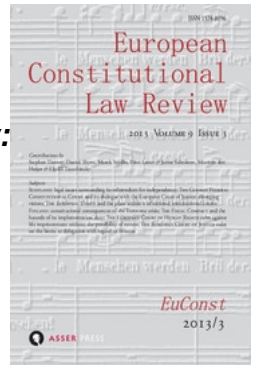

The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?

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The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?

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Economic crisis, constitutional crisis – Finnish constitutional requirements and solutions – National parliaments' European constitutional function – Finnish parliament's rights – Development of economic and monetary union – Economic and monetary union and development of it as the 'Union matter' in Finland – Stabilisation – European Financial Stability Facility – European Stability Mechanism – Economic governance – National, European, political, constitutional

Introduction

It has taken a drama of the magnitude of Europe's economic crisis to break the usually consensus-based model of European Union (EU) decision-making in Finland. The sudden urge to debate the ways in which the economic crisis has been tackled and decisions have been made has translated into precise and unexpectedly sceptical national positions. This is a clear change to the generally more mainstream and integration-oriented Finnish EU politics, where issues provoking national passion have been few and EU membership is generally understood in positive and beneficial terms. The dominant Finnish EU political philosophy has built on the presumption that a balanced EU membership requires participation in all relevant EU policies, irrespective of the increasing trend towards fragmentation and enhanced cooperation in the constitutional development of the EU, including in the Economic and Monetary Union (EMU).[1] So when the Finnish foreign minister updates his blog to state that the country should face openly the

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[1] *See*, e.g., Government Report on EU Policy 4/2009 vp.

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possibility of a euro breakup, and that the plans for a fiscal, economic and political union drafted by the heads of the Commission, Council, European Central Bank and Euro group are not to be trusted, this is front page news.[2]

The theme of this article is the constitutionality of the various recent EMU developments in Finland. In particular, concerns relating to the requirements of democratic decision-making have been raised relating to at least two levels of decision-making: national and European.[3] The same concerns have been voiced in conclusions of the European Council, where the need of a stronger democratic basis, wide consultation and participation, in particular the involvement of national parliaments, have been emphasised as preconditions for closer EMU integration.[4] The limitations of democracy at the EU level, of course, have been much debated before, but they have been emphasised in the context of combatting the euro crisis,[5] especially as regards decision-making at European level. As regards the national level, Finland has a model of national decision-making in EU affairs that gives extensive participation and information rights to the Finnish parliament, *eduskunta*. These rights are based on the Finnish Constitution[6] and constitutional practice. The *eduskunta* has followed the EMU developments closely and has participated actively in the formulation of Finnish positions. Its rights of participation have even been strengthened during the euro crisis.

In the first section of this contribution, after a brief description of Finnish EU politics in general and EMU politics in particular, the role of the *eduskunta* in EU matters will be explained. This is followed by an analysis in the second section of how the recent EMU developments have been placed in the constitutional framework for handling Union matters in Finland. Central to the Finnish debates have been questions about the proper relationship between the Union and the member states, about budgetary sovereignty and about the procedure for handling international agreements that affect the relationship between the EU institutions. These questions will be discussed in detail in the third section,[7] primarily through the

[2] On this, *see* Euobserver, 'Finland: We Have to Prepare for Euro Breakup', 17 Aug. 2012, <http://euobserver.com/economic/117259>, visited 18 Aug. 2013.

[3] *See*, e.g., P. Leino and J. Salminen, 'Should the Economic and Monetary Union Be Democratic after All? Some Reflections on the Current Crisis', 14 *German Law Journal* (2013) p. 844.

[4] *See* European Council conclusions on completing EMU, adopted on 14 Dec. 2012, para. 14; European Council conclusions on completing EMU, adopted on 18 Oct. 2012, para. 15.

[5] *See* Leino and Salminen, *supra* n. 3, at p. 847-854.

[6] Suomen perustuslaki, the Constitution on Finland, Act No. 731 of 1999, for English translation, *see* <www.finlex.fi/en/laki/kaannokset/1999/en19990731.pdf>, visited 18 Aug. 2013. For an introduction to the Constitution of Finland, *see*, e.g., J. Husa, *The Constitution of Finland: A Contextual Analysis* (Hart Publishing 2011) or M. Scheinin 'Constitutional Law and Human Rights', in J. Pöyhönen (ed.) *An Introduction to Finnish Law* (Kauppakaari 2002) p. 31.

[7] We have also discussed these measures, *see* P. Leino-Sandberg and J. Salminen, 'Eurokriisin demokratiaulottuvuuksia' [Democracy in Euro Crisis] *Lakimies* (2013).

lens of the decisions of the parliament's Constitutional Law Committee. In the Finnish constitutional setting, this body is the primary control mechanism for ensuring the constitutionality of legislation, including international obligations and Union-related measures.[8] In the last and fourth section we will argue that the lesson to be learned from the Finnish example might be that democracy still functions best at national level and through national constitutional channels, but that in order to operate both time and procedural guarantees are required. New, atypical arrangements also bring with them atypical challenges to participation, which need to be addressed. A particular concern is that additional national substantive requirements for decision-making in Brussels have been accompanied by fears that governing is becoming increasingly 'difficult' and the Finns are losing their old and largely self-appointed status as good and loyal EU subjects. These issues give rise to a fundamental concern relating to the conditions of EU decision-making: is there room for political debate, or is the national decision making in EU matters merely seen – from the perspective of Brussels – as a necessary but formal procedural stage that the bureaucratic vice pays to democratic virtue?

The Finnish Constitution and constitutional politics of the euro crisis

Finnish EU policymaking – like Finnish politics more generally – has traditionally been characterised by a rather broad or permissive consensus without an obvious government–opposition divide. It is the euro crises that have helped Finnish EU politics, after 17 years of EU membership, to mature into a more genuine political debate. It has proved irresistible for debaters to emphasise the spotless way in which Finland has fulfilled its own duties in the EMU, retaining its status as a triple-A economy, and the misery of now needing to take responsibility for the failures of others to do so. For the Finns, this is not really about money, but about principles.[9] In the background loom many of the core arrangements of the EMU, which have given cause to a more general debate concerning the legiti-

[8] There is no constitutional court in Finland, and ordinary courts have a secondary role in the review of constitutionality of legislation. About the developments of the constitutionality review in Finland in European context, *see*, e.g., J. Lavapuro et al., 'Rights-Based Constitutionalism in Finland and the Development of Pluralist Constitutional Review', *Int J Constitutional Law* (2011) p. 505, and the Constitutional Law Committee in relation to the EU Law, *see*, e.g., T. Ojanen, 'EU Law and the Response of the Constitutional Law Committee of the Finnish Parliament', in P. Wahlgren (ed.) *Scandinavian Studies in Law* (Stockholm 2007) p. 203.

[9] For the quote, *see EUobserver*, 'National Stereotyping – the Eurozone's Other Story', 22 Feb. 2012, <http://euobserver.com/political/115340>, visited 18 Aug. 2013.

macy of the Union.[10] Many Finns have quickly forgotten the instability and cost of running a national currency and have developed a nostalgic longing for the Finnish *markka*.[11] For many, questions concerning the euro, its stability and possible survival appear foreign and strangely distant, as if it never had been our currency in the first place, despite the years of stability, and in particular the much cherished low mortgage rates, brought by the common currency. Despite occasional grumbling, however, Finland has engaged actively in the identification of solutions[12] and has remained faithfully committed to the EMU; ultimately the majority necessary to approve the proposed measures has always been found in the Finnish parliament.

When Finnish EU membership was being negotiated in the early 1990s, participation in the EMU received little attention. When the time came to proceed to the third stage of the EMU, the move itself and the need to fulfil the membership criteria of the EMU did not provide any particular difficulties. Finland had suffered from a heavy recession in the early 1990s, which had been – a point gladly made in political debates concerning the current crisis – at least partially caused by factors outside its own influence, such as the collapse of the Soviet Union, which killed a golden channel for Finnish exports. As a consequence, the state was heavily in debt in the early 1990s with a clear budget deficit: fundamental adjustments needed to be made anyway, and paved the way for a smooth transition into the third stage of the EMU.

