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Commentary on the EU Permanent Austerity Treaty

After they had agreed the final wording of the intergovernmental agreement—the 'Treaty on Stability, Coordination and Governance in the Economic and Monetary Union"—the member-states of the euro area pronounced that the treaty "represents a major step towards closer and irrevocable fiscal and economic integration and stronger governance in the euro area," which they claimed "will significantly bolster the outlook for fiscal sustainability and euro area sovereign debt and enhance growth."

According to the German chancellor, Angela Merkel, the euro-zone member-states have set themselves on an "irreversible course towards a fiscal union." She told an international gathering at Davos: "We have to become used to the European Commission becoming more and more like a government."

The Government seems determined to push ahead in the next few months with the ratification of this treaty and its partner, the revised Treaty on the European Stability Mechanism (ESM).

The two treaties would make euro-zone member-states into regimes of economic austerity, involving deeper and deeper cuts in public expenditure, increases in indirect taxes, reductions in wages, sustained liberalisation of markets, and privatisation of public property.

The cumulative effect of being bound by both treaties would be an obligation to insert a balanced-budget rule "through provisions of binding force and permanent character, preferably constitutional or otherwise guaranteed to be fully respected and adhered to throughout the national budgetary processes," put Irish budgets under permanent and detailed euro-zone supervision, make the existing subordination of Ireland's interests to those of the "stability of the euro area as a whole" even more systematic and pronounced, impose conditions of "strict conditionality" without limit for ESM "solidarity" financial bail-outs, and require Ireland to contribute some €11 billion to the ESM fund when it is established later this year.

In other words, the EU Permanent Austerity Treaty will make a permanent feature of that external interference in our economic governance that was so obnoxious when Fianna Fáil surrendered sovereignty to the European Central Bank and the International Monetary Fund. But if it's bad in the short term—and it is—it's even worse when it's made permanent.

The fact that the British and Czech governments are not going to ratify the treaty is clear evidence that an EU member-state can stay outside it and still remain within the European Union. So the Irish Government cannot avoid holding a referendum by claiming that signing it is, in the words of article 29.4.10 of the Constitution, "necessitated by the obligations of membership of the European Union ."

And from a democratic and sovereignty point of view the treaties represent an abject surrender of governmental powers clearly vested by the Constitution exclusively in the democratically accountable organs of the state. This places a clear obligation on the Government to seek the consent of the people in a referendum before it makes any attempt to ratify these treaties.

Below is an annotated version of the treaty, which the Taoiseach, Enda Kenny, hopes to sign at a meeting of the European Council in March and which his Government hope to be able to ratify by the end of the year.

There is a fundamental division between those who advocate that euro-zone member-states should abandon more and more control over their financial and economic affairs and those who see a solution to our crisis in establishing genuine national independence and democracy. Central to the latter position is winning back for this country, and the other countries of Europe, the fundamental state powers that have been surrendered and using them intelligently for the benefit of the majority of the people, rather than for the social and economic elite.

The treaty has been drafted in such a way as to hoodwink the gullible into believing that the institutions of the European Union will not be involved in actions and procedures beyond those that they

have already been involved in and that they will act only within the framework of EU treaties. However, the fact is that the EU institutions will be used in new procedures and would exercise new powers created by the treaty.

What is involved is further EU integration through an intergovernmental agreement that confers new powers on the EU institutions outside the EU legal framework and changes the rules concerning the powers of the EU institutions. The main issue during the negotiations on the treaty was whether the contracting parties should be allowed to use the EU institutions to implement, monitor and enforce compliance with the proposed new set-up.

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.

TREATY ON STABILITY, COORDINATION AND GOVERNANCE IN THE ECONOMIC AND MONETARY UNION
Annotated version

THE CONTRACTING PARTIES [. . .]

As long as twelve states sign up. But Britain will not sign, nor will the Czech Republic. The Socialist Party candidate for the French presidency, François Hollande, has said that he would "renegotiate this deal" if elected in the coming presidential election.

CONSCIOUS of the obligation of the Contracting Parties, as Member States of the European Union, to regard their economic policies as a matter of common concern,

*Based on article 121 (1) of the Treaty on the Functioning of the European Union; but this goes on to state that economic policies are to be co-ordinated "**within the Council . . .**"*

DESIRING to promote conditions for stronger economic growth in the European Union and, to that end, to develop ever-closer coordination of economic policies within the euro area,

Repeats first Recital of Protocol (No. 14) on Euro Group.

BEARING IN MIND that the need for governments to maintain sound and sustainable public finances and to prevent a government deficit becoming excessive is of an essential importance to safeguard the stability of the euro area as a whole, and accordingly requires the introduction of specific rules to address this need, including a balanced budget rule and an automatic mechanism to take corrective action,

Balanced-budget rule and "automacity" of sanctions—Stability and Growth Pact, proposed by the Commission, adopted by the Council and effective from 13 December 2011. Now an obligation arising from "secondary legislation" is to be put into primary law.

