Reverse Qualified Majority Vote in Post-Crisis EU economic governance: a circumvention of institutional balance?

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Abstract: Since the entry into force of the Six Pack, most decisions on sanctions under the Stability and Growth Pact (SGP) are taken by reverse qualified majority voting (RQMV). According to this voting rule, a Commission recommendation is deemed to be approved by the Council unless rejected by a qualified majority of Council members. In order to achieve quasi-automaticity in the application of sanctions, RQMV allows for minority decision-making and establishes a new equilibrium between the Council and the Commission. Significantly, in recent years the EU legislature has continued to expand RQMV behind the scope of the Six Pack, raising the question whether it is gradually evolving into a method of decision-making of general application for the enforcement of EU law. The paper examines the origin and the rationale of reverse majority rules, with particular emphasis on measures introduced by the Six Pack, and assesses their legality in light of the prohibition of secondary legal basis, the principle of institutional balance and the equality of Member States before the Treaties. While recent case law, upholding the categorization of sanctions under the SGP as implementing measures, may be interpreted as providing some support for legislation introducing RQMV, major concerns still remain in relation to institutional balance and to the equality of Member States.

I. Introduction

In the wake of the financial and debt crisis, the EU legislature enacted a set of measures aimed at tackling perceived deficiencies of EU mechanisms for the coordination of economic policies and at strengthening EU oversight over national budgets of euro area Member States. The main legislative package, known as "Six Pack" and comprising five regulations and a directive, has considerably increased the role of EU institutions in fiscal surveillance[1]. Perhaps the most significant institutional innovation in the Six Pack is the introduction of reverse qualified majority voting (RQMV) for the adoption of certain measures[2].

The new decision-making mechanism is quite simple. Under RQMV, a Commission recommendation is automatically adopted by the Council unless it is rejected by qualified majority. The ordinary voting rule in the Council, according to which decisions are taking by qualified majority, is thereby reversed: Only the opposition of a qualified majority of Council members can prevent the measure from being adopted. The result is greater automaticity of decision-making.

The scope of RQMV is not limited to the Six Pack. On the one hand, the strengthening of fiscal surveillance through EU legislation has been complemented outside the EU legal framework by the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (TSCG). In order to achieve greater automaticity in the enforcement of the Stability and Growth Pact (SGP), Article 7 of the TSCG commits the contracting States to support the Commission when it finds that a Member State runs an excessive deficit, unless the Commission's recommendation is opposed by a qualified majority of euro area Member

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[1] For a general overview, see D. Adamski, "National Power Games and Structural Failures in European Macroeconomic Governance", (2012) 49 *Common Market Law Review* 1319; F. Amtenbrink, R. Repasi, "Compliance and Enforcement in Economic Policy Coordination in EMU", in A. Jakab, D. Kochenov (Eds), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance*, Oxford University Press, 2017, p. 145.

[2] One author even described the introduction of RQMV as "a Copernican revolution in EU decision-making" (R. Cisotta, "What Role for the European Commission in the New Governance of the Economic and Monetary Union?", IAI Working Paper 13-24, July 2013, 6).

States. On the other hand, RQMV has also been replicated in other, more recent pieces of EU legislation.

Rules on reverse majority voting raise legal as well as political concerns. By departing from the decision-making rules laid down in the Treaties, they may have the effect of sterilizing political confrontation and risk affecting the institutional balance. Against this background, the paper recalls the origin and the rationale of reverse majority rules, with a particular emphasis on measures introduced by the Six Pack, and discusses their legality in the light of scholarly criticism and of the case law of the Court of Justice of the European Union (CJEU).

II. The rationale of RQMV: the de-politicization of enforcement

The introduction of RQMV was intended to remedy a perceived shortcoming of fiscal surveillance, whose roots can be traced back to the original institutional architecture of EMU. A well known feature of EMU is asymmetry between its monetary and economic dimensions[3]. While monetary policy, for euro area Member States, is an exclusive EU competence managed by a centralized institution (the ECB), EU competence in the field of economic policy is limited, unclearly framed[4] and hampered by the lack of a strong federal budget. In order to foster economic policy convergence across the euro area, the Maastricht Treaty introduced two mechanisms. On the one hand, a procedure of multilateral surveillance (now Article 121 TFEU) aims at coordinating the economic policies of the Member States. On the other hand, a procedure was established to tackle Member States' excessive deficits (now regulated in Article 126 TFEU). The multilateral surveillance procedure (MSP) and the excessive deficit procedure (EDP) were supplemented a few years later by the SGP, consisting of two Council regulations[5] and a European Council resolution[6]. The preventive arm of SGP (Reg. 1466/97) strengthened oversight over national budgets by requiring euro area Member States to submit a stability programme[7] and entrusting the Council with monitoring its implementation[8]. A corrective arm (Reg. 1467/1997) was also introduced with a view to governing the EDP, streamlining the procedure and improving its effectiveness.

Ever since the negotiation of the Maastricht Treaty, the institutional setup of the economic policy component of EMU has been a battleground between different understandings of fiscal policy coordination and surveillance[9]. According to one view, the Member States' commitment to sound public finances required binding rules backed by a strict, almost automatic enforcement process following a rigorous timetable. Another view held that the enforcement of fiscal constraints should be left to flexible, largely discretionary mechanisms. Similar tensions characterized the process leading to the establishment of the

[3] F. Amtenbrink, J. de Haan, "Economic governance in the European Union: Fiscal policy discipline versus flexibility" (2003) 40 *Common Market Law Review* 1075; J.-V. Louis, "The Economic and Monetary Union: Law and Institutions" (2004) 41 *Common Market Law Review* 575; R.M. Lastra, J.-V. Louis, "European Economic and Monetary Union: History, Trends, and Prospects", (2013) 32 *Yearbook of European Law* 57.

[4] See R. Bieber, "The Allocation of Economic Policy Competences in the European Union", in L. Azoulai (Ed.), *The Question of Competence in the European Union*, Oxford University Press, 2014, 86-87.

[5] 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 economic policies, OJ 1997 L 209/1; Council Regulation (EC) No 1467/97 of 7 July 1997 on speeding up and clarifying the implementation of the excessive deficit procedure, OJ 1997 L 209/6.

[6] Resolution of the European Council on the Stability and Growth Pact, OJ 1997 C 236/1.

[7] Art. 3 of Reg. 1466/97.

[8] Art. 6 of Reg. 1466/97.

[9] I. Harden, "The Fiscal Constitution of EMU", in N. Walker, P. Beaumont (Eds), *Legal Framework of the Single European Currency*, Hart, 1999, 71 at 79.

SGP[10] and framed the debate on the occasion of subsequent Treaty revisions. Within the Convention on the Future of Europe that prepared the draft of the Treaty establishing a Constitution for Europe, the Commission suggested to rename EDP "recommendations" to "proposals", since the latter may only be modified in the Council by unanimity[11], whereas qualified majority is sufficient to amend a recommendation. This suggestion was retained in the Convention's draft, but was dropped by the intergovernmental conference (IGC) that adopted the final text of the Treaty[12] and did not resurface when the Treaty of Lisbon was negotiated three years later. Around the same time, a policy paper co-authored by the then economic adviser to the Commission's President suggested leaving the decision on the existence of an excessive deficit to the Commission alone and making the Council's approval of "technical" recommendations, including those on sanctions, automatic unless they were rejected by unanimity[13].

Ultimately, proposals for the de-politicization of fiscal surveillance did not make into the Treaty text, which still reflects a compromise between the competing views of enforcement outlined above. Fiscal discipline and oversight are anchored to (somewhat flexible) legal rules and criteria laid down in primary law, but their enforcement still rests largely on peer control. In particular, in the context of an EDP the finding of an excessive deficit and the assessment of actions taken by a Member State to correct it are left to the Council. According to the Treaty, enforcement of EMU fiscal constraints is thus premised on discretion exercised by a political institution. The Council has no obligation to endorse the Commission's recommendations and may discretionally take a different view as to compliance by a Member State with its obligations under the SGP.

