



ARTICLES

SHAPING THE FUTURE OF EUROPE – FIRST PART

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THE EUROPEAN COMMISSION BETWEEN INSTITUTIONAL UNITY AND FUNCTIONAL DIVERSIFICATION: THE CASE OF ECONOMIC GOVERNANCE

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ABSTRACT: The Commission performs legislative, executive and quasi-judicial functions at the same time. Over time these functions have multiplied, and their nature has become increasingly diverse and fragmented. In the field of economic governance, for instance, the Commission is fulfilling a new multi-faceted function, combining technical assessment with political decisions. Yet, art. 17 of the Treaties require collegial and consistent decision-making processes. Does functional diversification challenge the Commission's internal institutional unity and coherence? And what are the consequences for the Commission's role in the Union's institutional setting? This *Article* addresses these questions, by focusing on the functions in economic governance. The analysis unveils a paradox inherent in the Commission's multi-functionality. The Commission is often entrusted tasks of a political nature in virtue of its independent and impartial status, without however being endowed with the legitimacy basis that would go with it. Therefore, the *Article* warns against the dangers of too extended functional diversity, and contends that clarity as regards the functions fulfilled by the Commission is essential if the institution wants to act legitimately vis-à-vis the other EU institutions, the Member States and the European citizens at large.

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I. INTRODUCTION

The European Commission has recently been at the core of growing political contestation. It has been the main target of sovereigntists’ accusations pointing to Brussels “Eurocrats” as illegitimate sources of impositions. As misplaced as they may be, these allegations revive the old question of the Commission’s heterogenous nature as a “hybrid” institution, suggesting that the issue deserves further consideration.

Born as an expert-based, technical body, the Commission has evolved towards a semi-politicised institution. Its originally independent and administrative role was slowly eroded by the growing political leadership and quasi-governmental functions that the institution has been assuming. Critically, the Commission initiates legislation, detains extensive executive tasks in the implementation and monitoring of EU legislation, performs quasi-judicial functions in its infringement and supervisory powers, and represents the EU in international organizations and trade relations with third countries. Its functions are often compared to those of a national executive.¹

Yet, despite evolving powers and growing size, the Commission’s institutional architecture has barely changed in over fifty years and the rationale for the different functions originally lies with the Commission’s supranational role as guardian of the Treaties and promoter of the Union’s interest. Eventually, all functions and tasks need to be subsumed under the hat of a collegial body which must decide impartially and independently. Institutional coherence and unity are in this respect crucial imperatives of the Commission’s decision-making. Does functional diversification challenge this internal institutional unity? In this *Article* I will investigate this question and its consequences for the Commission’s role and legitimacy.

Literature on the Commission’s competences, powers and tasks is vast. Many scholars – in the field of both law and political science – have analyzed the Commission’s hybrid nature, pointing to fragmented internal structures, to diverging interests and to numerous intra-institutional conflicts.² However, the overall coherence of the internal Commission’s decision-making has never been the object of in-depth studies. This *Article* fills this gap by examining the heterogenous Commission’s decision-making functions against the background of its unitary institutional nature.

¹ AC Wille, *The Normalization of the European Commission: Politics and Bureaucracy in the EU Executive* (Oxford University Press 2013).

² See e.g. N Nugent and M Rhinard, *The European Commission* (Palgrave Macmillan 2015); T Christiansen, ‘The European Commission. The European Executive between Continuity and Change’ in JJ Richardson (ed), *European Union Power and Policy-Making* (Routledge 2005) 77, 99 ff.

In the *Article* I first briefly introduce the different Commission functions. I address functional diversification and its significance for the Commission's institutional functioning. I argue that, beyond – and underneath – the unitary, collegial output of the institution, fragmentation and heterogeneity permeate the internal decision-making of the Commission at a functional level. In the second part of the *Article* I focus on the powers and functions newly acquired by the Commission in economic governance. The case-study illustrates in practice how the Commission is called to combine the neutrality and rigour of independent economic assessment with political considerations that have enormous impact on the Member States. On this basis I expand the reflection to assess these findings in the light of the overall role of the Commission in the EU institutional setting.

