European Foundation: No backsliding at EU summit

Ahead of the informal meeting of members of the European Council in Brussels on Monday 30 January, the following issues must be addressed in relation to the crisis in the Eurozone, the proposed Treaty on Stability, Coordination and Governance in the Economic and Monetary Union [1] and the impending economic, political and constitutional dangers it poses to the United Kingdom:

1. The opt-out from the euro has not excluded Britain from the current damaging process, which has resulted from the creation of a common monetary policy. It is now crystal clear that all measures to prevent the current debt crisis have failed, including the creation of the EFSF and the ESM. Moreover, what the eurozone has been trying to prevent – the restructuring of Greek debt – is now unavoidable. However, Brussels refuses to accept the failure of the eurozone. In fact, they now want to move towards a fiscal and political union in order to save it.

2. Last December, the eurozone leaders aimed at overcoming the current crisis by agreeing a so-called “fiscal compact”. However, it has not been enough to calm the financial markets and the eurozone crisis will grow worse. The reality is that the markets are already demonstrating that there is almost no chance of the euro being saved. Consequently, the so-called Treaty on Stability, Coordination and Governance in the Economic and Monetary Union will do nothing to resolve the present debt crisis.

3. The European project is completely misconceived, and it is failing. The eurozone crisis will ultimately lead to collapse. The answer is not “more Europe”. The so-called “fiscal compact” is the beginning of the end of budgetary sovereignty for eurozone member states. They will further surrender their national sovereignty, which is a recipe for failure. Brussels’ strategy does not solve any problem. The eurozone, particularly Greece, Portugal, Italy, Spain, face a long period of stagnation, more debt, more recession, high unemployment, and painful structural reform. The costs of those member states’ exit of the eurozone would be temporary whereas the costs of keeping the euro would be unbearable.

4. With 50% of our trading with the European Union as a whole, we are trading with a bankrupt, low-growth Europe – the only exception being Germany. The United Kingdom’s trade deficit with the rest of the European Union increased by £40 billion in the last year alone, and would be even worse with fiscal union in the eurozone.

5. At last December’s European Council David Cameron took the historic decision to veto changes to the EU Treaties, on the grounds that the deal was not in Britain’s interests. David Cameron, by vetoing the treaty amendment, has created a situation where there is no going back. The status quo is no longer sustainable. The real problems are contained in the existing treaties themselves, which need to be fundamentally changed, along with our relationship with the European Union. It is time for David Cameron to define the terms of a fundamental renegotiation in the relationship between the UK and the EU. We have to start trading vigorously and independently with the

[1] This analysis looks at all drafts of the treaty, up to and including the fourth treaty. The fifth treaty is due to be released shortly.

rest of the world and we must re-gear our relationships as a matter of fundamental foreign policy and economic policy.

6. The European Council's legal service has moved at great speed to put into legal form the political commitments of the eurozone member states agreed on 9 December 2011. The first draft of an international agreement on a reinforced Economic Union circulated for the first time on 16 December. The negotiations on the draft agreement began last month between representatives of all member states including Britain –which has an observer status – three MEPs and the European Commission. There have been already four draft texts since the start of the negotiations, and the initial international agreement on a reinforced economic union is now entitled Treaty on stability, coordination and governance in the Economic and Monetary Union.

7. The fourth draft was presented to the EU finance ministers on 23 January. There is a general consensus on the principles and main elements of the draft treaty but the financial ministers could not overcome all the controversial issues. There is no agreement yet on the final wording of the draft Treaty on Stability, Coordination and Governance in the Economic and Monetary Union and a fifth draft is likely to be in circulation soon. According to *Europolitics,* "the EU's finance ministers have said they are close to a deal on a fiscal treaty to tighten fiscal discipline in the eurozone, and are expected to redraft the latest version before it is sent for sign-off to heads of state at a 30 January summit".

8. The EU leaders are expected to reach a final agreement on the text at an informal European Council meeting on 30 January, so the draft Treaty on Stability, Coordination and Governance in the Economic and Monetary Union can be formally signed at the beginning of March, and each signatory country can ratify it by the end of 2012.

9. The Treaty on stability, coordination and governance in the Economic and Monetary Union entails further EU integration although it is an intergovernmental agreement. It is well known that under Article 48 TEU any amendments to the Treaties must be agreed unanimously and ratified by all Member States. It is important to note that the eurozone member states can negotiate a treaty regarding an area outside the EU's exclusive competence but they cannot breach EU law. Further powers over Member States' budgets cannot be conferred beyond that which is foreseen in the Treaty for the EU institutions. In fact, any intergovernmental agreement changing the rules concerning the powers of the EU institutions requires the agreement of all Member States.

10. It has been said that the new rules enshrined in the draft treaty do not contradict the EU's existing rules. Article 2 has subjected the draft treaty to EU law. Under Article 2 (1) of the draft treaty, the contracting parties are required to "applied and interpreted" this treaty "in conformity with the Treaties on which the European Union is founded, in particular Article 4(3) of the Treaty on European Union (principle of sincere cooperation), and with European Union law, including procedural law whenever the adoption of secondary legislation is required." Furthermore, Article 2 (2) of the draft treaty reads, "The provisions of this Treaty shall apply insofar as they are compatible with the Treaties on which the Union is founded and with European Union law. They shall not encroach upon the competences of the

Union to act in the area of the economic union. (…)" Nevertheless, this does not mean that some provisions of the draft treaty are not inconsistent with the EU treaties. However, the drafters of the treaty are not particularly concerned with its legality – the main aim is to save the euro. Therefore, they turn a blind eye to potential breaches of the EU Treaties.