In the light of early practice, this mechanism was found to be wanting[14]. A spectacular failure occurred in 2003, when the Commission launched an EDP against Germany and France for running excessive deficits. Considering measures taken by both countries insufficient to address the situation, the Commission recommended to the Council to request a deficit correction. However, the Council refused to endorse the Commission's recommendation and instead suspended the procedure. While the Court of Justice later found that the Council's departure from the procedural frame set out in the Treaty was illegitimate, it confirmed that the Council is not bound by the Commission's recommendations and may decide to disregard them[15].

Albeit those events revealed the intrinsic weakness of discretionary coordination and of peer pressure as an enforcement tool[16], the first reform of the SGP in 2005[17] did not addressed the issue. It was only after the Greek debt crisis again made patent the SGP's failure to

[10] H. Hahn, "Der Stabilitätspakt für die Europäische Währungsunion. Das Einhalten derDefizitobergrenze als stete Rechtspflicht", (1997) 52 *JuristenZeitung* 1133 at 1134-35.

[11] Art. 293(1) TFEU.

[12] See R. Dehousse, "Why Has EU Macroeconomic Governance Become More Supranational?", (2016) 38 *Journal of European Integration* 617 at 621-622.

[13] M. Buti, S. Eijffinger, D. Franco, "Revisiting The Stability and Growth Pact: Grand Design or Internal Adjustment?", European Economy. Economic Papers, n. 180, July 2003, p. 27.

[14] For a discussion on the limited enforceability of the original SGP, see F. Kostoris Padoa-Schioppa, "The 2005 Reform of the Stability and Growth Pact: Too Little, Too Late?", Bruges European Economic Research Paper no 6, November 2006, 21-25.

[15] Judgment of 13 July 2004, case C-27/04, *Commission v. Council*, para. 80.

[16] Editorial Comments, "Whither the Stabilty and Growth Pact?", (2004) 41 *Common Market Law Review* 1193 at 1194; J.-V. Louis, "The Economic and Monetary Union: Law and Institutions" (2004) 41 *Common Market Law Review* 575 at 579-580.

[17] Council Regulation (EC) No 1055/2005 of 27 June 2005 amending Regulation (EC) No 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies, OJ 2005 L 174/1; Council Regulation (EC) No 1056/2005 of 27 June 2005 amending Regulation (EC) No 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure, OJ 2005 L 174/5.

guarantee the financial stability of the Eurozone[18] that the EU legislature attempted to tackle it within a comprehensive overhaul of rules on fiscal surveillance. In a reform process strongly based on intergovernmental negotiations and resembling a "non-declared" IGC[19], it was chiefly Germany and France that advocated strengthening oversight of national budgetary decisions and endowing the EU with broader sanctioning powers in order to boost the credibility of the euro area. A Franco-German paper issued in 2010 called for a "rules-based application of sanctions" to be "rapidly […] imposed" on Member States in breach of the SGP, including its preventive arm[20]. The paper did not address the voting procedure for the adoption of sanctions, but went as far as to suggest the introduction of "political sanctions such as suspension of voting rights". It also advocated use of the EU budget as a "complementary leverage to ensure compliance with the key macro economic conditions of the SGP", an idea that later made it into the Macro-conditionality Regulation[21].

The choice to confine SGP reform to the adoption of secondary measures[22] forced the abandonment of the boldest suggestions, including the idea of political sanctions, which would not have been compatible with the Treaties[23]. Yet the Six Pack considerably strengthened the sanctioning machinery[24], expanding the scope of sanctions and introducing the possibility to require a Member State deviating from its path of fiscal consolidation to lodge a deposit as a guarantee of compliance with Council recommendations[25].

As regards the decision-making procedures, the technical tool to achieve greater automaticity was found in the abandonment of (positive) qualified majority voting rule in favour of reverse (simple or qualified) majority voting when it comes to deciding on sanctions[26].

Such a procedure is not without precedents, either in the EU legal order or in the law of other international organizations. By far the best-known example of a reverse voting mechanism can be found in the WTO dispute settlement system, where reverse consensus governs both the establishment of panels and the adoption of their reports. Upon request of a Member complaining of a violation of WTO rules a panel is automatically established to adjudicate the dispute, unless the Dispute Settlement Body (DSB) by consensus rejects its

[18] See F. Allemand, F. Martucci, "La nouvelle gouvernance économique européenne" (2012) 48 *Cahiers de droit européen* 17 at 32.

[19] D. Leuffen, H. Degner, K. Radtke, "Which Mechanics Drive the 'Franco-German Engine'? An Analysis of How and Why France and Germany Have Managed to Shape Much of Today's EU" (2012) 366 *L'Europe en formation* 69.

[20] "European Economic Governance – A Franco-German paper", www.kas.de.

[21] Regulation (EU) No 1303/2013 of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006, OJ 2013 L 347/320.

[22] The option of a limited Treaty revision to further strengthen EU fiscal surveillance and to amend Art. 126 TFEU was envisaged at a European Council meeting in October 2011, but it soon became clear that the UK would not have permitted it. Those events ultimately led to the conclusion of the TSCG outside the EU framework.

[23] Rather euphemistically, the paper stated that "[t]he legal basis for imposing such penalties must be studied in depth".

[24] Regulation (EU) No 1173/2011 of the European Parliament and of the Council of 16 November 2011 on the effective enforcement of budgetary surveillance in the euro area, OJ 2011 L 306/1; Regulation (EU) No 1174/2011 of the European Parliament and of the Council of 16 November 2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area, OJ 2011 L 306/8.

[25] Art. 4 Reg. 1173/2011.

[26] On the legislative history of reverse majority voting rules in the Six Pack see M. Chang, "Fiscal Policy Coordination and the Future of the Community Method" (2013) 35 *Journal of European Integration* 255 at 262-265.

establishment[27]. Similarly, Appellate Body reports are "adopted by the DSB and unconditionally accepted by the parties" unless the DSB decides by consensus not to adopt them[28]. While formal adoption by the DSB enhances the legitimacy of the organization's dispute settlement process, in practice the reverse consensus rule implies that it is always granted, since at least the winner of the dispute will likely impede consensus against adoption of the report.

Precedents of reverse majority voting existed in the EU legal order as well, both under primary and under secondary law. An example of reverse majority voting rule expressly provided for in the Treaty could be found prior to the entry into force of the Lisbon Treaty in the procedure for authorizing a Member State to join an enhanced cooperation established under the third pillar: The authorization was deemed to be granted unless the Council rejected the request by qualified majority[29].

Acts of secondary law also provide for reverse majority voting. Long a feature in comitology[30], it was also introduced into EU trade policy in 2004, when the EU legislature made the adoption of trade defence measures subject to reverse simple majority voting (RSMV). The relevant measures proposed by the Commission are adopted unless the Council decides by a simple majority to reject the proposal within one month of its submission[31].

III. The scope of reverse majority rules: the Six Pack and beyond

Taking inspiration from those models, the 2011 Six Pack introduced reverse majority voting in respect of the adoption of several Council decisions, concerning both the enforcement of the SGP and the macroeconomic imbalance procedure (MIP). Similar decision-making rules have also been introduced by later legislation in the context of conditionality mechanisms.

III.1. Reverse majority under the preventive arm of the SGP

Under the preventive arm of the SGP, euro area Member States are required to present a stability programme indicating, in particular, the medium-term budgetary objective and the adjustment path towards that objective[32]. The programme is then assessed by the Council[33] and both the Commission and the Council monitor its implementation[34]. In case of a significant deviation from the adjustment path towards the medium-term budgetary objective, the Commission issues a warning to the Member State concerned. Within one month of

[27] Art. 6(1) of the Understanding on rules and procedures governing the settlement of disputes (DSU) annexed to the WTO Agreement.

