



## OVERVIEWS

# SPECIAL SECTION – DEMOCRATISING THE EURO AREA THROUGH A TREATY?

### DEMOCRATISING THE EURO AREA WITHOUT THE EUROPEAN PARLIAMENT AND OUTSIDE OF THE EU SYSTEM. A LEGAL ANALYSIS OF THE DRAFT TREATY ON THE DEMOCRATISATION OF THE GOVERNANCE OF THE EURO AREA (“T-DEM”)

TABLE OF CONTENTS: I. Introduction. – II. The T-Dem’s Parliamentary Assembly of the Euro Area. – III. The choice for an external institutionalization. – IV. Conclusion.

I. On the 10<sup>th</sup> March 2017, the official candidate of the Socialist Party for the French presidential elections, Benoît Hamon, outlined his programme for the European Union. This programme, against austerity and in favour of more flexibility as regards EU requirements in terms of public budgets and public debts, came with a Treaty proposal, the Draft Treaty on the Democratization of the Governance of the Euro Area (dubbed T-Dem). This draft Treaty was prepared by a team of academics, including Public law Professor Stéphanie Hennette-Vauchez, superstar economist Thomas Piketty (who had joined Hamon’s team), political science Associate Professor Guillaume Sacriste and sociology and political science Centre National de la Recherche Scientifique (CNRS) Research Director Antoine Vauchez. After Hamon’s stinging defeat, the four academics decided to try and give a second life to this project by publishing a book, translated since into several languages but not into English, in order to foster a broader debate about their draft project.<sup>1</sup>

The main purpose of the T-Dem, as stated in the Explanatory Statement, is to add more democracy in the governance of the euro area, especially as it has rapidly developed due to the financial crisis. This is a highly respectable ambition. However, like any serious institutional endeavour, it is not without risks and challenges. In the present paper, I will try to provide a summary legal analysis of the T-Dem. For the purpose of this analysis, I will use the draft T-Dem as it stands for the moment, notwithstanding it being accepted by the various governments of the euro area.

<sup>1</sup> S. HENNETTE, T. PIKETTY, G. SACRISTE, A. VAUCHEZ, *Pour un traité de démocratisation de l’Europe*, Paris: Seuil, 2017.

The T-Dem presents two main features from a legal point of view. First, it creates a new institution, the Parliamentary Assembly of the Euro Area. Second, it is meant to be an international treaty and not an amendment to the existing EU Treaties. I will start with an analysis of the Parliamentary Assembly (II). I will continue with an analysis of the possible legal risks that come with the choice for an institutionalisation “from outside” (III) and finish with some very short concluding remarks (IV).

II. The T-Dem Parliamentary Assembly has been designed to address the issue of the democratic deficit of the euro area. After presenting the Parliamentary Assembly, as it is currently laid down in the draft T-Dem (a), I will analyse its powers (b) and its composition (c).

a) The main objective of the T-Dem is to develop the institutional framework specific to the Euro system and make it more democratic by making the existing institutions share their powers with and/or be supervised by a Parliamentary Assembly.

The Economic and Monetary Union (EMU), as it stands, is an institutional subsystem within the institutional system of the European Union. It has institutions of its own such as the European Central Bank (ECB) which deals with monetary policy. Also, the European Council (consisting of heads of States and governments) and the Council (consisting of ministers of EU States) both have an “euro-area only” equivalent, respectively the Euro Summit and the Euro Group. The latter has been created *de facto* in 1997 and officially recognised by the Lisbon Treaty. The Euro Group is now (briefly) mentioned at Art. 137 TFEU. The Protocol no. 14 briefly describes its meetings and the election of its President.<sup>2</sup> The Euro Group gathers the ministers of Economy and Finance of the Member States of the euro area only, the President of the Euro Group (elected by the ministers for a two-and-a-half-year term, renewable *ad infinitum*), a representative of the European Commission and the President of the ECB. The existence of the Euro Summit is recognised only by the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, also referred to as TSCG or the Fiscal Compact. This Treaty is an intergovernmental treaty introduced as a new stricter version of the Stability and Growth Pact. It was signed on 2 March 2012 by all Member States of the European Union, except the Czech Republic, the United Kingdom and Croatia. The Fiscal Compact is not a part of EU law, and therefore the Euro Summit is not part of the EU institutional framework. Neither the Euro Group nor the Euro Summit has any decision-making powers. However, they are supposed to allow the Member States of the euro area to coordinate their positions between themselves. If the “T-Dem” were to come into force, it would create a new institution specific to the euro area, the Parliamentary Assembly of the Euro Area.

<sup>2</sup> Protocol no. 14 on the Euro Group (Protocol no. 14).

The Parliamentary Assembly of the Euro Area (hereafter the Assembly) could seem to be the euro-area equivalent of the European Parliament. There are however limits to the comparison between the two institutions. If the Assembly had been designed like the Euro Group and the Euro Summit, it would be either a smaller version of the European Parliament, with only Members of the European Parliament (MEPs) from the euro area, or, as suggested by Jean-Claude Piris in 2012, a subcommittee of the Economic and Monetary Committee, with only MEPs from the euro area.<sup>3</sup> In both cases, the structure would be limited either to MEPs having the nationality of a Member State of the euro area or to MEPs elected in a Member State of the euro area. The second solution seems to be more consistent with the transnational aspect of EU Citizenship, since a person having the nationality of a non-euro area country can be elected as an MEP in a euro area country.