CONSCIOUS of the need to ensure that their deficits do not exceed 3 % of their gross domestic product at market prices and that government debt does not exceed, or is sufficiently declining towards, 60 % of their gross domestic product at market prices,

The monetary union that the people licensed the state to join by ratifying the Maastricht and Lisbon Treaties was one based on the 3 per cent and 60 per cent of GDP rules of existing treaties. Now these rules provide considerable scope for hard-pressed member-states to be pressured to take steps against their national interests in a whole range of social and economic areas.

RECALLING that the Contracting Parties, as Member States of the European Union, should refrain from adopting any measure which could jeopardise the attainment of the Union's objectives in the framework of the economic union, notably the practice of accumulating debt outside the general government accounts,

This wording is from the Treaty on European Union, article 4 (3).

BEARING IN MIND that the Heads of State or Government of the euro area Member States agreed on 9 December 2011 on a reinforced architecture for Economic and Monetary Union, building upon the European Union Treaties and facilitating the implementation of measures taken on the basis of Articles 121, 126 and 136 of the Treaty on the Functioning of the European Union,

Last December, Herman van Rompuy told members of the European Parliament 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 purpose here is quite obvious: it is to create the impression that the "reinforced architecture" for economic and monetary union proposed does not stray beyond existing EU treaties, and if EU institutions become involved it would not be in new actions and procedures and would only be within the framework of the EU treaties, particularly articles 121 (economic policy co-ordination), 126 (excessive-deficit procedure) and 136 (measures to ensure the stability of the euro area) of the Treaty on European Union. However, under the "fiscal compact" the EU institutions would be used in new procedures and would exercise new powers. "Building upon the EU treaties" is an attempt to portray the process as being complementary with rather than increasing existing competence. ***An amendment to article 136 of the Treaty on the Functioning of the European Union plus a special treaty is the basis for the establishment of the so-called European stability mechanism. This amendment, in fact, increases the competence of the EU.***

BEARING IN MIND that the objective of the Heads of State or Government of the euro area Member States and of other Member States of the European Union is to incorporate the provisions of this Treaty as soon as possible into the Treaties on which the European Union is founded,

In fact article 16 acknowledges that it would be an incorporation of the "substance" rather that the actual "provisions" of the treaty. The revision procedure under article 48 of the Treaty on the Functioning of the European Union is to maintain the lie that no new competence is involved. ***But such amendments must be agreed unanimously and ratified by all member-states. What about Britain, the Czech Republic, and others?***

WELCOMING the legislative proposals made by the European Commission for the euro area within the framework of the European Union Treaties on 23 November 2011, on the strengthening of economic and budgetary surveillance of Member States experiencing or threatened with serious difficulties with respect to their financial stability, and on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States, and TAKING NOTE of the Commission's intention to present further legislative proposals for the euro area concerning, in particular, *ex ante* reporting of debt issuance plans, economic partnership programmes detailing structural reforms for Member States in excessive deficit procedure as well as coordination of major economic policy reform plans of Member States,

From the Financial Times, *20 February 2012: "European Union finance ministers are expected to approve new rules on Tuesday that would force eurozone members to submit their annual tax and spending plans to Brussels for review before they are approved by national parliaments.*

"According to a draft of the regulations obtained by the Financial Times, *the European*

Commission, the EU's executive branch, would also be given the power to deploy unilaterally surveillance teams to eurozone countries undergoing bailouts and even install technical experts in national ministries. The rules would enable the Commission to adopt in Ireland and Portugal the same sort of tough oversight that is expected to be foisted on Greece this week.

"The two new pieces of legislation expand on fresh powers given to the Commission earlier this year allowing it to dictate changes in spending and taxation in eurozone countries that have breached EU debt and deficit limits. At present, 14 of the 17 members of the single currency are in such an 'excessive deficit procedure.' Only Luxembourg, Finland and Estonia are not.

"Earlier changes were aimed at beefing up the disciplinary tools applied to countries with excessive deficits. The new legislation is intended to ensure countries do not break the rules in the first place.

"European officials see the new legislation as a further step towards creating a 'fiscal union' to accompany the currency zone's monetary union."

EXPRESSING their readiness to support proposals which the Commission might present to further strengthen the Stability and Growth Pact by introducing, for Member States whose currency is the euro, a new range for medium term objectives in line with the limits established in this Treaty.

"Medium term objective" is as defined in the revised Stability and Growth Pact: lower limit of a structural deficit of 0.5 per cent of gross domestic product. This target is more stringent than the 1 per cent deficit rule foreseen in the existing EU legislation.

TAKING NOTE that, when reviewing and monitoring the budgetary commitments under this Treaty, the European Commission will act 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,

A formulation intended to give the impression that EU institutions would be involved only in actions and procedures that they have already been involved in, and that they would act only within the framework of the EU treaties. Yet under the treaty, contracting parties would commit themselves to automatically accepting Commission recommendations. They can only reject the Commission proposal to place deficit countries under the excessive-deficit procedure. The EU treaties required qualified majorities to support sanctions; under this treaty a qualified majority would be necessary to stop them.