[28] Art. 17(14) DSU.

[29] Art. 40b TEU pre-Lisbon.

[30] See now Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers, OJ 2011 L 55/13. Committee procedures were previously regulated by Council decisions: see Council Decision 87/733/EEC of 13 July 1987 laying down the procedures for the exercise of implementing powers conferred on the Commission, OJ 1987 R 197/33, later replaced by Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission, OJ 1999 L 184/23.

[31] Art. 1(3), (7), (10) and (12), Art. 2(3), (7) and (8) of Council Regulation (EC) No 461/2004 of 8 March 2004 amending Regulation (EC) No 384/96 on protection against dumped imports from countries not members of the European Community and Regulation (EC) No 2026/97 on protection against subsidised imports from countries not members of the European Community, OJ 2004 L 77/12.

[32] Art. 3 Reg. 1466/97.

[33] Art. 5 Reg. 1466/97.

[34] Art. 6(1) Reg. 1466/97.

adoption of the warning, the Council examines the situation and recommends the necessary policy measures pursuant to Article 121(4) TFEU, on the basis of a Commission recommendation. If it considers that the State has failed to address the deviation within the deadline set by the Council, the Commission recommends to the Council the adoption of a decision establishing that no effective action has been taken. This decision is adopted by (ordinary) qualified majority. If the Council does not adopt the decision, and failure to take appropriate action on the part of the Member State concerned persists, the Commission, after one month from its earlier recommendation, recommends to the Council to adopt the decision establishing that the State has failed to take effective action. In this instance, RSMV applies: The decision is deemed to be adopted unless the Council decides, by simple majority, to reject the recommendation within ten days[35].

Up to this point, the whole procedure is also replicated for non-euro area Member States as regards the implementation of their convergence programmes[36]. However, in respect of euro area Member States, the Council decision establishing that the Member State has failed to take effective action triggers further consequences. Article 4 of Regulation 1173/2011 provides that twenty days after the adoption of the Council decision establishing that the Member State has not taken effective action, the Commission recommends that the Council require the Member State in question to lodge with the Commission an interest-bearing deposit amounting to 0,2 % of its GDP[37]. This further decision is adopted by RQMV[38]. Alternatively, by qualified majority, the Council may also amend the Commission's recommendation[39].

III.2. Reverse majority under the corrective arm of the SGP

Under the corrective arm of the SGP, RQMV is given a more prominent role. The decision as to the existence of an excessive deficit is taken by the Council on a proposal from the Commission[40]. Since the Treaty does not provide for a special voting procedure, the ordinary rule applies whereby the Council decides by qualified majority[41]. However, this rule must now be viewed in the light of the TSCG, whereby the Member States have sought to reinforce the automaticity of the EDP through a commitment undertaken outside the EU legal framework. According to Article 7 of the TSCG, euro area Member States "commit to supporting 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", unless a qualified majority of euro area Member States is opposed to the Commission's proposal. This provision aims to ensure that even as regards the decision establishing the existence of an excessive deficit the Commission's recommendations are automatically adopted.

Once an EDP has been opened, further decisions concerning the adoption of sanctions are taken by RQMV. Following the Council's decision establishing the existence of an excessive deficit, where the Member State concerned has already lodged an interest-bearing deposit under the preventive arm or the SGP, or where the Commission has identified particularly serious non-compliance with the budgetary policy obligations laid down in the SGP, the Commission recommends that the Council require the Member State concerned to

[35] Art. 6(2) Reg. 1466/97.
[36] Art. 10(2) Reg. 1466/97.
[37] Art. 4(1) Reg. 1173/2011.
[38] Art. 4(2) Reg. 1173/2011.
[39] Art. 4(3) Reg. 1173/2011.
[40] Art. 126(6) TFEU.
[41] Art. 16(3) TFEU.

lodge with the Commission a non-interest-bearing deposit amounting to 0,2 % of its GDP[42]. The decision is taken by RQMV[43].

Subsequent to the finding that a Member State runs an excessive deficit, the Council assesses the measures taken to address the situation and may establish that the State concerned has failed to take effective corrective action[44]. If that happens, the Commission recommends to the Council the adoption of a fine amounting to 0,2 % of the Member State's GDP[45]. Once again, the Council decides by RQMV[46] and may amend the recommendation by qualified majority[47].

III.3. Reverse majority under the MIP

While the SGP is concerned with the enforcement of fiscal rules, the MIP is a newly established procedure largely mirroring the SGP with a view to extending coordination and surveillance to macro-financial and macro-structural components of economic policy[48].

The starting point of the MIP is the Alert Mechanism Report (AMR)[49], which contains the Commission's assessment of Member States' economic developments, on the basis of a scoreboard of indicators looking at external imbalances and competitiveness, internal imbalances and employment trends[50]. In the AMR the Commission also identifies those States deserving further scrutiny because of a risk of being struck by imbalances[51]. For each of these countries the Commission carries out an in-depth review, assessing the existence and the gravity of economic imbalances[52]. On this basis, the Council, acting upon recommendation by the Commission, can recommend the adoption of corrective measures[53].

Based on the outcome of the in-depth review, the Commission may recommend the Council to adopt a recommendation establishing the existence of an economic imbalance in a Member State requesting the State to take corrective action[54]. The recommendation opens the corrective phase of the MIP. The concerned Member State must present a corrective action plan[55], which is then implemented under the monitoring of the Council and the Commission[56]. If the Council, based on a report by the Commission, considers the measures taken insufficient, it can adopt a decision establishing non-compliance and set a new deadline for the adoption of the corrective measures[57]. For euro area Member States, the decision establishing non-compliance triggers a sanctioning mechanism introduced by Regulation 1174/2011. As under the SGP, the Council can impose on the Member State concerned an interest-bearing deposit[58] or, after two successive Council recommendations in the same

[42] Art. 5(1) Reg. 1173/2011.
[43] Art. 5(2) Reg. 1173/2011.
[44] Art. 126(8) TFEU.
[45] Art. 6(1) Reg. 1173/2011
[46] Art. 6(2) Reg. 1173/2011.
[47] Art. 6(3) Reg. 1173/2011
[48] Regulation (EU) No 1176/2011 of the European Parliament and of the Council of 16 November 2011 on the prevention and correction of macroeconomic imbalances, OJ 2011 L 306/25.
[49] Art. 3(1) Reg. 1176/2011.
[50] Art. 4 Reg. 1176/2011.
[51] Art. 3(3) Reg. 1176/2011.
[52] Art. 5 Reg. 1176/2011.
[53] Art. 6(1) Reg. 1176/2011.
[54] Art. 7(2) Reg. 1176/2011.
[55] Art. 8 Reg. 1176/2011.
[56] Art. 9 Reg. 1176/2011.
[57] Art. 10(4) Reg. 1176/2011.
[58] Art. 3(1) Reg. 1174/2011.

imbalance procedure, an annual fine[59]. Decisions on the lodging of a deposit and on the fine are taken by RQMV upon recommendation by the Commission[60].

III.4. Reverse majority beyond the Six Pack: voting rules for the implementation of conditionality

It is worth noting that later legislative instruments have further extended the scope of RQMV. The first example is Regulation 472/2013, adopted as part of the so-called "Two Pack" and introducing specific rules on conditionality for Member States receiving financial assistance. The Regulation makes the imposition of post-programme surveillance on Member States exiting a macroeconomic adjustment programme subject to RMQV[61]. The adoption of recommendations under post-programme surveillance also occurs according to the same voting procedure[62].

A few months after the adoption of Regulation 472/2013, the EU legislature passed Regulation 1303/2013 (so-called Macro-conditionality Regulation), which boosts the effectiveness of EU budgetary constraints by linking the disbursement of European structural and investments funds to the performance of Member States[63]. Where a Member State has not taken effective action to tackle its excessive deficit, has failed to correct a macroeconomic imbalance, or has not complied with the macro-economic adjustment programme, funding may be suspended[64]. In those cases, the Council adopts an implementing act on a proposal by the Commission. Here again, the decision is taken by RQMV[65].