The analysis unveils a paradox inherent in the Commission's multi-functionality. In virtue of its independent and impartial status, the Commission is often entrusted tasks of a political nature, without however being endowed with the legitimacy that would go with it. Therefore, I argue that functional heterogeneity ultimately runs the risk of undermining the Commission's resilience to political contestation, as it does not provide with a clear representation of the legitimacy basis on which the Commission is acting. I contend that clarity as regards the functions fulfilled by the Commission is essential if the institution wants to withstand political contestation in the future and act legitimately vis-à-vis the Member States and the European citizens at large.³

II. THE ONE AND THE MANY EUROPEAN COMMISSION(S): INSTITUTIONAL COHERENCE AND FUNCTIONAL FRAGMENTATION

The Commission is a multi-functional institution. It has the – almost exclusive – right to initiate legislation (legislative function). It has been delegated executive powers by the Member States and therefore adopts non-legislative legal acts as an executive rule-maker (executive rule-making function). It monitors the application of EU law (infringement function) and, in some cases, it directly enforces rules, such as in the field of competition policy (competition function).⁴ Finally, it represents the Union in international fora, be it trade negotiations or international organizations (external representation function). However, the types and categories of the Commission's functions are a matter of contention and scholars often use different classifications and parameters.⁵ Indeed, the traditional separation of powers

³ The empirical part of this *Article* draws on interviews with Commission officials conducted by the author in 2017 and 2018 in the framework of the dissertation: M Patrin, *The Principle of Collegiality in the Commission Decision-making: Legal Substance and Institutional Practice* (European University Institute, Doctoral Dissertation, 2020). The case-study on economic governance is mainly based on the Commission's organisation and functioning at the time of the Juncker Commission.

⁴ J-P Jacqu , *Droit institutionnel de l'Union europ enne* (Daloz, 2010) 365.

⁵ A Wonka, 'The European Commission' in JJ Richardson and S. Mazey (eds), *European Union: Power and Policy-making* (Routledge 2015) 83, 84 ff.; T Christiansen, 'The European Commission. The European Executive between Continuity and Change' cit. 100; N Nugent and M Rhinard, *The European Commission* cit. 15 ff.

(Montesquieu's separation between legislative, executive and judicial power) is unfit to account for the distribution of powers and competences between EU institutions, and thus also to draw a clear demarcation line between the Commission's functions.⁶ For instance, the Commission has the right of legislative initiative but the actual legislators are the Council and the European Parliament; in infringement and competition policy it detains enforcement and quasi-judicial powers, although the Court of Justice of the European Union (CJEU) is famously responsible for the judicial oversight of the Union; it is often considered the main executive body of the Union, yet the locus of executive power is typically fragmented, scattered and shared between the Council and the Commission.⁷ These observations alone indicate that it is not easy to navigate between the different Commission's functions. Nevertheless, analysing how the Commission operates under these different functional clusters can reveal a lot about its internal institutional mechanisms and dynamics.

An additional consequence of the absence of a rigid doctrine of power separation in the EU is that the functional categories traditionally adopted to make sense of the Commission's powers are somewhat fluid, so that the Commission could historically acquire new and diverse competences and functions depending on the needs and circumstances. In this *Article*, I will argue that, in addition to the five above-described "traditional" functions in the areas of legislative initiative, executive rule-making, competition policy, infringement proceedings, and external representation, the Commission has recently gained an additional function in the field of economic governance, which constitutes an ever-growing area of Commission's institutional power. I will argue that the post-crisis reform of the Economic and Monetary Union (EMU) framework and the introduction of the European Semester have *de-facto* created a new role for the Commission as a coordinator, supervisor, enforcer and, to a certain extent, legislator in the area of economic governance.