NOTING in particular that, for the application of the budgetary "Balanced Budget Rule" described in Article 3 of this Treaty, this monitoring will be made through the setting up of country specific medium term objectives and of calendars of convergence, as appropriate, for each Contracting Party,

This is the "monitoring" procedure. A reference to the medium-term objectives already exists in secondary legislation, in particular the Stability and Growth Pact; but it should be noted that the balanced-budget rule is not provided for in the EU treaties.

NOTING that the medium term objectives should be updated regularly on the basis of a commonly agreed method, the main parameters of which are also to be reviewed regularly, reflecting appropriately the risks of explicit and implicit liabilities for public finance, as embodied in the aims of the Stability and Growth Pact,

This suggests a common method for assessing medium-term objectives for remedial budgetary action, based on the Stability and Growth Pact and state liabilities. How could Ireland maintain a common approach in assessing medium-term objectives with, for example, Germany? State liabilities would be difficult to forecast in the medium term—especially for a state that has adopted a sovereign bank guarantee!

NOTING that sufficient progress towards the medium term objectives should be evaluated on the basis of an overall assessment with the structural balance as a reference, including an analysis of expenditure net of discretionary revenue measures, in line with the provisions specified under European Union law, in particular Council Regulation (EC) No. 1466/97 of 7 July 1997 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of budgetary policies, as amended by Regulation (EU) No. 1175/2011 of the European Parliament and of the Council of 16 November 2011 (hereinafter "the revised Stability and Growth Pact"),

NOTING that the correction mechanism to be introduced by the Contracting Parties should aim at correcting deviations from the medium-term objective or the adjustment path including their cumulated impact on government debt dynamics,

NOTING that compliance with the obligation to transpose the "Balanced Budget Rule" into national legal systems through binding 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 Functioning of the European Union,

> *Under article 273 of the Treaty on the Functioning of the European Union, member-states are allowed to give powers to the European Court of Justice to settle disputes between them in a special agreement relating to the subject-matter of the EU treaties. Article 8 of the treaty purports to confer jurisdiction on the Commission and the ECJ as regards the obligation of the contracting parties to enshrine the balanced-budget rule in national law, which involves the use of EU institutions in a way that breaches the EU treaties. The ECJ would have competence to verify whether the contracting parties had adopted provisions complying with article 3 (2), whether they are binding, and if there is a "correction mechanism." But the obligation to give effect in national law to the balanced-budget rule is not an obligation under EU law.*

RECALLING that 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 and that the European Commission has established criteria for the determination of the lump sum or penalty to be paid in the framework of that Article,

> *Again stretching it. Article 260 refers to sanctions for failure to comply with "**an obligation under the Treaties**."*

RECALLING the need to facilitate the adoption of measures under the excessive deficit procedure of the European Union for euro area Contracting Parties whose planned or actual government deficit to gross domestic product exceeds 3 %, whilst strongly reinforcing the objective of that procedure, namely to encourage and, if necessary, compel the Member State concerned to reduce a deficit which might be identified,

> *Stresses the importance of implementing excessive-deficit procedures for euro states in breach of the rules of the Stability and Growth Pact.* ***The power to compel a member-state to comply with decisions reached during an excessive-deficit procedure is new****: under article 126 of the Treaty on European Union the maximum sanctions at present available include a fine—article 126 (11).*

RECALLING the obligation for those Contracting Parties whose government debt exceeds the 60 % reference value to reduce it at an average rate of one twentieth per year as a benchmark,

> *Reiterates the one-twentieth benchmark already available in Regulation 1467/97 (amended by Regulation 1177/2011).*

BEARING IN MIND the need to respect, in the implementation of this Treaty, the specific role of the social partners, as it is recognized in the laws or national systems of each of the Contracting Parties,

See article 152 of the Treaty on the Functioning of the European Union for EU law. Refers only to "laws or national systems."

STRESSING that none of the provisions of this Treaty is to be interpreted as altering in any way the economic policy conditions under which financial assistance has been granted to a Contracting Party in a stabilisation programme involving the European Union, its Member States and the International Monetary Fund,

Contracting parties receiving emergency funding from the International Monetary Fund and European Central Bank will not be able to use the provisions of the treaty to alter the conditions contained in their memorandum of understanding. In fact the medium-term objectives of those states are likely to reflect the terms of the memorandum of understanding.

NOTING that the smooth functioning of the Economic and Monetary Union makes it necessary that the Contracting Parties work jointly towards an economic policy where, whilst building upon the mechanisms of economic policy coordination as defined in the European Union Treaties, they take the necessary actions and measures in all the domains which are essential to the good functioning of the euro area,

Repeats the terms of article 136 of the Treaty on the Functioning of the European Union.

NOTING, in particular, the wish of the Contracting Parties to make more active use of 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, without undermining the internal market, as well as to make full recourse to measures specific to the Member States whose currency is the euro pursuant to Article 136 of the Treaty on the Functioning of the European Union, and to a procedure for the *ex ante* discussion and coordination among the Contracting Parties whose currency is the euro of all major economic policy reforms planned by them, with a view to benchmarking best practices,

Aspirational.