Instead, the Assembly appears more like an *alternative* to the European Parliament. According to the EU news website *EurActiv*, in the first version of the T-Dem, the Assembly was supposed to be composed only of Members of national parliaments chosen by their respective parliaments according to a procedure fixed by each Eurozone country.<sup>4</sup> According to the version published on the 10<sup>th</sup> March 2017, four fifths of the Members of this 400-seat (maximum) Assembly would be national Members of Parliament (hereinafter MPs) and one fifth would be MEPs. All the members would be designated in proportion to the political groups within the assemblies that they come from and with due regard to political pluralism, in accordance with a procedure laid down either by each euro area Member State (for national MPs) or by the European Parliament (for MEPs). The number of designated members of the Assembly from national parliaments shall be fixed in proportion to the population of the euro area Member States.<sup>5</sup>

*b)* According to the draft, the Parliamentary Assembly would have quite comprehensive, democratically relevant powers which seem quite consistent with the functions expected from a parliament in a parliamentary system, namely the legislative function, the budgetary function and political control.

As regards political control, the Assembly would participate in and supervise the convergence and coordination of national economic and budgetary policies, notably by adopting a position on the Alert Mechanism Report, taking part in the European Semester (both *ex ante* and *ex post*, i.e. at implementation stage), assessing the recommendations and reports submitted by the Commission to the Council as part of an excessive imbalance procedure and taking part in the supervision of the euro area Member

<sup>3</sup> J.-C. PIRIS, *The Future of Europe: Towards a Two-Speed EU?*, Cambridge: Cambridge University Press, 2012.

<sup>4</sup> R. ALINE, *Hamon Plans Radical Departure from EU "blabla"*, in *EurActiv*, 13 March 2017, [www.euractiv.com](http://www.euractiv.com).

<sup>5</sup> Art. 4 of the T-Dem.

States' coordination efforts on budgetary policies.<sup>6</sup> This is a very important point, since budget surveillance is at the centre of the criticisms directed against the democratic deficit of the euro area, as exemplified with the situation in Greece. It is unconceivable not to give democratic legitimacy to the surveillance of national budgets, when these budgets, by contrast, are adopted by the representatives of the citizens.

The Assembly would also engage in a governance dialogue with the ECB. The expression "governance dialogue" suggests that this dialogue would go further than the existing "monetary dialogue" with the European Parliament, according to which the President of the ECB is invited to attend the meetings of the Economic and Monetary Committee of the European Parliament at least four times a year in order to make a statement and to answer questions.<sup>7</sup> This is confirmed by the powers the Assembly would have as part of this dialogue. In particular, *ex ante*, the Assembly would adopt a resolution on the interpretation of the price stability objective and the inflation target adopted by the ECB. This would create a form of democratic accountability of the ECB for its core mission – the prevention of inflation – without threatening its independence – it would just be a non-binding resolution. *Ex post*, the Assembly would approve by vote the annual report of the ECB on the Single Supervisory Mechanism, i.e. the mechanism which granted the ECB a supervisory role to monitor the financial stability of banks based in participating States. The Assembly would not, however, approve the general annual report of the ECB, since the Treaties explicitly vest this power in the European Parliament.<sup>8</sup> We can see here that the coexistence of the Assembly with the European Parliament, along with the refusal to amend the Treaties, could lead to a difficulty in the distribution of tasks between the two parliamentary assemblies.

The Assembly would also monitor the institutions of governance of the euro area, including investigating allegations of misadministration in the "euro area governance", with the assistance of the Court of Auditors of the EU.<sup>9</sup> The T-Dem could go a bit further here, for example by stating that the President of the Euro Group must regularly appear before the Assembly to inform its members and answer their questions.<sup>10</sup> As the law currently stands, the President of the Euro Group is under no obligation to respond to an invitation from the European Parliament. In April 2017, the previous President of the Euro Group, Jeroen Dijsselbloem,<sup>11</sup> declined the invitation from the European Parlia-

<sup>6</sup> Art. 8 of the T-Dem.

<sup>7</sup> Art. 126, para. 3, of the Rules of Procedure of the European Parliament, January 2017.

<sup>8</sup> Art. 284, para. 3, TFEU.

<sup>9</sup> Art. 11 of the T-Dem.

<sup>10</sup> O. CLERC, P. KAUFFMANN, *L'union économique et monétaire européenne. Des origines aux crises contemporaines*, Paris: Pedone, 2016, p. 318.

<sup>11</sup> Mário José Gomes de Freitas Centeno has replaced Jeroen Dijsselbloem on the 13<sup>th</sup> January 2018.

ment to come and debate the austerity measures in Greece, thus causing an outrage.<sup>12</sup> In any case, as the draft T-Dem stands, the Assembly's ability to set up a committee of inquiry responsible for investigating alleged maladministration in the "euro area governance" is quite remarkable. It would somehow extend to "T-Dem law" the right to a good administration, which is a fundamental right in EU law,<sup>13</sup> and would make the Parliamentary Assembly of the Euro Area the equivalent of the EU Ombudsman. However, these powers of investigation and control of the Assembly rely to a large extent on the good will of the institutions subject to this control. For example, according to Art. 11, para. 4, of the T-Dem, "the European Central Bank and the Commission shall supply to the Assembly all documents and data which the latter considers desirable in the exercise of its powers". Since the T-Dem is not supposed to be concluded by the European Union, it is arguable that these institutions may not be legally bound to deliver the documents and data in question.

