



OVERVIEWS

SPECIAL SECTION – DEMOCRATISING THE EURO AREA THROUGH A TREATY?

GENUINE ECONOMIC AND MONETARY UNION WILL BE FEDERAL OR IT WILL NOT BE

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I. The EU has had many Treaties. There are by now some rules of thumb about writing Treaties which can usefully be adopted as good practice. Here are my ten top tips to good EU constitution-mongering:

- a) Prefer clarity to ambiguity, and transparency to opacity.
- b) Resist the temptation to create new institutions: there are probably enough already.
- c) Avoid simplistic solutions: European integration is inherently complicated.
- d) Eschew new constructions outside the EU Treaties which tend to aggravate the tension between the federal and confederal as well as undermining the *acquis communautaire*.
- e) Aim for a neutral constitutional framework which facilitates but does not preclude policy choices.
- f) Marry the need for effective central government with federal checks and balances.
- g) Reconcile the quest for a durable settlement with the need for continuing reform.
- h) Look back at the EU's history and learn from past mistakes.
- i) Remember that tinkering with institutions can make things worse.
- j) Read all the EU treaties carefully before you start.

Thomas Piketty and his fellow authors conform to some but not all of these guidelines.¹ They are undoubtedly correct that Economic and Monetary Union (EMU) is in want of reform. Their complaint seems to be that, because EMU is strictly defined by bureaucracy and not enough by democracy, small poor States (namely, Greece) can be bossed about by big rich ones (namely, Germany). There is something in this. The pre-

¹ S. HENNETTE, T. PIKETTY, G. SACRISTE, A. VAUCHEZ (dir.), *Pour un traité de démocratisation de l'Europe*, Paris: Seuil, 2017.

dicament they identify is typical of confederal systems. That is why federalists argue that the EU must move decisively away from a rigid rules-based regime towards an institutional system in which democratic government exercises discretion as to the direction of common economic policy and chooses how prohibitive or permissive fiscal policy is to be.

Mr Piketty and company do not address this federalist thesis. Instead they assume, without offering evidence, that what they call the “emergency” of imbalances is a problem which can be resolved by creating another parliamentary assembly. In jumping to such a conclusion, they overlook the risks of financial instability faced by EMU because its fiscal integration is too shallow and its government too weak. That is a pity. After all, the next financial crisis of the Eurozone is more likely to be triggered by the collapse of an Italian bank than it is by democratic shortcomings. While democratisation of the Eurozone is an enviable goal, it may not be the priority – and is in any case only one element in a more complicated story.

II. Recent efforts to reform EMU have stumbled not because Member States have objected to more democracy in practice but because they dislike more government in principle: for Germany, in particular, stronger central government at the EU level is unconscionable unless and until fiscal discipline can be assured across the Eurozone (notably in France and Italy). In fact, the EU finds itself in a classic vicious circle: while it knows it has to move eventually from relying on rules to building institutions it will not do so until those rules are obeyed. Solidarity expressed through measures of debt restructuring and the pooling of a share of sovereign debt will come only when the moral hazard is eliminated of sharing a currency with other States beyond control. As the Americans discovered before us, a confederation is not a viable basis for a single currency. Confederacy tends to breed distrust. Only a common democratic government of a single economic entity will imbue trust.

EMU today is far from achieving that sense of solidarity, riven as it is between federal monetary policy and confederal economic policy. Executive authority is shared between a supranational Commission and an intergovernmental Eurogroup. Neither body has the fiscal tools to manage more than the mere coordination of national macro-economic policies within the framework of broad economic and employment guidelines. Although the institutions have been empowered since the financial crisis by supplementary powers over the banking sector, the EU’s capability either to limit or to resolve a major banking crisis is much constrained by the current Treaties. The link between national banks and sovereign debt – anomalous in a monetary union – has not been broken. The powers and resources of the European Central Bank (ECB) are limited by statute. There is no fiscal capacity unique to the Eurozone. There is no issuance of common debt and accordingly little sense among Eurozone taxpayers that they are all in it together.