RECALLING the agreement of the Heads of State or Government of the euro area Member States on 26 October 2011 to improve the governance of the euro area, including the holding of at least two Euro Summit meetings per year, to be convened, unless justified by exceptional circumstances, immediately after meetings of the European Council or meetings with the participation of all Contracting Parties having ratified this Treaty,

Repeats the main points of the agreement of October 2011 on the euro-area summit.

RECALLING also the endorsement by the Heads of State or Government of the euro area Member States and of other Member States of the European Union on 25 March 2011 of the Euro Plus Pact which identifies the issues that are essential to fostering competitiveness in the euro area,

Euro Plus Pact.

STRESSING the importance of the Treaty establishing the European Stability Mechanism as an element of a global strategy to strengthen the Economic and Monetary Union and POINTING OUT 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,

The role of the European stability mechanism. No ratification, no assistance. Assistance will also be conditional on the adoption of a debt brake. What if the state implements the debt

brake by legislation and later it wishes to obtain access to funds? It is open to argue that the country's implementation was not done correctly.

NOTING that [. . .] are Contracting Parties whose currency is the euro and that, as such, they will be bound by the provisions of this Treaty from the first day of the month following the deposit of their instrument of ratification if the Treaty is in force at that date; NOTING ALSO that [. . .] are Contracting Parties which, as Member States of the European Union, have, at the date of signature of this Treaty, a derogation or an exemption from participation in the single currency and may be bound, as long as this derogation or exemption is not abrogated, only by those provisions of Titles III and IV by which they declare, on depositing their instrument of ratification or at a later date, that they intend to be bound,

HAVE AGREED UPON the following provisions:

TITLE I

PURPOSE AND SCOPE

Article 1

1. By this Treaty, the Contracting Parties agree, as Member States of the European Union, to strengthen the economic pillar of the Economic and Monetary Union by adopting a set of rules intended to foster budgetary discipline through a fiscal compact, to strengthen the coordination of economic policies and to improve the governance of the euro area, thereby supporting the achievement of the European Union's objectives for sustainable growth, employment, competitiveness and social cohesion.

The EU institutions cannot legally 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 EU 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. A group of member-states without the unanimous approval of the other member-states cannot confer any new powers outside the EU legal framework.

The treaty contains provisions that confer new powers on EU institutions; consequently those provisions breach EU law.

2. The provisions of this Treaty shall apply in full to the Contracting Parties whose currency is the euro. They shall also apply to the other Contracting Parties to the extent and under the conditions set out in Article 14.

The European Court of Justice has held that existing EU law does not prevent member-states from entrusting the Commission with the task of co-ordinating a collective action undertaken by them outside the framework of the EU treaties and that they can confer powers on the EU institutions. However, the instances must involve "collective action"—based on a unanimous decision of all member-states in this regard. Therefore, a group of member-states cannot confer any role or further powers on the EU institutions through an intergovernmental treaty outside the EU framework without the approval of all member-states.

TITLE II

CONSISTENCY AND RELATIONSHIP WITH THE LAW OF THE UNION

Article 2

1. This Treaty shall be applied and interpreted by the Contracting Parties in conformity with the Treaties on which the European Union is founded, in particular Article 4 (3) of the Treaty on European Union, and with European Union law, including procedural law whenever the adoption of secondary legislation is required.

Article 4 (3) of the Treaty on the Functioning of the European Union refers to a "duty of sincere cooperation" among member-states, in the form of (a) respect for the independence and rights of EU institutions ***in achieving the implementation of EU treaties*** *and (b) refraining from* ***measures that might restrict or conflict with EU objectives****. The treaty is to be read and interpreted in line with existing EU treaties (e.g. the rights and obligations of institutions, member-states, procedural requirements, objectives, etc.). Nevertheless this does not guarantee that some provisions of the treaty are not consistent with the EU treaties. Everything is fine as long as the signing parties keep their promises. But if a signing party decides that it no longer accepts the new stability criteria, one could not accuse it of violating EU law.*

2. 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.

TITLE III

FISCAL COMPACT

Article 3

1. The Contracting Parties shall apply the following rules, in addition and without prejudice to the obligations derived from European Union law:

Article 3 is to be to be read and interpreted in conjunction with existing EU law.

a) The budgetary position of the general government shall be balanced or in surplus.

The Stability and Growth Pact required budgets to be "close to balance or in surplus." Here is a higher target. The balanced-budget rule goes beyond what is provided under the EU treaties. 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.

b) The rule under point *a*) 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 a lower limit of a structural deficit of 0.5 % of the gross domestic product at market prices. The Contracting Parties shall ensure rapid convergence towards their respective medium-term objective. The time frame for such convergence will be proposed by the Commission taking into consideration country-specific sustainability risks. Progress towards and respect of the medium-term objective shall be evaluated on the basis of an overall assessment with the structural

balance as a reference, including an analysis of expenditure net of discretionary revenue measures, in line with the provisions of the revised Stability and Growth Pact.