Art. 9 of the T-Dem states that the Assembly would vote and supervise the financial assistance granted by the European Stability Mechanism (ESM), i.e. the intergovernmental mechanism designed to safeguard and provide Member States of the Eurozone in financial difficulty with instant access to financial assistance programmes, as created by the 2012 Treaty Establishing the European Stability Mechanism (hereafter the ESM Treaty). In particular, the Assembly would approve by a vote the financial assistance facility granted under this Treaty and, perhaps more importantly, the memorandum of understanding detailing the conditionality attached to the financial assistance facility. However, should the Assembly refuse its approval, it may not have any legal effect. The T-Dem would not legally bind the ESM, which is an international organization with international legal personality. The question of whether the T-Dem would bind the European Commission, which is entrusted with the task of negotiating and signing the memorandum of understanding on behalf of the ESM, is open to discussion. In any case, it is however likely that such a vote would have a political impact.

Art. 17 T-Dem ambitiously gives the Assembly the power to vote on the candidates chosen for the Executive Board of the ECB, the Presidency of the Euro Group, and the Managing Director of the ESM. This would give the Assembly a great power. The members of the Executive Board of the ECB are appointed by the European Council<sup>14</sup> but only by Member States whose currency is the euro.<sup>15</sup> The President of the Euro Group is elected by the Ministers of the Member States whose currency is the euro. The Managing Director of the ESM is appointed by the Board of Governors of the ESM,<sup>16</sup> each Gov-

<sup>12</sup> *After Snub, EU Lawmakers Urge Dijsselbloem To Quit as Eurogroup Head*, in *Reuters*, 3 April 2017, [www.reuters.com](http://www.reuters.com).

<sup>13</sup> Art. 41 of the Charter of Fundamental Rights of the European Union (Charter).

<sup>14</sup> Art. 283, para. 2, TFEU.

<sup>15</sup> Art. 139, para. 2, let. h), TFEU.

<sup>16</sup> Art. 5, para. 7, of the ESM Treaty.

error being, in short, the Minister of Finance of an ESM Member State<sup>17</sup> which can only be an euro area State.<sup>18</sup> Since the T-Dem would be binding in theory for all the euro area States, the vote of the Assembly would arguably bind these States when appointing the members of the Executive Board of the ECB, the President of the Euro Group, and the Managing Director of the European Stability Mechanism. It is not difficult to understand how dramatically this power would affect the governance of the euro area, giving the Assembly a proper veto on the choice of some of the most important actors of this governance.

As regards its legislative function, the Assembly would exercise the legislative powers within the euro area together with the Euro Group, in a procedure mimicking<sup>19</sup> the ordinary legislative procedure within the EU.<sup>20</sup> According to the draft, they would together adopt acts called regulations, directives and decisions, just like in EU law.<sup>21</sup> There is no definition of these acts in the T-Dem. It is likely that they would be given the same definition as in the context of EU law, but it is neither clear nor certain. For the sake of clarity, we might suggest that a provision be added to the T-Dem stating that legal concepts in the T-Dem coming from EU law should be construed so as to have the same meaning as in EU law, including the case-law of the CJEU.

The T-Dem ordinary legislative procedure is slightly but significantly different from the EU ordinary legislative procedure in two ways, first as regards legislative initiative and secondly as regards the right to have the last word.

In the EU system, the legislative initiative usually belongs to the European Commission. However, the European Commission hardly plays any role in the T-Dem, and in particular does not have the legislative initiative. Instead of the European Commission, the legislative initiative would concurrently belong to the members of the Euro Group and to the members of the Assembly.<sup>22</sup> This is an important point because it would significantly alter the institutional balance existing in the EU institutional system, which may prove controversial. By giving the legislative initiative to the members of the legislature itself, the T-Dem departs from the so-called Community Method, whilst coming closer to the way the right of legislative initiative is organised at national level.

The second difference between the T-Dem ordinary legislative procedure and the EU ordinary legislative procedure concerns the power to have the last word. According to the T-Dem, in case of failure of the conciliation stage (the last stage of the EU ordinary legislative procedure), the President of the Euro Group would be able to request that the Assembly takes a final decision. This would be an interesting contrast with the

<sup>17</sup> Art. 5, para. 1, of the ESM Treaty.

<sup>18</sup> Art. 2 of the ESM Treaty.

<sup>19</sup> Art. 13 of the T-Dem.

<sup>20</sup> Art. 294 TFEU.

<sup>21</sup> Art. 13, para. 4, of the T-Dem.

<sup>22</sup> Art. 13, para. 2, of the T-Dem.

“mainstream” EU legislative procedures. According to the EU ordinary legislative procedure, the Council and the European Parliament are strictly equal co-legislatures, and most of the EU special legislative procedures give more power to the intergovernmental body – the Council – than to the Parliamentary body – the European Parliament.

In accordance with the T-Dem ordinary legislative procedure, the Assembly and the Euro Group would adopt legal provisions to foster sustainable growth and employment within the euro area, social cohesion and better convergence of economic and fiscal policies.<sup>23</sup> They would also vote on the base and the rate of corporate tax which would contribute to the euro area budget<sup>24</sup> and adopt provisions with a view to pool public debts exceeding sixty per cent of each euro area Member State’s Gross Domestic Product (GDP).<sup>25</sup>

Finally, the Assembly and the Euro Group would establish the budget of the euro area together, according to a “special” legislative procedure<sup>26</sup> which mirrors the special legislative procedure used to adopt the EU budget<sup>27</sup> but with a form of co-initiative (“on the basis of a budget proposal prepared by the Assembly, the Euro Group adopts a budget project”<sup>28</sup>) instead of an initiative by the European Commission. According to Art. 16 of the draft, the budget would be financed wholly from own resources, which would consist of the corporate tax mentioned above.