This is not news. It was widely recognised at the time of Maastricht that the construction of EMU was only partial and would require reinforcement in due time by the addition of an executive authority to run the political economy. It was believed that a combination of pressure from the financial markets and the discipline of the gentleman's agreement of the Stability and Growth Pact would be enough to induce such reform.² The constitutional Convention on the future of Europe of 2002-03, presided over by Valéry Giscard d'Estaing, surely failed – against the wishes of the Prodi Commission – when it missed the opportunity to re-examine and repair the constitutional structure of EMU. In the event, it took the great financial crash of 2008 and the near collapse of Europe's banks to trigger reform of EMU governance – too little, too late – a reform process driven by crisis management, which was not in itself perfect and is in any case still incomplete.

One of the less successful of the many reforms adopted in a hurry by the EU in crisis mode was the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union.³ Herman Van Rompuy's original intention, blocked by David Cameron for reasons best known to himself, was to amend Protocol no. 12 on the Excessive Deficit Procedure.⁴ On 1 December 2011 Mario Draghi explained to Members of the European Parliament (MEPs) that the proposed reform would be “a fundamental restatement of the fiscal rules together with the mutual fiscal commitments that euro area governments have made” in order that those commitments should become “fully credible, individually and collectively”.⁵ Had Mr Cameron not interfered in this important business of the Eurozone, such a modest reform would doubtless have proceeded as smoothly as did the limited Treaty change (Art. 136 TFEU) that accompanied the creation of the European Stability Mechanism (ESM).⁶ But because the reform was articulated by way of a new intergovernmental Treaty it moved further away from the federal in the confederal direction, and became unnecessarily rigid, elaborate and even ponderous. Unsurprisingly the disciplinary provisions of the fiscal compact have been largely inoperative.

The Treaty on the Democratisation of the Governance of the Euro Area (T-Dem) team are seizing on the commitment made in the fiscal compact Treaty to incorporate its substance (after the manner of the Schengen Agreement) within the EU framework after five years. But this commitment, made in the heat of the moment, must now be reassessed. Certainly, it is true that some adjustment of the EU Treaties is needed to codify the best of the crisis-management measures, such as the bank surveillance and resolution mechanisms. In due course space must be found in terms of primary law for

² European Council Resolution of 17 June 1997 on the Stability and Growth Pact.

³ Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, D/12/2, 1 February 2012.

⁴ Protocol no. 12 of the Treaty on the European Union on the excessive deficit procedure.

⁵ M. HOLEHOUSE, *ECB's Draghi: We Need Fiscal Union not Bank Intervention*, in *The Telegraph*, 1 December 2011, www.telegraph.co.uk.

⁶ Treaty Establishing the European Stability Mechanism, T/ESM 2012-LT/en, 2 February 2012.

the innovations in decision-making procedures in the Council – notably, “reverse Qualified Majority Voting” (QMV) – as well as the introduction of the “European semester” that were introduced by the Six Pack and Two Pack by way of secondary legislation. But whether that moment is now, and whether those institutional adjustments should be attempted in isolation from wider and deeper constitutional reform, are other matters altogether. For my part, I remain sceptical. Certainly, the austere prohibitions on national budgetary policy prescribed in the fiscal compact Treaty have outlived any usefulness they may once have had. What would really make the Eurozone more roadworthy are, first, the creation of a capable executive authority at the EU level with the normal capability of a federal treasury and, second, the endowment of the ECB with all the resources and powers of a federal reserve bank.

There is already a vast literature on the economics of EMU reform, but too little on its constitutional aspects. I would draw attention especially to the radical approach of the Spinelli Group which argues that it is only the Commission and not the Eurogroup which could possibly fulfil these critical governmental functions, including international representation, in the interest of the Eurozone as a whole.⁷ Mr Piketty and his team, by contrast, tend to relegate the role of the Commission to something akin to a think-tank.

III. It is bizarre, in these circumstances, that the authors of T-Dem have decided, first, to concentrate only on the parliamentary and not the governmental aspect of EMU reform, and, secondly, to repeat the experience of proposing yet another intergovernmental Treaty outside but analogous to the European Union, exploiting the EU institutions while escaping true accountability to them. For one thing, the T-Dem Treaty, having standing only in international and not EU law, would be incompetent to exercise fiscal decisions on behalf of its signatory States. The *Bundesverfassungsgericht*, not least, will be quick to confirm this.