> ***This provision breaches EU law, because it is conferring specific new tasks on the European Commission, giving it the power to set up deadlines for budgetary convergence.*** *The expression used in the first draft, "structural deficit," has been replaced with "structural balance."* ***The obligation of national governments to cut deficits to 0.5 per cent of GDP is not provided in EU law.*** *The euro-zone leaders decided last December that the so-called "golden rule" would also include an automatic correction mechanism, to 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 euro-zone leaders also referred to a convergence calendar proposed by the Commission. But this has not been included. The structural-deficit target of 0.5 per cent of GDP in the draft treaty was more stringent than the 1 per cent deficit rule foreseen in the existing EU legislation.*

c) The Contracting Parties may temporarily deviate from their medium-term objective or the adjustment path towards it only in exceptional circumstances as defined in paragraph 3.

> *This is identical to the provision in article 5 of Stability and Growth Pact Regulation. These sorts of clauses, allowing for temporary deviation from the balanced-budget rule (contained in the revised Stability and Growth Pact rules), nullify the effects of the balanced-budget rule, as in theory every contracting party would be able to use the present crisis as evidence of "an unusual event" or "severe economic downturn."*

d) Where the ratio of government debt to gross domestic product at market prices is significantly below 60 % and where risks in terms of long-term sustainability of public finances are low, the lower limit of the medium-term objective specified under point *b*) can reach a structural deficit of at most 1.0 % of the gross domestic product at market prices.

> *Fiscally prudent states, as defined, are able to operate a "golden rule" at 1 per cent.*

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. The mechanism shall include the obligation of the Contracting Party concerned to implement measures to correct the deviations over a defined period of time.

> *Automaticity of the trigger for the correction mechanism in accordance with article 3 (2).*

2. The rules mentioned under paragraph 1 shall take effect in the national law of the Contracting Parties at the latest one year after the entry into force of this Treaty through provisions of binding force and permanent character, preferably constitutional, or otherwise guaranteed to be fully respected and adhered to throughout the national budgetary processes. The Contracting Parties shall put in place at national level the correction mechanism mentioned in paragraph 1.*e*) on the basis of common principles to be proposed by the European Commission, concerning in particular the nature, the size and the time frame of the corrective action to be undertaken, also in the case of exceptional circumstances, and the role and independence of the institutions responsible at national level for monitoring the observance of the rules. This mechanism shall fully respect the prerogatives of national Parliaments.

> *Some of the rules referred to in paragraph 1 are already in effect in the member-states by virtue of being included in an EU regulation (automatically applicable to EU member-states without the need for transposition). A constitutional debt brake is not obligatory. The provision must have "binding force and* [*a*] *permanent character": an act of parliament is not sufficient.*

"Preferably constitutional": The German chancellor, Angela Merkel, reportedly said that this formulation was used only to facilitate states "without constitutions"!

"Or otherwise guaranteed to be fully respected and adhered to throughout the national budgetary process": "the implication here is that Dáil Éireann is to have its freedom of action removed—a clear loss of sovereign powers. So much for the Taoiseach, Enda Kenny's, battle to restore our "economic sovereignty"!

3. For the purposes of this Article, definitions set out in Article 2 of Protocol (No. 12) on the excessive deficit procedure annexed to the European Union Treaties shall apply. In addition, "annual structural balance of the general government" refers to the annual cyclically adjusted balance net of one-off and temporary measures. "Exceptional circumstances" refer to the case of an unusual event outside the control of the Contracting Party concerned which has a major impact on the financial position of the general government or to periods of severe economic downturn as defined in the revised Stability and Growth Pact, provided that the temporary deviation of the Contracting Party concerned does not endanger fiscal sustainability in the medium term.

This applies definitions of terms used in the EU excessive-deficit procedure.

Article 4

When the ratio of their general government debt to gross domestic product exceeds the 60 % reference value mentioned under Article 1 of Protocol (No 12), the Contracting Parties shall reduce it at an average rate of one twentieth per year as a benchmark, as provided for in Article 2 of Council Regulation (EC) No. 1467/97 of 7 July 1997 on speeding up and clarifying the implementation of the excessive deficit procedure, as amended by Council Regulation (EU) No. 1177/2011 of 8 November 2011. The existence of an excessive deficit due to the breach of the debt criterion will be decided according to the procedure set forth in Article 126 of the Treaty on the Functioning of the European Union.

Article 5

The Contracting Parties that are subject to an excessive deficit procedure under the European Union Treaties shall put in place a budgetary and economic partnership programme including a detailed description of the structural reforms which must be put in place and implemented to ensure an effective and durable correction of their excessive deficits. The content and format of these programmes shall be defined in European Union law. 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.

Under this article, those contracting parties that are subject to an excessive-deficit procedure would have to submit to the European Commission and the Council "a budgetary and economic partnership programme including a detailed description of the structural reforms which must be put in place and implemented to ensure an effective and durable correction of their excessive deficits." 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" would entail. Under the excessive-deficit procedure (article 126 of the Treaty on the Functioning of the European Union) a member-state found by the Commission to be running a structural deficit is required to respond to and implement Council recommendations on how to redress the situation—article 126 (7), (8) and (9). Article 126 (11) recognised that member-states might not respond. Article 5 now imposes a duty to respond. This seems to indicate that the budgetary and economic partnership programme could be contained in a Council decision, probably adopted on the basis of article 126 (9) of the Treaty on the Functioning of the European Union. This provision makes

no reference to EU legislation providing for such a role for the European Commission and the Council. In fact this provision confers a new role on these EU institutions, breaching EU law.

