had formally ratified the treaty, including 13 eurozone states. It had still not been ratified by the Benelux states, Malta, Sweden, Hungary, Bulgaria or Poland. On the treaty, *see* P. Craig, 'The Stability, Coordination and Governance Treaty: Principle, Politics and Pragmatism', 37 *European Law Review* (2012) p. 231; D. Adamski, 'National Power Games and Structural Failures in the European Macroeconomic Governance', 49 *Common Market Law Review* (2012) p. 1319 at p. 1356-1360; N. de Sadeleer, 'The New Architecture of the European Economic Governance: A Leviathan or a Flat-Footed Colossus?', 19 *Maastricht Journal of European and Comparative Law* (2012) p. 354 at 364-374; and S. Peers, 'The Stability Treaty: Permanent Austerity or Gesture Politics?', 8 *European Constitutional Law Review* (2012) p. 404.

[3] This treaty entered into force in 2010, and was amended in 2011. Its purpose was to provide temporary financial assistance to those member states participating in the single currency which needed such assistance. For the text of the EFSF agreement and further information, *see*: <www.efsf.europa.eu/about/index.htm>.

[4] For the text, *see*: <www.european-council.europa.eu/media/582311/05-tesm2.en12.pdf>. This treaty, which was open only to the 17 eurozone states, entered into force on 27 Sept. 2012 in 16 of those states, and then in Estonia (the sole remaining eurozone state not bound by it) on 4 Oct. 2012. The treaty had originally been signed in in July 2011, but a revised version was then signed in February 2012. On the treaty, *see*: J.V. Louis, 'The Unexpected Revision of the Lisbon Treaty and the Establishment of a European Stability Mechanism', in D. Ashiagbor et al. (eds.), *The European Union after the Treaty of Lisbon* (CUP 2012) p. 284 at p. 297-314; A. Gregorio Merino, 'Legal Developments in the Economic and Monetary Union During the Debt Crisis: The Mechanisms of Financial Assistance', 49 *Common Market Law Review* (2012) p. 1613 at p. 1621-1623; and C. Ohler, 'The European Stability Mechanism: The Long Road to Financial Stability in the Euro Area', 54 *German Yearbook of International Law* (2011) p. 47.

on EMU.[5] Similarly, many member states have signed and will likely ratify the treaty creating a unified patent court – although unlike the other treaties mentioned, this treaty will not give additional powers to the EU institutions, but rather substitute its new court system for member states' national courts as regards the interpretation and enforcement of (*inter alia*) EU law.[6] Nevertheless, this means that the Court of Justice has its usual role (substituting the unified patent court for the national courts) as regards EU law issues.[7] Moreover, like the other treaties mentioned, this treaty will supplement EU legislation which will apply to only some member states.[8] More generally, the use of the EU institutions in such treaties, at least as regards the ESM treaty, has recently been approved by the Court of Justice.[9]

Due to the rising popularity of such treaties between member states, and their distinct features (the partial participation of member states, the strong link with substantive EU law which only some member states participate in, and the use of the EU institutions) the question arises: are we witnessing the birth of a new form of European Union law?

On the one hand, such treaties might be able to serve as a means of relaunching European integration among a coalition of willing member states, sidestepping the vetoes of recalcitrant member states.[10] Intergovernmentalism is often (rightly)

[5] *See also* the Greek loan facility, discussed in Gregorio Merino (ibid.), p. 1616-1618.

[6] *See* generally *Opinion 1/09* [2011] *ECR* I-1137. For the text of the treaty (signed on 19 Feb. 2013), *see* Council Doc. 16351/12, 11 Jan. 2013. The treaty will enter into force (*see* Art. 89) either (a) on 1 Jan. 2014; or (b) the first day of the fourth month after it has been ratified by 13 member states, including the three member states with the highest number of European patents in effect in 2012 (the UK, Germany and France); or (c) the first day of the fourth month after amendments to EU legislation on civil jurisdiction take effect, whichever is latest.

[7] *See Opinion 1/09* (ibid.), and Arts. 20-23 of the treaty (ibid.).

[8] Regs. 1257/2012, *OJ* [2012] L 361/1 (unitary patent Regulation) 1260/2012, *OJ* [2012] L 361/89 (translation Regulation). *See also* the decision authorising enhanced cooperation in this case (*OJ* [2011] L 76/53). All member states except Italy and Spain participate in this instance of enhanced cooperation, but those two member states have challenged the validity of the decision authorising enhanced cooperation before the Court of Justice: Joined Cases C-274/11 and 295/11 *Spain and Italy* v. *Council*, pending. An Advocate-General's opinion of 11 Dec. 2012 suggests that this challenge should be rejected. Italy signed the patent court treaty even though it does not participate in the EU legislation; it will therefore be bound by the treaty as regards European patents alone, not unitary (EU) patents. It should also be noted that the relevant EU legislation will not apply until the patent court treaty is in force, and unitary (EU) patents will only apply to those states which have ratified that treaty: Art. 7 of the translation Regulation and Art. 18 of the unitary patent Regulation (idem). For more on the legal issues concerning unitary (EU) patents, *see* S. Peers, 'The Constitutional Implications of the EU Patent', 7 *European Constitutional Law Review* (2011) p. 229.

[9] Case C-370/12 *Pringle*, judgment of 27 Nov. 2012 (not yet reported).

[10] This is not true of the ESM treaty (*supra* n. 4), which was the subject of a treaty amendment (*see* the European Council Decision in *OJ* [2011] L 91/1, adding a new Art. 136(3) TFEU; not yet in force at time of writing). In the event, however, this Treaty amendment was not necessary to

criticised for its ineffectiveness, compared to the EU legal process, and indeed most references to such measures in the treaties were removed by the Treaty of Lisbon,[11] and as a species of legal act adopted by *all* member states, such measures are nearly extinct.[12] However, this argument can be turned on its head, in cases where unanimity among all member states is necessary but lacking within the EU legal order, but a group of member states is keen to go ahead on an intergovernmental basis.[13] Moreover, arguably intergovernmental processes will not be as ineffective if they can 'borrow' the EU's institutions, because the member states concerned can then use ready-made 'motors of integration' rather than having to build such mechanisms from scratch. Under certain conditions, then, intergovernmentalism might be the best means to achieve a supranational end.

On the other hand, the development is *prima facie* problematic, because the legal requirements for treaty amendments, most notably the requirement of all member states' consent to those amendments, are being circumvented.[14] So is the potential involvement of the European Parliament (EP) and national parliaments at the negotiation stage,[15] although national parliaments will of course still have

permit member states to apply the ESM treaty: *see Pringle* (ibid.), paras. 183-185. As regards the unitary (EU) patent, the initial intention was for all member states to participate in the EU legislation and the connected treaty, but the Council resorted instead to enhanced cooperation when unanimity on EU legislation proved impossible to attain.

[11] In particular, the previous Art. 293 EC and Art. 34 TEU were repealed. Tellingly, the recent Treaty amendment inserting a reference to the ESM treaty into the TFEU (ibid.) reversed this trend – even though, as noted ibid., this amendment was not legally necessary for the ESM to take effect. Art. 350 TFEU makes express provision for a treaty among member states (*see also* the previous Art. K.7 TEU, repealed by the Treaty of Amsterdam).

[12] The large majority of the decisions and soft law acts of all member states' representatives which are still being adopted are also adopted by the *Council*; and the few measures still adopted by all member states' representatives alone are inextricable from the EU's legal order. For details, *see* S. Peers, *The Unravelling of EU Law* (*supra* n. 1).

[13] Indeed, it is possible for such treaties to come into force not only (obviously) before all member states have ratified them, but even before all of their signatories have ratified them: see Art. 1 of the EFSF Treaty, Art. 14(2) of the ESM Treaty, Art. 48 of the stability treaty and Art. 89 of the patent court treaty (*supra* ns. 3 to 6).

[14] On the exclusivity of the Treaty amendment procedure set out in the Treaties, *see* Case 43/75 *Defrenne II* [1976] *ECR* 455. This exclusivity presumably applies *a fortiori* after the amendments to that process pursuant to the Treaty of Lisbon: *see* S. Peers, 'The Future of EU Treaty Amendments', 31 *Yearbook of European Law* (2012) p. 17 at p. 75-76. This is separate from the issue of whether the EU legal order *ought* to allow for Treaty amendments which bind only the participating member states: see S. Peers (idem), p. 105. To a limited extent this is possible within the current legal framework: see Arts. 81(3), 82(2)(d), 83(1) third sub-para, 86(4) and 333 TFEU.

[15] *See* the possibility of calling a Convention pursuant to Art. 48(3) TEU. National parliaments would also lose the right to be informed of a proposed Treaty amendment pursuant to Art. 48(2), and the Commission and the European Central Bank would not be consulted, pursuant to Art. 48(2) and (3). However, the position of members of national parliaments does not give them an undisputed right to bring a direct action against an amendment to the Treaties pursuant to the sim-

a role when it comes to ratification of the treaties concerned. This approach to European integration could also potentially lead to conflicts and overlaps with EU law,[16] and also to 'contamination' of the EU institutions with intergovernmental processes, thereby reducing parliamentary or judicial control, and/or evading the legitimate constraints (compliance with the Charter, transparency) placed upon those institutions in the context of EU law.[17] In other words, what if the princess kisses the frog, but he does not turn into a handsome prince – and instead, the princess develops a sudden craving for flies?[18]

Traditionally, it was assumed that treaties between member states ('parallel agreements')[19] represented a possible threat to the EU legal order, at least when they addressed issues which formed part of or were related to the EU legal order, applied to some (not all) member states ('partial agreements'),[20] and did not use the EU institutions.[21] There was not such an obvious threat where such treaties were signed by all member states, and specifically concerned the implementation of treaty provisions,[22] and/or were expressly provided for in the

plified procedure set out in Art. 48(6)TEU which provides expressly for the negotiation of a treaty between member states: *see Pringle* (*supra* n. 9), paras. 41 and 42.

[16] For examples of such conflicts arising wholly inside the EU legal order arising from the use of differentiated integration within that framework, *see* Cases T-496/11 and T-45/12, *UK* v. *ECB*, pending.

[17] See, for instance, the criticisms in H. Meijers, et al., *Schengen: Internationalisation of Central Chapters of the Law on Aliens, Refugees, Privacy, Security and the Police* (Stichting NJCM-Boekerij 1992). Conversely, it has been argued that recourse to such treaties would be desirable, because there are flaws in the current EU institutional framework which could thereby be avoided: *see* generally J.C. Piris, *The Future of Europe? Towards a Two-Speed EU* (CUP 2012). This issue is beyond the scope of this paper.

[18] The metaphor is borrowed from my analysis of the integration of the Schengen *acquis* into the EU legal order: S. Peers, 'Caveat Emptor? The Integration of the Schengen Acquis into the European Union Legal Order', 2 *Cambridge Yearbook of European Legal Studies* (1999) p. 87 at p. 123.

[19] This includes other forms of intergovernmental measures (decisions of member states' representatives, or 'soft law' measures adopted by such representatives). *See* generally B. de Witte, 'Old-Fashioned Flexibility: International Agreements between Member States of the EU', in G. De Burca and J. Scott (eds.), *Constitutional Change in the EU: From Uniformity to Flexibility* (Hart 2000), p. 31. Treaties between some or all member states and *third* states (with or without the EU as a party) raise questions of EU external relations law, and are outside the scope of this paper, except to the extent that the relevant case law is applicable to treaties between member states.