When Finland joined the EU, it was understood from the constitutional perspective that the EMU in general, and the move to a common currency in particular, had consequences. The EMU conflicted with the Constitution and thus required the use of the 'exceptive enactment' procedure when incorporating the Accession Treaty in 1994 (*see infra*). The Finnish Accession Treaty included no opt-out regarding the EMU. While it was emphasised that EU membership involved obligations concerning the EMU, including a need to fulfil the Treaty-based criteria for participation, it was also stressed that the move to its third stage would necessitate a decision approving the move by the Finnish parliament based on a separate government proposal.[13] Later, when the move to the third stage was be-

[10] *See* Leino and Salminen, *supra* n. 3 and for previous discussion, *see* P. Leino, 'The European Central Bank and Legitimacy – Is the ECB a Modification of or an Exception to the Principle of Democracy?', *The Jean Monnet Working Papers 11/2000, Harvard Law School.*

[11] *Markka*, from 1860 thus preceding the Finnish independence (1917), provides debates with endless possibilities for romantic nostalgia in times of turbulence. To give an example, on 15 May 2013 Helsingin Sanomat – the leading Finnish newspaper – published a professionally designed set of drafts for new *markka* notes in preparation for the euro to go under.

[12] *See*, e.g., Euobserver, 'Finns Table Compromise for Funding Troubled Euro States', 28 June 2012, <http://euobserver.com/tickers/116798>, visited 18 Aug. 2013.

[13] Statement of the Constitutional Law Committee 14/1994 vp.

ing realised, the commitment to participate was seen as – unlike in Sweden – constitutionally settled as a part of the EU membership obligations.[14] There was a strong political will to join the third stage among the first wave of states, and in April 1998 the *eduskunta* decided on Finnish participation by simple majority, based on a government statement.[15] Since then, constitutional discussion about the EMU framework and its development has been lame – until the beginning of the euro crisis.

In Europe's current crisis, the national debate has focused primarily on Finland's role as a guarantor for the debts of others and how the problems have been caused less by the lack of rules than by an unwillingness to enforce budgetary discipline. A lack of a clear ethos of solidarity is a common characteristic of these debates, which have often been characterised by distrust and focused around a need to secure collateral for the money invested in bailout arrangements.[16] The debate gained a particular upswing when the adoption of the Portuguese package coincided with the parliamentary elections in April 2011,[17] which resulted in a clear power shift in the parliament and turned government building into an exceptionally difficult exercise by Finnish standards. A key promise given in the heat of electoral campaigning was that Finland would not lend money without collateral – a promise that has proved extremely painful to keep and provoked European reactions ranging from irritation to ridicule. As a result of the elections, a Eurosceptic party of a considerable size is now represented in the opposition, and the prolonged euro crisis has provided it with plenty of opportunities to challenge the government's EU policies.[18] In brief, the EMU has turned into genuine politics.

[14] *See* for discussion in Finland esp. M. Scheinin, *EMU ja Suomen valtiosääntö. Yhteiseen rahaan siirtyminen ja Suomen Pankin asema* [EMU and the Finnish Constitution. Common Currency and the Status of the Bank of Finland] (Kauppakaari 1997) p. 59-101.

[15] Government Statement 1/1998 vp, *see* Statement of the Constitutional Law Committee 8/1998 which was given in handling the Government Statement, *see* previously concerning the alternatives in such a situation Statement of the Constitutional Law Committee 18/1997 vp.

[16] *See*, e.g., *EUobserver*: 'Eurozone Chiefs: Greece Can Wait till November', 4 Oct. 2011, <http://euobserver.com/economic/113815>; 'Slovenia: EU Bail-Out Ratification in Danger', 21 Sept. 2011, <http://euobserver.com/economic/113693>, visited 18 Aug. 2013.

[17] J. Jokela and K. Korhonen, 'A Eurosceptic Big Bang: Finland's EU Policy in Hindsight of the 2011 Elections', *Briefing Paper* 23 May 2012, Finnish Institute of International Affairs.

[18] To give an example, the Social Democrat party had promised voters it would get collaterals for new loans. Since the Social Democrats form the backbone of the government together with the Conservatives, and most crucially hold the post of Minister of Finance, Finland has maintained its demands concerning no loan without collateral. *See*, e.g., *EUobserver*: 'Finland Puts Greek Bailout Package under Pressure', 19 Aug. 2011, <http://euobserver.com/economic/113349>, and 'Finland Abandons Greek Collateral Deal under German Pressure', 26 Aug. 2011, <http://euobserver.com/economic/113422>, or 'Finland on Greek Collateral: "It's Not about the Money"', 31 Aug. 2011, <http://euobserver.com/economic/113476>, visited 18 Aug. 2013.

As regards the Finnish constitutional setting, it would be difficult to argue that measures adopted to tackle the euro crisis would have escaped democratic institutions entirely. To the contrary, the measures and the relevant Finnish positions have been addressed by the *eduskunta* repeatedly, providing it with an opportunity to participate not only in the decision-making but also in their practical implementation (through national representatives, either the government or Finnish members in the relevant decision-making or supervisory bodies created through the EMU related measures). In addition, the *eduskunta* has ultimately approved and brought into force nationally the new agreements, such as the European Stability Mechanism (ESM).

The Finnish Constitution's openness to European law, its *Europarechtsfreundlichkeit*, is evident in a number of ways. First, it is reflected in the way in which the Finnish EU accession was brought into force in Finland, namely by invoking the peculiar Finnish institution of 'exceptive enactment', which allows for the adoption of legislation that conflicts with the Constitution if it is approved in a special procedure. According to legal doctrine, this has made EU law resistant to the demands stemming from Finnish constitutional law.[19] Second, the evolving constitutional practice during the first years of EU membership underlined the specificity of the EU among international relations and accommodated the traditional sovereignty principle into a new context. Finally, the 'new' Constitution (2000) contains a so-called internationalisation principle (Section 1.3 of the Constitution), which according to the *travaux preparatoires* has special relevance for EU membership.[20] In particular after the partial revision of the Constitution, which entered into force in March 2012, the Constitution expresses a commitment to EU membership.[21]

The core provisions concerning the handling of EU matters were, however, adopted already when preparing for EU membership and aim at guaranteeing the wide participation of the *eduskunta*. Alongside a vertical relocation of authority, Finnish EU membership has resulted in a horizontal relocation of authority between

[19] *See* N. Jääskinen, *Eurooppalaistuvan oikeuden oikeusteoreettisia ongelmia* [The Europeanization of Law – Jurisprudential Problems] (Yliopistopaino 2008) p. 49.

[20] According to the Section 1.3 of the Constitution 'Finland participates in international cooperation for the protection of peace and human rights and for the development of society. Finland is a Member State of the European Union.' The last sentence was amended in 2011 (Act No. 1112 of 2011) and entered into force 1 March 2012. *See* discussion in Ojanen, *supra* n. 8. *See also* T. Ojanen, 'The Impact of EU Membership on Finnish Constitutional Law', 10 *European Public Law* (2004) p. 531 at p. 534-539.

[21] *See also* J. Salminen, 'Revideringen av grundlagen – beredningen av nödvändiga ändringar i Finlands grundlag', [Amending the Constitution – Preparation of the Amendments of the Constitution of Finland], *Förvaltningsrättslig tidskrift* (2010) p. 161, and J. Salminen 'Manifestations of the European Union Membership in the Constitution of Finland in the European Context', *Europarättslig tidskrift* (2010) p. 509.

the parliament, the government and the president,[22] and contributed to an enhancing of the parliamentary features of the Finnish system.[23] The key element in this regard is the affirmation of the general competence of the government in EU affairs – instead of that of the president who is a major player in international relations in general – which in turn guarantees that the *eduskunta* can participate in the consideration of EU acts and other related measures.[24]

In Finland, the transfer of legislative powers to the EU institutions has been rather successfully compensated by providing the *eduskunta* with the possibility of participating in the *ex ante* preparation of national positions in EU affairs.[25] The core provisions can be in found in Chapter 8 of the Constitution, and more specifically in Sections 93.2, 96 and 97 of the Constitution, which regulate in particular the participation and information rights of the *eduskunta*.[26]

According to Section 93.2, the government prepares and decides in EU matters unless they require the approval of the parliament, in which case the latter participates in the national preparation of EU decisions. Section 96 holds the main provisions concerning this participation of the parliament.[27] According to this provision, the parliament considers those proposals for acts, agreements and other EU measures that under the constitution belong to its competence. The implementation of this provision involves a hypothetical exercise of determining which matters would be decided by the parliament if Finland were not an EU member. According to Section 3.1 of the Constitution, the *eduskunta* exercises legislative powers and decides on state finances. The core areas of competence of the parliament from the point of view of EU affairs therefore relate to matters that are of a 'legislative' nature, have effects on the parliament's budgetary competence, and to international agreements affecting the parliament's competence.

[22] T. Ojanen, 'The Europeanization of Finnish Law', in P. Luif (ed.) *Österreich, Schweden, Finnland. Zehn Jahre Mitgliedschaft in der Europäischen Union* (Böhlau Verlag 2007) p. 145 at p. 161.

[23] Ojanen, *supra* n. 22, at p. 161-163. *See also* A. Jyränki, 'Presidential Elements in Government: Finland: Foreign Affairs as the Last Stronghold of the Presidency', 3 *European Constitutional Law Review* (2007) p 285.