The implementation of the programme, and the yearly budgetary plans consistent with it, will be monitored by the Commission and by the Council.

Joint monitoring by the Commission and the Council of adherence by the state concerned to its budgetary and economic partnership programme as well as its annual budgetary plans. Secondary legislation already allows for this.

Article 6

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.

As proposed by the Commission in November 2011, member-states are required to notify their plans before the sale, but the treaty does not state how far in advance this information needs to be communicated, or whether the information will be made public. ***The European Commission has just put forward legislative proposals within the framework of the EU treaties regarding a mechanism for the ex-ante reporting of debt issuance plans of the member-states. This provision would confer a new role on the EU institutions.*** *It remains to be seen what the Commission and the Council will be required to do with the information.*

Article 7

While fully respecting the procedural requirements of the European Union Treaties, the Contracting Parties whose currency is the euro 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. 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.

The quasi-automaticity of sanctions under the excessive-deficit procedure is made operable by so-called "reverse majority voting." ***Article 126 (13) of the Treaty on the Functioning of the European Union requires a qualified majority to adopt sanctions. Article 7 ostensibly replaces this with reverse majority voting: in other words, a qualified majority must be against sanctions in order for their activation to be blocked.***

The use of reverse majority is not provided for in the EU treaties. This alteration directly bypasses the treaty change procedures contained in article 48 of the Treaty on European Union and may therefore be held inconsistent with EU treaties in case of legal dispute. *As noted by José Manuel Barroso, it "will add to the Six-Pack automaticity." This provision goes beyond what is provided under the EU Treaties.*

Article 8

1. 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, con-

cludes 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. 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. In both cases, the judgment of the Court of Justice 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 the Court.

> ***The Commission and the European Court of Justice enforcing compliance with article 3 (2) involves the use of the EU institutions in a way that breaches the EU treaties.*** *This article confers substantial additional powers on the Commission, which would be allowed to participate in proceedings that go beyond those that already exist under the EU treaties. In this way the contracting parties would be allowed to make use of the Commission for purposes that are outside the scope of EU treaties, thereby breaching EU law.*
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> *The text also reads: "the judgment of the Court of Justice 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 the Court." This provision is similar to article 260 of the Treaty on the Functioning of the European Union, whereby member-states are required to comply with judgements of the European Court of Justice, but if a member-state fails to comply with a ruling pursuant to article 8 of the treaty the Commission cannot bring the matter before the court and ask for fines to be imposed, as foreseen in article 260 (2). The European Court of Justice cannot fine countries if they do not comply with such judgements, as foreseen in the EU Treaties. But, according to the preamble to the 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 and that the European Commission has established criteria for the determination of the lump sum or penalty to be paid in the framework of that Article." But this is stretching the scope of the provision, as article 260 refers only to sanctions for failure to comply with an obligation under the treaties!*
>
> *Contracting parties gain the power to sue a member-state before the European Court of Justice for failure to implement a debt brake. Does this not risk using the ECJ—which is not an economic body and has declined to issue judgements on economic matters—as a substitute for economic analysis? The ECJ lacks economists who can assist in the judicial review of economic-based mechanisms. This creates a new precedent in the EU, as hitherto member-states have refrained from commenting on the domestic constitutional provisions of other member-state (unless such provisions are overtly controversial).*

2. 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 and request the imposition of financial sanctions following criteria established by the Commission in the framework of Article 260 of the Treaty on the Functioning of the European Union. 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 amounts imposed on a Contracting Party whose currency is the euro shall be payable to the European Stability Mechanism. In other cases, payments shall be made to the general budget of the European Union.

> *The treaty confers on the ECJ the power to impose fines on countries. 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 Contract-*

ing Parties. Failure to implement a debt brake or implementation of an ineffective debt brake may result in the imposition of fines on non-compliant Parties." This provision has disappeared.

3. 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 gives the idea that the use of the ECJ and the European Commission by the contracting parties is legal under the EU treaties. The Commission and the ECJ cannot enforce the treaty provisions. The ECJ has allowed member-states to use the EU institutions in procedures established outside the framework of the treaties only when there was unanimous agreement. Consequently, all EU member-states must agree on the use of the EU institutions outside the framework of the EU treaties. Under this treaty the EU institutions would be exercising functions beyond those given to them under EU treaties. A group of member-states cannot, without the unanimous approval of all member-states, confer new powers on EU institutions outside the EU legal framework. Article 126 (10) explicitly excludes the launch of infringement proceedings against member-states that fail to comply. This treaty is not part of the Community legal order and is therefore not legally binding on the ECJ and the other institutions.