11. The first draft text also reads "In accordance with the case law of the Court of Justice of the European Union, EU law has precedence over the provisions of this treaty". However, this sentence has disappeared from the latest draft. Nevertheless, the ECJ has confirmed the principle of primacy of EU law over international agreements. This intergovernmental treaty is not part of the Community legal order, therefore, it is not legally binding on the European Court of Justice and the other institutions. It is not enforceable because the European Court of Justice has no competence to rule on the compliance of the agreement, but it has competence to consider any potential conflict with the EU treaties. If there is a conflict between the EU treaties and this intergovernmental treaty obviously the EU Treaties would take precedence. Patrick Sensburg, German MP, said to *Euractiv* "Everything is fine as long as the signing parties keep their promises. But if a signing party decides that it does not accept the new stability criteria anymore, you could not accuse it of violating EU law."

12. According to the preamble to the draft treaty, the European Commission will review and monitor the budgetary commitments proposed in this treaty acting "within the framework of its powers as provided by the Treaty on the functioning of the European Union, in particular Articles 121, 126 and 136 thereof". It is important to recall that, last December, Herman Van Rompuy told MEPs that moving forward with an intergovernmental agreement "has some handicaps" but, he said "we will try to overcome them, and I think we will need a large interpretation of the role of institutions and others, as we did it in the past." The text of the treaty has been drafted in order to give the idea that the EU institutions would only be involved in actions and procedures that they already have under the EU treaties, that they would only act within the framework of the EU Treaties, particularly Articles 121, 126 and 136 TFEU. However, the EU institutions would be used in new procedures and would exercise new powers created by the draft treaty. They are pushing for the involvement of the EU's institutions in the operation of the new fiscal compact. Unsurprisingly, Brussels is up to its usual legal tricks.

13. As it is intergovernmental, this treaty must be formed outside the EU's existing Treaties and under the general rules of public international law. It cannot, therefore, be part of EU law. However, the eurozone leaders stressed the "objective remains to incorporate these provisions into the treaties of the Union as soon as possible", so it can become part of the Community legal order. The objective of having the arrangement stitched up into the new treaty has already been set.

14. It is important to recall that the Prüm Convention has already set an alarming precedent as a group of Member States have reached an agreement between themselves, which was subsequently incorporated in the EU framework. The 2005 Prüm Convention was signed among seven member states outside the legal framework of the EU, but it was foreseen "Within three years at most following entry into force of this Convention, on the basis of an assessment of experience of its implementation, an initiative shall be submitted, (…), with the aim of incorporating the provisions of this Convention into the legal framework

of the European Union." Then, in 2007, the Council Decision on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime, incorporated in the framework of the EU the main provisions of the Prüm Treaty. Nevertheless, it is important to note that neither Schengen and Prum initially provided for the involvement of the EU institutions.

15. The preamble to the draft treaty includes a reference to the eurozone leaders and of other Member States of the EU to "incorporate the provisions of this Treaty as soon as possible into the Treaties on which the European Union is founded". However, at the European Parliament's request, the latest draft of the treaty includes a new provision, Article 16, stipulating "Within five years at most following the entry into force of this Treaty, on the basis of an assessment of the experience with its implementation, the necessary steps shall be taken, in compliance with the provisions of the Treaty on the European Union and the Treaty on the Functioning of the European Union, with the aim of incorporating the substance of this Treaty into the legal framework of the European Union." There is now a clear aim of incorporating this treaty into the EU legal framework within five years of its entry into force. This provision is very similar to the one included in the Prum Convention. There is no reference to incorporate the treaty into the EU treaties but into the EU legal framework, which would be done trough secondary legislation, as happened with the Prum Convention.

16. The UK cannot change its position by agreeing to the incorporation of the new treaty into the EU Treaties. The incorporation of this treaty into the EU treaties would, obviously, entail a treaty change, which, accordingly, requires the agreement of all member states, including the UK. However, the aim is to integrate some provisions of the draft treaty into the EU legal framework via secondary legislation. This would therefore mark an attempt to bypass the UK veto.

17. It has been said that much of what is proposed in the draft treaty could be done through to so-called six-pack and the Commission's proposals from last November. The draft regulations aimed at strengthening the powers of the Commission in surveillance of national budgets are based on Article 136 whereby the eurozone member states are allowed to "strengthen the co-ordination and surveillance of their budgetary discipline", subject to the ordinary legislative procedure, and QMV is required at the Council, but only eurozone Member states are allowed to vote. Jean-Paul Gauzès MEP said, "We should integrate as much of the international treaty elements as possible into these two new texts."

18. Although the negotiators are attempting to align as much as possible the draft treaty provisions with those provided in EU law, it seems that the contracting parties are accepting commitments which contradict their obligations under the Treaties.

19. Article 3 of the draft treaty provides that "The Contracting Parties shall apply the following rules, in addition to and without prejudice to the obligations derived from Union Law". However, the balanced budget rule goes beyond what is provided under the EU Treaties.

20. The draft treaty provides, in Article 3 (1), that "The budgetary position of the general government shall be balanced or in surplus." Such a rule "shall be deemed to be respected if the annual structural balance of the general

government is at its country-specific medium-term objective as defined in the revised Stability and Growth Pact with the annual structural deficit not exceeding 0.5% of the gross domestic product at market prices." The expression used on the first draft "structural deficit" has now been replaced by "structural balance". The structural deficit target of 0.5% of GDP in the draft treaty is more stringent than the 1% deficit rule foreseen in the existing EU legislation. The obligation of national governments to cut deficits to 0.5% of GDP is not provided in EU law and is likely to be an issue for several member states.