Another problem which immediately arises is the role of the non-Eurozone States. It is the express wish of Presidents Tusk and Juncker that those countries which have yet to adopt the euro should be more encouraged to do so. The creation of a new institution by the “Ins” outside the EU framework from which the “Pre-Ins” are excluded is unlikely to help this process of convergence. Surely it would be more prudent to devise a new Protocol to the EU Treaties whose operation solely concerned the Eurozone, but whose negotiation and ratification would involve all Member States?⁸ A further alarming anomaly lies in T-DEM’s proposal for the entry into force of their new Treaty. Under its scheme, the intergovernmental Treaty provisions would only apply to those Eurozone States that ratified it:

⁷ The Spinelli Group, Bertelsmann Stiftung, *A Fundamental Law of the European Union*, Gütersloh: Verlag Bertelsmann Stiftung, 2013.

⁸ I have recommended just such an approach in A. DUFF, *The Protocol of Frankfurt: a New Treaty for the Eurozone*, Brussels: European Policy Centre, 2016.

nothing is said about the fate of those which do not.⁹ As a single currency cannot be subject to two competing forms of governance, the implication of T-Dem is that any Eurozone State that rejects the Euro Assembly will have to be ejected from the euro.

The T-Dem team do not explain, at least to my satisfaction, why they believe a new parliamentary assembly is required to make the Eurozone more democratic. They do not analyse in detail the current role of the European Parliament in scrutinising and shaping the economic and monetary affairs of the Union as a whole or of the Eurozone in particular. Like many outside the Brussels bubble, Mr Piketty and company underestimate the importance of the regular dialogue that takes place between the presidents of the ECB, the Eurogroup and the Eurogroup working group with the Parliament's Economic and Monetary Affairs Committee (ECON). The fact that national parliaments are already involved in the European semester – and could be more so if they wished – is also conveniently overlooked. And no reference is made to the seminal role of the European Parliament in the large volume of legislation, enacted quickly and effectively, in the raft of measures taken in the wake of the great crash. The legislative and budgetary procedures proposed by T-Dem for the putative Assembly are in some respects a retreat from the level of parliamentary accountability one finds already installed by the Treaty of Lisbon. The decision-making procedures advocated in T-Dem would be likely to end in stalemate: the President of the Eurogroup is reduced to making a final plea to the Assembly to take a decision; nothing is said about what would happen were the Assembly to remain deaf to such pleadings.¹⁰

The proposed composition of the Euro Assembly, capped at 400, is unworkable.¹¹ The 80 MEPs would be outnumbered by national MPs in a ratio of 1:4, a disadvantage which would render them virtually helpless to press home the views and interests of the European Parliament. The apportionment of seats for national MPs between states disregards the federal principle of degressive proportionality, so we can be certain that smaller Member States as well as the European Parliament will reject such a proposal.

T-Dem poses another difficulty in that its new Euro Assembly would be expected to control the activities of the ministerial Eurogroup which would enjoy a much wider range of competences than is the case at present. The authors correctly identify the need for a large fiscal capacity of the Eurozone, even suggesting (albeit somewhat loosely) that “all items” should be included in the Eurozone budget.¹² They also propose that revenue for this budget should be supplied exclusively by company taxation – which would seem to be unnecessarily restrictive. The discussions currently under way

⁹ Art. 21 T-Dem.

¹⁰ Art. 13, para. 2, and Art. 15, para. 7, T-Dem.

¹¹ Art. 4 T-Dem.

¹² Art. 14, para. 2, T-Dem.

about the new system of own resources prompted by the task force led by Mario Monti embrace a wider number of options.

The authors of T-Dem are bold to propose the pooling public debt in excess of 60% of Gross Domestic Product (GDP). They do not, however, show how the accretion of such important new powers by a core group of EU Member States could overcome the constraints laid down in the EU Treaties concerning the levying of EU taxes, the requirement for unanimity in Council for decisions on tax harmonisation or the prohibition on EU financing of national debt. Nor do they address the question of how to avoid actions by a few States that may impair the smooth operation of the internal market. T-Dem's piecemeal, intergovernmental approach to radical reform of EMU would have deep implications for the constitutional future of the European Union as a whole which the authors do not appear to have taken fully into account.