TITLE IV

ECONOMIC POLICY COORDINATION AND CONVERGENCE

Article 9

Building upon the economic policy coordination as defined in the Treaty on the Functioning of the European Union, the Contracting Parties undertake to work jointly towards an economic policy fostering the smooth functioning of the Economic and Monetary Union and economic growth through enhanced convergence and competitiveness. To that end, 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.

Article 121 of the Treaty on the Functioning of the European Union. Purely aspirational paragraph.

Article 10

In accordance with the requirements of the European Union Treaties, the Contracting Parties stand ready to make active use, whenever appropriate and necessary, of 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 of 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.

This provision foresees greater use of article 136 of the Treaty on the Functioning of the European Union to extend its scope. Europhiles talk of "innovative" use, which is now been amended to include a new paragraph for the European stability mechanism. Article 20 of the Treaty on European Union and articles 326–334 of the Treaty on the Functioning of the European Union are provisions for enhanced co-operation. Contracting parties will examine the potential for a greater use of enhanced co-operation. The introduction of a common con-

solidated corporate tax base has been mentioned as a possible project in this respect. Indirectly it refers to such measures as the Euro Plus Pact of March 2011.

It is well known that Germany and France want to have a say in how the other member-states run their economies. Sarkozy and Merkel, in a letter of December 2011 informing van Rompuy of their proposal 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 allow for faster progress in specific areas such as: Financial regulation; Labour 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."

The euro-zone 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." The explicit statements in the article are referring to the possibility of using the general rules on enhanced co-operation within the present EU treaties to adopt EU measures that would apply solely to the member-states that participate in this treaty. ***It is important to note that not all measures can be decided by enhanced co-operation between member-states within the EU legal system. Under Article 20 of the Treaty on European Union, enhanced co-operation is reserved for areas of the "Union's non exclusive competence.*** *Moreover, enhanced co-operation measures must be based on a proposal by the Commission that is then blocked in the Council: the decision to enter into enhanced co-operation 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 co-operation by a qualified majority of all member-states in the Council and after obtaining the consent of the European Parliament. Under Article 326 of the Treaty on the Functioning of the European Union, "any enhanced cooperation shall comply with the Treaties and Union law."* ***The use of enhanced co-operation 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 co-operation will be open to all member-states; consequently, it cannot be addressed merely to euro-zone states, or the contracting parties to this treaty.*** *Under Article 20 of the Treaty on European Union and articles 329 and 331 of the Treaty on the Functioning of the European Union, a minimum of nine participants is required; only willing member-states participate, and any member-states can participate. If these criteria are not complied with, the use of enhanced co-operation could be challenged in the European Court of Justice.*

Article 11

With a view to benchmarking best practices and working towards a more closely coordinated economic policy, the Contracting Parties ensure that all major economic policy reforms that they plan to undertake will be discussed *ex-ante* and, where appropriate, coordinated among themselves. This coordination shall involve the institutions of the European Union as required by European Union law.

The reference to "coordinated among themselves" risks formalising the exclusion of an outer core of member-states that have decided not to, or are unable to, ratify the treaty.

TITLE V

GOVERNANCE OF THE EURO AREA

Article 12

1. The Heads of State or Government of the Contracting Parties whose currency is the euro shall meet informally in Euro Summit meetings, together with the President of the European Commission. The President of the European Central Bank shall be invited to take part in the meetings. The President of the Euro Summit shall be appointed by the Heads of State or Government of the Contracting Parties whose currency is the euro by simple majority at the same time the European Council elects its President and for the same term of office.

There is no legal basis in the Treaty on the Functioning of the European Union for this new legal institution and the new post of president of the Euro Summit. Consequently, to formally institutionalise Euro Summits the EU treaties would have to be amended.

2. Euro Summit meetings shall take place, when necessary, and at least twice a year, to discuss questions related to the specific responsibilities which the Contracting Parties whose currency is the euro share with regard to the single currency, other issues concerning the governance of the euro area and the rules that apply to it, and strategic orientations for the conduct of economic policies to increase convergence in the euro area.

Previously, euro summits took place on ad hoc basis.

3. The Heads of State or Government of the Contracting Parties, other than those whose currency is the euro, who have ratified this Treaty shall participate in discussions of Euro Summit meetings concerning competitiveness for the Contracting Parties, the modification of the global architecture of the euro area and the fundamental rules that will apply to it in the future, as well as, when appropriate and at least once a year, in discussions on specific issues of implementation of this Treaty on Stability, Coordination and Governance in the Economic and Monetary Union.

4. The President of the Euro Summit shall ensure the preparation and continuity of Euro Summit meetings, in close cooperation with the President of the European Commission. The body charged with the preparation and follow up of the Euro Summit meetings shall be the Euro Group and its president may be invited to attend the Euro Summit meetings for that purpose.

The same preparation procedure as for meetings of the European Council.

5. 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.

6. 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.

Inner core?

Article 13

As foreseen in Title II of Protocol (No. 1) on the role of national Parliaments in the European Union annexed to the European Union Treaties, the European Parliament and the national Parliaments of the Contracting Parties will together determine the organisation and promotion of a conference of representatives of the relevant committees of the national Parliaments and representatives of the relevant committees of the European Parliament in order to discuss budgetary policies and other issues covered by this Treaty.