21. The eurozone leaders decided last December that the so-called golden rule would also include an automatic correction mechanism that shall be triggered in the event of deviation and would be defined by each Member State, but "on the basis of principles proposed by the Commission." The eurozone leaders also referred to a convergence calendar proposed by the European Commission. But, this has not been included in the first drafts.

22. Under the latest draft "The Contracting Parties shall ensure rapid convergence towards their respective medium-term objective." Furthermore, Article 3 (1) (b) states "The time frame for such convergence will be proposed by the Commission taking into consideration country-specific sustainability risks." One could say that this provision breaches EU law because it is conferring specific new tasks to the European Commission. The Commission, under the latest draft, has the power to set up deadlines for budgetary convergence.

23. Under Article 3 (1) (e) "In the event of significant observed deviations from the medium-term objective or the adjustment path towards it, a correction mechanism shall be triggered automatically." Also, under Article 3 (2) the contracting parties would have to "put in place a correction mechanism to be triggered automatically in the event of significant deviations from the reference value or the adjustment path towards it" which would be defined at national level, "on the basis of common principles to be proposed by the European Commission". It is important to note that the balanced budget rule is not provided for in the EU treaties. The contracting parties, under such a provision, are making use of the European Commission for purposes not provided in the EU Treaties, which breaches EU law.

24. Under the first draft, the contracting parties would have been obliged to enshrine the so-called golden rule in their constitutions, but the latest draft has watered down this requirement. Several countries, including Denmark, Ireland and Finland have indicated that they would have to hold referendums in order to change their constitutions to include the so-called golden rule on balanced budgets. Consequently, under the latest draft, although it is recommended, it is no longer a requirement that this rule on balanced budgets be introduced into the constitutions of the contracting parties. Article 3 (2) now reads "The rules mentioned under paragraph 1 shall take effect in the national law of the Contracting Parties within one year of the entry into force of this Treaty through provisions of binding force and permanent character, preferably constitutional, or otherwise guaranteed to be respected throughout the national budgetary processes."

25. Under Article 5 of the first draft of the intergovernmental agreement, those contracting parties that are subject to an excessive deficit procedure, under the EU Treaties, would have to submit to the European Commission and the

Council "a budgetary and economic partnership programme with binding value including a detailed description of the structural reforms necessary to ensure an effectively durable correction of their excessive deficits." The Eurozone leaders agreed on such a provision at the European Council in December 2011. However, the Eurozone leaders' statement provided that the Commission and the Council would endorse and monitor the implementation of such programme, and "the yearly budgetary plans consistent with it", but this reference was not included in the first draft. There was an initial concern to not expressly confer specific tasks on the EU institutions. However, the latest draft provides "The content and format of these programmes shall be defined in the law of the Union. Their submission to the European Commission and the Council for endorsement and their monitoring will take place within the context of the existing surveillance procedures of the Stability and Growth Pact." The drafters of the treaty are seeking to align this provision with the EU so the involvement of the EU institutions relates to activities and procedures that they already pursue under the EU Treaties. It seems that existing EU law would apply to the endorsement and monitoring of the so-called budgetary and economic partnership programmes. Nevertheless, it remains to be seen what the term "endorsement" included in the draft treaty would entail.

26. Furthermore, Article 5 (2) reads "The implementation of the programme, and the yearly budgetary plans consistent with it, will be monitored by the Commission and by the Council." This provision makes no reference to EU legislation providing for such a role of the European Commission and the Council. In fact, this provision confers a new role upon these EU institutions, breaching EU law.

27. Nevertheless, last November, the European Commission put forward a proposal for a regulation on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member states in the euro area which provides for similar rules. Under this proposal, eurozone member states would be required to submit annually to the Commission and the Eurogroup their draft budgetary plans for the forthcoming year for monitoring purposes before the plans being submitted to national parliaments. If the Commission believes that a member state is not complying with the Stability and Growth Pact's budgetary policy obligations, it would be empowered under the draft proposal to request a revised draft budgetary plan from the Member State concerned. The Commission may request an alternative draft budgetary plan if it identifies particularly serious non-compliance with the obligations laid down in the Stability and Growth Pact. The proposal does not give the Commission the power to veto draft budgets – the treaties would have to be amended to confer such power upon the Commission. However, it is not clear that the Commission has legitimacy to intervene in member states' matters in this way.

28. Under the first draft, the contracting parties would have to "improve the reporting of their national debt issuance" namely, "they shall report ex-ante on their national debt issuance plans to the European Commission and the Council." This provision has been amended at Italy's request, and it now reads "With a view to better coordinating the planning of their national debt issuance, the Contracting Parties shall report ex-ante on their public debt issuance plans to the European Commission and to the Council." It is important to stress that the international agreement cannot bind the EU institutions so it remains to be seen what the Commission and the Council will

be required to do with the information. This provision would confer a new role on the EU institutions. Nevertheless, the European Commission is already planning to put forward legislative proposals within the EU Treaties framework, regarding a mechanism of ex ante reporting of debt issuance plans of the EU Member States.