Finally, a similar conditionality mechanism is foreseen in the Commission's proposal for a regulation on the protection of the EU budget in case of generalised deficiencies of the rule of law in the Member States[66]. The aim of the proposed measure, which takes inspiration from the Macro-conditionality Regulation, is to respond to serious instances of rule of law backsliding in a Member State threatening "the principles of sound financial management or the protection of the financial interests of the Union"[67]. It is the Commission, as the "guardian of the Treaties"[68], which is given the task of assessing the existence of such risks[69]. Where it deems that a "generalised deficiency as regards the rule of law" is established, it proposes to the Council the adoption of an implementing act[70] suspending funding to the Member State concerned[71]. As in the case of the Macro-conditionality Regulation, the Commission proposal

[59] Art. 3(2) Reg. 1174/2011.

[60] Art. 3(3) Reg. 1174/2011.

[61] Art. 14(1) Reg. 472/2013.

[62] Art. 14(4) of Reg. 472/2013.

[63] Regulation (EU) No 1303/2013 of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006, OJ 2013 L 347/320.

[64] Art. 23(9) Reg. 1303/2013.

[65] Art. 23(10) Reg. 1303/2013.

[66] Proposal for a Regulation of the European Parliament and the Council on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States COM(2018) 324.

[67] Art. 3 of the proposal, which also provides a non-exhaustive list of "generalized deficiencies as regards the rule of law" and of "principles of sound financial management" they may affect.

[68] Pursuant to Art. 17(1) TEU, the Commission "shall oversee the application of Union law under the control of the Court of Justice of the European Union".

[69] Art. 5 of the proposal.

[70] Art. 5(6) of the proposal.

[71] The content of measures that may adopted pursuant to this procedure is detailed in Art. 4 of the proposal.

to suspend disbursement is automatically adopted unless the Council rejects it by qualified majority[72].

The extension of RQMV beyond the SGP and the rules on economic policy coordination is a significant development. The introduction of reverse majority voting in the Six Pack could perhaps be viewed as an exceptional measure responding to an emergency-driven logic, enacted at a time where the strengthening of euro area economic governance was widely considered necessary to reassure capital markets and boost the credibility of the common currency[73]. In addition, it responded to a view of strictly rule-based enforcement of fiscal constraints and macroeconomic criteria that had long been advocated. However, the replication of this decision-making procedure in other pieces of legislation shows that RQMV is not confined to exceptional instances. It reveals, by contrast, an appetite for replacing political discretion with semi-automatic decision-making as a general governance mechanism and as a tool to strengthen the effectiveness of the EU sanctioning machinery.

Once relegated to rather technical aspects of internal market rule-making (comitology) or to the domain of trade policy, reversed majority rules have found their way into the core of EU economic governance, an area where the Treaty drafters had sought to strike a delicate balance between Member States' autonomy and the spill-over effect of monetary integration. The trend towards further expansion of this decision-making rule raises delicate questions of legality and legitimacy. If RQMV gains ground and comes to be resorted to more systematically, its implications on the integrity of the EU institutional architecture should be carefully assessed.

IV. The legality of RQMV: secondary legal bases and institutional balance

Perhaps surprisingly, the provisions of the Six Pack introducing RQMV did not encounter significant opposition and were not subject to much political debate at the time of their adoption. This may be due to the wide perception that failures of EU budgetary oversight had to be remedied quickly and without engaging in a long and uncertain process of Treaty revision. Since then, however, they have attracted considerable criticism.

Many critiques take aim at reforms of the EU economic governance more generally. In this vein, several authors argue that the Six Pack measures further undermine the already fragile democratic credentials of the EMU. According to this view, by sterilizing political confrontation and replacing discretion with semi-automatic enforcement mechanisms the reforms have exacerbated concerns about the legitimacy of the EMU institutional setup[74], raising legal questions about the limits of EU competence[75] and about consistency with Member States' constitutional requirements.

[72] Art. 5(7) of the proposal.

[73] Editorial Comments, "Some thoughts concerning the Draft Treaty on a Reinforced Economic Union" (2012) 49 *Common Market Law Review* 1-2.

[74] M. Dawson, F. de Witte, "Constitutional Balance in the EU after the Euro-Crisis" (2013) 76 *Modern Law Review* 817; P. Leino, J. Salminen, "Should the Economic and Monetary Union Be Democratic after All; Some Reflections on the Current Crisis" (2013) 14 *German Law Journal* 844; F. Scharpf, "Democracy Large and Small: Reforming the EU to Sustain Democratic Legitimacy at All Levels" (2015) 21 *Juncture* 266 at 269-270; J. Snell, "The Trilemma of European Economic and Monetary Integration, and Its Consequences" (2016) 22 *European Law Journal* 157.

[75] F. Rödl, "Kompetenzverstoß der Europäischen Union: die Sanktionierung der Eurostaaten im Rahmen der Excessive Imbalance Procedure" (2012) 10 *Zeitschrift für Staats- und Europawissenschaften (ZSE)* 99 at 101-105; C. Calliess, C. Schoenfleisch, "Auf dem Weg in die europäische 'Fiskalunion'? – Europa- und verfassungsrechtlicheFragen einer Reform der Wirtschafts- und Währungsunion im Kontext des Fiskalvertrages" (2012) 67 *JuristenZeitung* 477 at 480.

While these critiques address the shortcomings of the reform of fiscal discipline in general terms, further strands of criticism are more specifically levelled against RQMV. They challenge its compatibility with the Council voting rules laid down in the Treaties, with the principle of institutional balance and with the principle of equality of Member States, respectively. On either of those grounds, most commentators question the legality of reverse majority voting rules introduced by the Six Pack[76].

Although the legal debate on RQMV has been relatively intense in the aftermath of the Six Pack, there are at least three major reasons for a new assessment. First, the expansion of the scope of RQMV beyond the Six Pack suggests an ongoing shift towards the systematic acceptance of this decision-making method for the adoption of implementing acts, at least in the domain of economic governance and with regard to the exercise of EU sanctioning or quasi-sanctioning powers. Given its expansive potential, it is crucial to assess the legality of this practice and identify legal limits to it, in order to prevent an encroachment on fundamental principles of the EU institutional architecture.

Second, since the adoption of the Six Pack the case law of the CJEU, while not directly addressing the legality of RQMV, has provided some clarifications on the nature of sanctions under the SGP. The qualification of sanctions, including those adopted under RQMV, as implementing measures may dispel some of the critiques voiced against this voting method, but whether it would suffice to uphold its legality is highly questionable.

Finally, while the new decision-making rules have not been triggered so far, they might be put to the test in the near future. No Member States have been subjected to financial penalties under an EDP so far, Spain and Portugal only narrowly escaping sanctions in 2016, when the Commission and the Council agreed not to impose fines for their failure to take effective action to correct their excessive deficits[77]. The EDP against Portugal was terminated in 2017[78] and the Commission has recently recommended the closure of the long-lasting EDP concerning Spain (2009-2019)[79]. However, the Commission has recently taken steps for the opening of an EDP against Italy for failure to comply with the debt reduction benchmark[80], potentially putting an end to years of flexible application of the SGP's corrective arm. Should the Council be called upon to decide on the existence of an excessive deficit in the next months and should it share the Commission's view, fines could be adopted in later phases of the procedure according to Regulation 1173/2011.