There are, furthermore, fundamental constitutional objections to the creation of a joint chamber of MEPs and national Members of the Parliament (MPs). The proposal neglects the fact that the two levels of parliamentarianism in a federal system have different mandates, distinct legitimacy and contrasting functions and preoccupations. One may doubt that many national parliamentarians – even among German Members of the *Bundestag* – will be either informed about or sympathetic to the common interest of the Eurozone. T-Dem proposes that the Euro Assembly will vote through the fiscal transfers under the ESM – a duty that most national MPs will find counter-intuitive.

A sludgy amalgam of the two parliamentary tiers offends the principle of the separation of powers. It also breaches the principle of subsidiarity which implies that decisions should be taken at the appropriate level by those primarily responsible for the consequences of their actions. The proposed hybrid Assembly would lead inevitably to a constitutional struggle between its federal and national elements, each justifiably jealous of their own prerogatives. The main role of national MPs in the context of the European Union is to hold their own ministers to account for what they get up to at meetings of the Council in Brussels.¹³ Thomas Piketty is welcome to propose measures to advance the cause of the *Assemblée Nationale* in this regard.¹⁴

One need not dwell here on the enormous practical and logistical problems presented by having to ship hundreds of national MPs to Brussels several times a year. But one may be certain that the spectacle of creating yet another costly and fractious European assembly is not likely to gladden the heart of sceptical public opinion.

IV. The intervention of Emmanuel Macron in the debate about EMU reform quickens the pace of integration. The issues raised by Mr Piketty and his team are indeed important,

¹³ Arts. 10 and 12 TEU and Protocols nos 1 and 2.

¹⁴ See S. VALLÉE, *Pour un traité de démocratisation de l'Europe*, in *Les Invités de Mediapart*, 19 April 2017, mediapart.fr.

and will find a place in the debate. But one expects President Macron to search wider for advice.

A better approach – and more federalist – would be to retain the cohesion of the European Parliament and respect the Union's single institutional framework. Once fiscal integration is deepened and the federal nature of EMU is confirmed and clarified, it will be perfectly possible to differentiate within the House between MEPs elected in Eurozone States and those who are not when it comes to voting on fiscal legislation specific to the Eurozone. No MEP, however, should be barred from attending meetings and speaking on any matter under the sun.

The European Parliament as a whole deserves a larger role in adopting jointly with the Council the recommendations setting the macro-economic guidelines (Art. 121, TFEU). When it comes to more intensive action under the excessive deficit procedure (Art. 126 TFEU), Parliament should be enabled to propose amendments to the Commission's proposals: the Eurogroup might only reject those amendments in the case that the Commission delivers a negative opinion on Parliament's amendments.¹⁵ The national parliament of the country concerned in an excessive deficit procedure should be given the right to be heard directly by the EU institutions. And several measures which today take the form of executive decisions of the Council should become acts of the legislature, adopted by co-decision.¹⁶

In conclusion, Thomas Piketty and his colleagues are to be commended for joining the debate about the future of the EMU. But they are unwise to undermine the legitimacy of the directly-elected European Parliament. It is a mistake to look for solutions to the EU's problems outside the EU Treaties. And they should retarget their efforts to focus on the obvious lack of capable government rather than the alleged weakness of parliamentary democracy. Strong parliaments rise in reaction to strong government, and it is precisely the latter that Europe's polity needs urgently now.

Andrew Duff*

¹⁵ See, for example, A. DUFF, *The Protocol of Frankfurt: a New Treaty for the Eurozone*, cit., Art. 11, para. 5.

¹⁶ See, for example, The Spinelli Group, Bertelsmann Stiftung, *A Fundamental Law of the European Union*, cit., Arts 220 and 225.

* President of the Spinelli Group, Visiting Fellow at the European Policy Centre, Member of the European Parliament 1999-2014, www.spinelligroup.eu.