[24] Ojanen, *supra* n. 22, at p. 168.

[25] *See* esp. V. Viljanen, 'Onko eduskunnan asema lainsäädäntövallan käyttäjänä muuttunut' [Has the Role of the Finnish Parliament as a Legislature Changed?], *Lakimies* (2005) p. 1050 at p. 1063, *see also* V. Viljanen, 'Eurooppalaistuminen valtioelinten välisissä suhteissa' [The European Impact on the Status of Finnish State Organs], *Lakimies* (2003) p. 1169 at p. 1177-1179. *See also* J. Salminen, 'Kansallisen parlamentin eurooppalaiset tehtävät' [National Parliaments' European Functions] *Oikeustiede – Jurisprudentia*, XLII:2009, p. 359-408.

[26] On this, *see* N. Jääskinen and T. Kivisaari, 'Parliamentary Scrutiny of European Union Affairs in Finland', in M. Wiberg (ed.), *Trying to Make Democracy Work – Nordic Parliaments and the European Union* (Stockholm 1997) p. 29.

[27] For a description of the Section 96 and 97 procedures, *see Improving EU Scrutiny. Report of the Committee to Assess EU Scrutiny Procedures*, *Publications of the Parliamentary Office* 4/2005.

In practice, the division into 'legislative' and 'non-legislative' matters tends to be the key consideration in determining the role of the parliament.[28] This essentially is a substantive operation. A matter is legislative in case it affects the rights and obligations of private individuals (Section 80 of the Constitution) or if the Constitution otherwise requires for an act to be adopted. Further, the parliament's Constitutional Law Committee has clarified that a matter is of a legislative nature if it affects the foundations of an individual's rights or obligations; if the same matter is currently regulated in an act of parliament or if there is a general understanding that the matter should be regulated by such act.[29] Provisions in international obligations that are of a 'legislative' nature and other significant commitments also fall within the parliament's competence (Section 95). Sections 94 and 95 of the Constitution concern the acceptance of international obligations, their rejection and bringing them into force. The parliament's approval is required for obligations containing provisions of a legislative nature.

Even if many of the measures (ESM, ESFS, new Treaty on Stability, Coordination and Governance in the EMU) taken in the context of the euro crisis have, as to their form, been international agreements and thus formally fallen outside the constitutional framework for Union decision-making, Finnish positions have been prepared as if they were 'EU affairs'.

Chapter 7 of the Constitution concerns state finances. The parliament decides on the state budget and its consent is required for a state security or a guarantee (Sections 82 and 83 Constitution). Even if these provisions are reasonably seldom activated by individual EU measures, the EMU development has been understood to affect these provisions. For example, the draft ESM agreement and the draft European Financial Stability Facility (EFSF) framework agreement were addressed by the parliament under Section 96 specifically due to their effects on state finances. To the extent that new arrangements have been made through agreements when approving these arrangements, they have not been considered to result in such a transfer of competence that would need to be considered significant. This is important since after the 2012 revision of the Constitution, a distinction is made between a 'transfer of competence' and a 'significant transfer of competence': while the former can be approved by a simple majority, the latter requires a qualified one (Sections 94.2 and 95.2 Constitution).[30] The international agreements

[28] Statement of the Constitutional Law Committee 11/2000 vp and 12/2000 vp, *see also* Statement 45/2000 vp and Viljanen 2005, *supra* n. 27, at p. 1059-1061.

[29] *See* Statement of the Constitutional Law Committee 11/2000 vp.

[30] Laki perustuslain muuttamisesta, Act No. 1112 of 2011; for discussion on the changing situation, in J. Salminen, 'Toimivallan siirto Euroopan unionille' [Transfer of Power to the European Union] in *Juhlajulkaisu Mikael Hidén 1939-7/12-2009* (Suomalainen Lakimiesyhdistys 2011) at p. 269.

mentioned have not been considered to result in a 'significant transfer of competence'.[31]

As regards the procedural requirements, Section 96.2 specifies the ways in which the government communicates the relevant proposals for EU acts, agreements and other measures without delay for the determination of the parliament's position. In matters that fall under the parliament's competence, its position in practice equals the Finnish position, even if the former usually leaves the details to the government's discretion and limits itself to steering the main political lines. EU proposals are considered by the parliament's Grand Committee and usually also in one or more of its sub-committees. The government is obliged to keep the relevant committees updated with information on the negotiations and to keep the Grand Committee informed of its position. Section 97 includes provisions on the parliament's right to receive information on international affairs. It requires the government to keep the Grand Committee informed through reports on the preparation of EU matters other than those falling under Section 96, either upon request or when otherwise necessary. This concerns for example preliminary stages of a decision-making process or matters in which the Council does not formally act. Under Section 97.2 the Prime Minister is required to provide information on matters on the European Council agenda both before and after its meetings and on envisaged amendments to the Treaties. On the basis of the information provided, the committees may issue statements to the government, and they frequently do so.

The measures adopted to tackle the crisis have been widely and repeatedly discussed in the parliament, including its Committee on Constitutional Law. A look at the matters handled by said Committee in 2010-2012 demonstrates not only the intensity of discussions, but also that these measures relating to the crisis have usually been considered to have a constitutional dimension, which has necessitated their handling in this particular Committee.[32] The Committee has taken a central and active role in the discussions. The Committee is politically organised within the *eduskunta*: it is composed of MPs and reflects the power relations in the parliament. But the Committee has an essentially judicial function: it establishes the correct interpretation of the Constitution, for which it consults key

[31] Statement of the Constitutional Law Committee 5/2011 vp, Statement of the Constitutional Law Committee 13/2012 vp and Statement of the Constitutional Law Committee 37/2012 vp.

[32] The number of opinions adopted by the Constitutional Law Committee in these matters is considerable. In 2010 one of the fifty opinions adopted concerned the development of the EMU. In 2011 these matters formed one of the most central subject matters: seven out of altogether 25 opinions concerned these measures, and in the following year (2012) 4 out of 39 opinions concerned the EMU and related measures. In addition, the Committee has included various statements relating to these measures in its meeting protocols. For a detailed analysis, *see* Leino and Salminen, *supra* n. 7.

experts on constitutional law. Its opinions generally enjoy great authority and are treated as binding on parliament and authorities. This makes the Committee the most central constitutional body of Finland.

Of relevance here is that the Constitutional Law Committee has considered the measures combating the euro crisis as matters belonging to Section 96 or 97, whether formally taken within the EU framework or not. It has thereby allocated the primary competence in these matters to the government under Section 93.2, but placing it under a strict obligation to report to the parliament in all matters falling under the competence of the latter. This is in line with the traditional interpretation of the Sections 96 and 97, which have been generally understood to extend beyond the matters that belong formally to Union competence to questions that can be considered 'comparable' to Union matters both as regards their substance and their effects.[33] Therefore, both the EFSF, an international agreement of a private law nature, and the ESM, in which only the Euro states participate but which allocates substantial roles for the Commission, the European Central Bank and the Court of Justice, have been understood to fall within the scope of Sections 96/97 as they are clearly and tightly connected to Union cooperation.[34] The solution is not entirely unique, but is invoked relatively rarely.[35] The international agreements mentioned have also been approved by the *eduskunta* under the Section 94/95 Procedure, offering it an exceptional possibility to address the same matters twice. Because they already had been considered *ex ante* by the *eduskunta* in detail, the approval stage no longer raised significant problems. In addition, in the context of the ESM, some of its prospective decisions have been considered so significant that the *eduskunta* had to be informed before any decisions are taken, as will be explained in more detail below.

The aforementioned interpretation of the Constitutional Law Committee guaranteed strong rights of participation for the parliament, giving it a wide prerogative to be informed while the matters were being negotiated and to require modifications to the proposed instruments in order to guarantee their compatibility with the Finnish constitution. Had the international agreements been treated as 'traditional' international agreements, the parliament's rights of participation

[33] *See* Proposal of the Government 1/1998 vp p. 146-147, also Report of the Constitutional Law Committee 10/1998 vp, p. 26-27, Report of the Constitutional Law Committee 6/1999 and Statement of the Constitutional Law Committee 56/2006 vp.

[34] *See* Statement of the Constitutional Law Committee 1/2011 vp and Statement of the Constitutional Law Committee 5/2011 vp.