[20] *See* generally: B. de Witte, 'Chameleonic Member States: Differentiation by Means of Partial and Parallel International Agreements', in B. de Witte et al., (eds.), *The Many Faces of Differentiation in EU Law* (Intersentia 2001), p. 231; A. Rosas, 'The Status in EU Law of International Agreements Concluded by Member States', 34 *Fordham International Law Journal* (2011) p. 1304 at p. 1317-1320; and R. Schutze, 'EC Law and International Agreements of the Member States: An Ambivalent Relationship?', 9 *Cambridge Yearbook of European Legal Studies* (2007) p. 386 at p. 408-425.

[21] *See*, for instance, the Schengen Convention (*OJ* [2000] L 239).

[22] *See*, for instance, the treaty on customs clearance (*OJ* [2009] C 92/1). This treaty had not yet entered into force at time of writing, since it had been ratified by 21 member states but must

treaties,[23] were outside the scope of the EU legal order,[24] or were concluded between the EU and its member states with no participation of third states.[25] Yet the most recent batch of major treaties between member states appear not only to pose no threat to the EU legal order, but rather to *support* it, even though they only apply to some (rather than all) member states.

In light of these dramatically conflicting perspectives, and in the context of the upsurge in the negotiation of such treaties between member states, it is necessary to examine what constraints exist on the use of EU institutions in treaties between member states, in particular following the clarification of a number of relevant points by the Court of Justice in its recent *Pringle* judgment.[26] To what extent do such constraints address the legitimate concerns about the use of the EU institutions in such treaties? And, on the other hand, are these limitations unreasonably holding back the growth of what could be a vibrant new form of European integration?

This paper analyses in turn the constraints which apply to the use of the EU's political institutions (along with other non-judicial institutions) and to the use of the EU's judicial system in the framework of partial agreements, followed by an analysis of the broader constitutional framework applicable to such treaties and concluding with an assessment about the role of partial agreements in the future development of EU law.

Political and monetary institutions

The case-law

Before *Pringle*, the initial leading judgments of the Court of Justice on the use of the EU's political (and other non-judicial) institutions outside the framework of the treaties dated from 1993-1994, and concerned the primary law framework as it stood prior to the Maastricht Treaty. First of all, in *Bangladesh*, the EP challenged

be ratified by all of them to enter into force. But 11 member states were applying it provisionally between themselves (*see* Art. 7(3) of the treaty).

[23] *See*, for instance, the references to the conclusion of treaties between member states pursuant to the previous Art. 34 TEU and Art. 220 EEC/EC, later renumbered Art. 293 EC. The treaties also provide for acts of member states as regards appointments to some of the institutions: *see* Art. 253 TFEU.

[24] For example (at the time of signing), the treaties establishing the European University Institute (*OJ* [1976] C 29/1), the Rome Convention on conflicts of contract law (consolidated text: *OJ* [1998] C 27/34), the Community Patent Convention (*OJ* [1976] L 17/1 and *OJ* [1989] L 401) and treaties signed within the framework of European Political Cooperation. On the latter, *see* S. Peers, *EU Justice and Home Affairs Law*, 3rd edn. (OUP 2011), p. 596-597 and 657.

[25] For an example, see the European Schools Convention (*OJ* [1994] L 212/3).

[26] *Supra* n. 9.

the validity of a collective decision by (all of) the *member states*, meeting within the Council, to grant financial aid to Bangladesh and to confer power upon the Commission to manage that aid (if member states chose not to send the money directly), along with the Commission's implementation of that decision.[27] Secondly, in *Lome*, the EP challenged a decision by the *Council* (as such) to establish a special system, distinct from the EU's usual budgetary procedure, to administer member states' assistance to African, Caribbean and Pacific countries within the framework of the Lome Convention.[28]

In *Bangladesh*, the Court first noted that member states were free to exercise their powers as regards humanitarian aid collectively, either within the Council or outside it. Next, it ruled that the relevant provision of the EEC Treaty (as it was then) 'does not prevent the member states from entrusting the Commission with the task of coordinating a collective action undertaken by them on the basis of an act of their representatives meeting in the Council.' Thirdly, member states were also free, when taking a decision outside the Community legal framework, to base themselves on budgetary rules applied within that framework. It therefore concluded that the decision had not been taken by the Council, but by the member states collectively.[29] As for the action against the Commission, the Court simply concluded that since the financial contribution which that institution had managed was made outside the EU legal framework, the EU budget had not been amended, and so the EP's prerogatives could not have been affected. Due to the legal framework at the time – which permitted the EP to bring proceedings only as regards the defence of its prerogatives[30] – the case was therefore inadmissible, and the Court only ruled on the substantive issues related to the EP's prerogatives.

Some further insight into the legal status of the EU institutions outside the EU legal framework can be gleaned from Advocate-General Jacobs' opinion in this case. In his view, 'in cases where Member States decide to act *individually or collectively* in fields within their competence', in principle they can confer upon the Commission 'the task of ensuring coordination of such action.' If they did so,

> [i]t is for the Commission to decide whether or not to accept such a mission, provided of course that *it does so in a way which is compatible with its duties under the Community Treaties.*' There could 'be no objection to the Commission, which is itself

[27] Joined Cases C-181/91 and C-248/91 *Parliament* v. *Council and Commission* [1993] *ECR* I-3685.

[28] Case C-316/91 *Parliament* v. *Council* [1994] *ECR* I-625.

[29] On the role of the Court of Justice controlling the legal acts of member states, see the 'Court of Justice' section below.

[30] Case C-70/88 *EP* v. *Council* [1990] *ECR* I-2041, later confirmed by the amendment of Art. 173 EC by the Maastricht Treaty. The EP's standing was not widened until the Treaty of Nice.

> a political institution, accepting tasks, outside the framework of the Community treaties, commensurate with the political responsibilities of the Community.[31]

In *Lome*, the Court ruled that it did not breach the EU legal order for the Council to adopt a financial regulation to administer the development aid in question, pursuant to a provision of an 'internal agreement' between member states. More generally, referring to *Bangladesh*, the Court ruled that '[n]o provision of the Treaty prevents member states from using, outside its framework, procedural steps drawing on the rules applicable to Community expenditure and from associating the Community institutions with the procedure thus set up.'[32] It should be noted that the member states' agreement provided that the Council would act on the basis of a draft from the Commission, after the opinion of the European Investment Bank and the Court of Auditors.[33]

Again, there was some further clarification of the issues in an Opinion from Advocate-General Jacobs. He rejected the argument that 'a Community institution may never act on the basis of a mandate conferred upon it by the Member States,' giving a number of examples (mixed agreements, accession negotiations and foreign policy cooperation) where the EU institutions had carried out functions conferred upon them by member states, outside the EU legal framework – although it should be noted that each of these cases concerned the conferral of power by *all* member states. Although the EEC Treaty (as it then was) provided that the institutions could only act within the limit of the powers conferred upon them by it,[34] it was 'not the purpose of that provision, however, to rule out the possibility of a Community institution undertaking functions on the mandate of the Member States.' So it was 'therefore possible for a Community institution to undertake on behalf of the Member States certain functions outside the framework of the Treaty provided that such functions, and the way in which it performs them, are compatible with its Treaty obligations.' It would be more acceptable for the EU institutions to take on executive functions, rather than legislative functions, since the Council was the Community's main legislature, and:

> … as a general rule, it may not operate in a legislative capacity on the mandate of the Member States in parallel with its legislative function under the Treaty. Such action might have the result that the procedures provided for in the Treaty were evaded, and might also cause confusion with regard to the nature of the acts adopted by the Council.

[31] Para. 27 of the opinion (emphasis added).

[32] Para. 41 of the judgment (*supra* n. 30).

[33] Para. 3 of the judgment (ibid.). The most recent internal agreement concerning the same fund provides for a similar role for the same institutions and bodies (*OJ* [2006] L 247/32).

[34] Art. 4(1) EEC; *see* now Art. 13(2) TEU.

The Court recently addressed these issues again in the *Pringle* judgment, in which the conferral of powers upon the EU institutions pursuant to the ESM treaty was challenged.[35] It began by rephrasing its prior case-law (*Bangladesh* and *Lome*), stating that 'the Member States are entitled, in areas which do not fall under the exclusive competence of the Union, to entrust tasks to the institutions, outside the framework of the Union, such as the task of coordinating a collective action undertaken by the Member States or managing financial assistance.' Then it added the proviso, based expressly on the case-law concerning the use of the institutions in treaties between the EU and *third states*, that such tasks could be conferred only if those tasks 'do not alter the essential character of the powers conferred on those institutions by the' treaties.[36]

Applying these principles to the facts of the case, the EU did not have exclusive competence over economic policy (the subject of the ESM treaty), the Commission and the European Central Bank (ECB) were not granted 'any power to make decisions of their own', their acts only committed the ESM and their tasks in the ESM treaty did not alter the essential character of the powers conferred upon those institutions by the treaties. In particular, the Commission's involvement in the ESM Treaty was consistent with its role as set out in Article 17(1) TEU, because the objective of the ESM treaty (ensuring the financial stability of the euro area as a whole) 'promote[d] the general interest of the Union' and the Commission's tasks in the ESM treaty regarding the conditions for granting financial assistance ensured the consistency of those conditions with EU law, and were thus linked to the Commission's role 'oversee[ing] the application of Union law.' As regards the ECB, its tasks in the ESM treaty were consistent with its role 'support[ing] the general economic policies' in the EU (Article 282(2) TFEU), and the ECB Statute entitles it to 'participate in international monetary institutions' and 'establish relations … with organisations.' Finally, the role of the institutions did not conflict with the possibility of launching enhanced cooperation within the scope of the EU's competences, since the EU did not anyway have a specific competence as regards permanent financial assistance to eurozone states.

In the Advocate-General's view,[37] the starting point was a decision of all member states' representatives to entrust the Commission and ECB with tasks pursuant to the ESM treaty,[38] which went beyond the prior case-law since the content of the ESM treaty was not known when that decision was adopted, and the ESM treaty was not concluded by all member states. Nevertheless, this demonstrated

[35] *Supra* n. 9, paras. 155-169 of the judgment.

[36] Para. 158 of the judgment, referring to, '*inter alia*': *Opinion 1/92* [1992] *ECR* I-2821, paras. 32 and 41; *Opinion 1/00* [2002] *ECR* I-3493, para. 20; and *Opinion 1/09* (*supra* n. 6), para. 75.

[37] Paras. 170-182 of the view.

[38] Para. 172 of her view, referring to Council Doc. 12114/11, 24 June 2011.

sufficient collective action by all member states, and the representatives knew what the gist of the ESM treaty would be at the time.[39] The Commission could not be obliged to accept tasks under the ESM treaty, since that would conflict with its independence. But substantively, the ESM treaty 'would only infringe European Union law if that Treaty required the Commission to perform tasks which the Treaties prohibited.'[40] Given that the Commission's task in the ESM treaty was to ensure the consistency of financial assistance with EU law, there was no such breach. As for the role of the ECB, in her view its tasks in the ESM treaty were 'minor' and (as the Court held) linked to support of general economic policy. Again, the ECB could not be obliged to accept tasks under that treaty, in particular in light of its independence. Finally, it should be noted that, unlike the Court, the Advocate-General did not refer to the prior external relations case-law on use of the institutions.