TITLE VI

General and final provisions

Article 14

1. This Treaty shall be ratified by the Contracting Parties in accordance with their respective constitutional requirements. The instruments of ratification shall be deposited with the General Secretariat of the Council of the European Union.

The contracting parties, according to their constitutional requirements, through national parliaments or some possibly by referendum, will ratify the agreement. Contracting parties must apply the balanced-budget rule through provisions of binding force and permanent character, preferably constitutional or otherwise guaranteed to be fully respected and adhered to throughout the national budgetary processes. Legislative provisions do not have a permanent character, inasmuch as it is always open to the Oireachtas to amend legislation, and it is not constitutionally open to the Oireachtas to put any act beyond amendment.

A majority of the Supreme Court in the Crotty case in 1987, which found that a referendum was necessary to ratify significant changes to EU treaties, held that an organ of the state cannot agree to circumscribe or restrict any unfettered power conferred on it by the Constitution. Mr Justice Walsh said that the freedom to form economic policy was an aspect of the state's sovereignty. This meant that article 3 (1) would have to be protected by article 29.4 of the Constitution, which ratified the Maastricht Treaty, if it was to be constitutionally valid. However, article 29 refers to treaties of the European Union, and the proposed treaty will only be a treaty agreed between 25 of the 27 member-states, so it will not be covered by article 29.

Given that Britain and the Czech Republic have opted out of the proposed treaty, it would seem very difficult to argue that the treaty is necessitated by our membership of the European Union. These rules and policy conditions in turn provide considerable scope for financially hard-pressed member-states to be pressured to take steps against their national interest, including in relation to harmonising corporate taxes. Establishing this permanent enhanced fiscal architecture would be a major step towards an EU fiscal and political union, something that has been recognised in statements by leading EU politicians. This implies a significant diminution of national state sovereignty, going well beyond the scope of the existing European Union and the monetary union that it embodies, which only the people themselves can agree to.

The absence of limitations on the "strict conditionality" that will mark financial disbursements from the proposed ESM fund—such as might have been set out in an accompanying protocol, for instance—emphasises further the dangers to the state's interests that could arise from harsh or excessively onerous conditions attaching to financial assistance that might be offered to member-states seeking assistance from the fund.

2. This Treaty shall enter into force on 1 January 2013, provided that twelve Contracting Parties whose currency is the euro have deposited their instrument of ratification, or on the first day of the month following the deposit of the twelfth instrument of ratification by a Contracting Party whose currency is the euro, whichever is the earlier.

Consequently, it would enter into force even if some countries' national parliaments reject it or it is not approved in a referendum.

3. This Treaty shall apply as from the day of entry into force amongst the Contracting Parties whose currency is the euro and which have ratified it. It shall apply to the other Contracting Parties whose currency is the euro as from the first day of the month following the deposit of their respective instrument of ratification.

It remains to be seen what would happen if fewer than twelve euro-zone states fail to ratify the treaty before 1 January 2013. The treaty would apply from the day of coming into force among the euro-zone contracting parties that had ratified it.

4. By derogation to paragraph 3, Article 12 shall apply to all Contracting Parties whose currency is the euro as from the date of the entry into force of this Treaty.

Institutional provisions will apply to all euro-area states, irrespective of ratification?

5. This Treaty shall apply to the Contracting Parties with a derogation as defined in Article 139(1) of the Treaty on the Functioning of the European Union, or with an exemption as defined in Protocol No. 16 on certain provisions related to Denmark annexed to the European Union Treaties, which have ratified it, as from the day when the decision abrogating that derogation or exemption takes effect, unless the Contracting Party concerned declares its intention to be bound at an earlier date by all or part of the provisions in Titles III and IV of this Treaty.

The provisions relating to the euro summit meetings will apply to all euro-zone contracting parties from the date of entering into force of the treaty, to convince them to sign up. Non-eurozone contracting parties will be bound by the treaty 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 co-ordination and convergence) of the agreement. On the other hand, the euro-zone member-states might not be willing to accept a new member-state that had not ratified this agreement.

Article 15

This Treaty shall be open to accession by Member States of the European Union other than the Contracting Parties. Accession shall be effective upon the deposit of the instruments of accession with the Depositary, who shall notify the other Contracting Parties thereof.

Article 16

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.

This provision is very similar to the one included in the Prüm Convention. ***There is no reference to incorporating the treaty in the EU treaties but in the EU legal framework, which would be done through secondary legislation, as happened with the Prüm Convention.*** *The incorporation of this treaty in the EU treaties would obviously*

entail a treaty change, which, accordingly, requires the agreement of all member-states. However, the aim is to integrate some provisions of the draft treaty in the EU legal framework by means of secondary legislation.

Done at Brussels on the [. . .] of [. . .] in the year two thousand and twelve in a single original whose Bulgarian, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Irish, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovenian, Spanish and Swedish texts are equally authentic, which shall be deposited in the archives of the Depositary which will transmit a certified copy to each of the Contracting Parties.

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