29. According to the Eurozone statement from last December, as soon as the Commission deems that a Member State is in breach of the 3% ceiling, there will be automatic consequences unless euro area Member States, acting by qualified majority, are opposed. Under the so-called six-pack on economic governance, approved by all 27 Member States and the European Parliament in October, which entered into force on 13 December, the Commission first warning to the member state which failed to respect the Stability and Growth pact principles (preventive arm of the Stability and Growth Pact) has to be adopted by a qualified majority of eurozone member states. If a member state deviates from the adjustment path toward its medium term budgetary objective, on the basis of a Commission's recommendation, the Council will decide by qualified majority voting, on non-compliance by a member state. However, if the Council does not take this decision, and if the noncompliance continues, after one month the Commission can recommend, again, to the Council to decide on non-compliance, but this time such decision is taken by reverse qualify majority. Hence, it is considered adopted by the Council if not rejected by qualified majority. Under the corrective arm of the pact (excessive deficit procedure), the Commission's proposal for imposing sanctions related to non-compliance with the SGP will be deemed adopted by the Council unless it decides, by qualified majority, to reject the proposal. The 'six-pack' already provides for a 'reverse qualified majority voting' in the Council although there is no legal basis on the EU Treaties.

30. Under the latest draft of the treaty, the eurozone's contracting parties "commit to support the proposals or recommendations submitted by the European Commission where it considers that a Member State of the European Union whose currency is the euro is in breach of the deficit criterion in the framework of an excessive deficit procedure." They used stronger wording on the latest draft, as under the first draft the word used was "undertake", suggesting therefore a clear and binding commitment.

31. Furthermore, Article 7 reads "This obligation shall not apply where it is established among the Contracting Parties whose currency is the euro that a qualified majority of them, calculated by analogy with the relevant provisions of the European Union Treaties without taking into account the position of the Contracting Party concerned, is opposed to the decision proposed or recommended."

32. Under the draft treaty, reverse qualified majority voting would be extended to all Excessive Deficit Procedure, "including the preventive arm." As noted by President Barroso, it "will add to the Six-Pack automaticity". This provision goes beyond what is provided under the EU Treaties. One could say that the provision would affect the role of the Council as well as conflicts with the Treaty, as a qualified majority is presently required to support sanctions but not a qualified majority to stop them. Within the eurozone, France and Germany have a 'blocking minority'. Therefore, at the end of the day, the Commission's proposals would always be adopted if they have the backing of France and Germany.

33. The main issue, during the negotiations, has been whether the contracting parties are allowed to use the EU institutions to implement, monitor and enforce compliance with the draft treaty's rules. The ECJ has made clear that an international agreement cannot affect the allocation of responsibilities defined in the Treaties and, consequently, the autonomy of the Community legal order. The EU institutions legally cannot have a formal role in any agreement outside the EU treaties. The EU institutions were created by the EU treaties, which conferred upon them powers and duties. The role of the EU institutions is not only defined by the European Treaties but is limited by those Treaties and it would be unlawful for an institution to operate beyond the powers granted to it by the Treaties. The Commission or the ECJ cannot enforce the draft Treaty on stability, coordination and governance in the Economic and Monetary Union, as it is not within their mandate. A group of Member States without unanimous approval of the other member states cannot confer any new powers to the EU institutions outside the EU legal framework.

34. One of the legal grounds for the use of the EU institutions outside the EU legal framework is based on a European Court of Justice ruling from 1993 on humanitarian aid to Bangladesh. In Joined Cases C-181/91 and C-248/91 the ECJ ruled that the Member States might exercise their competence "collectively" outside the Council. The ECJ has held that Article 211 TFEU 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. The Court of Justice has therefore ruled that Member States can act collectively outside the framework of the EU Treaties and that they can confer powers upon the EU institutions. However, these cases involve "collective action" – there was, therefore, a unanimous decision of all member states in this regard. Therefore, a group of member states cannot confer any role or further powers to the EU institutions through an intergovernmental treaty outside of the EU framework without the approval of all EU member states.

35. EU Officials said that the Treaty establishing the European Stability Mechanism (ESM) employs the European Commission and the European Central Bank to monitor the memoranda of understanding. Therefore, the same logic for using EU institutions for this intergovernmental agreement would be the same as applied to the ESM treaty. It is important to note that in this case there was an agreement among all EU member states to involve the EU institutions. The Treaty establishing the European Stability Mechanism reads "On 20 June 2011, the representatives of the Governments of the Member States of the European Union authorised the Contracting Parties of this Treaty to request the European Commission and the European Central Bank ("ECB") to perform the tasks provided for in this Treaty." Hence, British consent is required for the use of the EU institutions.

36. The draft treaty has been cautiously drafted so as to involve the EU institutions only in procedures and activities they already have under the EU Treaties. Nevertheless, there are provisions in the draft text, which confer new powers for the EU institutions. Consequently, those provisions breach EU law.

37. Article 8 of the draft treaty, by conferring jurisdiction upon the Commission and the ECJ as regards the obligation of the contracting parties to comply with Article 3(2) of the draft treaty to enshrine commitment to the balanced

budget into national law, involves the use of the EU institutions in a way that breaches the EU Treaties.

38. According to the Preamble to the draft treaty “the obligation to transpose the “Balanced Budget Rule” into national legal systems through biding and permanent provisions, preferably constitutional, should be subject to the jurisdiction of the Court of Justice of the European Union, in accordance with Article 273 of the Treaty on the Function of the European Union.” Under Article 273 TFEU Member States are allowed to give powers to the ECJ to settle a dispute between them in a special agreement relating to the subject-matter of the EU Treaties. However, the negotiators are allowing for an extensive interpretation of this provision.