That prior case-law, which was expressly applied by the Court in the *Pringle* judgment to treaties between member states,[41] applied the principle that the Commission could be given extra powers in external treaties to endorse its role in the competition provisions of the European Economic Area (EEA) treaty[42] and of the European Common Aviation Area (ECAA) treaty.[43]

Analysis

In light of all the case-law, as restated and developed in *Pringle*, what are the legal constraints upon the use of the EU's non-judicial institutions in treaties between member states? At the outset, it is beyond doubt that the EU's institutions or bodies can be tasked with activities by the member states, outside the framework of the EU legal order. The real issue is therefore what conditions apply to the use of these institutions.[44] To analyse this issue, the following analysis addresses in turn:

[39] In fact, an earlier version of the ESM Treaty was signed already in July 2011 (*see* <http://ec.europa.eu/economy_finance/articles/financial_operations/2011-07-11-esm-treaty_en.htm>.

[40] Para. 176 of her view.

[41] *See* also the Court's application of Art. 3(2) TFEU, which is based on the external competence case law, to treaties between member states, in paras. 100-101 of the *Pringle* judgment. There is one remaining distinction between treaties solely between member states, on the one hand, and treaties between member states and third countries, on the other: only the latter are protected pursuant to Art. 351 TFEU. On this issue, *see* further the 'Court of Justice' section below.

[42] *Opinion 1/92* (*supra* n. 36), para. 41. In particular, the allocation of competition jurisdiction under that treaty did not change the nature of the Commission's powers.

[43] *Opinion 1/00* (ibid), paras. 12 and 20-22. In particular, while that treaty affected the powers of the Commission, it did not alter their essential character.

[44] The procedure for the enforcement of such constraints is discussed in the 'Court of Justice' section below; *see* in particular the first and second categories of the Court's jurisdiction discussed there.

a) the legality of the use of the EU institutions in partial agreements;
b) the relationship between enhanced cooperation within the EU legal framework and the use of the EU institutions in partial agreements;
c) whether the use of the EU institutions in partial agreements is limited to treaties concerning certain subjects, or types of EU competence, only;
d) whether only some non-judicial institutions can be used in partial agreements;
e) the definition of the 'essential character' of the institutions' powers;
f) whether the EU's Charter of Fundamental Rights applies to the institutions when they are used in partial agreements; and
g) whether all member states must consent to the use of the EU institutions in partial agreements.

First of all, the non-judicial institutions can be used in the context of partial agreements, for such use was tacitly accepted by the Court in *Pringle*. It might be argued that such use should be confined to cases (such as the ESM Treaty) where the parties to the relevant treaties match the existing framework for differentiated integration within the EU legal order – although this was only coincidentally the case in *Pringle*,[45] and the Court's judgment did not even hint at such a condition. It might, however, be argued that there should at least be a general link between the use of the non-judicial institutions in partial agreements, and differentiated integration already taking place *within* the EU legal order. The better view, however, is that the only requirement necessary is that the use of the institutions does not change their essential nature – and their use only in the context of a partial agreement will not necessarily do that, in light of the widespread differentiation which already exists within the EU's legal framework.[46]

Secondly, the Court confirmed in *Pringle* that the existence of the enhanced cooperation provisions does not prevent the use of the non-judicial institutions in treaties between member states, at least where the treaties concerned do not concern an issue within the EU's specific competences.[47] What if the treaty between member states using the EU's institutions *does* concern an issue within the scope of the EU's specific competences? In this case, the better view is that the relationship between member states' treaties and the EU legal order in general – including

[45] As noted already, while the ESM Treaty was in force in all eurozone states at the time of the *Pringle* judgment, it originally entered into force – and could have remained in force – in only some of those states (*supra* n. 4).

[46] Again, the *Pringle* judgment does not hint at such a condition. *See also* the endorsement by Advocate-General Jacobs of the use of the institutions by member states, individually or collectively – which must logically include their use by some (but not all) member states (*supra* n. 31).

[47] Paras. 166-168 of the *Pringle* judgment (*supra* n. 9). By 'specific competences', the Court apparently means all of the EU's competences other than the residual power set out in Art. 352 TFEU: *see* paras. 64-67 of the *Pringle* judgment.

the possible use of enhanced cooperation, and whether the EU's institutions are used or not – is regulated solely by Article 3(2) TFEU, which the Court applied to such treaties in *Pringle*.[48] This means that, despite the treaty provisions on enhanced cooperation, member states retain power to enter into treaties with each other as regards any area of EU competence, apart from exclusive competence or areas where the EU has exercised its shared competence to the extent that it has pre-empted member states' action within the meaning of Article 3(2).[49]

Thirdly, a related issue is whether the possibility of using the EU institutions in treaties between member states is limited to certain types of subject-matter. The *Lome* and *Bangladesh* cases both concerned financial assistance for non-member states, while *Pringle* similarly concerned financial assistance for member states. Admittedly, the EU's competences in these areas are quite distinctive – it has a parallel competence in the former case,[50] and lacks any specific competence in the latter.[51] However, the external relations judgments both concerned competition powers for the Commission, and there is nothing in any of these judgments that suggests that the EU institutions can only be used in member states' treaties which concern certain subject-matter or types of competence. Rather, the Court referred in the *Lome* and *Bangladesh* cases to the use of the institutions as part of member states' collective exercise of their competence, and then in *Pringle* to the use of the institutions as regards an issue which was not within the EU's exclusive competence, stating that powers could be conferred upon EU institutions by member states in areas 'such as' financial assistance. It must therefore be concluded that the EU institutions can be used in member states' treaties as long as the subject-matter of those treaties is outside the scope of the EU's exclusive competence[52] – a rule which parallels the limit on the possible scope of the enhanced cooperation rules.[53] It is possible, however, that the subject-matter of a treaty will affect the essential *nature* of an institution's role – an issue considered further below.

Fourthly, are the member states prohibited from using certain EU institutions or bodies in treaties between them? The Court has expressly confirmed that it is acceptable to use the Commission (in *Bangladesh*, *Pringle* and the external relations

[48] *See supra* n. 41. The Advocate-General's view (at para. 174) explicitly argued that the enhanced cooperation provisions could not pre-empt the possible conclusion of treaties between member states using the EU's institutions.

[49] *See* de Witte (*supra* n. 19), p. 55-57, and S. Peers, *The Unravelling of EU Law* (*supra* n. 1).

[50] *See* now Art. 4(4) TFEU.

[51] *See* text, *supra* n. 47.

[52] The Court appears implicitly to rule out the possibility that the EU institutions could be used in treaties between member states *within* the scope of EU exclusive competence, if the EU has authorised member states to conclude such treaties pursuant to Art. 2(1) TFEU.

[53] *See* Art. 20(2) TEU and Art. 329(1) TFEU, and the interpretation of this rule in the opinion in *Spain and Italy* v. *Council*, pending (*supra* n. 8).

cases), the ECB (in *Pringle*) and the Council (in *Lome*), and in fact the *Lome* case also concerned the use of the European Investment Bank and the Court of Auditors.[54] On this point, it seems clear that member states are not limited to using only certain of the institutions, in light of the Court's general references to use of the institutions in the *Lome* and *Pringle* cases. The point is particularly relevant for the EP – the most important institution which has not yet been mentioned in the case-law, precisely because treaties between member states have rarely made any use of it[55] – and which therefore (if this trend continues) has the most to lose from the adoption of treaties between member states instead of the adoption of EU legislation. The real issue here is to what extent the use of any particular institution in a treaty between member states would be altering the essential nature of its powers – the fifth issue for analysis.

According to the Court's case-law, the essential nature of the institutions' powers is not altered when their competition law powers are extended to third states (the EEA and ECAA judgments), where their role consists of ensuring compatibility with EU law or supporting the EU's general economic policy (*Pringle*), or (implicitly) where they coordinate or manage financial assistance to third states (*Lome* and *Bangladesh*). At first sight, the *Pringle* ruling could be understood to mean that the institutions cannot adopt legally binding acts within the framework of member states' treaties, but this cannot be correct. If that were the case, they could not be given powers as regards competition law, or coordinating or managing financial assistance to third states,[56] and the Court's insistence that the institutions must be subject to judicial review when they adopt binding measures in the framework of member states' treaties would make no sense. Similarly, this would be inconsistent with the Court's case-law insisting that any rulings it issues pursuant to treaties between member states must be legally binding.[57] Presumably the *Pringle* judgment must rather be taken to mean that where a treaty between member states gives the EU's non-judicial institutions no power to adopt binding acts, the essential role of those institutions has not been altered – or at least a strong presumption to that effect.

[54] *See* text, *supra* n. 33. Presumably the role of these bodies was not discussed in the judgment because the EP was limited to arguing about its own prerogatives (*see* text, *supra* n. 30).

[55] However, *see* Art. 13 of the stability treaty, discussed in Peers (*supra* n. 2), p. 434-435.

[56] In *Bangladesh*, the Court did not assess whether the Commission's act was legally binding, because it was sufficient that it did not affect the EP's prerogatives. The Commission's self-serving argument that the EU legal order must be used instead of treaties between member states because 'only limited tasks' can be conferred upon EU institutions pursuant to the latter does not reflect the wording of the *Pringle* judgment (see the blueprint for building EMU, COM(2012)777, 28 Nov. 2012).

[57] On both these points, *see* the 'Court of Justice' section below.

So what would amount to a change in the essential character of an institution? The Advocate-General's view in *Pringle* is surely correct to suggest that the loss of independence of the Commission or ECB would amount to such an essential change.[58] Giving an institution a role in a treaty between member states which is profoundly different from its role pursuant to EU law (for instance, giving the Council, instead of the Commission, the power to adopt delegated acts,[59] or permitting the Council to act without a Commission proposal) would also alter the essential character of the institutions concerned.

As for legislative functions in particular, Advocate-General Jacobs' argument about the possible conflicting role of the Council if it were to adopt legislation pursuant to a member states' treaty obviously has to be adapted in light of the hugely increased legislative role of the EP since 1991. Having said that, the adoption of legislation by EU institutions pursuant to a treaty between member states should not be ruled out – provided that (in accordance with the previous point) the roles of the Council and the EP are not fundamentally altered, by significantly increasing the power of either institution in the legislative process as compared to the other,[60] by substituting qualified majority voting in the Council on a particular topic for unanimity (or vice versa), or by giving the EU institutions powers to harmonise national law in areas where the treaties either confine the EU to a supporting competence,[61] or rule out powers to harmonise national law altogether.[62] Following this approach, the procedures set out under the treaties would not be evaded, and as for the risk of confusion with EU legal acts, that train left the station a long time ago. More broadly, ruling out *a priori* any possible legislative function for the EU institutions in treaties between member states could damage the democratic legitimacy of those treaties and of the EU legal order by association.

It would certainly alter the essential character of the institutions to alter their composition in the framework of partial agreements, most obviously by excluding the Members of the European Parliament (MEPs), Commissioners or Council members that are not elected from or appointed in respect of the non-participating member states.[63] Admittedly, the treaties do provide for the Council (but not

[58] *Supra* n. 37.

[59] Compare to Art. 290 TFEU.

[60] A simplification of the ordinary legislative procedure (for instance to drop the third reading) would not amount to such a fundamental change. Neither would it fundamentally alter an institution's legislative role if it were confined to the same position that it enjoyed under the Treaties (i.e., if the EP were only consulted on taxation matters). Reclassifying a legislative act as a non-legislative act (or vice versa) would be a fundamental change, unless the same voting rules in the EP and Council (unanimity and consent, for instance) still applied.