*c)* According to Art. 4, para. 1, T-Dem:

“the number of members of the Assembly shall not exceed 400. It shall be composed, for the four fifths of its members, of representatives designated by national parliaments in proportion to the groups within them and with due regard to political pluralism, in accordance with a procedure laid down in proportion to the groups within it and with due regard to political pluralism, in accordance with a procedure laid down by the European Parliament”.

The presence of national MPs, and by extension the involvement of national parliaments, makes sense in an area which is still mostly intergovernmental. It is also consistent with a strong and recurrent need to have national parliaments more involved at European level, in order to mitigate the general conception that the European Union lacks democratic legitimacy. Furthermore, as Member States grow more and more reluctant about further integration and the transfer of powers from the Member States to the EU, the involvement of national parliaments is also a way to keep power closer to the States. For all these reasons, the Lisbon Treaty dedicates a whole protocol – Proto-

<sup>23</sup> Art. 12, para. 1, of the T-Dem.

<sup>24</sup> Art. 12, para. 2, of the T-Dem.

<sup>25</sup> Art. 12, para. 4, of the T-Dem.

<sup>26</sup> Art. 15 of the T-Dem.

<sup>27</sup> Art. 314 TFEU.

<sup>28</sup> Art. 15, para. 2, of the T-Dem.

col no. 1 – on the role of national parliaments in the European Union<sup>29</sup> and makes them the guardians of the subsidiarity principle.<sup>30</sup> At national level also, there has been some projects aiming at a better involvement of national parliaments at European level. For example, in 2001, the French Senate suggested creating a second European chamber, next to the European Parliament, composed of national MPs.<sup>31</sup>

The idea of mixing MEPs and MPs is also a recurrent one. In 1989, a conference of MEPs and national MPs drawn from parliamentary committees responsible for European Union affairs was created and named Conference of Parliamentary Committees for Union Affairs of Parliaments of the European Union (in short COSAC, the English language using the French abbreviation for *Conférence des organes spécialisés dans les affaires de l'Union*). Just as the T-Dem proposal, the former French President Valéry Giscard d'Estaing proposed in 1995 a Parliamentary Comity for the Euro, composed of both MEPs and MPs.<sup>32</sup> In 2002, the European Parliament report on relations between the European Parliament and the national parliaments in European integration (the so-called “Napolitano Report”) proposed that an interparliamentary agreement be drawn up between the national parliaments and the European Parliament as a means of organising this cooperation in a systematic way. According to the Report, this agreement would include an outline of reciprocal commitments with regard to programmes of multilateral or bilateral meetings on European issues of common interest and the exchange of information and documents.<sup>33</sup> More recently, the idea of a strong cooperation between MEPs and MPs within a European body was materialised with the interparliamentary conference on stability, economic coordination and governance in the EU, created by Art. 13 of the Fiscal Compact.<sup>34</sup> The Parliamentary Assembly of the Euro Area goes a step further, by establishing an institution including both MEPs and national MPs.

Such hybrid solutions are the consequence of two phenomena. First, the States are reluctant to vest powers in the European Parliament when it comes to “sensitive” areas of public policy, which they prefer to deal with in an intergovernmental manner. Sec-

<sup>29</sup> Protocol no. 1 on the role of national parliaments in the European Union (Protocol no. 1).

<sup>30</sup> See Protocol no. 2 on the application of the principles of subsidiarity and proportionality (Protocol no. 2).

<sup>31</sup> Information Report no. 381 (2000-2001) of 13 June 2001 of M. Daniel Hoefel, on behalf of the Senate delegation for the European Union.

<sup>32</sup> V. GISCARD D'ESTAING, *Manifeste pour une nouvelle Europe fédérative*, in *Revue des affaires européennes*, 1995, p. 19 *et seq.*, spec. p. 24.

<sup>33</sup> Report on behalf of the Committee on Constitutional Affairs PE 304.302 of 23 January 2002 on relations between the European Parliament and the national parliaments in European integration.

<sup>34</sup> “As provided for in Title II of Protocol (no. 1) on the role of national parliaments in the European Union annexed to the European Union Treaties, the European Parliament and the national parliaments of the Contracting Parties will together determine the organisation and promotion of a conference of representatives of the relevant committees of the European Parliament and representatives of the relevant committees of national parliaments in order to discuss budgetary policies and other issues covered by this Treaty”.



ond, the European Parliament has somehow failed to convince the general public that it was an effective source of democratic legitimacy for the European Union, as evidenced by the low turnout at each European election. More specific to the euro area is the fear that, if the European Parliament was involved as a whole, an action deemed important for the euro area could be blocked by non-euro area MEPs. It has to be noted here, however, that this risk is not completely precluded by the T-Dem as it stands, since none of its provisions prevents the European Parliament from choosing non-euro area MEPs as members of the Assembly. It could be useful to add this precision.