[35] It has been for example used for decisions of the heads of states and governments meeting in the Council, *see* Statement of the Constitutional Law Committee 49/2001 vp, and for the Prüm agreement, which was made between seven member states outside the EU structure but involved the exercise of EU competence and had the objective of being later integrated into the EU legal structure, Statement of the Constitutional Law Committee 56/2006 vp.

would have been limited to a 'take it or leave it' choice. At the same time, the chosen method has also contributed to increasing time pressure on the government in situations in which time already has been scarce. Moreover, parliament has occasionally been required to formulate its position based on incomplete reports and lacking information, which has provoked criticism.[36] One of the key experts that the Constitutional Law Committee relies on has openly criticised the timetables for making euro decisions: the parliament needs to formulate its position too quickly, especially considering their importance. The Constitutional Law Committee, for instance, was convened on less than 24 hours' notice to decide on matters that significantly impinge on the parliament's budgetary powers. For the expert mentioned, this entails being called to give evidence the day before the hearing and receiving the relevant documents the evening before, which leaves the long hours of the night for the preparation of an opinion on an extremely complex issue.[37] Time pressure, mainly due to the incredibly hectic timetable at Union level, clearly has had negative consequences for the possibilities for scrutiny and genuine debate at the national level.

The EU's secretive decision-making culture, in which most of the EU euro crisis proposals have remained confidential until the decisions were made, also has caused tensions. There is a world of a difference with the Finnish culture of open government,[38] where parliamentary documents are open for public scrutiny as a matter of principle. This is reflected in the major part of the government's correspondence with the parliament in EU matters being publicly available, often in two languages, on the parliament's website. Although confidentiality cannot be a justification for limiting parliament's access to information, the government in rare and well-justified cases may request the Grand Committee of the parliament to maintain confidentiality for a limited period of time, which in practice limits the flow of information posted on the parliament's website. It is striking how often the government, during the euro crisis, has needed to request confidentiality on

[36] Minutes of the Constitutional Law Committee 68/2012 vp and Statement of the Constitutional Law Committee 14/2011 vp. *See also* decision of the Chancellor of Justice 10 Oct. 2012 (Dnro OKV/1034/1/2012 etc.).

[37] For comments by T. Ojanen, Professor of Constitutional Law at the University of Helsinki, 'Oikeusprofessori haukkuu europäätösten kireät aikataulut', published in Helsingin Sanomat on 17 Dec. 2012. Similar concerns were also raised at a discussion event organised by the Finnish Institute for International Affairs after the December 2012 European Council, for a summary of discussions, *see* 'Eurooppa-neuvoston jälkilöylyt', <www.fiia.fi/en/event/534/eurooppa-neuvoston_jalkiloylyt/>, visited on 18 Aug. 2013.

[38] *See* Section 12.2 of the Constitution: 'Documents and recordings in the possession of the authorities are public, unless their publication has been specifically restricted by an Act. Everyone has the right of access to public documents and recordings.'

the basis of a possible harm to the country's international relations.[39] This always has been granted by the Grand Committee, although it heavily criticized EU pressure to conduct these debates in secret, underlining that 'democracy also requires that the principles of transparency and public access to documents are realised in the development of EMU.'[40]

The limits of acceptable publicity were tested in the context of the Greek government collaterals. In May 2013 the Supreme Administrative Court gave a ruling concerning the numerous appeals relating to the publicity of the Greek bail-out collaterals, which had at the time of signing of the pact been largely refused by the Finnish Ministry of Finance due to requests to that effect by the Greek government.[41] In its ruling, the Supreme Administrative Court established that exceptions to the general principle of openness always need to be examined on a case-by-case basis, and that with some minor exceptions in the current case, no justified grounds for limiting public access to the main bulk of information could be found. The decision was celebrated by the media and politicians alike. It is seen as placing the government under an obligation to resist any future secrecy requirements that might conflict with Finnish legislation on public access.

Substantive requirements of Finnish Constitution on attempts to rescue euro

A particular challenge to the constitutional discussions has been caused by the numerous 'quick fixes' to the basic framework of the economic union, which have been both diverse in their legal form and adopted in quick succession, creating obstacles for a thorough examination of matters. The variety of measures has also made their relationship to the wider EMU framework difficult to grasp. Since several measures have been taken by both the Union and the member states in an intergovernmental setting, the result has been a web of various mechanisms and parallel processes, which have required more than a modest degree of constitutional imagination at national level. In the following, the constitutional debate concerning two EMU-related groups of measures – *new stabilisation mechanisms* and *new instruments of economic governance* – will be explored in a greater detail through the interpretative practice of the Constitutional Law Committee.

[39] Laki viranomaisten toiminnan julkisuudesta [Act on the Openness of Government Activities], Act No. 621 of 1999, for English translation, *see* <www.finlex.fi/en/laki/kaannokset/1999/en19990621>, visited 18 Aug. 2013. *See also* in the context of the control of use of resources, T. Pöysti, 'Scandinavian Idea of Informational Fairness in Law – Encounters of Scandinavian and European Freedom of Information and Copyright Law', 50 *Scandinavian Studies in Law* (2007) p. 222 at p. 231.

[40] Statement of the Grand Committee 4/2012. Banking Union and the Future of EMU.

[41] KHO:2013:90, decision of 14 May 2013.

As said before, in its practice the Committee has labelled the nature of both stability mechanisms and measures relating to economic governance as 'Union matters' (Sections 96/97), thus activating the strong prerogatives of the *eduskunta* both as regards its rights of information and participation in decision-making. It has addressed the problems more in procedural terms, but remained hesitant to discuss developments substantially. For example, it has given less attention to how these developments might relate to the internationalisation principle or a possible constitutional responsibility to participate in European integration (Section 1.3) or explored the substantial limits of the development in its practice. This is linked to section 94.3 of the Constitution, which establishes that 'an international obligation shall not endanger the democratic foundations of the Constitution.' It is evident that this provision also applies to the execution of international obligations, and not merely their adoption. One can conclude that the recent interpretative practice of the Constitutional Law Committee suggests that a further development of the EMU is not limited by any particular sovereign powers that would, as a matter of principle, necessarily need to be preserved for the member states, presuming that the transfer of competences concerned is realised in a democratically solid way. Still, it is evident that the exercise of budgetary competence is among those matters where questions of democratic participation have a particular relevance. For this reason, the growing tendency to isolate these questions from the political process and leave them to experts in financial institutions, national audit offices and the banking sector to settle as apolitical questions, pretty much in the same way that monetary policy has been traditionally run,[42] is problematic, not least because budgetary policies involve fundamental functions of redistribution.[43]

As far as both stability mechanisms and economic governance have been concerned, the EU Treaties have preserved the primary responsibility for state finances and budgetary powers of the member states. At the same time, the stability and economic governance measures taken during the euro crisis have been understood to affect Finnish sovereignty, although not significantly. It is evident that the financial responsibilities relating to the stabilisation mechanisms are considerable no matter how they are measured, and even the measures adopted in relation to economic governance set restrictions on the exercise of financial and budgetary competences. Since the Constitution plays a significant role in both the political and legal culture in Finland, constitutional challenges have been visible in everyday decision-making as concerns relating to national sovereignty, the financial competence of the *eduskunta* and the democratic legitimacy of the exercise of financial powers.[44]

[42] Leino, *supra* n. 10.

[43] K. Tuori, 'Euroopan taloudellinen valtiosääntö' [The Economic Constitution of Europe], in *Oikeuden avantgarde, Juhlajulkaisu Juha Karhu* (Talentum 2013) p. 387 at p. 400-401.

[44] *See* Tuori, *supra* n. 44, at p. 403.

Stabilisation mechanisms

Be it reluctantly, the Constitutional Law Committee ultimately always has concluded that the European stability mechanisms, sometimes after some adjustments, are compatible with the Constitution. Participation in these mechanisms has not been understood as a significant limitation of sovereignty in terms of Sections 94.2 and 95.2 of the Constitution, even though they involve serious economic liabilities with potential consequences for a state's future democratic choices, in particular if the possible risks were to materialise in full. Participation in the mechanisms is a way of contributing to the stability of the EMU, thus enabling the member states to exercise their financial competence in a tightly integrated union. The national solutions have relied on a finding that sovereignty in state finances is in practice partly exercised through participation in the EMU and the stability mechanisms that have evolved around it are necessary; such an interpretation has been crucial in guaranteeing that the member states' financial and budgetary competence remains genuine.

In some matters the Committee saw unanimous decision-making in the stability mechanisms as a precondition for compatibility with Finnish sovereignty and the Finnish Constitution. Instead of the usual strong emphasis on loyal cooperation, the need to prevent decision-making has been regarded as more than a theoretical alternative. The possibility of invoking this option has also been considered significant from the point of view of sovereignty. It could be argued that the participation of a Finnish representative in decision-making within the ESM is more an exercise of sovereignty than the possibility of preventing that a decision is taken. However, a key issue in the considerations of the Constitutional Law Committee has been whether a possible amendment of a state's maximum liabilities could take place without unanimity, thus opening up a possibility of amendment without Finnish approval – even though the matter would concern the Constitution and Finnish sovereignty.[45] This fixation on the unanimity requirement constitutes a departure from the dominant political views on Union decision-making in Finland, which have traditionally relied more on effective participation in Union decision-making and less on the possibility of preventing it. In this particular instance, while one big member state could alone prevent a decision from being taken, others would not have such a veto. The fixation on unanimity is significant since it symbolises the entry of a growing sense of a loss of trust in European decision-making in constitutional discussions.