[61] *See* Arts. 2(5) and 6 TFEU.

[62] *See*, for instance, Art. 153(5) TFEU.

[63] Such a development is advocated by Piris (*supra* n. 17, at p. 56-57), although he believes that it would not be possible on the basis of the existing treaties.

the other institutions) to function without the participation of all member states, in the event of various forms of differentiated integration within the EU legal framework,[64] but surely that does not mean (in the absence of provisions in the treaties to the contrary) that the composition of the Council (or *a fortiori* any other EU institution) can be altered by member states in the context of treaties between them. This is a distinct question from the legality of creating entirely *new* institutions in treaties between member states, which might be similar to EU institutions and even 'borrow' some of those institutions' personnel.[65]

Applying these principles to the stability treaty, the Commission's role enforcing deficit targets, proposing time frames for deficit reduction and common principles for an automatic correction mechanism and reporting on member states' implementation of their obligation as regards that mechanism are broadly consistent with its powers as regards economic governance pursuant to EU law.[66] As for the Council, the stability treaty does not alter its voting rules as such, and there is nothing in EU law to prevent member states agreeing to coordinate their voting behaviour in the Council.[67] The EP's modest role in that treaty is also consistent with EU law.[68] While the role of these institutions in that treaty has been stringently criticised,[69] this criticism does not take account of the Court's doctrine that a change in the 'essential nature' of the institutions would be forbidden, and the safeguards that necessarily result from this limitation.

Sixth, does the EU Charter of Fundamental Rights apply when the EU institutions act in the framework of treaties between member states? There are other important questions about the substantive legal constraints upon such treaties,[70] but this is the most fundamental constitutional question. In order to answer this question, the starting point is the wording of the first sentence of Article 51(1) of the Charter, which provides that: 'The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law.'

Grammatically, the most obvious interpretation of the words 'only when they are implementing Union law' is that they apply solely to the member states, not

[64] *See* Art. 238(3) TFEU.

[65] On this issue, *see* the 'constitutional framework' section below.

[66] *See* Arts. 3 and 8 of that treaty, as discussed in Craig, de Sadeleer and Peers, *supra* n. 2.

[67] Art. 7 of the stability treaty. In the view of Adamski, Art. 7 'hovers in the realm of wishful thinking' (*supra* n. 2, at p. 1358).

[68] *See* Art. 13 of that treaty, as discussed in Peers, *supra* n. 2, p. 434-435.

[69] Craig, *supra* n. 2, p. 240-244.

[70] On the other issues, such as the application of the access to documents rules and the constraints imposed by internal market law, as well as the broader question of the comprehensibility of using treaties among member states to support the EU integration process, *see* S. Peers, *The Unravelling of EU Law* (*supra* n. 1).

to the EU institutions or other EU entities – which would mean that the EU institutions would be bound by the Charter whether they are implementing EU law or not. However, the wording could also support an alternative interpretation – that the Charter only applies to the member states and the EU institutions only when *either* of them is implementing EU law. The explanations to the Charter, which must be taken into account when interpreting it,[71] appear to assume that the requirement of a link with EU law is only relevant to member states.[72]

In the *Pringle* judgment, the Court of Justice ruled that member states were not covered by the Charter when they acted pursuant to the ESM treaty, given that the EU had no specific competence on the subject-matter of that treaty.[73] This leaves open the possibility that the member states would be bound by the Charter if they had concluded a treaty in an area of shared competence – but surely that goes beyond any plausible interpretation of Article 51(1) of the Charter, as in such a case member states would not be implementing Union law. More significantly, the Court said nothing about the possible application of the Charter to the EU institutions in the context of the ESM treaty, perhaps because it had taken the view that those institutions could not adopt binding acts pursuant to that treaty. For her part, the Advocate-General stated that as an EU institution, the Commission 'as such is bound by the full extent of European Union law, including the Charter of Fundamental Rights.'[74] This appears to assume that the EU institutions are bound by the Charter even if their actions take place outside the scope of EU law.

The issue is particularly relevant as regards the protection of the social rights in the Charter, given the conditions that must be attached (according to the *Pringle* judgment) to any financial assistance for eurozone states. In practice, similar conditions are also attached to financial assistance for non-eurozone states, pursuant to Article 143 TFEU. In this context, the Court of Justice has been asked on several occasions whether certain government cutbacks are in breach of the Charter, and has consistently ruled that the Charter does not apply, because there is no

[71] See Art. 6(1) TEU, Art. 52(7) of the Charter, and Cases C-279/09 *DEB* [2010] *ECR* I-13849, para. 32 and C-283/11 *Sky*, judgment of 22 Jan. 2013, not yet reported, para. 42.

[72] Compare the first para. of the explanations on Art. 51 ('the Charter applies primarily to the institutions and bodies of the Union') to the second para. ('As regards the Member States,… the requirement to respect fundamental rights defined in the context of the Union is only binding on the Member States when they act in the scope of Union law'). *See* also para. 193 of the Advocate-General's view in *Pringle* (*supra* n. 9).

[73] Para. 180 of the judgment (ibid.). On the notion of 'specific competence', *see supra* n. 47. Compare with the Advocate-General's view, which leaves open the issue of the scope of the Charter and argues instead that references from national courts are enough to ensure compatibility with EU law as regards Art. 47 of the Charter (paras. 193-194 of the view); this appears to assume that the Charter *does* apply to member states in the context of the ESM treaty.

[74] Para. 176 of her view.

link between the disputes in question and EU law.[75] With the greatest respect, the Court is clearly incorrect even on a narrow interpretation of the definition of EU law, since there are Council measures pursuant to Articles 122 and 143 TFEU which expressly require the specific cutbacks in question to be made.[76] Furthermore, the EU's future 'two-pack' legislation will likely, once adopted, link financial assistance conditionality even further to EU law, by means of Council approval of adjustment programmes.[77] So such conditionality in any event falls within the scope of EU law.

However, it is still important to answer the underlying question. As a matter of principle, it would be problematic if the EU institutions could escape the constraints of the Charter merely because they happen to be acting pursuant to treaties between member states, rather than EU law. Such a distinction would create an incentive to avoid the application of the Charter to the EU institutions simply by means of changing the forum in which they carried out their activity. It might seem odd that EU institutions would be bound by the Charter in the context of treaties between member states, while member states themselves would not be, but there is a fundamental difference between the two: the EU institutions owe their existence to EU law, but member states do not.

Finally, do all member states have to consent to the use of the EU's non-judicial institutions in partial agreements? This issue is of central political importance. If all member states must consent to the use of the institutions in partial agreements, then each member state can refuse that consent, or insist that its consent is dependent upon the fulfilment of other conditions. In practice, as noted already, member states' representatives approved the use of EU institutions as regards the ESM treaty,[78] and such decisions have also been adopted as regards the use of the EU institutions in other recent treaties between member states[79] – except, crucially, as regards the stability treaty, when the UK withheld its consent for the use of the institutions in the hope that other member states would therefore be compelled to use the route of treaty amendment and so would have to offer the UK the

[75] Cases: C-434/11, *Corpul Național al Polițiștilor*, order of 14 Dec. 2011; C-134/12, *Ministerul Administrației și Internelor (MAI)*, order of 10 May 2012; and C-369/12 *Corpul Național al Polițiștilor – Biroul Executiv Central*, order of 15 Nov. 2012 (none yet reported). *See also* pending Cases C-128/12 *Sindicato dos Bancários do Norte and Others* v. *BPN* and C-264/12 *Sindicato Nacional dos Profissionais de Seguros e Afins* v. *Fidelidade Mundial.*

[76] For details, *see* C. Barnard, 'The Charter in Time of Crisis: A Case Study of Dismissal', in N. Countouris and M. Freedland (eds.), *Resocialising Europe in a Time of Crisis* (CUP, forthcoming). Of course, it does not necessarily follow that the relevant national decisions are in *breach* of the Charter, merely that they fall within its scope as the member states in question are implementing EU law.

[77] COM(2011)819, 23 Nov. 2011, Art. 6.

[78] *Supra* n. 38.

[79] *See* Council Docs. and 12569/1/12, 20 July 2012 and 12971/12, 31 July 2012.

guarantees it desired relating to its financial services industry. But the other member states called the British government's bluff, and the UK has not (yet) pursued its legal argument that such consent is required by means of a legal challenge to the institutions or the other member states.

Despite the usual practice of resorting to decisions of the member states' representatives to approve the use of the EU institutions in treaties between member states, the practice of the EU institutions (and by analogy, the member states) does not create a binding precedent.[80] According to the case-law on this issue, although, in the *Bangladesh* judgment, the Court referred to member states conferring powers upon EU institutions by means of an act of their representatives meeting within the Council, it did not state that such acts were a legal requirement, and did not indicate whether all member states' representatives would have to consent to such use as regards partial agreements. Subsequently, in *Lome* and *Pringle* it referred more generally to the use of EU institutions by member states. In the external relations judgments, there was no specific mention of a requirement of all member states' consent to use of the EU institutions. While in each case, the agreement in question would have been concluded by the Community, the Court does not refer to the legal nature of the treaty concerned (i.e., whether the treaty was a 'mixed agreement', which would also have to be concluded by member states) or the decision-making process which would apply in the Council (i.e., qualified majority or unanimity) in order to conclude the treaty on behalf of the Community. While the EEA treaty (the subject of the Court's first two judgments) was both a 'mixed' agreement and an association agreement (subject to unanimous agreement in Council), the subject of the Court's third judgment (the ECAA treaty) was a transport agreement, subject to a qualified majority vote – and which was *not* a mixed agreement at the time the Court considered it.[81]

Although the Advocate-General's view in the *Pringle* judgment appears to assume that some approval by member states' representatives (i.e., 'sufficient collective action') is necessary in order for member states' treaties to use the EU institutions, the Court did not hint at any such requirement in its judgment. In any event, she indicated that approval by *all* member states' representatives went beyond the prior case-law, which could be understood to mean that only the approval of the *participating* member states' representatives was necessary.

It therefore appears that the prior approval of all member states' representatives is *not* necessary in order for member states' treaties to use the EU institutions, even as regards partial agreements. The legitimate interests of member states which do not participate in those agreements are sufficiently safeguarded by the requirement

[80] *Opinion 1/94* [1994] *ECR* I-5267, para. 52.

[81] *See* particularly paras. 16 and 17 of *Opinion 1/00* (*supra* n. 36). Subsequently the treaty was concluded in the form of a mixed agreement (*OJ* [2006] L 285/1).

that the essential nature of these institutions cannot be changed in the context of member states' treaties, and by the substantive limits (in particular relating to non-discrimination against non-participants) which apply,[82] and which can be enforced by the Court of Justice.[83] As for the EP, its interests are protected by the requirement that the EU institutions could not adopt legislation pursuant to treaties between member states unless its legislative role within the EU legal framework were essentially reproduced. Taken as a whole, then, the distinction between authorising and implementing partial agreements which use the EU institutions broadly parallels the distinction between authorising and implementing enhanced cooperation.[84]

Court of Justice

There are four categories of jurisdiction for the Court of Justice as regards treaties concluded between member states. First of all, the Court has its ordinary jurisdiction as regards the interpretation and application of EU law, to the extent to which such treaties between member states overlap with EU law. Secondly, it has jurisdiction over the EU institutions' activity within the framework of the relevant treaties, not just where those institutions adopt measures pursuant to EU law which is linked to such treaties,[85] but also where the institutions' activity pursuant to those treaties falls outside the scope of EU law. Thirdly, the EU treaties in some cases provide expressly for the Court to exercise jurisdiction even outside the scope of the EU legal order. Finally, the Court can exercise jurisdiction over member states' treaties even if none of the other three categories apply. These categories – which are not mutually exclusive[86] – will be considered in turn.