Should the Parliamentary Assembly of the Euro Area come into existence, it would entail the risk of further marginalising the European Parliament, which, despite its flaws, is the only body dedicated to a genuinely European democratic representation. This could however be mitigated by changing the MPs/MEPs *ratio*. For example, in 1998, Valéry Giscard d'Estaing, following on from his idea of a Parliamentary Comity for the Euro before the French Parliament, suggested that it should be composed 50 per cent of MEPs and 50 per cent of national MPs of the euro area.<sup>35</sup>

There is also the risk that the Parliamentary Assembly of the Euro Area would add another layer of complexity in the European institutional landscape. There are already several parliamentary bodies or structures operating at EU level. We have already mentioned the COSAC and the interparliamentary conference on stability, economic coordination and governance in the EU. There are others, like the Interparliamentary Conference for the Common Foreign and Security Policy (CFSP) and the Common Security and Defence Policy (CSDP) which is a joint conference of the committees dealing with foreign policy and security policy issues in the parliaments of the Member States. In September 2012, it replaced the Assembly of the Western European Union, which was dissolved in 2011. This multiplication of parliamentary assemblies at EU level creates a risk of a certain imbalance between the "parliamentary" pole of the European Union governance and its "intergovernmental" pole. Each "special" parliamentary assembly would only deal with the questions falling within its jurisdiction, whereas governments have a general overview of all subjects. There would therefore be a significant need for a strong coordination between the Parliamentary Assembly of the Euro Area and all the other existing "EU parliamentary bodies", especially with the European Parliament. Due regard and implementation should therefore be given to Art. 3, para. 2, T-Dem, according to which the Parliamentary Assembly of the Euro Area "shall work in close cooperation with the European Parliament".

The question of the exact composition of such an Assembly is also of paramount importance for its legitimacy. It would have a deep impact on how it would be accepted by the Member States of the euro area and on how it would operate. The T-Dem does not give a precise distribution of the seats but rather refers to the principle of propor-

<sup>35</sup> Parliamentary debate, session of 21 April 1998.

tionality: “the number of members of the Assembly designated within national parliaments shall be fixed in proportion to the population of the euro area Member States. Each national Parliament sends at least one representative”.<sup>36</sup> Art. 4, para. 4, T-Dem adds that a regulation would fix the number of members of the Assembly. It seems reasonable to assume that the same regulation would also determine the size of each delegation. However, it is unclear in the text who is supposed to adopt this regulation. The Assembly alone? The Assembly together with the Euro Group, in accordance with the ordinary legislative procedure? Someone else? Furthermore, the general rule of proportionality can result in a large variety of solutions. Would the Parliamentary Assembly, like the European Parliament,<sup>37</sup> apply the “degressive proportionality”, which means that small States would be allocated more seats than would be allocated strictly in proportion to their population? Would it use “regular” proportionality? The choice would be between narrowing the influence gap between the small States and the big States, on the one hand, or ensuring that the Assembly is truly representative of the populations of the euro area States, on the other hand. Furthermore, whatever the choice would be, the issue would necessarily be made more complicated by the presence of MEPs in the Assembly, who would have the nationality and/or have been elected in the same countries as certain members of the national delegations. This would necessarily affect the balance of forces between countries and impact the alliance strategies of the members of the Assembly in order to reach a majority. This issue, as we can see, is far from simple.

III. The T-Dem is not meant to be an amendment to the European Treaties – which, as the explanatory statement says, “appears strongly impracticable in the short term” – but an international treaty signed by the Member States of the euro area, in parallel to the existing European Treaties. It therefore could be called a project of external institutionalisation (i.e. the creation of institutions outside of the European Union to deal with EU-related issues).

External institutionalisation is quite an ancient phenomenon in the European construction. The 1990 Convention implementing the Schengen Agreement, for example, created an Executive Committee in order to adopt certain measures necessary to abolish border controls. This method was also commonly used recently concerning the EMU as regards the public debt crisis. The Fiscal Compact created the Euro Summit and the interparliamentary budget conference, while also modifying the way the EU institutions

<sup>36</sup> Art. 4, para. 2, of the T-Dem.

<sup>37</sup> Art. 14, para. 2, TEU: “The European Parliament shall be composed of representatives of the Union’s citizens. They shall not exceed seven hundred and fifty in number, plus the President. Representation of citizens shall be degressively proportional, with a minimum threshold of six members per member State. No member State shall be allocated more than ninety-six seats”.

operate as regards the excessive imbalance procedure. The ESM Treaty created an international organisation in charge of raising funds on international market in order to bail out States experiencing financial difficulties, under conditions.

In the “pros” column, this method, applied to the democratisation of the euro area, allows for a quicker action and avoids having to wait for a hypothetical amendment to the Treaties, or even a less hypothetical – but still unlikely – use of Art. 48, para. 7, TEU, which allows the European Council, by unanimity, to shift the adoption of certain acts from a special legislative procedure (usually the Council alone) to the ordinary legislative procedure (making the Council and the European Parliament co-legislatures). In the “cons” column however, this method raises issues of legality and constitutionality (a) and generates what we can call legal costs (b).

a) The T-Dem has been designed as a Treaty between the euro area countries. It is not meant to be part of EU law, since the EU itself is not supposed to conclude it. However, the T-Dem Party States would remain bound by EU law, and would therefore be responsible should this Treaty be incompatible with EU law. This is not just a purely theoretical prospect. Just recently, on the 6<sup>th</sup> March 2018, the Court ruled that the arbitration clause in the Agreement between the Netherlands and Slovakia, on the protection of investments, was not compatible with EU law.<sup>38</sup> Question is, is the T-Dem compatible with EU law?