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[76] A. Fischer-Lescano, S. Kommer, "Verstärkte Zusammenarbeit in der EU. Ein Modell für Kooperationsfortschritte in der Wirtschafts- und Sozialpolitik?", Friedrich-Ebert-Stiftung Internationale Politikanalyse, September 2011, p. 15; M. Ruffert, "The European debt crisis and European Union law" (2011) 48 *Common Market Law Review* 1777 at 1800; J. Bast, F. Rödl, "Jenseits der Koordinierung? Zu den Grenzen der EU Verträge für eine Europäische Wirtschaftsregierung" (2012) 39 *Europäische Grundrechte Zeitschrift* 269; H. Rathke, "'Umgekehrte Abstimmung' in der Fiskalunion: neue Stabilitätskultur oder halbautomatischer Vertragsbruch" (2012) *Die Öffentliche Verwaltung* 751; R. Palmstorfer, "The Reverse Majority Voting under the 'Six Pack': A Bad Turn for the Union" (2014) 20 *European Law Journal* 186; C. Kaupa, *The Pluralist Character of the European Economic Constitution*, Hart, 2016, 332.

[77] Council Decision (EU) 2017/984 of 8 August 2016 giving notice to Spain to take measures for the deficit reduction judged necessary in order to remedy the situation of excessive deficit, OJ 2017 L 148/38; Council Decision (EU) 2017/985 of 8 August 2016 giving notice to Portugal to take measures for the deficit reduction judged necessary in order to remedy the situation of excessive deficit, OJ 2017 L 148/42.

[78] Council Decision (EU) 2017/1225 of 16 June 2017 abrogating Decision 2010/288/EU on the existence of an excessive deficit in Portugal, OJ 2017 L 174/19.

[79] Recommendation for a Council Decision abrogating Decision 2009/417/EC on the existence of an excessive deficit in Spain, ec.europa.eu/info/files/recommendation-council-decision-abrogating-decision-2009-417-ec-existence-excessive-deficit-spain_en.

[80] Report from the Commission. Italy. Report prepared in accordance with Article 126(3) of the Treaty on the Functioning of the European Union, ec.europa.eu/info/files/report-commission-italy-report-prepared-accordance-article-126-3-treaty-functioning-european-union_en.

IV.1. Compatibility with the general Treaty provision on Council voting rules

A key legal problem raised by reverse majority rules is that they derogate from decision-making rules set out in the Treaties.

Article 16(3) TEU lays down the general rule on voting in the Council, stating that unless the Treaty provides otherwise the Council shall decide by qualified majority. Provisions on RQMV in the Six Pack depart from this criterion without any explicit authorization in primary law. Neither Article 121 TFEU nor Article 126 TFEU make any reference to voting rules other than qualified majority. Article 121(4) and Article 126(13) TFEU provide for two adjustments of voting rules. The first adjustment is that the Member State to which a recommendation is addressed is excluded from the vote. The second relates to the threshold for qualified majority: since the relevant decisions only concern euro area Member States, the Treaty clarifies that qualified majority is calculated solely on the basis of the participating Member States[81]. Neither of these Treaty provisions, however, authorizes replacing qualified majority with a different criterion.

In the absence of a Treaty provision laying down different voting rules, it is uncertain whether a derogation from Article 16(3) TEU may be introduced by secondary law. As a general rule, the EU legislature is barred from introducing so-called "secondary legal bases", i.e. provisions of secondary law that set out procedures other than those provided for in the Treaties for the adoption of subsequent measures[82]. Some authors see this prohibition as a ground of invalidity of Six Pack provisions on RQMV[83].

Against this background, two arguments have been advanced in support of the legality of RQMV.

The first argument is that the adjustment of voting rules is justified by Article 136 TFEU, the legal basis of Regulations 1173/2011 and 1174/2011 in combination with Article 121(6) TFEU. Article 136 TFEU is a special legal basis for the adoption of "measures specific to those Member States whose currency is the euro". Since its purpose is to allow for a strengthening of euro area economic governance, it has been argued that this provision implicitly authorizes a derogation from the general voting rule enshrined in Article 16(3) TEU[84].

Most authors, however, correctly reject this view. Article 136 TFEU authorizes the adoption of measures which apply solely to euro area Member States, but does not allow for decision-making procedures other than those provided for in the Treaties. Like measures implementing enhanced cooperation[85], acts adopted pursuant to Article 136 TFEU only differ from those enacted under an "ordinary" legal basis because their geographic scope of application is limited to a restricted group of Member States. In any other respect, they are identical to other secondary law measures. If the Council may not alter decision-making procedures set out in the Treaties under different legal bases, it may not do so pursuant to Article 136 TFEU either. This conclusion is also supported by the wording of Article 136(1) TFEU, which expressly states that measures are adopted "in accordance with the relevant

[81] Both provisions refer to Art. 238(3)(a) TFEU, which addresses qualified majority voting in the Council in the event that not all Member States take part in the measure ("A qualified majority shall be defined as at least 55 % of the members of the Council representing the participating Member States, comprising at least 65 % of the population of these States").

[82] Case C-133/08, *Parliament v. Council*.

[83] Palmstorfer, *supra* n 76, 194; Kaupa, *supra* n 76, 332.

[84] C. Antpöhler, "Emergenz der europäischen Wirtschaftsregierung. Das Six Pack als Zeichen supranationaler Leistungsfähigkeit" (2012) 72 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 353 at 380; G.L. Tosato, "L'integrazione europea ai tempi della crisi dell'euro" (2012) 95 *Rivista di diritto internazionale* 681 at 691.

[85] Art. 20 TEU, Arts 326-334 TFEU. The avant-garde mechanism for the euro area introduced by Art. 136 TFEU is sometimes categorized as a special regime of enhanced cooperation (see B. de Witte, "An Undivided Union? Differentiated Integration in Post-Brexit Times" (2018) 55 *Common Market Law Review* 227 at 240).

procedure from among those referred to in Articles 121 and 126". Therefore, Article 136 TFEU makes it possible to have recourse to existing procedures to deepen euro area integration, but does not allow for the establishment of different decision-making procedures[86].

The second possible justification for RQMV rests on the categorization of acts adopted pursuant to that procedure as implementation measures. Whereas the legislature may not modify decision-making procedures directly laid down in the Treaties (such as legislative procedures), it may establish different decision-making procedures for the purpose of adopting implementing acts. The main legal basis for EU implementing powers is Article 291 TFEU. Pursuant to this provision, the implementation of EU law is primarily a task of the Member States, which are required to "adopt all measures of national law necessary to implement legally binding Union acts"[87]. This is a specification of positive obligations imposed by the principle of sincere cooperation[88]. When there is a need for uniform implementation conditions, implementing powers should be exercised by EU institutions: more precisely, they are conferred on the Commission, or, "in duly justified specific cases", on the Council[89].

However, the picture is complicated by the recent case law of the CJEU, which has clarified that Article 291 TFEU neither exhausts the scope of implementation powers under EU law nor applies to the fining of a Member State under the SGP. In the *Short Selling* case, the Court ruled that Article 291 TFEU is not the only avenue for entrusting an EU body with the power to implement binding acts of EU law and that such powers may also be exercised, for instance, by EU agencies[90]. Further elaborating on this rationale, in a 2017 judgment concerning the legality of fines adopted against Member States for misrepresentation of deficit and debt statistics, the Court held that sanctions under the SGP also represent an instance of autonomous executive power that Article 291 TFEU fails to catch[91]. Article 8 of Regulation 1173/2011 empowers the Commission to conduct investigations on budgetary statistics presented by the Member States. If it finds that data have been misrepresented, the Commission can recommend to the Council the fining the Member State concerned. The Court found that the Council's decision imposing the fine is an implementation measure, yet falls outside the scope of Article 291 TFEU. The latter provision is solely applicable to legally binding EU acts "which lend themselves in principle to implementation by the Member States"[92]. By contrast, the Court observed that a measure sanctioning a Member State "does not lend itself in the slightest to implementation by the Member States themselves" and must therefore be excluded from the scope of application of Article 291 TFEU[93].

Based on this ruling, the other sanctioning measures provided for in the Six Pack, including those adopted under RQMV, should also be categorized as implementing measures. This qualification could provide some support for the compatibility of RQMV with the Treaties, as long as this voting method is confined to the adoption of implementing measures. While a legislative act may not establish secondary legal bases for the adoption of measures that are reserved to the legislature, the same does not hold true for the adoption of implementing acts[94].