Ordinary jurisdiction

The long-standing case-law of the Court of Justice establishes that the Court has its ordinary jurisdiction to rule on the validity or interpretation of EU law even where the facts of the case partly or wholly concern a treaty between member

[82] On those limits, *see supra* n. 70. For the opposing view on this issue – which does not consider the safeguards deriving from the 'essential nature' doctrine – *see* Craig (*supra* n. 2) and Piris (*supra* n. 17).

[83] *See* the 'Court of Justice' section below.

[84] *See* the opinion of the Advocate-General in *Spain and Italy* v. *Council* (*supra* n. 8).

[85] This would in fact constitute an aspect of the *first* category of jurisdiction.

[86] For instance, the first and third categories of jurisdiction apply to the ESM Treaty. However, if a treaty among member states gives the Court explicit jurisdiction to rule on any acts of the EU institutions adopted within that treaty framework, then the rules relating to the fourth category of jurisdiction logically apply as a *lex specialis* in place of the rules concerning the second category.

states, in particular to ensure that member states do not breach EU law when applying such treaties.[87] This case-law was decisively and clearly confirmed in the *Pringle* judgment.[88] While it has been argued that there would need to be consent by all member states for the Court to exercise such jurisdiction,[89] this argument not only overlooks the established case-law (since re-iterated in *Pringle*), which implicitly rejects such a condition,[90] but is deeply flawed in principle – since it would mean that member states could escape any scrutiny by the Court of Justice of the compatibility of their actions with EU law as long as their actions took the form of a treaty between member states, provided that at least one member state (which might itself be a party to that treaty) objected to the Court's jurisdiction. This would amount to a licence to violate EU law with impunity.

As for the details of the Court's ordinary jurisdiction, the Court does not have jurisdiction to *annul* the conclusion of treaties between member states pursuant to Article 263 TFEU, equivalent to its jurisdiction to annul secondary EU measures, including those EU measures which violate the rules relating to differentiated integration within the EU legal order.[91] This exclusion of jurisdiction applies even where all member states have acted collectively within the context of the Council, and there are many links between the member states' action and the EU institutions.[92] Similarly, the Court's ordinary jurisdiction does not extend to a power to rule on the exception of illegality or damages liability as regards such agreements, or to rule on their interpretation or validity following a preliminary reference from a national court or tribunal of a member state.[93] Also, Article 218 TFEU does not give the Court jurisdiction to review in advance the compatibility with EU law of agreements which *member states* envisage signing, unless the Union would also possibly be a party.[94] Having said that, a Court ruling pursuant to an infringement action or reference from a national court that such treaties (or

[87] For references from national courts, *see* in particular Cases 44/84 *Hurd* v. *Jones* [1986] *ECR* 29, 235/87 *Matteucci* [1988] *ECR* 5589 and C-336/96 *Gilly* [1998] *ECR* I-2793. For infringement actions, *see*, for instance, Case C-6/89 *Commission* v. *Belgium* [1990] *ECR* I-5195.

[88] Paras. 78-81 of the judgment (*supra* n. 9); *see also* paras. 66-68 of the Advocate-General's view.

[89] Piris (*supra* n. 17), p. 141.

[90] The member states' agreement to confer power on the EU institutions as regards the ESM Treaty (*supra* n. 38) made no reference to the Court of Justice.

[91] *See*, for instance, *Spain and Italy* v. *Council* (*supra* n. 8).

[92] *EP* v. *Council and Commission* (*supra* n. 27), paras. 9-25. However, the Court stated that it had jurisdiction to establish whether the member states' act was, in reality, an act of the Council. On the facts of the case, it was not.

[93] *See* Arts. 277, 268 and 267 TFEU. The opinion in *EP* v. *Council and Commission* (ibid.), para. 33, explicitly ruled out the admissibility of an action pursuant to the (current) Art. 277 TFEU where the parent act had been adopted by member states, rather than the Council.

[94] Arts. 103-105 of the Euratom Treaty give the Court jurisdiction over treaties between member states on the one hand, and third countries, third-country nationals or international organisa-

their application) are incompatible with EU law will necessarily require those agreements to be amended or denounced, or member states' application of those treaties amended, to cure that incompatibility.[95]

Even if the agreement in question was signed before one or both member states joined the EU, the protection conferred by Article 351 TFEU for treaties concluded by member states before they joined the EU (i.e., the continued application of those treaties, even if they breach EU law) is no longer applicable once both of them have joined.[96] Moreover, to the extent that a treaty between member states is closely linked to EU measures,[97] any challenge to the validity of such measures within the EU legal system could possibly, if successful, cast doubt in turn on the validity or feasibility of that treaty.[98] Conceivably, in such cases the Commission or the member state bringing an annulment action against the EU measure could bring a parallel infringement action as regards the treaty between member states, and a national court could ask the Court of Justice simultaneous questions regarding the validity of the EU measure and the compatibility of the connected agreement with EU law.

Arguably, infringement proceedings could be brought in respect of treaties between member states against (a) member state(s) at the stage of negotiation of such treaties, by analogy with EU external relations law.[99] In contrast, national

tions on the other hand (*see Ruling 1/78* [1978] *ECR* 2151), but this also does not extend to special jurisdiction over treaties *between member states alone*.

[95] The European Investment Bank or the European Central Bank could also bring proceedings against a member state pursuant to Art. 271(a) or (d) TFEU. However, as compared to Art. 263 TFEU, the EP would not have a remedy available to it.

[96] *See*, for instance, Case 10/61 *Commission* v. *Italy* [1962] *ECR* 1; *Matteucci* (*supra* n. 87), para. 21; and Case C-478/07 *Budějovický Budvar* [2009] *ECR* I-7721, para. 99. In any event, this protection is limited, since the second paragraph of Art. 351 requires member states to take steps to adjust the prior treaty to their EU obligations: *see* C-84/98 *Commission* v. *Portugal* [2000] *ECR* I-5215. Furthermore, Art. 351 could logically have little relevance to treaties between member states that use the EU's institutions, since such treaties are unlikely to pre-date member states' accession to the EU; any which do (like the EEA or ECAA) will probably have to be denounced upon accession, pursuant to the accession treaty. If a protocol to a pre-accession treaty were adopted after accession, in order to involve the EU institutions in that treaty, the protection conferred by Art. 351 would then cease to apply anyway: *see* Case C-467/98 *Commission* v. *Denmark* [2002] *ECR* I-9519 (*open skies*). *See* Rosas (*supra* n. 38) at p. 1319-1320.

[97] It would be immaterial whether the treaty and/or the EU measure applied to all member states, or to some only.

[98] The obvious example is the treaty creating a Unified Patent Court, which, to the extent that it will apply to EU unitary patents, is inextricable from the EU legislation creating those unitary patents, which is subject to legal challenge (*supra* n. 8). However, the treaty creating the Court could arguably still be ratified as regards European patents valid for multiple member states (*see idem*).

[99] *See*, for instance, Cases 22/70 *Commission* v. *Council (ERTA)* [1971] *ECR* 263, C-25/94 *Commission* v. *Council* [1996] *ECR* I-1469 and C-266/03 *Commission* v. *Luxembourg* [2005] *ECR* I-4805. The analogy with external relations law is strengthened by the Court's ruling in *Pringle* that

courts could not usually refer questions to the Court of Justice on the compatibility of such treaties with EU law until the treaties were actually implemented – unless a member state's legal order permitted challenges at an earlier stage.[100]

Jurisdiction over the institutions

The second category of the Court's jurisdiction regarding treaties between member states – the power to control the institutions' actions pursuant to such treaties, as distinct from the institutions' actions pursuant to EU law – was first addressed in the *Bangladesh* judgment. In that judgment, having ruled that the EP's action against the Council was inadmissible, because the act in question had been adopted only by the member states,[101] the Court moved on to consider the EP's action against the Commission, which had entered the Greek contributions to the collective assistance into the EU budget.[102] In its defence, the Commission had argued that its act was not challengeable within the meaning of Article 173 EEC (now Article 263 TFEU), and that the EP's prerogatives relating to the budget had not been infringed. On the latter point, it must be recalled that until the entry into force of the Treaty of Nice, the EP could only bring actions to protect its institutional prerogatives.[103]

Assessing the Commission's arguments, the Court noted that the Commission was acting on a mandate conferred by member states, not the Council, and that the funding was based on a collective action of the member states and financed by them. It followed that the contributions were not 'Community revenue', and their expenditure was not 'expenditure of the Community', within the meaning of the EEC Treaty. So the entry of the Greek contributions into the EU budget could not have amended that budget, and the EP's prerogatives could therefore not have been infringed.

In the Advocate-General's opinion, if the Commission undertook tasks outside the framework of EU law, the Court's powers of review were limited:[104]

> In the performance of such tasks, the Commission's actions will be subject to review by the Court if they are challenged as being unlawful under the Treaties. But the Commission's involvement will not otherwise bring the activities in question within the jurisdiction of the Court or within the scope of the Community Treaties.

Art. 3(2) TFEU applies not only to treaties with third states, but also to treaties between member states alone (*supra* n. 41).

[100] *See* implicitly *Pringle* (ibid.), which was referred before the ESM treaty had entered into force, and by analogy Case C-491/01 *BAT* [2002] *ECR* I-11453, paras. 28-41.

[101] *See* text, *supra* n. 30.

[102] *Supra* n. 27, paras. 26-32 of the judgment.

[103] *See* text, *supra* n. 30.

[104] Para. 26 of the opinion (*supra* n. 27).

Applying this test, the opinion argued that the Commission had breached EU rules relating to implementation of the budget, and that its acts had legal effect (and so were reviewable in principle), but that the EP's prerogatives had not been infringed, so it lacked standing to challenge this illegal act.[105]

In *Lome*, the Council argued that the Court could not review an act of an EU institution that was adopted outside the framework of EU law. The Court decisively rejected that argument. Since 'an action for annulment must be available in the case of all measures adopted by the institutions, whatever their nature or form, which are intended to have legal effects,'[106] it followed that 'an action … against an act of an institution intended to have legal effects is admissible irrespective of whether the act was adopted by the institution pursuant to Treaty provisions.'[107] The Court then assessed whether the very existence of the Council act infringed EU law, but not whether the Council had infringed the rules set out in the agreement between member states. However, the Court would not have been able to examine the latter issue in proceedings brought by the EP, since that institution could only bring claims regarding the protection of its prerogatives.

The Advocate-General's opinion in this case proceeded from a different starting point, for in his view (as he had expressed already in the *Bangladesh* opinion) an act adopted by an EU institution outside the scope of the EU legal order could only be reviewed to assess whether it was incompatible with EU law.[108] This approach clearly differs in principle from the Court's ruling that the acts of the institutions without must *always* be subject to legal challenge – but the Court left open the question of the grounds for review of those acts. If those acts can only be reviewed for incompatibility with EU law, then the Court's approach really does not differ in practice from the Advocate-General's.

Most recently, in the *Pringle* judgment, the Court did not address this issue, perhaps because of its rulings that the ESM treaty did not confer powers on the EU's political and monetary institutions to adopt binding decisions.[109] Nevertheless, since it is possible for member states' treaties to confer power upon the EU institutions to adopt binding decisions,[110] it is necessary to examine the extent of the Court's jurisdiction as regards the institutions.