One of the reasons why this may not be the case is a question of principle linked to the choice for an external institutionalisation. This question has been perfectly summed up by Paul Craig in his analysis of the Fiscal Compact:

“if the Member States fail to attain unanimity for amendment [to the EU Treaties], and do not seek or fail to attain their ends through enhanced co-operation, does it mean that 12, 15, 21, etc. Member States can make a treaty to achieve the desired ends and the EU institutions can play a role therein, where the [28] Member States have not agreed to make use of the EU institutions, and where the treaty thus made deals with subject-matter covered directly by the existing Lisbon Treaty?”<sup>39</sup>

In a similar fashion, Federico Fabbrini questions “the legality of the use of intergovernmental agreements in light of the principle of institutional balance” and contends that “the use of intergovernmental agreements outside the framework of EU law by the member states, even when EU law would provide a perfectly suitable venue to adopt a specific legal measure, constitutes a violation of the principle of institutional balance governing the EU law-making regime”.<sup>40</sup>

<sup>38</sup> Court of Justice, judgment of 6 March 2018, case C-284/16, *Achmea*.

<sup>39</sup> P. CRAIG, *The Stability, Coordination and Governance Treaty: Principle, Politics and Pragmatism*, in *European Law Review*, 2012, p. 239.

<sup>40</sup> F. FABBRINI, *A Principle in Need of Renewal? The Euro-Crisis and the Principle of Institutional Balance*, in *Cahiers de droit européen*, 2016, p. 288.

The case-law of the CJEU on this question has been summed up by the Court in the landmark *Pringle* ruling, which partly dealt with the compatibility of the ESM Treaty with EU law.<sup>41</sup> According to the Court,

“The Member States are entitled, in areas which do not fall under the exclusive competence of the Union, to entrust tasks to the institutions, outside the framework of the Union, such as the task of coordinating a collective action undertaken by the Member States or managing financial assistance (see *Parliament v Council and Commission*, paragraphs 16, 20 and 22, and *Parliament v Council*, paragraphs 26, 34 and 41), provided that those tasks *do not alter the essential character of the powers conferred on those institutions by the EU and FEU Treaties* (see, inter alia, Opinion 1/92 [1992] ECR I-2821, paragraphs 32 and 41; Opinion 1/00 [2002] ECR I-3493, paragraph 20; and Opinion 1/09 [2011] ECR I-1137, paragraph 75).<sup>42</sup>

The Court went on to assess whether these conditions were respected by the ESM Treaty and noticed that “the duties conferred on the Commission and [the ECB] within the ESM Treaty, important as they are, *do not entail any power to make decisions of their own*. Further, the activities pursued by those two institutions within the ESM Treaty *solely commit the ESM*”.<sup>43</sup>

One could wonder whether the T-Dem complies with these requirements. In the mainstream EU institutional system, the Euro Group is an informal body with no decision-making power. Art. 13 T-Dem gives the Euro Group legislative powers (together with the Assembly) within the governance of the euro area. One could argue that this provision entails a power for the Euro Group, that it does not have in the normal framework of the European Union, to make decisions – even though not alone. As for the European Parliament, who normally exercises legislative, budgetary and political control functions (Art. 14 TEU), it is deprived of such functions within the T-Dem, and only gets to designate MEPs to sit, with an important minority, in a broader assembly that shall exercise them. One could wonder whether it alters the essential character of the powers conferred on the European Parliament by the TEU and TFEU.

It is however unlikely that the Court would conclude that the T-Dem is incompatible with EU law. The Euro Group is not an institution, and barely appears in the Treaty, so giving it decision-making powers in the T-Dem may not be a legal problem. As for the European Parliament, it is not consistently powerful in all areas of EU policy, and it is even extremely weak in some of them, notably the CFSP. It could justify *a fortiori* its low involvement in a non-EU institutional system created between certain Member States. In any case, the standard of “alteration of the essential character of the powers of an institution” is quite vague. If we look at case-law, it seems that the Court only identifies

<sup>41</sup> Court of Justice, judgment of 27 November 2012, case C-370/12, *Pringle*.

<sup>42</sup> *Ibid.*, para. 158. Emphasis added.

<sup>43</sup> *Ibid.*, para. 161. Emphasis added.

such an alteration when the Court itself is concerned. It has been the case, for example, when the first version of the EEA Treaty provided that the Member States of the European Free Trade Association (EFTA) could ask the CJEU a non-binding interpretation of provisions of the EEA Treaty which were identical in substance to the provisions of the Community Treaties. The Court of Justice considered that it was “unacceptable” that the answers which the Court of Justice was to give to the courts and tribunals in the EFTA States were to be purely advisory and without any binding effects, and that “such a situation would change the nature of the function of the Court of Justice as it is conceived by the EEC Treaty, namely that of a court whose judgments are binding”.<sup>44</sup> Otherwise, the CJEU usually never finds such “alteration of the nature of the powers” of an institution in international treaties.