Multiple functions have always coexisted in the Commission's remit of activities. They have traditionally found their justification in the role of the Commission as guardian of the Treaties acting in the interest of the European Union. Be it as an enforcer, legislator, or in representing the Union, the Commission is faithful to the original mission of safeguarding the European interest. In addition, the Commission being a collegial body, these different functions must be performed alongside each other in a coherent and consistent manner. Indeed, according to the principle of collegiality, all decisions must be attributed to the college as a whole and Commissioners are collectively responsible for them. In this sense, collegiality safeguards the independence of the Commission as the Union's impartial and supranational arbiter. Resistance to external pressure through collective endorsement of common decisions remains a key tool for the authoritativeness and respectability of the

⁶ G Majone, 'Delegation of Regulatory Powers in a Mixed Polity' (2002) ELJ 323; See also XA Yataganas, 'Delegation of Regulatory Authority in the European Union. The Relevance of the American Model of Independent Agencies' (Jean Monnet Working Paper 3-2001).

⁷ D Curtin, *Executive Power of the European Union: Law, Practices, and the Living Constitution* (Oxford University Press 2009).

Commission's output. In addition, collegiality is also a principle of unity of decision-making and it watches over the coherence and homogeneity of the Commission's decisions.

The need for institutional coherence thus informs the internal procedures of coordination within the Commission's political and administrative layers beyond the multi-functional character of the activities performed. Independently from the functions it fulfils, and across all of them, the internal Commission's decision-making procedures must preserve and ensure the cohesion of collegial output. This has significant repercussions for the procedural coordination within the Commission and for the relations between the college of Commissioners and the administrative services. In a complex and multi-tasking institution such as the Commission, decision-making is a continuous process encompassing different levels of activity. To be truly collegial and cohesive, a decision will need to be prepared well before it reaches the college stage through association and consultation of interested actors and departments (Figure 1).

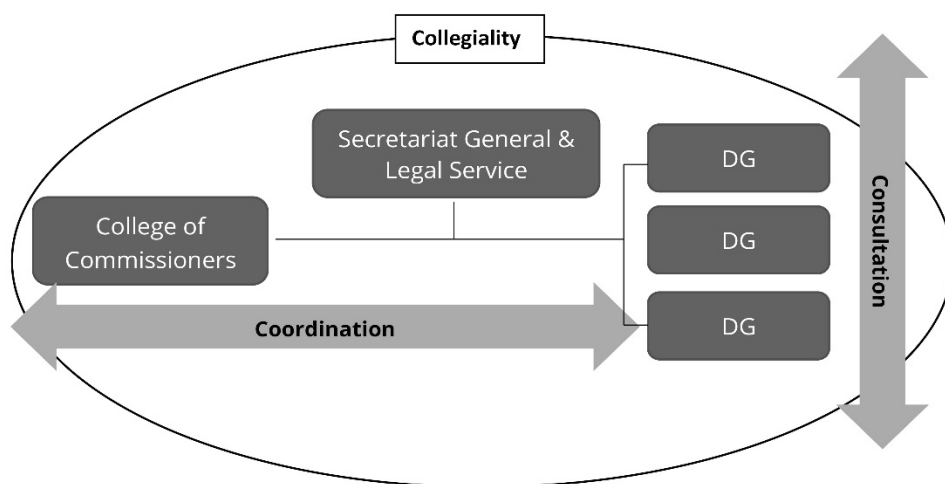


FIGURE 1: The Commission's collegial organization. Source: made by the author.

Yet, at a closer look, the multifaceted nature of the functions performed by the Commission, which require different procedures and respond to different logics, challenges this institutional coherence. It reveals a constitutive fragmentation of decision-making that can prove problematic for the overall role that the Commission plays in the EU. From

a purely formal perspective the college of Commissioners adopts all decisions irrespective of the Commission's area of activity.⁸ However, looking at the micro-level of decision-making, internal coordination and collegial decision-making are far from being uniform and vary greatly according to the types of acts adopted (see *infra* Table 1).