[45] Statement of the Constitutional Law Committee 25/2011 vp, Statement of the Constitutional Law Committee 22/2011 vp, Statement of the Constitutional Law Committee 1/2011 vp and Statement of the Constitutional Law Committee 13/2012 vp.

The credit package adopted to assist Iceland (2009), the opportunity provided for Latvia to borrow from Finland (2010) and even the Council decision to launch the European Financial Stabilisation Mechanism (EFSM)[46] attracted little discussion in Finland. However, the euro states' agreement on the EFSF,[47] a temporal loan instrument aimed at safeguarding financial stability in Europe by an agreement under English law, provoked discussion and even loud protests, particularly from the opposition in Finland. The EFSF sets up a Luxembourg-based company, owned by the member states, which issues bonds and other financial instruments on the markets in order to provide financial assistance. Later in 2010 it was decided that a permanent mechanism, the ESM,[48] would be adopted to introduce new means to fight the crisis but also to take over the functions of the EFSF – not least due to the continuing discussion concerning its compatibility and suitability with the Treaty framework. The ESM is a public international financing institution which is based on an intergovernmental treaty between the euro area states, and which entered into force on 1 January 2013 after Finnish ratification in late 2012. The function of the ESM is to provide financial assistance to the euro-area states; in order to finance the loans it issues debt instruments. Contrary to the Stability Facility in which the member states solely act as guarantors, the member states have invested capital in the mechanism.

Despite its private law features the Framework Agreement on EFSF was, at least in Finland, considered to be an intergovernmental treaty, requiring the approval of the *eduskunta* according to Section 94 of the Constitution, because its substance affected both the budgetary powers and legislative powers of the *eduskunta*.[49] That the funding of the facility was guaranteed by the contracting states and Section 82.2 of the Constitution requires the parliament's consent for a state security was an additional justification for a requirement of the parliament's approval.[50] The Constitutional Law Committee paid special attention to the constitutional effects of a potential increase of the Finnish liabilities when the total amount of the se-

[46] It is an emergency funding instrument based on Art. 122(2) TFEU, which enables the Council to grant Union financial assistance to a member state that is 'in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control.' *See* Council Regulation (EU) No. 407/2010 of 11 May 2010 establishing a European financial stabilisation mechanism, *OJ* [12 May 2010] L 118. *See* discussion in J. Louis, 'Guest Editorial: The No-Bailout Clause and Rescue Packages', 47 *Common Market Law Review* (2010) p. 971.

[47] *See* Louis, *supra* n. 46.

[48] For a discussion, *see* M. Ruffert, 'The European Debt Crisis and European Union Law', 48 *Common Market Law Review* (2011) p. 1777, and R. Smits, 'Correspondence', 49 *Common Market Law Review* (2012) p. 827.

[49] Statement of the Constitutional Law Committee 5/2011 vp.

[50] In the constitutional practice a special problem was caused because varying understandings about the actual and precise amount of the state security. *See* Statement of the Constitutional Law Committee 14/2011 vp and Statement of the Constitutional Law Committee 3/2012 vp.

curities by the member states for the Facility was increased from EUR 440 billion to EUR 780 billion; for the Finnish part this entailed an increase from EUR 8 billion to EUR 14 billion. When evaluating the absolute amount of Finnish liabilities in relation to the annual national budget, the Constitutional Law Committee established that the risks related to the increase did not endanger the possibilities of Finland to meet the obligations it has based on its Constitution.[51] This particular statement, which is not further developed in the Committee's practice, and the unspecified obligations of the state it builds on, is rather open to different interpretations. Various risk calculations are typically difficult to conduct, and the parliament, its committees and the experts they consult are largely reliant on the information and estimates provided by the government. At the same time, the statement suggests that the absolute amount of commitments and the risks involved may affect the Committee's future conclusions concerning the compatibility of a proposed financial measure with the Constitution. However, in view of the amount of commitments and the risks involved, the Constitutional Law Committee has confirmed the government's wide room of manoeuvre, which the latter exercises under an equally wide political responsibility.

The first drafts of the ESM Treaty were repeatedly scrutinized *ex ante* by the *eduskunta* and its Constitutional Law Committee before the treaty was submitted to the parliament for final approval.[52] As said before, the Constitutional Law Committee had established that the treaty impinged upon the legislative and budgetary powers of the *eduskunta* and thus the approval by the latter was required.[53] Again, as when considering the EFSF Treaty, the Constitutional Law Committee assessed the amount of Finnish capital investment in the ESM and the risks related to it against the so-called Constitution-based obligations of the state. It required the financial liabilities and investments in the various parallel mechanisms to be calculated *in toto.* In the ESM, the Finnish part of the paid-in capital (EUR 1.4 billion) and callable capital (EUR 11 billion) was found to be extensive, when compared for example with the annual state budget. In order to establish the applicable procedure for approval and bringing into force the Treaty, the Committee considered the total amount of public debt and risks of the investment. Of major importance for its conclusion was the interpretation that the *eduskunta* has, due to the participation and information right based on Sections 96 and 97 of the Constitution, possibilities to genuinely control and influence the

[51] Statement of the Constitutional Law Committee 5/2011 vp.

[52] *See* EUobserver, 'Finland Threatens Summit Deal over Bailout Fund', published on 3 July 2012, <http://euobserver.com/economic/116848>, visited 18 Aug. 2013.

[53] *See* in *ex ante* participation Statement of the Constitutional Law Committee 25/2011 vp, Statement of the Constitutional Law Committee 22/2011 vp and Statement of the Constitutional Law Committee 1/2011 vp, and finally Statement of the Constitutional Law Committee 13/2012. *See also* Minutes of the Constitutional Law Committee 11/2011 vp.

Finnish member of the ESM Board of Governors, where for example decisions on the capital payments are made unanimously. According to the Constitutional Law Committee, the state's current liabilities did not even in this case endanger its possibilities to take responsibility for its Constitution-based duties.[54] When evaluating the possible risks to the investments made, operations within the ESM provided greatly improved possibilities to risk management when compared with the previous situation.

Especially the emergency decision procedure (Articles 4 and 5(6) of ESM Treaty) provoked discussion in Finland in the context of the *ex ante* scrutiny by the Constitutional Law Committee, in particular as regards the scope of decision-making by qualified majority in the ESM Board of Governors. Based on the draft agreement, it seemed that the financial liabilities of Finland could also grow by a qualified majority decision of the Board of Governors over the maximum limit defined in the agreement, even if Finland opposed such a decision. This possibility was considered to affect national sovereignty and the budgetary competence of the Finnish parliament, and led to demands concerning a need to specify the agreement in this respect. This position gained no particular admiration in those EU circles that grew impatient when needing to wait for a breakthrough to overcome Finnish objections relating to the said 'emergency' voting procedure.[55] When Finland ultimately approved the agreement, this matter was no longer raised, as it had been solved through changes to the agreement during negotiations, for example as regards the situations in which the emergency voting procedure could be used and by limiting the relevant liabilities.[56] In the end, the transfer of powers to the ESM, like previously to the EFSF, was not considered significant with regard to Finnish sovereignty. Thus both international instruments were accepted in the *eduskunta* and brought into force nationally in accordance with the ordinary legislative procedure pertaining to an act of parliament.[57] This position appears justified: even if the financial significance of the commitments was undoubtedly considerable, the transfer of competence was not.

Not only have the Grand Committee and the Constitutional Law Committee made specific demands in relation to information flows from the government to the *eduskunta*, but the Audit Committee, which is responsible for overseeing the management of government finances and compliance with the budget, has set such demands as well. In a recently issued statement, it concludes that while it has

[54] Statement of the Constitutional Law Committee 13/2012.

[55] EUobserver, 'EU Ministers Agree New Bail-Out Fund, Criticise Greece', published on 24 Jan. 2012, <http://euobserver.com/economic/114992>, visited 18 Aug. 2013.

[56] Statement of the Constitutional Law Committee 25/2011 vp and Statement of the Constitutional Law Committee 22/2011 vp.