39. Under Article 8 of the first draft of the agreement “Any Contracting Party which considers that another Contracting Party has failed to comply with Article 3(2) may bring the matter before the Court of Justice of the European Union.” The Court would have competence to verify whether the contracting parties have put in place provisions complying with Article 3(2), whether they are biding and if there is a ‘correction mechanism”. It is important to note that the European Court of Justice, without amending the treaties, cannot strike down national laws that conflict with such a rule. Under the first draft, contracting parties, but not the Commission, could take each other to the ECJ if they believe that they have not transposed the balanced budget rule into national law. The second draft has changed this provision, providing “The European Commission may, on behalf of Contracting Parties, bring an action for an alleged infringement of Title III before the Court of Justice of the European Union.” An EU diplomat told the *EUObserver* “The legal trick to get around the issue could be mandating the commission to act “on behalf” of member states”. It is important to note that Article 273 TFEU does not foresee other forms of jurisdiction of the Court, namely infringement procedures brought by the Commission. Furthermore, under the second draft, the ECJ’s jurisdiction would have been extended to other provisions of the draft treaty. In this way, they would have conferred on the ECJ the power to rule on excessive deficit breaches, which would conflict with Article 126 (10) TFEU. This provision specifically excludes the launch of infringement procedures against member states that fail to comply with decisions taken under the excessive deficit procedure. Hence, the EU Treaties provide that the Court of Justice has no jurisdiction over the excessive deficit procedure.

40. The third draft of the treaty has reduced the role of the Court of Justice but nevertheless it has still conferred significant powers upon the European Commission. The ECJ’s role is the same as foreseen in the first draft. Under the third draft, Article 8 read “Any Contracting Party which considers that another Contracting Party has failed to comply with Article 3(2) may bring the matter before the Court of Justice of the European Union or invite the European Commission to issue a report on the matter.” The text provided that the Commission might be invited by any contracting party that considers that another party has failed to comply with Article 3 (2) to issue a report on the matter. In this case, “if the European Commission, after having given the Contracting Party concerned the opportunity to submit its observations, confirms non compliance in its report, the matter will be brought to the Court of Justice by the Contracting Parties.” This is another legal trick to overcome the EU treaties and provide the European Commission with a role on this matter – on whether to take contracting parties to the ECJ.

41. The latest draft has conferred even more powers on the European Commission. The referral to the ECJ is no longer reserved to the contracting parties as foreseen in the first draft, but it has been indirectly extended to the Commission. Under Article 8 (1) of the latest draft "The European Commission is invited to present in due time to the Contracting Parties a report on the provisions adopted by each of them in compliance with Article 3(2). If the European Commission, after having given the Contracting Party concerned the opportunity to submit its observations, concludes in its report that a Contracting Party has failed to comply with Article 3(2), the matter will be brought to the Court of Justice of the European Union by one or more of the Contracting Parties." Moreover, "(…) where a Contracting Party considers, independently of the Commission's report, that another Contracting Party has failed to comply with Article 3 (2), it may also bring the matter to the Court of Justice."

42. This provision is similar to Article 259 TFEU whereby "A Member State which considers that another Member State has failed to fulfil an obligation under the Treaties may bring the matter before the Court of Justice of the European Union", but "(…) it shall bring the matter before the Commission" which "shall deliver a reasoned opinion." Furthermore, under this provision Member States are not prevented from bringing the matter before the Court "if the Commission has not delivered an opinion within three months".

43. The Commission no longer needs to be invited by contracting parties but is authorized, under the latest draft, to issue a report on the provisions adopted by each contracting party in compliance with Article 3(2). The European Commission would be allowed to assess whether the contracting parties have properly implemented the golden rule. The Commission would be empowered to ask a country that has incorrectly incorporated such a rule into its national law to give an explanation, and then if the Commission is not satisfied, the other contracting parties are then obliged to refer the case to the ECJ.

44. The Commission cannot take the contracting parties to the ECJ if they don't comply with Article 3 (2) of the draft treaty. This would conflict with the infringement procedures provided for in the TFEU. It is important to note that Article 273 TFEU does not foresee other forms of jurisdiction of the Court, namely infringement procedures brought by the Commission. Under Article 273 the ECJ has jurisdiction to settle disputes between member states, but no role is foreseen for the European Commission. The draft treaty does not allow the European Commission to directly take contracting parties to the ECJ as this would be a clear breach of the EU treaties, but it still plays a considerable role. This is another legal trick. The European Commission would be allowed to decide whether a country should be taken to the ECJ. Such provision goes far beyond the terms allowed under Article 273 TFEU. The provision on the draft treaty confers upon the Commission a new role that is not foreseen in the EU Treaties, particularly in article 273 TFEU, and conflicts with Article 259 TFEU.

45. Article 8 (1) of the draft treaty, confers substantial additional powers upon the Commission, which would be allowed to participate in proceedings that go beyond those which already exist under the EU Treaties. In this way the contracting parties would be allowed to make use of the Commission for purposes, which are outside the scope of EU treaties, breaching, therefore, EU law.

46. The draft text also reads, “The judgment of the Court of Justice of the European Union shall be binding on the parties in the procedure, which shall take the necessary measures to comply with the judgment within a period to be decided by said Court.” This is not provided in Article 273, but the Court’s jurisprudence makes clear that its rulings must always be binding. Under Article 260 “If the Court of Justice of the European Union finds that a Member State has failed to fulfil an obligation under the Treaties, the State shall be required to take the necessary measures to comply with the judgment of the Court.” Hence, if a member state does not comply with a judgment of the Court, the Commission may bring the case before the Court. If the Court finds that the Member State concerned has not complied with its judgment it may impose a lump sum or penalty payment on it.