[86] Palmstorfer, *supra* n 76, 196; Rödl, *supra* n 75, 106.
[87] Art. 291(1) TFEU.
[88] Art. 4(3) TEU.
[89] Art. 291(2) TFEU.
[90] Case C-270/12, *United Kingdom v. European Parliament and Council (Short Selling)*.
[91] Case C-521/15, *Spain v. Council*.
[92] *Ibid*., para. 48.
[93] *Ibid*., para. 49.
[94] Case 230/78, *Eridania*, para. 7; Opinion of AG Maduro, case C-133/08, para. 17.

However, that any measure could be adopted under RQMV on the sole basis that it is an implementing act and that the EU legislature has so provided, is by no means a foregone conclusion. Acknowledging that the legislature may, for the sake of adopting implementing measures, establish procedures other than those provided for in the Treaties, does not necessarily imply that it is free to derogate from *any* Treaty provision relating to institutional decision-making. One thing is to delegate implementing powers to an EU agency, or to make the exercise of executive power by the Commission subject to oversight mechanisms that the Treaty does not expressly regulate, as in the case of comitology. To derogate from the Treaty rules setting out the basic functioning of a core EU political institution is quite another.

With regard to Article 16(3) TEU, very strong arguments militate against the claim that it can be derogated from for the purpose of enacting implementing measures. To begin with, the wording of the provision clearly seems to exclude it. It reads: "The Council shall act by a qualified majority except where the Treaties provide otherwise". According to a plain reading of this provision, the only exceptions to the qualified majority rule are those explicitly permitted by the Treaties. This interpretation is also supported by systematic and teleological considerations. First, since voting rules other than qualified majority voting are clearly conceived of as exceptional, they should be of strict interpretation. As the Court of Justice has consistently held, "exceptions are to be interpreted strictly so that general rules are not negated"[95]. To hold that there may be instances where the Council does not decide by qualified majority voting other than those provided for in the Treaties would disregard this basic principle of construction. In addition, it should be borne in mind that respect for decision-making rules set out in the Treaties is not an end in itself, but is instrumental in safeguarding key elements of the EU constitutional fabric: its autonomy and independence of action, the integrity of its institutional system, the principle of institutional balance and the equality of the Member States. Therefore, a teleological reading suggests a strict interpretation of Article 16(3) TEU as well.

IV.2. Compatibility with the principle of institutional balance

Even if one took the more permissive view that procedures for the adoption of implementing measures could derogate from the qualified majority rule under Article 16(3) TEU, this conclusion still would not suffice to uphold the legality of RQMV. Assuming that the legislature is authorized to lay down, for the purpose of regulating the exercise of implementation powers, different procedures than those set out in the Treaties, and thereby to derogate from Article 16(3) TEU, legislation must still comply with the other primary law provisions. In particular, it must respect the principle of institutional balance.

The EU is an organisation with limited competences, founded on the principle of conferral[96]. It may only exercise the competences that are attributed to it by the Member States[97]. The principle of conferral affects not only the vertical division of competence between the EU and the Member States, but also the horizontal allocation of tasks between EU institutions. As Article 13(2) TEU prescribes, "[e]ach institution shall act within the limits of the powers conferred on it in the Treaties". A corollary of the application of the principle of conferred powers to the institutions is the principle of institutional balance[98], whereby the Treaties set up a system for distributing powers among the different Community institutions, assigning to each institution its own role in the institutional structure[99].

[95] Case C-346/08, *Commission v. United Kingdom*, para. 39.
[96] See Art. 5(1) TEU.
[97] Art. 5(2) TEU.
[98] J.-P. Jacqué, "The Principle of Institutional Balance" (2004) 41 *Common Market Law Review* 383.
[99] Case 77/88, *Parliament v. Council*, para. 21.

It is on the principle of institutional balance that the Court of Justice grounded the prohibition of secondary legal bases. In the Court's view, to acknowledge the power of an institution to establish secondary legal bases would be "tantamount to according that institution a legislative power which exceeds that provided for by the Treaty"[100] and would undermine the requirement that each institution exercise its powers with due regard for the powers of the other institutions[101].

Although the SGP sanctioning machinery relies on implementation measures for the adoption of sanctions, primary law dictates a comprehensive framework for both the preventive arm (MSP) and the corrective arm (EDP) of SGP. As noted, key features of the Treaty regime on fiscal surveillance are the central role of the Council and the strong reliance on political discretion. In this context, the limited effectiveness of decision-making due to the difficulty in achieving the necessary majorities, far from being an unintended shortcoming, is a physiological feature of the system[102], which arguably can only be remedied by Treaty amendment.

By introducing a new decision-making procedure that relies on RQMV, the legislature affected the delicate balance between the effectiveness of the EMU enforcement machinery and the legitimacy of decision-making. When RQMV applies, the backing of a minority suffices to adopt the measure recommended by the Commission. As a result, the Council loses its central position in the procedure to the benefit of the Commission. A new equilibrium between those institutions is established, whereby the enforcement power, when it comes to the adoption of sanctions, is effectively shifted from the former to the latter. This strengthening of the Commission's role to the detriment of the Council may prove problematic in terms of institutional balance, particularly in the context of the EDP, where euro area Member States have additionally committed under international law to support the Commission's proposals[103]. The combination of rules under the Six Pack and under the TSCG curtails the Council's discretion. Although the TSCG does not create obligations under EU law and may be unenforceable[104], rules introducing RQMV in the EDP should be viewed in that light. At the stage of establishing the existence of an excessive deficit and deciding on the need for the Member State concerned to take corrective measures, the Council still enjoys discretion, but the Member States have indicated that they intend not to make use of that discretion. Subsequent steps then follow almost automatically pursuant to RQMV. Whether that is compatible with a Treaty framework that confers on the Commission only limited powers, namely to investigate and to assess whether the requirements for launching the procedure are met, is doubtful[105].

Should a Member State be fined under provisions of the SGP that rely on RQMV[106] and decide to challenge the decision, the Court of Justice could be called upon to assess the compatibility of the new voting rules with the Treaties and with the principle of institutional balance. It is not certain that the Court would be receptive to a challenge based on institutional balance. Despite being often hailed as a fundamental element of the EU constitutional architecture[107], it is a rather "fragile principle with uncertain contents"[108] and its invocation

[100] *Ibid.*, para. 56.
[101] *Ibid.*, para. 57.
[102] See the View of AG Tizzano in case C-27/04, *Commission v. Council*, para. 45.
[103] Art. 7 TSCG.
[104] See *infra*, para. IV.4.
[105] See Rathke, *supra* n 76, 755; Palmstorfer, *supra* n 76, 200-201.
[106] That was not the case for Art. 8 Reg. 1173/2011, which provided the basis for the adoption of sanctions challenged in case C-521/15, *Spain v. Council*.
[107] P. Craig, "Institutions, Power and Institutional Balance", in P. Craig, G. de Búrca (Eds), *The Evolution of EU Law*, Oxford University Press, 2011, 41; F. Fabbrini, "A Principle in Need of Renewal? The Euro-Crisis and the Principle of Institutional Balance" (2016) 52 *Cahiers de droit européen* 285 at 286.

has only rarely determined the outcome of the Court's rulings[109]. In the aftermath of the financial and debt crisis, in particular, the Court seems not to have taken in due account concerns about institutional balance[110]. However, the extensive interpretation of implementing powers retained in *Short Selling* and in *Spain v. Council* increases the risk that institutional balance be circumvented and thus suggests that arguments relating to it deserve careful scrutiny.

IV.3. RQMV and the equality of the Member States

Institutional balance only addresses relations between EU (political) institutions. A modification of decision-making rules as in the case of RQMV, however, may also affect power relations *within* the Council, i.e. ultimately relations among Member States. Therefore, doubts may arise as to the compatibility of RQMV with the principle of equality of the Member States.