[57] Statement of the Constitutional Law Committee 5/2011 vp and Statement of the Constitutional Law Committee 13/2012 vp.

received a fair amount of updated information from the government relating to the crisis, the overall impact of the financial commitments and the related risks have only been addressed to a limited extent. The same finding applies to the more comprehensive political objectives relating to crisis management and the effectiveness of the adopted measures. The Audit Committee further insisted on being informed under Section 97 of the Constitution of the annual reports of both the ESM and the ESM audit committee, and of the EFSF, in order to enable a discussion of the risks involved.[58] The risks and wider political scenarios are something that have gained little public discussion at EU level, and to the extent such analyses exist, the decision-makers have not been eager to share them with the wider public. This of course provides an extra hurdle for the government when needing to provide such analyses to the *eduskunta*.

The parliament is now involved in the functioning of the mechanisms, both based on national implementing legislation and through political means in decision-making that in fact, as to its nature, might more logically belong to the executive, even if it does have implications for the parliament's possibilities to exercise its budgetary competence. Based on the implementation act concerning the EFSF, the government is under an obligation to give a statement to the *eduskunta* before issuing guarantees, which will be followed by a vote of confidence on the government.[59] So far the government has given five such statements.[60] The use of this procedure, of giving a statement automatically followed by a vote of confidence, to this kind of a matter is atypical in the Finnish context.[61] Also, the issuing of EFSF guarantees is one of the few EU-related matters discussed in the parliament's plenary assembly instead of the Grand Committee, which is usually responsible for handling EU matters.

As regards decision-making within the ESM, the parliament has based the requirement concerning its participation in national decision-making on Sections 96 and 97 of the Constitution. The arrangements made in the context of the ESM rely on the central role of the exercise of budgetary and financial powers of the *eduskunta*. In addition, decisions relating to the granting of loans are as to their nature and their financial implications considered to be so significant that they require the provision of relevant information by the responsible Cabinet minister prior to decision-making within the ESM in order to safeguard the prerogatives of the parliament.[62] These constitutional requirements for participation of

[58] Report of the Audit Committee 2/2013 vp.

[59] Laki Euroopan rahoitusvakausvälineelle annettavista valtiontakauksista [Act on the State Securities for the EFSF], Act No. 668 of 2010, § 3.2.

[60] The Government Statements 2/2010 vp (on Ireland), 1/2011 vp (Portugal), 1/2012 vp (Greece), 3/2012 vp (Spain) and 1/2013 (on continuing the State Securities).

[61] Report of the EFSF Committee, Publications of the *eduskunta* 1/2012, p. 25.

[62] Statement of the Constitutional Law Committee 13/2012.

national parliaments through the national representative have needed to be reflected in the decision-making rules, arrangements and practices within the mechanism. At the same time, while the ESM agreement was at many points clarified during its negotiation, it still includes various issues that are open to different interpretations and which will undoubtedly affect the concrete ways in which the parliament will be able to participate in decision-making that has only indirect effect on its prerogatives, as far as actions within the ESM capital are concerned.[63] In case the ESM Treaty is to be amended in order to raise the ESM capital, the matter would – since it involves an amendment of an international agreement – need to be approved by the parliament on the basis of Section 94 of the Constitution.

Even if the ESM is based on an intergovernmental treaty, the institution has various obvious linkages with the Union through the involvement of the same institutional actors and through the amendment of Article 136 TFEU. The European Council decided that this article should be amended in order to clarify the existence of a competence for the Eurozone states to establish a permanent stability mechanism that can be activated if there is a need to safeguard the stability of the Euro area. The European Council used the simplified revision procedure provided for in Article 48(6) TEU for this purpose. It strongly emphasised that the amendment was only of a clarifying nature and that no new competences were transferred to the Union – this is a condition for the use of Article 48(6).

From the perspective of Finnish constitutional law the TFEU Treaty amendment did not provide any particular difficulties. Legally and politically the key question was whether the amendment should be approved by parliament. There was agreement among the government, the Constitutional Law Committee and the experts it consulted that this was indeed the case. Although the amendment was not considered to be 'legislative' in character, it required the parliament's approval because it was 'otherwise significant' under Section 94.1 of the Constitution – after all, the amendment was considered a way for the member states to engage in further development of the Union, much in the same way as the Lisbon Treaty had been regarded as significant in the meaning of the Section 94.1 of the Constitution. Although rather technical, the amendment did touch on the Treaty system, which had in turn previously been approved by the parliament, and was of particular importance for the Union in the current turbulent situation.[64] The solution appears logical and appropriate. The characterisation of the amendment followed the same logic in Finland as that applied later by the European Court of

[63] *See*, e.g., Statement of the Constitutional Law Committee 22/2012 vp, Minutes of the Constitutional Law Committee 68/2012 vp and Minutes of the Constitutional Law Committee 49/2012.

[64] Statement of the Constitutional Law Committee 6/2011 vp.

Justice in its *Pringle* ruling,[65] focusing on how the amendment did not confer any new competence on the Union and how the ESM Treaty was compatible with the relevant provisions of the TFEU.[66]

Instruments of economic governance

Member states' financial sovereignty has not only been affected by stability mechanisms but also by various instruments of economic governance, which build on the Maastricht Treaty and the so-called Stability and Growth Pact (1997). There is a growing tendency towards European policy guidance, complemented by fiscal supervision which extends to member states' annual budgetary processes.

The further development of the Stability and Growth Pact was initiated already in 2010, when the Commission proposed amendments to both its preventive and corrective part. The so-called 'six-pack' consisting of five regulations and one directive entered into force in December 2011,[67] and may contribute to a significant strengthening of the Stability and Growth Pact by means of reversed qualified majority voting and more or less automatic sanctions.[68] In addition, in May 2013 a 'two-pack' of two regulations was adopted in order to address the euro area more specifically by placing Euro states under an obligation to submit their draft budgets to the Commission and by introducing enhanced surveillance of troubled member

[65] ECJ 27 Nov., Case C-370/12, *Thomas Pringle* v. *Government of Ireland, Ireland and The Attorney General.*

[66] For a discussion of the ruling, *see* Leino and Salminen, *supra* n. 3, at p. 857.

[67] *See* Communication from the Commission. Reinforcing economic policy coordination, COM(2010) 250 final, Brussels, 12 May 2010; Communication from the Commission. Enhancing economic policy coordination for stability, growth and jobs – Tools for stronger EU economic governance, COM(2010) 367 final, Brussels, 30 June 2010.

[68] November 2011 six-pack adopted by the Council to improve budgetary discipline, on the one hand, and economic surveillance, on the other, including Regulation amending Regulation 1466/97 on the surveillance of member states budgetary and economic policies; Regulation amending regulation 1467/97 on the EU's excessive deficit procedure; Regulation on the enforcement of budgetary surveillance in the euro area; Regulation on the prevention and correction of macroeconomic imbalances; regulation on enforcement measures to correct excessive macroeconomic imbalances in the euro area; and a Directive on requirements for the member states' budgetary frameworks. These measures where concluded in two parts, first, a preventive part that was based on Art. 121 TFEU and including Council Regulation (EC) 1466/97, amended by Council Regulation 1055/2005 and Regulation 1175/2011 of EP and Council and second, a corrective part based on Art. 126 TFEU and Protocol 12 on excessive deficit procedure including Council Regulation (EC) 1467/97, amended by 1056/2005 and 1177/2011 and Council Regulation (EC) 479/2009, amended by 679/2010 and 679/2010. In addition, the Commission has in November 2011 proposed the amendment of two of the regulations that were already amended as a part of the six-pack in order to tailor them to address the euro-area more specifically.

states.[69] In addition, some other decisions have been taken, including the Euro Plus Pact,[70] which establishes 'stronger economic policy coordination for competitiveness and convergence.'

Since these developments have taken place within the Union structures, the starting point for national decision-making has been that new legal instruments falling under Union competence do not involve new additional procedures or elements to those already approved when ratifying the Treaties, strongly presuming that the Union has the competence to adopt such instruments.[71] In the case of the 'six-pack' legislation, the Constitutional Law Committee was involved *ex ante* based on the Constitution's Section 96 procedure on the involvement of the *eduskunta* in Union affairs described above, and had the possibility of establishing at an early stage of negotiations that certain aspects of the legal bases of the 'six-pack' legislation required clarification; it was in particular questioned whether Article 136 TFEU could be used as a legal basis for the proposed measures.[72] The 'six-pack' and the 'two-pack' created no particular Finnish constitutional difficulties as regards for example sovereignty; this position can be endorsed, despite the legal obligations in the excessive deficit procedure, the enhanced EU supervision and enhanced requirements for national budgetary procedures, which all affect the exercise of fiscal and budgetary competences of the *eduskunta*. At the moment, the procedure used for the adoption of the national budgetary framework, in particular the parts involving the government and the *eduskunta*, are described in national legislation in a rather superficial manner, and the 'six-pack' legislation did not cause any instant need to amend Finnish legislation according to the Constitutional Law Committee.[73] Actually, the 'six-pack' legislation might help to clarify how the will of the *eduskunta* could be taken into consideration more carefully than has previously been the case. From the parliament's point of view, it is important that it has proper and timely possibilities to give its consent to the frameworks that are later discussed at the EU level. The participation and information rights of the *eduskunta* are to be taken into consideration when reporting to the EU level and in the context of the relevant supervision. The role of the *eduskun-*

[69] Regulation (EU) No. 473/2013 of the European Parliament and of the Council 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 and Regulation (EU) No. 472/2013 of the European Parliament and of the Council on the strengthening of economic and budgetary surveillance of member states in the euro area experiencing or threatened with serious difficulties with respect to their financial stability.