47. The draft treaty provision is similar to Article 260 TFEU whereby the member states are required to comply with the ECJ judgments but if a Member State fails to comply with an ECJ’s ruling pursuant to Article 8 of the draft treaty, the Commission cannot bring the matter before the Court and ask for fines to be imposed as foreseen in Article 260 (2) TFEU. The ECJ cannot fine countries if they do not comply with such judgments, as foreseen in the EU Treaties. However, according to the preamble to the draft treaty “Article 260 of the Treaty on the Functioning of the European Union empowers the Court of Justice of the European Union to impose the payment of a lump sum or penalty on a Member State of the European Union having failed to comply with one of its judgments.” Article 8 (2) has been substantial changed in the latest draft, it now provides “If, on the basis of its own assessment or of an assessment by the European Commission, a Contracting Party considers that another Contracting Party has not taken the necessary measures to comply with the judgment of the Court of Justice referred to in paragraph 1, it may bring the case before the Court of Justice.” This is another legal trick, as under Article 273 TFEU the European Commission cannot seek to impose upon contracting party penalties in accordance with Article 260 TFEU.

48. Moreover, under Article 8 (2), “If the Court finds that the Contracting Party concerned has not complied with its judgment, it may impose on it a lump sum or a penalty payment appropriate in the circumstances and that shall not exceed 0,1 % of its gross domestic product.” The draft treaty confers, therefore, on the ECJ the power to impose fines on countries, which have failed to implement the so-called balanced budget rule into national law, prohibiting a structural deficit of more than 0.5 percent of GDP. Under the draft treaty the penalty must not be higher than 0.1% of a country’s GDP. Moreover, article 8 provides “The amounts imposed shall be payable to the European Stability Mechanism.” At Germany request the ESM would be the recipient of any fines imposed by the EU court on countries, which fail to comply with Article 3 (2).

49. There are very controversial issues at stake. According to the *EUObserver*, Danish Economy Minister, Margrethe Vestager said, “This is a proposal on which there is no consensus yet. From a strictly Danish point of view, it’s hard to see your fines going to the ESM, which is a eurozone fine-box.” On 23 January, the EU finance ministers discussed the role of the ECJ in imposing penalties on countries for failing to implement certain terms of the draft treaty. According to the Eurogroup President, Jean-Claude Juncker, “All of us agree that the Court should be able to impose sanctions and we’ve asked the legal

services of the Council and Commission to look for an approach where an uncontroversial legal basis could be given to this provision".

50. The first draft text also provided that "The implementation of the rules put in place by the Contracting Parties to comply with Article 3(2) will be subject to the review of the national Courts of the Contracting Parties." However, this provision has disappeared from the latest draft. It appears to be an attempt to confer more powers upon the ECJ.

51. There is also a new paragraph in Article 8, which provides "This Article constitutes a special agreement between the Contracting Parties within the meaning of Article 273 of the Treaty on the Functioning of the European Union". This provision deceitfully gives the idea that the use of the ECJ and the European Commission by the contracting parties is legal under the EU treaties, in order to avoid any objections from the UK on the use of the Court. Article 8 of the draft treaty is not compatible with the EU Treaties. The European Commission and European Court of Justice cannot enforce the draft treaty provisions. The Court of Justice has allowed Member States to use the EU institutions in procedures established outside the framework of the Treaties. All EU Member States must agree on the use of the EU institutions outside the framework of the EU Treaties. Under the present draft treaty, the EU institutions would be exercising functions beyond those given to them under the EU Treaties, which breaches EU law.

52. David Cameron must put his foot down because EU institutions cannot be used to enforce the intergovernmental treaty, outside the EU legal framework, without the agreement of all EU member states. David Cameron must retain his pledge to do "everything possible" to stop the contracting parties of a new treaty from using the European Commission and the European Court of Justice, for purposes outside the EU framework.

53. David Cameron may challenge the legality of the contracting parties to this treaty for using EU institutions and their staff and buildings. However, on 6 January, David Cameron told BBC's *Today* programme "There are legal difficulties over this. One of the problems is that the European Court of Justice, we all think it is great independent arbiter, but the European Court of Justice tends to come down on the side of whatever more Europe involves."

54. The Contracting Parties also "undertake to work jointly towards an economic policy fostering growth through enhanced convergence and competitiveness and improving the functioning of the Economic and Monetary Union." In order to achieve this objective, they agreed, according to Article 9 of the draft treaty, to "take the necessary actions and measures in all the domains which are essential to the good functioning of the euro area, as mentioned in the Euro Plus Pact." In the latest draft, the reference to the Euro Plus Pact has been removed and it is now provided "the Contracting Parties shall take the necessary actions and measures in all the domains which are essential to the good functioning of the euro area in pursuit of the objectives of fostering competitiveness, promoting employment, contributing further to the sustainability of public finances and reinforcing financial stability." It has been a controversial issue whether to include an explicit reference to the Euro plus pact on closer eurozone coordination on tax, labour and economic policies, as it would entail an obligation to implement the Euro Plus Pact, which is currently not binding.

55. It is well known that Germany and France want to have a say on how the other Member States run their economies. It is important to mention that Sarkozy and Merkel in a letter from December 2011 informing Van Rompuy of their proposals to move towards a fiscal union and overcome the euro crisis, said, “We need to foster growth through greater competitiveness as well as greater convergence of economic policies at least amongst Euro Area Member States.” They believe that “a new common legal framework” based “on Article 136 and/or on enhanced cooperation” should be created “to allowing for faster progress in specific areas such as: Financial regulation; Labor markets; Convergence and harmonisation of corporate tax base and creation of a financial transaction tax; Growth supporting policies and more efficient use of European funds in the euro area.” In fact, David Cameron mentioned that Angela Merkel and Nicolas Sarkozy´s letter shows that “they specifically wanted the 17 to look at issues such as financial services and the market within that treaty.” Unsurprisingly, at France’s request, the second draft text of the treaty included references to the internal market, Article 1 was therefore amended referring to “enhanced governance” that will “foster fiscal discipline and deeper integration in the internal market as well as stronger growth, enhanced competitiveness and social cohesion”. Obviously, such a provision has raised concerns in the UK because in this way, single market matters would be discussed among the contracting parties to the treaty, excluding the UK. Being considered an important concession to the UK, the third draft of the treaty has removed the reference to “deeper integration in the internal market” from that provision.