In principle, the importance of the rule of law which lies at the heart of the EU legal order, as recognised by the Court of Justice,[111] requires that binding acts of

[105] Paras. 31-46 of the opinion (ibid.).

[106] Para. 8 of the judgment (*supra* n. 28), referring to *ERTA* (*supra* n. 99), para. 42.

[107] Ibid., para. 9 of the judgment.

[108] Para. 93 of the opinion (ibid.). In his view, there was no such incompatibility in this case.

[109] Para. 161 of the judgment (*supra* n. 9). The Advocate-General's view does not address this issue either.

[110] *See* text *supra* n. 57.

[111] *See*, in particular Case 294/83 *EP* v. *Council* [1985] *ECR* 1339 (*Les Verts*) and the *Chernobyl* judgment (Case C-70/88, *supra* n. 30).

the EU institutions which were adopted outside of the legal framework of EU law need to be examined not only for their compatibility with EU law, but also for breach of any relevant rules which are set out in or which can be deduced from the treaty concerned, including the applicable rules of public international law.[112] This is, of course, a distinct issue from the Court's jurisdiction as regards *member states*' actions to implement the treaties concerned, which falls rather within the scope of the first (and possibly also the third and fourth) category of its jurisdiction.[113]

Could sufficient judicial review be ensured instead via national courts?[114] A comparable issue arose in the *SEGI* case, concerning the limits on the Court's legal control of 'third pillar' actions.[115] The Court's acceptance in that case that it did not have jurisdiction to entertain an action for damages as regards a 'third pillar' measure, and that national courts could therefore rule on the lawfulness of such measures and related compensation actions, must be distinguished on the ground that the specific legal framework in place (the previous Article 35 TEU) expressly limited the Court's jurisdiction.[116] Furthermore, the Court placed more stress in its judgment on the possibility of obtaining redress via means of obtaining a reference for validity of the act to the Court of Justice from a national court.

In the absence of such a specific legal framework, it should follow that the Court of Justice has its usual jurisdiction to rule on the validity and legality of the institutions' acts. This is implicitly confirmed by the *Bangladesh* judgment, in which the Court of Justice applied the usual rules on standing (as they stood at the time) to decide on the challenge to acts of the Commission which were adopted pursuant to a legal framework which was outside the scope of the EU legal order.[117]

Finally, it is arguable that the Court of Justice cannot enjoy this second category of jurisdiction (at least where the institutions' acts fall outside the scope of the EU legal order) unless all member states have consented to it. This issue is considered below, in the context of the fourth category of jurisdiction.

[112] *See* by analogy Case T-231/04 *Greece* v. *Commission* [2007] *ECR* II-63, appealed to the Court of Justice (Case C-203/07 P *Greece* v. *Commission* [2008] *ECR* I-8161). This jurisdiction would also extend to the alleged breach of the EU Charter of Fundamental Rights by the institutions pursuant to a treaty between member states: *see* the 'political institutions' section above.

[113] It is also distinct from the grounds

[114] On the possibility of creating a new international court with such jurisdiction, *see* the 'constitutional framework' section below.

[115] Case C-355/04 P, [2007] *ECR* I-1657.

[116] *See* similarly current Arts. 269, 275 and 276 TFEU.

[117] For that reason, the Court's ruling of inadmissibility (due to the EP's limited capacity to bring proceedings) was consistent with its later ruling in *Lome* that acts of the institutions adopted outside the EU legal framework must always be subject to judicial review.

Express jurisdiction outside the scope of the EU legal order

The third category of the Court of Justice's jurisdiction regarding treaties between member states is the conferral of such jurisdiction by means of an express provision set out in the EU treaties. In such cases, member states' consent to the Court's jurisdiction was granted when they acceded to the EU or ratified the relevant Treaty amendments. It also follows that there is no additional requirement of preserving the 'essential character' of the Court's jurisdiction, since such a rule is also built in to the relevant provisions of EU primary law. Prior to the entry into force of the Treaty of Lisbon, such a power was expressly set out in the TEU (as regards 'third pillar' Conventions),[118] and was frequently used.[119] Since then, the only remaining such provision is Article 273 TFEU,[120] which provides that: 'The Court of Justice shall have jurisdiction in any dispute between Member States which relates to the subject matter of the treaties if the dispute is submitted to it under a special agreement between the parties.'

There was an equivalent provision in the Euratom Treaty,[121] but no equivalent provision in the Treaty establishing the European Coal and Steel Community (ECSC).[122]

In practice, Article 273 has rarely been used (at least explicitly) until recently. However, a double taxation treaty between Germany and Austria provides for such jurisdiction.[123] More significantly, the ESM treaty grants jurisdiction to the Court

[118] Before the Treaty of Amsterdam, such jurisdiction was conferred by Art. K.3(2)(c) TEU.

[119] During the 'Maastricht era', Art. K.3(2)(c) TEU provided for an option to grant the Court jurisdiction over dispute settlement and references from national courts as regards conventions between member states within the scope of the initial 'third pillar.' Following the entry into force of the Treaty of Amsterdam, the Court had jurisdiction pursuant to Art. 35 TEU over dispute settlement and references from national courts as regards all third pillar Conventions concluded between member states (as well as third pillar Framework Decisions and Decisions adopted by the Council), except that it was up to member states whether to accept the Court's jurisdiction as regards references from their national courts.

[120] Previously Art. 239 EC before the Treaty of Lisbon, and Art. 182 EEC/EC before the Treaty of Amsterdam.

[121] Art. 154 of the Euratom Treaty, repealed by the Treaty of Lisbon (*see* now Art. 106a of the Euratom Treaty, *OJ* [2010] C 84).

[122] The most similar provision is Art. 43 of that Treaty, which first of all gave jurisdiction to the Court 'in any other case provided for in a supplementary provision of the Treaty.' This jurisdiction was applied in Case 6/60 *Humblet* [1960] *ECR* 559, concerning the interpretation of the Protocol on privileges and immunities to the ECSC Treaty, Art. 16 of which gave the Court general jurisdiction to settle disputes relating to it. Secondly, Art. 43 of that Treaty gave the Court 'jurisdiction in any case relating to the objects of the present Treaty, where the laws of a member State grant such jurisdiction to it.' Neither provision expressly concerns disputes between member states outside the framework of the Treaty.

[123] See 'EC Law and Tax Treaties' (Doc. TAXUD E1/FR DOC (05) 2306, 9 June 2005), online at: <http://ec.europa.eu/taxation_customs/resources/documents/taxation/personal_tax/double_tax_conventions/eclawtaxtreaties_en.pdf>, n. 54.

pursuant to this Article,[124] as does the stability treaty.[125] Implicitly the EFSF treaty and the Greek loans treaties grant the Court jurisdiction pursuant to Article 273 as well.[126]

Prior to the *Pringle* judgment, two Opinions of Advocates-General had touched on the interpretation of Article 273. The first Opinion suggested that the Court could interpret the bilateral agreements on civil jurisdiction rules between member states which were preserved by the Brussels Convention, if the member states in question invoked Article 182 EEC (as it then was).[127] As for the second Opinion, it suggested that where a dispute between member states falls partly inside and partly outside the Court's usual jurisdiction, it may be advisable to bring the entire dispute before the Court by invoking Article 239 EC (as it then was) as regards the latter aspects of the dispute.[128]

The Court has now ruled on the interpretation of Article 273 for the first time, in the *Pringle* judgment,[129] as regards the use of Article 273 in the ESM treaty. In the Court's view, first of all 'there is no reason, given the objective pursued by that provision, why such agreement could not be given in advance, with reference to a whole class of pre-defined disputes.'[130] Secondly, the provision was 'related to the subject-matter of the Treaties', because a dispute about the 'interpretation or application of the ESM treaty is likely also to concern the interpretation or application of' EU law, because the conditions of financial support would be at least partly 'determined by' EU law on economic governance.[131] Thirdly, the relevant provision of the ESM treaty satisfied the 'condition' that 'only' member states could be party to disputes pursuant to Article 273, even though the ESM would be a party to such disputes, since the ESM consisted of member states.[132]

In the view of the Advocate-General in the *Pringle* case,[133] the relevant ESM treaty clause was related to the subject-matter of the treaties also as regards the

[124] Point 16 in the preamble and Art. 37(3) of that treaty (*supra* n. 4), which gives the Court jurisdiction if a member state disputes a decision of the ESM Board of Governors.

[125] Art. 8 of that treaty (*supra* n. 2), which gives the Court jurisdiction to determine whether a member state has complied with Art. 3(2) of the treaty, which requires eurozone states to provide for an automatic deficit correction mechanism in their national law.

[126] Art. 16(2) of the EFSF agreement gives the Court of Justice jurisdiction as regards disputes between member states only. A dispute between a member state and the EFSF (which is a private company) as such must be brought before the Luxembourg courts. On the Greek loan agreements, *see* Merino (*supra* n. 4), p. 1638-9.

[127] Joined Cases 9 and 10/77 *Bavaria Fluggesellschaft* [1977] *ECR* 1517, para. 4 of the opinion.

[128] Para. 9 of the Opinion in Case C-459/03 *Commission* v. *Ireland* [2006] *ECR* I-4635.

[129] Paras. 170-176 of the judgment.

[130] Para. 172 of the judgment.

[131] Para. 174 of the judgment.

[132] Para. 175 of the judgment.

[133] Paras. 183-190 of the view.

possible need to interpret Article 125 TFEU (the 'no bail-out' clause) in the context of financial assistance. She also stated her view that Article 273 could not relate to an *actual* interpretation of the treaties, by comparison with Article 259 TFEU (which confers jurisdiction upon the Court where a member state argues that another member state has breached the treaties). Article 273 applies, in her opinion, where the subject-matter of the *treaty* in question was related to the subject-matter of the EU treaties; it was not necessary for each individual *dispute* was related to the treaties.[134]

More broadly, the Advocate-General observed that because member states acting within the ESM framework are bound 'by particular [EU] legal obligations…. [t]he competence of the Court of Justice thereby secures the uniform application of European Union law' and 'strengthens the Union system of legal remedies, which corresponds to the objective of Article 273.' She also stated that since the use of Article 273 is 'optional' for member states, 'a broad interpretation of that provision is unexceptionable.'[135]

The Court's judgment in *Pringle* has clarified a number of issues as regards Article 273, but a number of other questions remain. First of all, does there need to be an express mention of Article 273 in the treaty concerned, as was the case with the ESM treaty? In light of the Court's permissive approach to interpreting Article 273 in *Pringle*, there is surely no such requirement, in the absence of an express obligation to that effect in Article 273. Secondly, can Article 273 be invoked only in the framework of an advance agreement between member states in the form of a treaty? Apparently not, because the Court's *Pringle* judgment clearly assumed that there could be other circumstances in which the clause applied (most obviously an *ad hoc* arrangement to settle a dispute, which might or might not concern an existing treaty), and there are no specific procedural requirements set out in Article 273, as compared to Article 259 TFEU or the former Article 35 TEU.[136]

Thirdly, does Article 273 lay down any rules as regards the procedure to invoke the Court's jurisdiction? While proceedings pursuant to Article 273 have to be brought between member states, in light of the Court's lack of formality in *Pringle* as regards proceedings against the ESM, the parties to the relevant agreements clearly have considerable flexibility to regulate such issues. Member states are therefore presumably free to place possible limits on the use of the Court pursuant to Article 273; for example, an agreement between member states could require a

[134] Para. 186 of the view.