[70] *See* the Conclusions of the Heads of State or Government of the Euro Area of 11 March 2011, <www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ecofin/119810.pdf>.

[71] Statement of the Constitutional Law Committee 49/2010 vp.

[72] Ibid.

[73] Ibid.

ta will also be affected by the way in which the Commission will exercise its newly acquired powers in practice.

However, a particular concern raised in this context by the Constitutional Law Committee has been the possible indirect use of Union secondary legislation to modify the interinstitutional balance established by the Treaties, a consideration that is important also for future and more general developments.[74] This concern is a relevant one: for example, amendments to the Stability and Growth Pact could alter the constitutional balance between the Union institutions, and there has been a general tendency to strengthen the role of the Commission, for example through the introduction of the automatic sanction procedure and reverse qualified majority voting – a procedure that remains unknown to the Treaties – in the context of economic governance.

The EMU structures were further strengthened through the Treaty on Stability, Coordination and Governance in the EMU (Fiscal Compact) concluded in March 2012 by a great majority of Union member states.[75] The contracting parties aim at regulating the action taking place within the framework of the EU Treaties through an international agreement – yet another very interesting legal construction, which attracted heavy criticism from the Finnish foreign affairs minister for being unnecessary and harmful.[76] While the main impact of the Treaty might be more political than legal, this does not make it entirely useless when budgetary cuts need to be legitimated in national debates. The Fiscal Compact builds on the 'six-pack' legislation by making the supervision of budgetary commitments more effective and its added value is that it demands that a structural budgetary rule and a debt brake have to be introduced in the contracting parties' national legislation. What is relevant from the point of view of Finnish constitutional law is that this Treaty did not establish any significant new competences at the European level.[77] On the contrary, the Fiscal Compact underlines the member states' own responsibility for their fiscal and budgetary politics within the EMU framework.

[74] *See also* for example the development of a future? Banking Union in the recent Commission proposal COM(2013) 520/F1 for a regulation establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Bank Resolution Fund.

[75] *See* P. Craig, 'The Stability, Coordination and Governance Treaty: Principle, Politics and Pragmatism', 37 *European Law Review* (2013) p. 231. *See also* L. Besselink and J.H. Reestman, 'Editorial: The Fiscal Compact and the European Constitutions: "Europe Speaking German"', *European Constitutional Law Review* (2012) p. 1. The full text of the agreement is available at <http://european-council.europa.eu/media/639235/st00tscg26_en12.pdf>.

[76] Euobserver, 'Finnish Minister Pours Cold Water on Fiscal Treaty', published on 17 Jan. 2012, <http://euobserver.com/economic/114906>, visited 18 Aug. 2013.

[77] Statement of the Constitutional Law Committee 37/2012 vp and before Statement of the Constitutional Law Committee 24/2011 vp. *See also* Minutes of the Constitutional Law Committee 49/2012 vp.

Although the provisions of the Fiscal Compact limit the budgetary powers of the *eduskunta,* and these limitations were considered significant as such by the Committee when compared to those contained in the EU Treaties and the Stability and Growth Pact, the Fiscal Compact was not considered by the Committee to result in *constitutionally* significant, additional limitations to the budgetary powers of the *eduskunta*. This finding seems solid: the obligation to conform to a balanced budget rule as such existed previously and the main contribution of the Fiscal Compact is to simply provide national guarantees for its implementation.[78]

Article 3(2) of the Fiscal Compact stipulates that the contracting parties are to adopt 'provisions of binding force and permanent character, preferably constitutional, or otherwise guaranteed to be fully respected and adhered to throughout the national budgetary processes.' This implementation duty not only concerns the balanced budget rule but also a correction mechanism to be triggered automatically in the event of significant observed deviations from the medium-term objective or the adjustment path towards it. The article adds that the correction mechanism is to fully respect the prerogatives of national parliaments. Since it was deemed possible to fulfil these obligations with an ordinary act of parliament and the prerogatives of the parliament were supposedly not affected, the adoption of the correction mechanism in Finnish law as such did not provoke constitutional problems. Even the widening of the competence of the Court of Justice of the European Union was debated, but the Constitutional Law Committee did not consider the transfer of powers significant enough to affect the choice of national procedure for approving and bringing the agreement into force.

The requirement included in drafts of the Fiscal Compact to insert the guarantees in the Constitution would have caused difficulties: from the point of state's constitutional powers, an international agreement obligating a state to amend its constitution certainly appeared in Finland as an extremely foreign idea. Instead, the correction mechanism was inserted into an act of parliament and built on duties of reporting and informing by the government to the *eduskunta*, including a plan for how the deviations will be corrected by the end of the year following the observation of the deviation.[79] The provisions of 'legislative' nature in the Fiscal Compact, including the balanced budget rule, are implemented as binding law according to the implementing act.[80] The mechanism includes three stages.

[78] *See* discussion in C. Callies, 'From Fiscal Compact to Fiscal Union? New Rules for the Eurozone', 14 *Cambridge Yearbook of European Legal Studies* (2012) p. 101.

[79] Talous- ja rahaliiton vakaudesta, yhteensovittamisesta sekä ohjauksesta ja hallinnasta tehdyn sopimuksen lainsäädännön alaan kuuluvien määräysten voimaansaattamisesta ja sopimuksen soveltamisesta sekä julkisen talouden monivuotisia kehyksiä koskevista vaatimuksista [Act on the Implementation of the Provisions of a Legislative Nature in the Treaty on the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union and etc.] Act No. 869 of 2012, § 3.

[80] Ibid., § 1.

The government first has the choice of adopting pre-emptive corrective measures at its own initiative. If the problem persists and Finland receives a recommendation by the Council, the government needs to consider giving a report to the parliament. If the Council establishes that Finland has not taken sufficient measures, a statement must be given to the parliament. The procedure builds on Section 44 of the Constitution, which enables the government to present a statement or report to the *eduskunta* 'on a matter relating to the governance of the country or its international relations.' The consideration of the statement always ends with a vote of confidence in the government. The Finnish version of the correction mechanism exceptionally limits the discretion of the government to choose between a statement and a report. Since the constitutional system provides no relevant alternative, this was deemed possible, and was further justified by the way in which the Constitution's Section 44 procedure enables the participation of the *eduskunta* in a significant debate and in decision-making on economic politics.

Whether the Finnish correction mechanism ultimately lives up to the requirements of the Fiscal Compact is not entirely clear. Certainly, the Finnish version of the correction mechanism 'fully respects the prerogatives of national parliament' (Article 3(2) Treaty). However, the provision is far from being automatically activated. It could be interpreted to constitute a procedure that ensures the effect of the treaty in the national budgetary process in a satisfactory manner ('otherwise guaranteed to be fully respected and adhered to throughout the national budgetary processes', Article 3(2) of the Treaty.) Whether it satisfies the criteria depends on how the prerogatives of a national parliament are understood: this specific method allocates a considerable responsibility to the *eduskunta.*

More politics, more democracy

A striking feature of the debate surrounding the euro crisis concerns the terms in which it has been conducted. It is evident that at least at times the 'market' has been running the show for the politicians, while the latter have been left to give a formal blessing to the arrangements strongly advocated as the only way out by economists, bankers and financial institutions. As a consequence, debate has partially escaped democratic forums, provoking comments on how the intergovernmental mode of functioning is turning into a template for the post-democratic exercise of political authority, and on how national parliaments 'cannot avoid the suspicion of merely rubber-stamping prior decisions taken elsewhere', a suspicion that 'inevitably corrodes any democratic credibility.'[81] The argument does not seem to apply in the Finnish context with quite the same force, largely because of the

[81] *See* J. Habermas, *The Crisis of the European Union. A Response* (translated by C. Cronin) (Polity 2012) p. 130.

rather imaginative national solutions to guarantee the parliament's prerogatives in EU decision-making. While there might also be reason to celebrate the ways in which the Union legal order has proved adaptive and innovative in tackling the crisis, one should still be concerned about the possibility that the current ways to fix the crisis might become a more permanent feature of Union development. This is because quite often, temporary 'crisis' arrangements tend to become more permanent than intended: absolute necessity and temporariness would contradict with the state of exception becoming the rule.[82] Even if operating in an intergovernmental setting with strict unanimity requirements provides a small and less influential member state exceptional moments around a table where its vote might really make a difference, from the Finnish point of view this working mode is generally problematic, not to speak of the more general implications it has for the quality of decision-making in the Union.