56. The Eurozone leaders also reached an agreement on making “more active use of enhanced cooperation on matters which are essential for the smooth functioning of the euro area, without undermining the internal market.” Hence, the draft treaty explicitly states that “the Contracting Parties undertake to make recourse, whenever appropriate and necessary, to measures specific to those Member States whose currency is the euro as provided for in Article 136 of the Treaty on the Functioning of the European Union and to the enhanced cooperation as provided for in Article 20 of the Treaty on European Union and in Articles 326 to 334 of the treaty on the Functioning of the European Union on matters that are essential for the smooth functioning of the euro area, without undermining the internal market.” They are referring to the possibility of using the general rules on enhanced cooperation within the current EU Treaties, to adopt EU measures that will apply solely to the member states that participate in this treaty.

57. It is important to note that not all measures can be decided by enhanced cooperation between Member States within the EU legal system. Under Article 20 TEU enhanced cooperation is reserved for areas of the “Union’s non exclusive competence.” Moreover, enhanced cooperation measures must be based on a Commission proposal, which is then blocked in the Council – the decision to enter into enhanced cooperation is therefore “a last resort.” Following a request by the Member States that wish to establish enhanced cooperation, the Commission may submit a proposal to the Council to that effect. The Council will grant authorisation to proceed with the enhanced cooperation by a qualified majority of all Member States in the Council and after obtaining the consent of the European Parliament. Under Article 326 TFEU “Any enhanced cooperation shall comply with the Treaties and Union law.” The use of enhanced cooperation must respect the EU Treaties, consequently, it is impossible to amend the EU’s primary law. Moreover, “Such cooperation shall not undermine the internal market or economic,

social and territorial cohesion. It shall not constitute a barrier to or discrimination in trade between Member States, nor shall it distort competition between them." Furthermore, enhanced cooperation shall be open to all Member States, consequently it cannot be addressed merely to eurozone States, or the contracting parties to this treaty. Under Articles 20 TEU and 329 and 331 TFEU, a minimum of nine participants is required and only willing Member States participate and any Member States can participate.

58. If these criteria are not complied with the use of enhanced cooperation could be challenged at the ECJ.

59. Under Article 11 of the draft treaty, with a view to "working towards a more closely coordinated economic policy", the contracting parties would ensure "that all major economic policy reforms that they plan to undertake will be discussed ex-ante and, where appropriate, coordinated among themselves." Moreover, it is provided that such coordination "shall involve the institutions of the European Union as required by European Union law." The Commission is planning to propose legislation on this matter, but no EU legislation has been adopted yet.

60. Last December, the Eurozone leaders reiterated that the "Euro area governance will be reinforced as agreed at the Euro Summit of 26 October", particularly by "regular Euro Summits (to) be held at least twice a year." The eurozone leaders also decided to create a new post "president of the Euro summit", who is now Herman Van Rompuy. Hence, under Article 12 (1) of the draft treaty, the eurozone Heads of State or Government and the President of the European Commission will meet informally in Euro Summit meetings. They also enshrined in the draft treaty the appointment of the President of the Euro Summit by the eurozone leaders by simple majority.

61. The Lisbon Treaty formally recognises the Eurogroup, it recognizes the European Council as an EU institution and provides for the post of president of the European Council but there is no reference in the Treaties of this new EU institution and the new post of president of the Euro summit. Hence, there is no legal basis. Consequently, if they want to formally institutionalise the Euro summits, the EU Treaties would have to be amended. One could wonder where the money for the budget to be allocated to eurozone summits would come from.

62. The draft text also provides that "Euro Summit meetings shall take place, when necessary, and at least twice a year, to discuss questions related to the specific responsibilities those Member States share with regard to the single currency, other issues concerning the governance of the euro area and the rules that apply to it, and in particular strategic orientations for the conduct of economic policies and for improved competitiveness and increased convergence in the euro area." As it has already been agreed at the October summit, the other member states would be merely informed by the President of the Euro Summit of the preparation and outcome of the Euro Summit meetings. Article 12 (5) provides "The President of the Euro Summit shall keep the Contracting Parties whose currency is not the euro and the other Member States of the European Union closely informed of the preparation and outcome of the Euro Summit meetings."

63. The Government will have no say but would be "informed" of measures, which might have a catastrophic impact on the British economy. David

Cameron was aware of the risk of fiscal union and economic government, hence he decided to use his veto. The eurozone leaders by having their own meetings, they would agree positions on financial and economic issues, which they would then impose on the other member states, if unanimity is not required. As William Hague said "We are, by preventing a new Treaty or amendments to the Treaties of the European Union, ensuring that the key decisions that affect us, such as to do with the single market, are still made by the 27 nations including us…" The eurozone member states can use their voting power at EU level to force through measures in detriment of the UK's national interest. By using his veto, the PM prevented the situation from getting worse but the status quo has not changed. The City of London would continue to be subject to further EU regulations. As noted by Bernard Jenkin "Even though the proposed monthly meetings of the EU17+6+3 will constitutionally be restricted to taking decisions solely with regard to euro matters, it is inevitable that they will take decisions that will affect UK interests. Britain will therefore be outside the tent when the problems of the Eurozone, inextricably interlinked with our financial services industry, will be discussed."