[135] Para. 189 of the view.

[136] The two earlier Opinions assume that pursuant to Art. 273, the Court could have jurisdiction in a dispute between two member states, either pursuant to a treaty (*Bavaria Fluggesellschaft*, *supra* n. 127), or to an *ad hoc* arrangement (*Commission* v. *Ireland, supra* n. 128).

prior period of consultation, arbitration or mediation before the Court's jurisdiction is invoked. Equally, the special rules in the stability treaty, which entail a greater role for the Commission in assessing member states' compliance with their obligation to establish an automatic correction rule for deficits, and possible fines for member states which do not comply with an initial judgment of the Court, cannot be objected to either.[137] As long as the Commission is not a party to proceedings pursuant to Article 273, member states are free to 'tie themselves to the mast' by obliging themselves to bring proceedings against a state which the Commission judges to be in breach of the relevant obligations, and the Court's dispute settlement jurisdiction can logically extend to encompass a procedure to enforce its own judgments.

Fourthly, what is the exact scope of Article 273? In *Pringle*, it was sufficient for the Court that it was probable that disputes relating to the relevant treaty would also concern EU law. The Advocate-General's view – on which the Court did not comment – was both wider and narrower – wider, because any dispute concerning the ESM treaty could fall within the scope of Article 273, and narrower, because she believed that Article 273 was a *lex specialis* compared to Article 259.

On this point, the 'subject-matter' of the treaties must logically encompass disputes relating to the treaties themselves, whether they arise in the context of treaties between member states or otherwise. In the absence of any rule in the treaty regulating the relationship between Articles 259 and 273, it must therefore be possible for Article 273 to serve as a potential additional means of bringing disputes between member states relating to EU law before the Court of Justice – although given the mandatory nature of Article 259, proceedings pursuant to Article 273 can only be a parallel option, which cannot replace the possible use of Article 259. *A fortiori*, Article 273 can also be used where the treaties provide for a derogation as regards Article 259,[138] but cannot be used where the treaties expressly rule out any jurisdiction for the Court of Justice at all, or set out an explicit limitation on its jurisdiction.[139] In particular, this means that Article 273 was validly used in the stability treaty in order to provide for dispute settlement as regards the creation of an automatic correction mechanism for deficits, even though Article 259 cannot be used in the context of the EU's excessive deficit procedure. In any event, the relevant rule in the stability treaty is closely con-

[137] For discussion of these rules, *see* Craig (*supra* n. 2) p. 245-7, Merino (*supra* n. 4), p. 1638-1640, de Sadeleer (*supra* n. 2) p. 1373, and Peers (*supra* n. 2), p. 417-420.

[138] *See* Arts. 108(2), 114(9), 126(10) and 348 TFEU.

[139] *See* Arts. 269, 275 and 276 TFEU. Since the treaty drafters decided provision to limit the Court's jurisdiction explicitly in many specific treaty Articles (*see also* ibid., and the previous Art. 68 EC and Art. 35 TEU), it must be assumed *a contrario* that they did not wish to limit the possible application of Art. 273.

nected to EU legislation on economic governance which does not relate directly to the excessive deficit rules.[140]

As for issues not currently regulated directly by EU law, the scope of Article 273 must logically extend beyond disputes which are 'likely also to concern the interpretation or application of' EU law (as in the Court's *Pringle* judgment), because of the existence of Article 344 TFEU, which precludes member states from submitting a dispute concerning the 'interpretation or application of the Treaties' to any form of settlement other than those provided for therein.[141] The difference in wording between the two Treaty articles suggests that the 'subject-matter' of EU law has a wider scope than the 'interpretation or application of the Treaties.' The best interpretation of Article 273 is therefore that it can apply whenever an issue falls within the scope of the EU's competence, but it cannot apply to areas of law which the EU cannot harmonise. This interpretation would be consistent with the scope of the powers of the EU's non-judicial institutions to participate in treaties between member states.[142]

Finally, contrary to the view of the Advocate-General in *Pringle*, the wording of Article 273 makes clear that a *dispute* has to relate to the 'subject-matter' of the treaties; it is not enough that it concerns a *treaty* which, taken as a whole, is related to the treaties' subject-matter.

Implied jurisdiction outside the scope of the EU legal order

It might be argued at the outset that there cannot be a fourth category of jurisdiction for the Court over treaties between member states, because (without a treaty amendment) it can only enjoy the express jurisdiction as set out in the treaties, possibly with only a limited extension to control the EU institutions' actions outside the scope of the EU legal framework, in the interests of ensuring the rule of law. However, such a contention has clearly been rejected, both in the practice of member states and the case-law of the Court of Justice.[143] Nevertheless, it is still necessary to examine the conditions and limits which apply to this fourth category of the Court's jurisdiction.

[140] *See* Peers (*supra* n. 2), p. 414 and 419.

[141] On Art. 344, *see* particularly Case C-459/03 *Commission* v. *Ireland* (*supra* n. 128), and also: *Opinion 1/91* [1991] *ECR* I-6079, para. 35; *Opinion 1/00* (*supra* n. 36), para. 17; *Opinion 1/09* (*supra* n. 6), para. 63; and T. Lock, 'The European Court of Justice: What Are the Limits of Its Exclusive Jurisdiction?', 16 *Maastricht Journal of European and Comparative Law* (2009) p. 291.

[142] *See* the section on 'Political Institutions', *supra*.

[143] The argument that Art. 273 TFEU – and previously Art. 35 TEU – list exhaustively the circumstances where the Court can enjoy jurisdiction outside the scope of the EU legal order can be rejected by analogy with *Opinion 1/09* (*supra* n. 6), in which the Court ruled that Art. 292 TFEU did not confer exclusive jurisdiction on the Court as regards patent litigation.

First of all, member states' practice was to confer jurisdiction on the Court of Justice as regards most treaties which were negotiated or contemplated pursuant to the prior Article 293 EC (repealed by the Treaty of Lisbon),[144] which had provided that member states were obliged 'so far as is necessary' to negotiate with each other as regards: 'the protection of persons and the enjoyment and protection of rights under the same conditions as those accorded by each State to its own nationals'; 'the abolition of double taxation within the Community'; 'the mutual recognition of companies or firms within the meaning of' the provisions on freedom of establishment, 'the retention of legal personality in the event of transfer of their seat from one country to another, and the possibility of mergers between companies or firms governed by the laws of different countries'; and 'the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards.' There was no express mention of conferring jurisdiction upon the Court.

In particular, member states granted jurisdiction to the Court in the form of Protocols to the Brussels Convention on jurisdiction over civil and commercial proceedings (and the related mutual recognition of judgments)[145] and the Convention on the mutual recognition of companies.[146] They also considered conferring jurisdiction as regards draft treaties on mergers,[147] transfers of companies[148] and insolvency proceedings.[149] However, the Court was not given any jurisdiction to interpret the Convention on double taxation arbitration.[150]

According to the explanatory report to the two protocols, it was not necessary to amend the treaties to give the Court this jurisdiction, since the protocols concerned the interpretation of conventions adopted pursuant to Article 220 EEC (as it was then; subsequently Article 293 EC, since repealed), rather than revising the treaty itself; they did not amend the Court's jurisdiction as already set out in the treaties, but merely added to it.[151] The report also claimed that on other occasions, jurisdiction has been conferred on the Court of Justice without applying the treaty amendment procedure.[152]

Member states also agreed to give jurisdiction to the Court as regards conventions that were *not* within the scope of Article 293 EC, and so were even less

[144] Art. 220 EEC/EC prior to the Treaty of Amsterdam.

[145] *OJ* [1975] L 204/28.

[146] *Bulletin-EC*, Supplement 4/71. The Convention (and Protocol) never entered into force.

[147] *See Bulletin-EC*, Supplement 13/73.

[148] *See* I. Fletcher, *Conflict of Laws and European Community Law* (North Holland 1982), p. 251-268.

[149] (1996) 35 *ILM* 1223.

[150] *OJ* [1990] L 225/10.

[151] The Jenard report: *OJ* [1979] C 59/66, point 4.

[152] The report referred to internal agreements pursuant to association treaties (*OJ* [1964] 93, p. 1490/64), and appeals pursuant to Reg. 17/62 on competition law (*OJ* [1962] 13, p. 204/62).

connected to the EU legal order. In particular, two protocols to the Rome Convention on the conflict of laws as regards contractual obligations confer such jurisdiction,[153] as does the European Schools Convention, which both the Community (now the EU) and the member states (but no third states) are party to.[154] Member states also agreed to confer jurisdiction on the Court as regards the Community Patent Convention,[155] although that treaty never entered into force. Such jurisdiction might also have been conferred as regards a draft treaty on trademarks, had it been concluded.[156] Conversely, the Court was not given any jurisdiction as regards the criminal and civil law Conventions agreed within the framework of European Political Cooperation,[157] the Convention establishing the European University Institute,[158] the Dublin Convention on asylum requests[159] or the recent customs clearance treaty.[160]

According to the report on the Protocols to the Rome Convention,[161] member states again rejected the idea that the treaties would have to be amended to provide for the Court's jurisdiction, on the basis that there was no amendment to the text of the Treaty or any effect upon the structure or operation of the Court, but rather an extension of its jurisdiction, 'irrespective' of whether the Convention in question was referred to in Article 293 EC. It was also agreed that the consent of all member states would be necessary to confer such jurisdiction, 'since the powers of a Community institution, as defined by the Treaty, are affected.'[162] This explains why a separate second protocol to the convention, which conferred

[153] *OJ* [1989] L 48/1 (first protocol); *OJ* [1989] L 48/17 (second protocol). For the Convention itself, *see supra* n. 24.

[154] *Supra* n. 25. For this treaty, the Court has a special jurisdiction (*see* Art. 26 of the treaty) to settle disputes between contracting parties, if the disputes have not been settled by the Board of Governors: *see* Case C-545/09, *Commission* v. *UK*, judgment of 2 Feb. 2012, not yet reported. However, the tribunal established by this treaty (*see* Art. 27 of the treaty) cannot itself send references to the Court of Justice: *see* Case C-196/09 *Miles*, judgment of 14 June 2011, not yet reported. Also, the Court has no jurisdiction to rule on disputes relating to the separate agreement on the establishment of the schools, brought pursuant to the TFEU infringement procedure, if there is no issue relating to a breach of EU law: *see* Case C-132/09 *Commission* v. *Belgium* [2010] *ECR* I-8695. Conversely, the Court's first category of powers (ordinary jurisdiction regarding EU law) applies, as it does to any treaties concluded between member states: *see Hurd* v. *Jones* and Case C-6/89 *Commission* v. *Belgium* (*supra* n. 87).

[155] *Supra* n. 24.

[156] *See Bulletin-EC*, Supplement 8/76.

[157] *Supra* n. 24.

[158] Ibid.

[159] *OJ* [1997] C 254/1.

[160] *Supra* n. 22.

[161] The Tizzano report (*OJ* [1990] C 219/1), point 16.