This principle is enshrined in Article 4(2) TEU, which prescribes that "[t]he Union shall respect the equality of Member States before the Treaties". It stems from the sovereign equality of States in the international community[111], a "fundamental axiomatic premise" of international law[112]. As usually in international organizations[113], and in fact to a larger degree than in other international organizations due to the EU's supranational character, the principle of equality of Member States applies with some derogations in the EU legal order. In particular, decision-making rules do not fully reflect equality among the Member States, but often attempt to reconcile equality with effectiveness (by replacing unanimity with majority voting) and with democratic legitimacy (by attributing to each Member State a weight in decision-making processes depending on the size of its population)[114].

The rules on qualified majority voting in the Council are perhaps the foremost example of such adjustment. Under the EU Treaties, qualified majority requires a twofold threshold to be met. The current rule, which replaced the old weighted-vote system as of 1 November 2014, provides that "a qualified majority shall be defined as at least 55 % of the members of the Council, comprising at least fifteen of them and representing Member States comprising at least 65 % of the population of the Union"[115]. Like weighted vote, the "double majority" threshold entails that Member States do not have equal weight in Council decision-making. As mentioned, the adjustment is necessary to safeguard the legitimacy of the EU decision-making process and the democratic credentials of the EU, by balancing equality of States and equality of peoples. Compared to the old system, however, the new rules on qualified majority significantly increase the weight of larger Member States. In the case of Germany, voting power almost doubled from 8,4% pre-Lisbon to the current 16,12%, corresponding to its share

[108] S. Prechal, "Institutional Balance: A Fragile Principle with Uncertain Contents", in T. Heukels, N. Blokker, M. Brus (Eds), *The European Union after Amsterdam. A Legal Analysis*, Kluwer, 1998, 273.

[109] See M. Chamon, "The Institutional Balance, an Ill-Fated Principle of EU Law" (2015) 21 *European Public Law* 371 at 372.

[110] See P. Craig, "*Pringle* and Use of EU Institutions Outside the EU Legal Framework: Foundations, Procedure and Substance" (2013) 9 *European Constitutional Law Review* 263; M. Chamon, "The Empowerment of Agencies under the *Meroni* Doctrine and Article 114 TFEU: Comment on *United Kingdom v. Parliament and Council (Short-Selling)* and the Proposed Single Resolution Mechanism" (2014) 39 *European Law Review* 380.

[111] L.S. Rossi, "The Principle of Equality among Member States of the European Union", in L.S. Rossi, F. Casolari (Eds), *The Principle of Equality in EU Law*, Springer, 2017, 3.

[112] J. Kokott, "States, Sovereign Equality", in *Max Planck Encyclopedia of Public International Law*, Oxford University Press, 2011, para. 1.

[113] See B. Boutros-Ghali, "Le principe d'égalité des états et les organisations internationales" (1960) 100 *Collected Courses of the Hague Academy of International Law* 9.

[114] See Rossi, *supra* n 111, 10-15.

[115] Art. 116(4) TFEU.

of the EU population[116]. Where only euro area Member States take part in the vote, as in those instances to which RQMV applies, the share even rises to 24,17%.

RQMV further exacerbates overrepresentation of larger Member States[117]. In essence, RQMV is but a rule that allows for minority decision-making. In order for a Commission proposal or recommendation to be approved, it suffices that it is supported by a coalition as large as a blocking minority, representing at least 35% of the EU population. In addition, since only euro area Member States take part in the adoption of sanctioning and quasi-sanctioning measures under the SGP, this threshold is actually even lower than the "ordinary" blocking minority. As a general rule, pursuant to Article 16(4) TEU a blocking minority must include at least four Council members. However, this requirement does not apply in cases of differentiated integration, where not all Council members take part in the vote. In such cases, a blocking minority is made up of "at least the minimum number of Council members representing more than 35 % of the population of the participating Member States, plus one member"[118]. As a result, under current Eurozone membership, any group of three Member States comprising both Germany and France (or Germany and Italy or Germany and Spain, although such coalitions would be highly unlikely) would be able to pass a measure under RQMV[119].

Where (ordinary) qualified majority applies, a variety of possible coalitions may form, ultimately leading, in most cases, to decision by consensus once it becomes clear that Council members opposed to the proposal are unable to build a blocking minority[120]. Under RQMV, this logic is reversed. A coalition of Council members reaching the size of a blocking minority suffices… not to preserve the *status quo*, but to adopt the measure. As a consequence, power relations within the Council are reshaped. In order to understand the actual effects of the shift from qualified majority to RQMV, one has to take account of usual patterns of coalition building. Perhaps surprisingly, empirical evidence shows that Germany, despite its large population, is more frequently outvoted than most of the other large and medium-sized Member States[121]. Against this backdrop, not only does RQMV generally favour larger Member States, which may rely on the weight of their population as the core around which a minority coalition could easily gather. It also appears, more specifically, to have been conceived of as a legal arrangement to ensure that coalitions of creditor Member States centred around Germany, albeit a minority in the Council, may not be voted down.

Seen from the viewpoint of the principle of equality of Member States before the Treaties, this distortive effect is problematic, regardless of whether it is confined to the adoption of implementing acts. Admittedly, the normative content of the principle of equality among the Member States is not easy to identify. Many a function has been ascribed to it, from justifying the primacy of EU law over domestic law[122] to providing the constitutional foundation for mutual recognition[123]. Yet few would probably doubt that the equality of

[116] S. Van den Bogaert, "Qualified Majority Voting in the Council: First Reflections on the New Rules" (2008) 15 *Maastricht Journal of European & Comparative Law* 97 at 102.

[117] See Allemand and Martucci, *supra* n 18, 80.

[118] Art. 238(3)(a) TFEU.

[119] A simulator is available on the Council's website: www.consilium.europa.eu/en/council-eu/voting-system/voting-calculator/.

[120] See F.M. Häge, "Coalition Building and Consensus in the Council of the European Union" (2012) 43 *British Journal of Political Science* 481.

[121] D.P. Frantescu, "France more likely than Germany to lead the EU Council after Brexit, voting records in the Council show", www.votewatch.eu/blog/france-more-likely-than-germany-to-lead-the-eu-council-after-brexit-voting-records-in-the-council-show/.

[122] F. Fabbrini, "After the OMT Case: The Supremacy of EU Law as the Guarantee of the Equality of the Member States" (2015) 16 *German Law Journal* 1003.

[123] K. Lenaerts, "*La vie après l'avis*: Exploring the Principle of Mutual (Yet Not Blind) Trust" (2017) 54 *Common Market Law Review* 805 at 808.

Member States is closely connected to the integrity of the EU institutional system and that it requires EU decision-making processes to be so structured as to prevent the will of one or very few Member States from being automatically translated into the general will of the supranational polity[124].

RQMV comes dangerously close to producing exactly that result. For sure it does exacerbate the asymmetry of the EMU, since the quasi-automaticity of sanctions it is supposed to engineer deepens the rift between creditor and debtor states and contributes to making the latter comparatively less autonomous than the former in the conduct of their economic policy[125]. While this may perhaps not be prohibited by primary law, the alteration of the balance of power it generates in the Council decision-making dynamic casts doubts on its compatibility with the legal principle that proclaims the Member States equal before the Treaties.