Problems exist at both the European and the national level. At the EU level, the conditions for debate have been stringent: the preparations of the European Council where the relevant political decisions have been taken have been characterised by an almost complete lack of transparency. Proposals have been made late and without any public consultation: many relevant facts relating to the background of the decisions have only been brought to public knowledge after the decisions were made. This is something that the Finnish Grand Committee criticised in exceptionally heavy terms when considering the future development of the EMU in December 2012. It argued that any such plans presume a broad public debate and expressed its concern about the ways in which the measures adopted to combat the crises have been tackled by waiving regular procedures: this raises serious doubts about the compatibility of those measures with the Treaty, which, after all, has been adopted in a 'fundamentally democratic procedure'.[83] This criticism is particularly serious, recalling that many of the points on the European Council agenda have in fact been extremely heavy and would obviously have benefited from much more thorough preparation – but there has never been time. This has set clear limits on national discussions as well, in particular in those states where a serious attempt has been made to have a debate. These debates have been conditioned by the fear that the EU would – particularly in case national debates proved substantial and required amendments – not be capable of taking the necessary decisions following the scheduled timetable. It is obvious that the European agenda has not welcomed national debate or any reconsideration of the proposed measures; the reactions to the Finnish collateral requirements serve as a subtle reminder of this. This sets serious limits to the possibilities of genuine po-

[82] For a critical discussion of crisis management arrangements in general, G. Agamben, *State of Exception* (translated by K. Attell) (The University of Chicago Press 2005) p. 9.

[83] Statement of the Grand Committee 4/2012. Banking Union and the Future of EMU.

litical contestation of the European agenda, which in the context of the euro crisis has been usually set by the market forces.

From the point of view of the functioning of democracy – or when mirrored against the EU's own Treaty provisions of participatory democracy as a building block of all Union's functions – a particular concern is the limited role of civil society in the debates. In Finland the participation of civil society is formally guaranteed by making EU-related documentation publicly available and through public consultations which are to some extent institutionalised. Both of these avenues have been seriously restricted due to secrecy requirements coming from Brussels, a fact that has been subject to deep-found criticism, especially since no institutionalised mechanisms for conducting such consultations before decision-making in European Council exist at the European level.

This is linked to the following. The euro crises have emphasised the position of the European Council more than would follow from the Treaty of Lisbon. From the point of view of democracy, it would of course be difficult to claim that an institution consisting of the heads of states or governments would be undemocratic, and an institution is of course not undemocratic only because it lacks a direct relationship of accountability with the European Parliament. In its recent conclusions, the European Council has considered the concerns raised in the context of the democratic entitlement of the EMU decisions only very briefly, and had nothing to add to the reforms already brought about by the Treaty of Lisbon more than three years ago. Instead of focusing on the quality of its own decision-making, the European Council has underlined the need to involve the European Parliament more, and to explore new mechanisms to increase the modest cooperation between the European Parliament and national parliaments, in line with the relevant provisions of the Lisbon framework, through a conference that may discuss EMU-related issues.[84] This is unlikely to bring any qualitative changes to the main framework of decision-making. The same applies to the following declaration by the European Council, which states the obvious:

> As a general principle, democratic control and accountability should occur at the level at which the decisions are taken. This implies relying on the European Parliament as regards accountability for decisions at European level but also maintaining and securing the pivotal role of national parliaments, as appropriate.[85]

[84] *See* European Council conclusions on completing EMU adopted on 14 Dec. 2012, para. 14. Towards a Genuine Economic and Monetary Union; Report by President of the European Council H. Van Rompuy, Brussels, 26 June 2012; Final Report of 5 Dec. 2012 p. 17. *See also Towards a Genuine Economic and Monetary Unio*n, Interim Report, Brussels, 12 Oct. 2012.

[85] The quote is from the van Rompuy interim report of October 2012; the idea is repeated in the Final Report p. 16.

In the member states there is little desire to let the European Parliament take over the role of national parliaments as a source of democratic legitimacy. But at the same time, the declaration underlines the most fundamental lesson from the euro crisis, namely that the clearest means for realising democratic accountability are still provided through the national parliaments, simply because of the lack of sufficient accountability arrangements at the EU level. The Finnish mechanism for guaranteeing the democratic legitimacy of the European Council decisions and many intergovernmental solutions used to tackle the euro crisis has worked reasonably well, and the position of the *eduskunta* has remained central in establishing the national positions. The way in which the relevant agreements have been examined by the parliament *ex ante* has been a clear strength of the Finnish system, even if hampered by the time constraints at EU level. A particular challenge is caused by the ESM decision-making in the future: since the Finnish parliament is tied to all future arrangements even within the current framework, the matter will remain on the agenda and the parliament will participate in the decision-making.

Against this background, it is of interest that the proposals aiming at improving decision-making have mainly focused on increasing EU powers in the economic union. This is something that the Report on the development towards a genuine EMU by Mr Van Rompuy enlarges upon, especially in relation to the European Parliament:

> […] the provisions for democratic legitimacy and accountability should ensure that the common interest of the union is duly taken into account; yet national parliaments are not in the best position to take it into account fully. This implies that further integration of policy making and a greater pooling of competences at the European level should first and foremost be accompanied with a commensurate involvement of the European Parliament in the integrated frameworks for a genuine EMU.[86]

While the member states have retained significant national competences in the area of economic policy, the implementation of such policies is already interlocked with EU guidelines, monitoring and surveillance aiming to guarantee the stability objectives even after prospective euro area states have fulfilled the convergence criteria and joined the common currency. It is evident that the plans to deepen economic integration would create new challenges to the already shaky legitimacy of the Union, in particular in the member states where the national democratic guarantees for parliamentary involvement in EU level decision-making are weak. But even in those member states where constitutional mechanisms allow for the wide participation of the parliament, such as in Finland, the plans to develop the

[86] *Towards a Genuine Economic and Monetary Union*, Final Report, p. 16.

economic union further along the lines proposed by the Commission in its recent Blueprint and further developed in its two March 2013 Communications building on the December 2012 European Council Conclusions, raise a number of fundamental points with completely new challenges.[87] The monetary union has always been built on the presumption that the running of a common currency does not require arrangements of direct democratic accountability, and that the expertise gathered in the European Central Bank would take care of maintaining the stability of the euro.[88] The recent experiences give reason to be critical towards all proposals that would aim at developing the economic union in the direction of the monetary one, building on governance by expertise. And the more atypical these arrangements grow, the more imagination would be needed to secure points for democratic style.

The more fundamental concern relates to the way in which many problems in the EU are not thought of in a genuinely political way, as problems to be decided through debate between protagonists sharing different opinions, values and preferences between options that have uncertain consequences. In the EMU context, usually only one option has been tabled after extremely limited consultations with the member states, one that has been strongly recommended by experts and supposedly required by the markets, while any political debate about its desirability has been experienced as threatening, even dangerous, and always been linked with the threat of serious consequences by way of market reactions. At the same time, these decisions have had significant political consequences for all states participating in the euro arrangements, in one way or the other. Political choices necessitate political debate, even when the options remain unclear, the outcome is uncertain, and there is a need to act with deliberation and responsibility.[89] There is a fundamental tension between the political consequences of many of the euro crisis solutions, on the one hand, and the clear persistence by the decision-makers that these decisions should not be politicised since they have no alternatives, on the other hand. As this article demonstrates, it has in fact been possible to accommodate most of the Finnish concerns. There is no single solution to these problems, or an

[87] Communication from the Commission, A blueprint for a deep and genuine economic and monetary union. Launching a European Debate, 28 Nov. 2012, COM(2012) 777 fin, and Communications from the Commission to the European Parliament and the Council, Towards a Deep and Genuine Economic and Monetary Union. The introduction of a Convergence and Competitiveness Instrument, 20 March 2013 COM(2013) 165 fin, and Towards a Deep and Genuine Economic and Monetary Union. *Ex ante* Coordination of Plans for Major Economic Policy reforms, Brussels, 20 March 2013 COM(2013) 166 fin.

[88] For further references concerning the ideology behind the EMU arrangements, *see* Leino and Salminen, *supra* n. 3 and Leino, *supra* n. 10.

[89] *See* B.R. Barber, *Strong Democracy. Participatory Politics for a New Age* (University of California Press 1984/2003) p. 12.

inner light that would help us navigate among the possible alternatives. And since there are alternatives, their pros and cons should be public knowledge, and these matters should be returned to the sphere of politics where they properly belong.