[162] Ibid., point 17. The literature has assumed this analysis to be correct: *see* P. Kaye, *New Private International Law of Contract of the European Community* (Dartmouth 1993), p. 82 and A. Mayss and A. Reed, *European Business Litigation* (Ashgate 1998), p. 258.

jurisdiction upon the Court, had to be ratified by all member states in order for the first protocol to the Convention, which set out the details of such jurisdiction, could enter into force in respect of any of the member states which ratified it.[163]

As for the case-law of the Court of Justice, the issue of the Court's 'extra' jurisdiction has been addressed – along with the extra powers for the EU's other institutions – in the context of treaties concluded between the EU and third states. First of all, the Court ruled that no provision of the treaties prevented it being given jurisdiction as regards references from courts of third countries, as long as its rulings would be binding; a purely advisory jurisdiction would 'change the nature of the function of the Court of Justice.'[164] Subsequently, the Court stated as a general rule that '[t]he powers conferred on the Court by the Treaty may be modified pursuant only to the procedure provided for in' the treaties; '[h]owever, an international agreement concluded by the Community may confer new powers on the Court, provided that in so doing it does not change the nature of the function of the Court as conceived' in the treaties.[165] Again, the crucial point was that the Court's rulings would be binding both upon the national courts of third states and in the context of dispute settlement.[166] More recently, the Court ruled again that it could be awarded such jurisdiction, since there was no 'essential change' in its role if its rulings were binding and it maintained sole jurisdiction over the legality of EU measures.[167]

In light of this practice and case-law, it is clear that this fourth category of jurisdiction exists for the Court of Justice.[168] As with the political institutions, the external relations case-law is relevant to treaties between member states, for the same reasons.[169] So the question is what conditions and limits apply to this jurisdiction.

First of all, on the key issue of whether unanimous consent of member states is required for jurisdiction to be conferred upon the Court,[170] the practice (most

[163] The first protocol only needed to be ratified by seven member states before it could enter into force; it is in force in all member states except Ireland. Both protocols entered into force on 1 Aug. 2004: *OJ* [2004] C 277. The Rome Convention itself only needed to be ratified by seven member states before it could enter into force (Art. 29(1) of the Convention, *supra* n. 24).

[164] *Opinion 1/91* (*supra* n. 141), paras. 59-63. On the other hand, it was acceptable that the Court's jurisdiction would not be mandatory as regards third-country courts.

[165] *Opinion 1/92* (*supra* n. 36), para. 32.

[166] Ibid., paras. 33-35.

[167] *Opinion 1/00* (*supra* n. 36), paras. 12, 18, 20, 24 and 25.

[168] Moreover, the practice and case law converge: the distinction drawn by the Court's rationale in *Opinion 1/92* (*supra* n. 36) between treaty amendments and conferring new jurisdiction on the Court is nearly identical to the distinction drawn in the Jenard and Tizzano reports (*supra* ns. 151 and 161).

[169] *See* the 'Political Institutions' section, *supra*.

[170] The following discussion applies *mutatis mutandis* to the second category of jurisdiction.

notably as regards the protocols to the Rome Convention) suggests that it is.[171] But as noted above, the practice of the EU institutions (and by analogy, the member states) does not create a binding precedent.[172] In fact, it is striking that, as noted above, the case-law does not refer, even obliquely, to any form of consent requirement.[173]

Moreover, if the Court had wished to indicate that all member states had to consent in order for it to exercise any jurisdiction outside the EU legal order, surely it would have mentioned this requirement when it fleshed out the conditions which applied to the use of the EU institutions in international agreements. It must therefore be concluded that there is no requirement of unanimous consent of member states in order for the Court to be awarded extra jurisdiction in a treaty between member states. At most, it might be argued that unanimous consent might be required for a treaty which regulates an issue which has no connection to the EU legal order – as was the case for the Rome Convention at the time when the relevant protocols to that Convention were signed. But there are few such issues left.[174]

Rather, the Court's concern, as set out in the external relations case-law regarding the 'essential character' of its role, is clearly instead about its role as an institution. In that regard, it is clear from the case-law that no treaty between member states can confer jurisdiction upon the Court of Justice unless the Court's rulings are binding, and the institutional framework of the treaty concerned cannot threaten the autonomy of the EU legal order, by placing judges in conflicting positions or interfering with the Court's usual jurisdiction over EU law. Possibly other restrictions might be deduced as well, but in general the Court's case-law seems open to accept variations upon the Court's core jurisdiction over dispute settlement and references from national courts. If anything, the key question is not so much whether member states are constrained from conferring jurisdiction upon the Court of Justice in treaties between them, but whether they might even be obliged to do so – an issue which we turn to next.

[171] The involvement of the Court of Justice as regards the treaty establishing the Unified Patent Court, which will likely not be signed by every member state and will probably enter into force before every signatory has ratified it (*supra* n. 8), is not a contrary example, because that treaty simply confirms the Court's jurisdiction pursuant to the existing EU legal order (*see* Opinion 1/09, *supra* n. 6).

[172] *See* text, *supra* n. 80.

[173] *See* text, *supra* n. 36. The reference to member states' representatives in *Bangladesh* does not concern conferring powers on the Court.

[174] Indeed, the Rome Convention has been replaced (except as regards Denmark) by Reg. 593/2008, *OJ* [2008] L 177/6.

Constitutional framework

The use of EU institutions in member states' treaties raises two distinct – but closely related – fundamental questions. First of all, are member states *prohibited* to any extent from creating 'competing' institutions when they negotiate treaties between themselves? Secondly, are member states to any extent *obliged* to use the EU institutions in such treaties? Either rule might be derived from Article 4(3) TEU,[175] which obliges member states' treaties to refrain not only from impeding the implementation of substantive EU law,[176] but also from impeding the functioning of the EU institutions.[177]

On the first point, a specific aspect of this issue should be addressed separately: can member states 'borrow' the individuals who serve on EU institutions, and require them to serve on competing bodies established by member states' treaties? This prospect might attract considerable interest in the context of partial agreements, where it could serve as a simple means of using the institutional expertise of the persons concerned, while preventing persons elected in or appointed by non-participating member states from having a role in the competing institutions.[178]

The Court of Justice has ruled on this issue in the context of 'borrowing' its judges, concluding that the inclusion of judges from the Court on other courts with overlapping jurisdiction could risk a conflict with their role as judges of the Court of Justice and raise doubts about their independence.[179] By analogy, Commissioners or members of the ECB's organs could also face conflicts of interests and threats to their independence if they were 'borrowed' by competing institutions and MEPs are subject to specific rules on incompatibilities with other positions.[180] But there should not be any such problems for members of the Council and the European Council – who are first and foremost national politicians, serving as members of an EU institution only as an adjunct to their national rule and not subject to an obligation to act independently or a specific requirement to serve the EU's interests.[181] Applying these principles, the formal creation of the 'Euro

[175] *See* Art. 2(1) of the stability treaty, which expressly refers to conformity with Art. 4(3) TEU; the reference to Art. 4(3) in the preamble to the patent court treaty; and the discussion of Art. 4(3) in *Pringle* (*supra* n. 9), paras. 148-152.

[176] For a detailed discussion, *see* Peers, *The Unravelling of EU Law* (*supra* n. 1).

[177] *Hurd* v. *Jones* (*supra* n. 87), paras. 38 and 39. *See* subsequently Case C-6/89 *Commission* v. *Belgium* (*idem*) and earlier Case 208/80 *Lord Bruce of Donington* [1981] *ECR* 2205.

[178] See generally Piris, *supra* n. 17.

[179] *Opinion 1/76* [1977] *ECR* 741, para. 22, and *Opinion 1/91* (*supra* n. 141), paras. 47-53.

[180] Art. 6 of the Decision on electoral procedures (*OJ* [1976] L 278/1), as amended in 2002 (*OJ* [2002] L 283/1).

[181] While all EU institutions are subject to the general obligation to serve the EU's interests, et al pursuant to Art. 13(1) TEU, the Commission has additional obligations pursuant to Art. 17(1)

summit', borrowing many of the features and some of the individuals (including the President) of the European Council is unproblematic.[182]

On the other hand, are there any limits on the creation of competing institutions that do not otherwise borrow individuals from EU institutions? It would breach Article 344 TFEU to give another court the jurisdiction to rule on disputes between member states as regards EU law,[183] and any international court replacing national courts would be subject to the EU judicial system, including (*inter alia*) Article 267 TFEU, as regards its relations with the Court of Justice.[184] Otherwise, the Court's case-law has not yet indicated that there are any further specific constraints upon the creation of competing institutions, beyond the general obligation not to impede the functioning of the EU's institutions. Surely, however, if an agreement among (some or all) member states established an ambitious European integration process that both covered a broad swathe of the subject-matter of the treaties and created competing institutions, this would represent such an existential threat to the viability of the EU that it would necessarily constitute a breach of Article 4(3) TEU.[185]

On the second point – the possible existence of an obligation to use the EU institutions in member states' treaties – it is arguable that at least in some cases the substantive link between member states' treaties and EU law is so strong that it would be hard to ensure consistency between the two unless the EU institutions had a role in those treaties. The recent financial assistance treaties and the stability treaties are obvious examples.[186] Similarly, the treaties refer to an obligation to coordinate EU and national humanitarian aid and development policies, and give an express role to the EU institutions in that regard.[187] In another field, the breach of EU free movement law pursuant to the Schengen Convention might have been avoided if the EU institutions had a larger role in that Convention from the outset.[188] To the extent that a treaty among member states is the only way or the best way to support a policy of the European Union, Article 4(3) might even entail an

TEU and must remain independent pursuant to Art. 17(3), while members of the Council and European Council are accountable to national parliaments and electorates (Art. 10(2) TEU).

[182] See Art. 12 of that treaty, discussed in Peers (*supra* n. 2), p. 430-444.

[183] *Opinion 1/91* (*supra* n. 141), para 35.

[184] See generally *Opinion 1/09* (*supra* n. 6). In *Opinion 1/76* (*supra* n. 179), paras. 17-22, the Court appeared to regard the possible creation of an international court with parallel jurisdiction over references from national courts with equanimity, but in light of the ruling in *Opinion 1/09* this precedent is now doubtful.

[185] For the opposing view, *see* Piris, *supra* n. 17, chapter 6.

[186] Indeed, the Advocate-General's view in *Pringle* (*supra* n. 9), states (at para. 199) that the use of the Commission and the ECB in the ESM Treaty is 'evidence' that Art. 4(3) TEU has *not* been breached.

[187] *See* Arts. 208(1), 210 and 214(1) and (6) TFEU.

[188] *See* Case C-503/03 *Commission* v. *Spain* [2006] *ECR* I-1097.

obligation to enter into such agreements in the first place.[189] Finally, as noted already, the use of the Court of Justice is certainly mandatory to the extent that a treaty creates an international court which replaces national courts.[190]

Conclusions

The use of EU institutions in partial agreements has recently become so prevalent, so controversial and so important in practice that the next amendment to the treaties – if there is one in the near future – should address this issue explicitly. It will likely be impossible, however, to separate this issue from broader and more fundamental questions about the development of differentiated integration within the EU legal order. Certainly the key issues of the consent of all member states, the role of the Court of Justice, the scope of and the limits of the use of the institutions should be addressed. Since, under certain conditions, intergovernmentalism can actually bolster supranational integration, rather than frustrate it, partial agreements using the EU institutions could play an increasingly important role in the EU legal framework – to the extent that they might rightly be considered a new form of EU law.

[189] The requirement to negotiate such treaties set out in the previous Art. 293 EC can be seen as a particular example of this obligation. Acts of member states related directly to the functioning of the EU institutions (*see*, for instance, Art. 253 TFEU) are another example.

[190] *See* text at *supra* n. 184.

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