Finally, one last problematic aspect of the new voting rules relates to the exclusion from the vote of the Member State concerned, stipulated in Article 12(1) of Regulation 1173/2011[126]. Pursuant to the Treaty framework on EDP, from the decision on the existence of an excessive deficit onwards the Council member representing the State against which the procedure is launched may not take part in the vote[127]. However, Regulation 1173/2011 goes one step further than the Treaty, since it extends exclusion from the vote to further measures (sanctions and deposits) that the Treaty does not contemplate. Since it derogates from the principle of equality among Member States, Article 126(13) TFEU excluding the representative of the Member State concerned from the exercise of voting rights cannot be applied analogically to any other measure than those it mentions expressly, namely "the measures referred to in paragraphs 6 to 9, 11 and 12" of Article 126 TFEU. It should therefore be concluded that the EU legislature did not have the power to replicate that rule in Regulation 1173/2011. This surprising analogous application of an exclusionary rule is perhaps more telling than one would suspect at first sight. It sheds light on the awkward relationship existing between the Treaty rules on EDP and Regulation 1173/2011. Obviously it is not in the power of the legislature to modify decision-making rules set out by Article 126 TFEU (or any other Treaty provision), which can only be amended by resorting to the Treaty revision procedures. Thus, the legality of the Six Pack rests on the assumption that the measures contained therein and introducing RQMV are *distinct* from those provided for by Article 126 TFEU. They are additional steps in the enforcement of the EDP, which are admissible since the Treaty framework for this procedure is non-exhaustive. However, Article 12(1) of Regulation 1173/2011 rests on the exact opposite assumption, namely that the new sanctioning powers are just a specification of Treaty rules on EDP. The only possible justification for excluding a Member State from the vote is for decisions on deposits and sanctions to form an integral part of "the measures referred to in paragraphs 6 to 9, 11 and 12" of Article 126 TFEU, the sole to which the exclusion applies. Clearly, both cannot be true.

From a legal standpoint, ascertaining the relationship between Treaty rules and Six Pack rules is significant, although in both cases RQMV is arguably in breach of primary law. If Six Pack measures are viewed as an enforcement machinery distinct from and parallel to the Treaty provisions on EDP, then perhaps an argument could be made that they do not distort

[124] M. La Torre, "A Weberian Moment for Europe? Constitutionalism and the Crisis of European Integration" (2014) 20 *European Public Law* 421 at 424.

[125] M. Dawson, "The Legal and Political Accountability Structure of 'Post Crisis' EU Economic Governance" (2015) 53 *Journal of Common Market Studies* 976 at 980-982; S. Fabbrini, "The constitutional conundrum of the European Union" (2016) 23 *Journal of European Public Policy* 84 at 93.

[126] "For the measures referred to in Articles 4, 5, 6 and 8, only members of the Council representing Member States whose currency is the euro shall vote, and the Council shall act without taking into account the vote of the member of the Council representing the Member State concerned".

[127] Art. 126(13) TFEU.

the institutional balance. In that case, however, the exclusion from the vote of the representative of the Member State concerned would not be supported by any primary law provision and would illegitimately deny the equality of the Member States before the Treaties. If, on the contrary, one takes the view that the Six Pack only provides clarification as to the enforcement of the EDP pursuant to Article 126 TFEU, then the exclusion of a Member State could be justified, but RQMV would distort the balance of powers between the institutions set out in the Treaty[128]. Institutional balance and equality among Member States are two sides of the same coin. The problem with RQMV is that, whatever side is taken, the coin is revealed as a fake.

IV.4. The likely effects of Member States' commitment under Article 7 TSCG in light of the EU Treaties

The paper has so far addressed concerns raised by RQMV within the EU legal order. In order to complete the picture, it is now turn to briefly examine the effects of Article 7 TSCG.

As mentioned, the contracting Member States undertook in the TSCG to support the Commission's proposals under an EDP unless they are rejected by a qualified majority of euro area Member States. The link with voting rules prescribed by the Six Pack is clear. While it introduced a semi-automatic decision-making procedure for the imposition of deposits and sanctions, the Six Pack did not alter the procedure for finding that a Member State runs an excessive deficit (Article 126(6) TFEU), which could not be modified through secondary law. Article 7 TSCG was devised as a second best option when it became clear that the UK would not have consented to Treaty amendment[129]. It seeks to circumvent the hurdle of finding a qualified majority in the Council by binding participating Member States to a given voting behaviour[130]. Strictly speaking, Article 7 TSCG does not lay down any procedural rule for the adoption of recommendations. It merely embodies a voting commitment by euro area Member States. But what are its legal effects?

Unlike the Six Pack regulations, the TSCG is not part of the EU legal order. It is an *inter se* agreement concluded by a group of Member States outside the Union framework, albeit instrumental in achieving EU objectives and complementary to EU measures on economic governance[131]. For sure, the Member States could not amend the EU Treaties by way of a side agreement outside the Treaty revision procedures established in Article 48 TEU[132]. *A fortiori*, a limited group of Member States could not derogate from their commitments under the EU Treaties through an *inter se* agreement.

Not belonging to the EU legal order, the TSCG cannot establish commitments under EU law and only creates reciprocal obligations between the Member States under international law. Since EU law, in the same vein as it prevails over the domestic law of the Member States[133], also enjoys primacy over *inter se* agreements[134], those obligations would have to be compatible with it. In case the agreement required the Member States to behave contrary to

[128] See *supra*, para. IV.2.

[129] See R. Baratta, "Legal Issues of the Fiscal Compact" (2012) *Il Diritto dell'Unione Europea* 647 at 668.

[130] Allemand and Martucci, *supra* n 18.

[131] B. de Witte, T. Martinelli, "Treaties between Member States as Quasi-Instruments of EU Law", in Marise Cremona, Claire Kilpatrick (Eds), *EU Legal Acts: Challenges and Transformations*, Oxford University Press, 2018, p. 157, 170.

[132] Case 43/75, *Defrenne v. SABENA*.

[133] See J. Klabbers, *Treaty Conflict and the European Union*, Cambridge University Press, 2009, 209; J. Heesen, *Interne Abkommen: völkerrechtliche Verträge zwischen den Mitgliedstaaten der Europäischen Union*, Springer, 2015, 233.

[134] Case 10/61, *Commission* v *Italy*; case 235/87, *Matteucci*, para. 16; case C-55/00, *Gottardo*, para. 33; case C-370/12, *Pringle*, para. 106; joined cases C-8/15 P to C-10/15 P, *Ledra Advertising*, paras. 57-59.

EU law, they would be under a duty to disapply it and to comply with their obligations under EU law instead.

Insofar as the contracting States do not attempt to modify voting procedures, but merely undertake to vote in a particular way, the agreement does not appear to be incompatible with the EU Treaties. However, the commitment to support the Commission's proposals, deriving from a source external to the EU legal order, would clearly be unenforceable under EU law. Moreover, it would also be hardly enforceable under the TSCG itself: Although the agreement attributes to the CJEU jurisdiction to verify compliance with some of its provisions, Article 7 is not among them[135]. Ultimately, from the perspective of the EU legal order, this provision appears as nothing more than a gentlemen's agreement for coordinating positions before voting in the Council[136], which however does not lend itself to enforcement against Member States that do not stick to the agreement.

V. Conclusion

Reverse majority voting rules are no novelty either in the realm of international organizations or in the EU legal order. Crisis-induced reforms relied on such voting mechanisms, and especially on RQMV, in order to improve the efficiency of enforcement of fiscal constraints and macroeconomic policy guidelines. The extension of RQMV beyond the Six Pack to further pieces of legislation suggest the emergence of reverse majority voting rule as a regular component of the EU enforcement machinery. Against this background, the legality of reverse majority voting rules introduced by sources of secondary law deserves close scrutiny. According to the CJEU's case law, the EU legislature may establish simplified decision-making rules for the adoption of implementing acts. However, this does not entail the legislature's freedom to derogate from basic Treaty rules governing the functioning of EU institutions, such as those relating to voting in the Council. Alternatively, even if a very lax interpretation of the power of the EU legislature to lay down rules for the adoption of implementing measures were to prevail, the legality of RQMV would nevertheless be doubtful, since this voting system is liable to negatively affect both institutional balance and the equality of the Member States before the Treaties.

[135] Art. 8 TSCG.
[136] Baratta, *supra* n 129, 669.