In addition to the issue of whether the T-Dem is compatible with EU law, it is far from certain that it would be compatible with national constitutions. In 2012, the German Constitutional Court agreed to the ratification of the ESM Treaty, but only under certain conditions concerning the control by the *Bundestag* of the decisions adopted under this Treaty.<sup>45</sup> The Karlsruhe Court, like it had done before and notably in 2011 in the case concerning the aid measures for Greece and the euro rescue package,<sup>46</sup> considered that the right to decide on the budget is a central element of the democratic development of informed opinion. Therefore, the *Bundestag* must retain control of fundamental budgetary decisions even in a system of intergovernmental governing. According to the Court, the *Bundestag* may not transfer its budgetary responsibility to other entities by means of imprecise budgetary authorisations. Hence a series of conditions imposed by the Court in order to ensure that the *Bundestag* would be involved in the operation of the ESM. Based on this precedent, what would be the position of the German Constitutional Court on the T-Dem? Here is a Treaty that would give budgetary powers, including the creation of a corporate tax and the pooling of public debts, to the Euro Group together with an Assembly with only a minority of German MPs. There is a real risk that the German Constitutional Court, and possibly others, would find a Treaty like the T-Dem incompatible with their national Constitution. It should be noted however that this risk would be the same if there were to be an amendment of the EU Treaties under Art. 49 TEU.

*b)* If external institutionalisation frees the Member States from the constraints of the EU institutional and legal framework, it also deprives them of its guarantees. The loss of EU legal and institutional framework could have unpredicted consequences.

<sup>44</sup> Court of Justice, opinion 1/91 of 14 December 1991, para. 61.

<sup>45</sup> German Federal Constitutional Court, judgment of 12 September 2012, 2 BvR 1390/12, 2 BvR 1421/12, 2 BvR 1438/12, 2 BvR 1439/12, 2 BvR 1440/12, 2 BvR 6/12. See an English version at [www.bundesverfassungsgericht.de](http://www.bundesverfassungsgericht.de).

<sup>46</sup> German Federal Constitutional Court, judgment of 7 September 2011, 2 BvR 987/10. See an English version at [www.bundesverfassungsgericht.de](http://www.bundesverfassungsgericht.de).

For example, the transparency register for lobbyists, based at present on an inter-institutional agreement between the European Commission and the European Parliament,<sup>47</sup> would probably not apply fully to the Parliamentary Assembly, since it only applies to activities “carried out with the objective of directly or indirectly influencing the formulation or implementation of policy and the decision-making processes of the EU institutions” consisting mainly in contacts with Members of those institutions. Let us recall that the Parliamentary Assembly is not an EU institution and that only a fifth of its members would be Members of the European Parliament. The Parliamentary Assembly may have to include a transparency register of its own in its Rules of Procedure.

The most pressing problem, however, is judicial protection. Even though the decision-making process put forward in the draft is intended to mimic the decision-making process in the EU (especially the legislative procedure), it is clear that the decisions taken by these bodies would not become EU law. Therefore, unless explicitly provided otherwise in the Treaty, they would have no direct effect, they would not benefit from the primacy of EU law and nor would they be protected or interpreted by the CJEU. This euro area legislation would exist in parallel with EU law.

The first consequence of that would be that the tribunals and courts of the euro area States would not be able to ask the CJEU for a preliminary ruling on the interpretation of the T-Dem or of the legislation adopted on its basis. There is therefore a real risk of diverging interpretations between euro area States.

The second consequence is that there would be no judicial review of the legislation adopted on the basis of the T-Dem. Surely, there would be indirect ways to ensure a legal protection against what we could call “T-Dem law”. In particular, the CJEU would be able to assess the compatibility of the T-Dem law with EU law through the infringement procedure. This procedure, however, cannot be considered to be an effective remedy since it cannot be used by natural or legal persons. They can only file a complaint to the European Commission, which then has discretion to commence the proceedings.

The Court could also carry out such a review once the matter has been referred for a preliminary ruling by a national court. From a purely technical point of view, the Court has no jurisdiction to review the compatibility of national law (including international treaties to which the Member States are party) with EU law under the preliminary ruling procedure. The Court could however reply to the question of whether EU law must be interpreted in a way that is compatible with a T-Dem provision, which more or less amounts to the same thing.<sup>48</sup>

<sup>47</sup> Currently the agreement between the European Parliament and the European Commission of 19 September 2014 on the transparency register for organisations and self-employed individuals engaged in EU policy-making and policy implementation, p. 11.

<sup>48</sup> See *Pringle*, cit.

However, this would depend on whether or not natural and legal persons could challenge T-Dem law before the national courts, which itself would depend on each legal system. Furthermore, if the Court were to rule that a piece of the “euro area legislation” appears to be incompatible with EU law, the T-Dem contracting parties would be liable and could be found by the CJEU to be in breach of EU law. In the absence of any *ex ante* procedure designed to ensure that the T-Dem legislation is compatible with EU legislation, the former is doomed to be precarious and at risk of *ex post* uncomfortable legal challenges.

Furthermore, in any case, if a T-Dem provision appears incompatible with EU law, the T-Dem provision in question would be neither annulled nor declared void. It would result in a conflict of international legal obligations for the State parties. In most cases, this conflict would probably be mitigated by interpreting T-Dem law in compliance with EU law, as provided by Art. 18 T-Dem.<sup>49</sup> However, should such a compliant interpretation prove impossible, the only way to resolve the conflict would be either to amend EU law or to amend T-Dem law. There would be no automatic adjustment of T-Dem law to EU law.

Another issue is the compatibility of T-Dem “secondary law” (*i.e.* the acts adopted by the Euro Group and the Assembly) with the T-Dem itself. Since the T-Dem does not provide for any form of “internal” judicial review, there is no guarantee that T-Dem legislation would always be compatible with the T-Dem itself. The T-Dem does not contain many substantive provisions. It does however set out a formal, procedural and institutional framework. What if a T-Dem act is *ultra vires*? What if a procedural infringement occurs during the adoption of a T-Dem act? Considering the fact that EU law emphasises the value of the rule of law,<sup>50</sup> which is binding even on the Member States’ judiciary,<sup>51</sup> it would be hard to accept that a “parent” institutional framework would not provide for a proper system of judicial review.