64. Poland has threatened not to sign the draft treaty unless it is allowed to take part in future eurozone summits. Under the latest draft, in an attempt to please Poland, Article 12 (6) provides "In order to discuss specific issues concerning the implementation of this Treaty, the President of the Euro Summit will invite, when appropriate and at least once a year, the Heads of State or Government of Contracting Parties whose currency is not the euro who have ratified this Treaty", but they shall "have declared their intention to be bound by some of its provisions in accordance with Article 14(5) to a meeting of the Euro Summit." Hence, non-euro countries will be solely invited if they have ratified the treaty as well as accept to be bound by some provisions of it, namely the so-called golden rule and provisions concerning "economic policy coordination and convergence." However, according to Euractiv, Polish Prime Minister Donald Tusk said "If Poland does not win an appropriate status of participant in the eurozone meetings, which would give us a feeling that we take part in the decision-making process ... we will find it difficult to sign the fiscal pact".

65. Although they say that non-eurozone countries would be invited to the eurozone summits "to discuss specific issues concerning the implementation of this Treaty", it would be like a European Council without the UK. This is another controversial issue, which still has to be further negotiated.

66. There is a new paragraph on the latest draft, which provides "The President of the European Parliament may be invited to be heard. The President of the Euro Summit shall present a report to the European Parliament after each of the meetings of the Euro Summit." This is has been clearly a request of the European Parliament.

67. The draft treaty would apply to the eurozone member states as well as other contracting parties, under specific conditions. The contracting parties, according to their constitutional requirements, through national parliaments or possibly some referendums, will ratify the agreement. Under the first draft, the agreement would have entered into force following the deposit of the ninth instrument of ratification by a eurozone contracting party. Consequently, it would still enter into force even if some countries national parliaments reject it or it is not approved in referenda. The second draft has increased the

threshold of countries necessary to ratify the agreement from nine to fifteen. However, amid concerns that some countries might face difficulties in passing the treaty through national parliaments or it might be subject to referenda, under the latest draft, the threshold has been reduced from fifteen to twelve. It also specifically provides that "This Treaty shall enter into force on 1 January 2013, provided that twelve Contracting Parties whose currency is the euro" have ratified it. This is likely to create even more divisions among eurozone countries. It remains to be seen what would happen if less than twelve eurozone states fail to ratify the treaty before 1 January 2013.

68. The number of countries required to ratify the treaty before it comes into force it is also a controversial issue, which still has to be further negotiated. It is still unclear how many countries will sign up to it. Obviously, the member states outside the eurozone are not willing to commit to a treaty without knowing the final legal text. According to Finnish foreign minister, Erkki Tuomioja, "The whole contract is at best unnecessary and at worst harmful, and Finland has reason to oppose the whole treaty and at least remain outside it." Moreover, he said that new treaty will "just confuse decision-makers, undermine the EU commission's role and create new divisions within the EU". Moreover, the draft treaty might be subject to referendum in Ireland, the Czech Republic and Romania.

69. The treaty would apply as from the day of coming into force amongst the eurozone contracting parties, which have ratified it. According to the draft text, the provisions related to the Euro summit meetings will apply to all eurozone-contracting parties from the date of the entry into force of the agreement. In order to address several non eurozone member states concerns and convince them to sign up, under the draft treaty non-eurozone contracting parties will be bound by it when they join the single currency, unless they decide to be bound at an earlier date, by all or part of the provisions in titles III (budgetary discipline) and IV (economic policy coordination and convergence) of the agreement. On the other hand, the eurozone member states might not be willing to accept a new member state that had not ratify this agreement.

70. Germany has been calling for a link between the European Stability Mechanism (ESM) and the new intergovernmental agreement to be included in the draft treaty. Hence, at Germany request the preamble to the latest text of the draft treaty provides that "the granting of assistance in the framework of new programmes under the European Stability Mechanism will be conditional, as of 1 March 2013, on the ratification of this Treaty by the Contracting Party concerned and, as soon as the transposition period mentioned in Article 3(2) has expired, on compliance with the requirements of this Article." Hence, in order to an eurozone member state to be granted assistance within the framework of the ESM it must ratify this treaty and comply and implement the so called golden rule provided in Article 3 (2) one year of entry into force of the intergovernmental treaty. The ESM, which is expected to come into force July 2012, would not be open to all eurozone countries but just those that have ratified this treaty. Obviously, not all states are willing to accept such a rule.

71. The latest draft of the treaty includes a new provision, Article 15, which states, "This Treaty shall be open to accession by Member States of the European Union other than the Contracting Parties upon application that any such Member State may file with the Depositary." Moreover, it reads "The Contracting Parties shall approve the application by common agreement". It

seems that this provision includes all states that initially signed up for this treaty but then have not become contracting parties. Such provision is particularly addressed to the UK, which has probably pleased Nick Clegg.

72. It remains to be seen what will be decided at the negotiations on the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union at the informal European Council on 30 January. David Cameron vetoed the EU treaty amendment to avoid having the Eurozone club pursuing its interests using the EU institutions. He said "the fact is that an organisation outside the EU treaties is not allowed to cut across those treaties or the legislation under those treaties." The use of the EU institutions by the draft treaty's contracting parties is the outcome of stretching the EU treaties. The UK may be entitled to bring a legal action before the ECJ against the other Member States or EU institutions if the draft treaty is purported to amend the exiting Treaties and confer new tasks and powers on the EU institutions.