It should therefore be recommended that the Court of Justice be given jurisdiction to review the compatibility of the T-Dem legislation with both EU law and the T-Dem. Opinion 1/91 on the EEA Treaty<sup>52</sup> suggests that the Court of Justice would not necessarily be hostile to that proposal, provided that its rulings are binding.<sup>53</sup> However, since the T-Dem would not be an international agreement of the European Union, and since

<sup>49</sup> “This Treaty shall be applied and interpreted by the Contracting Parties in conformity with the Treaties on which the European Union is founded, in particular Article 4(3) of the Treaty on European Union, and with European Union law, including procedural law whenever the adoption of secondary legislation is required”.

<sup>50</sup> See for example Art. 2 TEU and Court of Justice, judgment of 23 April 1986, case 294/83, *Parti écologiste “Les Verts” v. European Parliament*, para. 23.

<sup>51</sup> See Court of Justice, judgment of 27 February 2018, case C-64/16, *Associação Sindical dos Juizes Portugueses*, para. 30 *et seq.*

<sup>52</sup> Opinion 1/91, cit.

<sup>53</sup> *Ibid.*, para. 61.

therefore the advisory procedure of Art. 218, para. 11, TFEU would not apply, there would be no way of reviewing *ex ante* the compatibility of the T-Dem itself with EU law.<sup>54</sup>

Finally, there is the issue of enforcement. Outside the institutional framework of the European Union, T-Dem law would be deprived of the enforcement mechanism provided for in EU law, in particular the role of the European Commission and of the CJEU as regards the infringement procedure.

A parallel could be made here with Art. 8 of the Fiscal Compact. According to Art. 8, para. 1, compliance with the Contracting Parties' obligation to transpose the "balanced budget rule" (the so-called "golden rule") into their national legal systems, through binding, permanent and preferably constitutional provisions, is subject to the jurisdiction of the CJEU, in accordance with Art. 273 TFEU ("The Court of Justice shall have jurisdiction in any dispute between Member States which relates to the subject matter of the Treaties if the dispute is submitted to it under a special agreement between the parties"). According to Art. 8, para. 2, if a Contracting Party then considers that another Contracting Party has not taken the necessary measures to comply with the judgment of the Court of Justice referred to in para. 1, it may bring the case before the Court of Justice and request the imposition of financial sanctions under Art. 260 TFEU.

It is however uncertain whether such a mechanism a) is compatible with EU law<sup>55</sup> and b) would work in the context of the T-Dem. Let us emphasise here that Art. 273 TFEU requires a "dispute between Member States which relates to the subject matter of the Treaties". It is far from certain that a dispute concerning the T-Dem could be considered as such. As for Art. 260 TFEU, it requires that a Member State has not taken the necessary measures to comply with a judgment of the Court according to which this Member State has failed to fulfil an obligation under the Treaties. It is unlikely that a failure to comply with T-Dem legislation could be considered as a failure to fulfil an obligation under the Treaties.

Even if it were the case, the whole mechanism would rely on States bringing cases before the Court against other States. The fact that only a small number of infringement cases have ever been brought by Member States before the Court under Art. 259 TFEU shows that they are reluctant to do so, which would inevitably affect the efficiency of such an enforcement mechanism. Under the Fiscal Compact, this reluctance was compensated by the role given to the Commission to issue a report on whether the Member States complied with their obligations under the Treaty. A negative report was then

<sup>54</sup> "A Member State, the European Parliament, the Council or the Commission may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties. Where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised".

<sup>55</sup> See on this subject P. CRAIG, *The Stability, Coordination and Governance Treaty: Principle, Politics and Pragmatism*, cit.



supposed to imply that the Contracting parties had an obligation to act under Art. 273 TFEU. Besides the fact that the legality of this mechanism has been criticised,<sup>56</sup> it would probably not sit well with the T-Dem, which gives almost no power to the Commission.

IV. The draft T-Dem is without doubt a very ambitious text raising highly important issues about the democratisation of the euro area. As such, it is in line with certain political statements, like the one issued by the French President Emmanuel Macron in Athens on the 7<sup>th</sup> September 2017.<sup>57</sup> It is therefore worthy of attention and interest, both at academic and at political level. Above all, its main quality is that it exists. Here is a draft Treaty, carefully crafted from a legal perspective, which provides a realistic and ready-made solution to solve the democratic conundrum of the euro area. Like every piece of legal engineering, it has its flaws and presents legal risks and legal costs. Through broad dialogue, discussion and reflexion, these difficulties can however probably be overcome. The choices made by its authors, notably the choice to set aside the European Parliament and the choice to go for an international treaty, are debatable, both legally and politically. However, in the best-case scenario, notwithstanding it being accepted by all euro area States, it could be signed and concluded after minor amendments. In any case, it raises a necessary debate on the democratisation of the euro area, with more than just empty words and good intentions. Whatever one may think of the T-Dem, the stakes are too high, and the danger of European disintegration too acute to dismiss any good-willed and serious attempt to bring more democracy into the European Union in general, and into the euro area in particular.

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<sup>56</sup> *Ibid.*

<sup>57</sup> *In Athens, Macron Outlines "Roadmap" for European Democratic Revival*, in *EurActiv*, 8 September 2017, [www.euractiv.com](http://www.euractiv.com).

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