In some cases, the decision-making follows a strict set of procedures allowing for a high level of coordination. Legislative initiatives for instance are very collegial, as regards both the work of the services, where the act is usually drafted, and in the college, where several Commissioners are directly involved at an early stage, especially in the presence of files of high political salience. Interservice consultations, inter-cabinets meetings as well as frequent discussions in the college of Commissioners mark the internal decision-making process for legislation.⁹ Delegated and implementing decisions are equally the result of highly complex coordination procedures, also foreseeing the association of national experts.¹⁰ However, once a measure has been agreed with a broad range of stakeholders and interested parties, the college has none or little discretion to amend the act.

Conversely, where files are deemed to be of a technical nature, the process is highly decentralised with decisions being taken by one Commissioner and one Directorate-General (DG) and only formally rubberstamped by the college. This is particularly problematic when it comes to competition policy. Arguably, competition rules and procedures form an area of separated responsibility, for which the competition Commissioner is exclusively in charge.¹¹ Although final decisions are adopted by the college, the full set of procedures, inquiries and the information needed to work out the cases are exclusive prerogative of one single Commissioner and department.¹² Along similar lines, in infringement proceedings the college has often only a formal role, whereas the main work is done by the services and by the Legal Service in particular. Essentially, decisions on infringements are considered technical and are rooted in the impartial status of the Commission as the watchdog of EU law. This impartiality is embodied by the Legal Service, who has a predominant role in the internal decision-making.¹³

⁸ Exceptions are expressly provided for by the Commission's Rules of Procedure in the empowerment and delegation procedures, Rules of Procedure of the Commission C(2000) 3614, as amended by the Decision 2011/737/EU of the Commission of 9 November 2011 amending its Rules of Procedure.

⁹ M Szapiro, *The European Commission: A Practical Guide* (John Harper Publishing 2013).

¹⁰ N Nugent and M Rhinard, *The European Commission* cit. 323 ff.

¹¹ Significantly, Nugent and Rhinard note that "the centre of the Commission's development and implementation of competition policy is the Directorate-General for Competition", N Nugent and M Rhinard, *The European Commission* cit. 328.

¹² G Monti, 'Independence, Interdependence and Legitimacy: The EU Commission, National Competition Authorities and the European Competition Network' in D Ritleng (ed), *Independence and Legitimacy in the Institutional System of the European Union* (Oxford University Press 2016) 180 ff; European Commission, Antitrust Manual of Procedures: Internal DG Competition working documents on procedures for the application of Articles 101 and 102 TFEU of March 2012 ec.europa.eu.

¹³ S Andersen, *The Enforcement of EU Law: The Role of the European Commission* (Oxford University Press 2013) 45 ff.

Finally, ensuring internal coherence in external relations is not straightforward either, and this not only for the nature of the policy area, but more importantly for the institutional fragmentation that characterises it. Since the Lisbon Treaty, external affairs are in the hands of the High Representative for Foreign Affairs and Security Policy, who sits in both the Commission and the Council. In performing his duties, the High Representative is administratively supported by the European External Action Service (EEAS), which operates as a separate department independent from the other Commission services.¹⁴ This hybrid institutional arrangement introduces a potentially disruptive element in the internal dynamics of the Commission and in its unitary institutional output. Great part of the external relations' decision-making processes involves another institution and takes place in a separated administrative service.

Based on these considerations, Table 1 summarizes the relations inside the college, within the services as well as between the college and the services for each function performed by the Commission. It shows that collegial procedures and coordination are not uniform across the functional spectrum and that they vary in all three dimensions examined, with significant consequence for the overall institutional coherence of the Commission.

Commission's functions	Collegial procedures	Coordination within the college	Horizontal coordination between departments	Vertical coordination college/ services
Legislative	Many formal and informal procedures inter-service and inter-cabinet at all stages of decision-making	High	High	High
Executive Rule-Making	Extensive consultation at the preparatory stage. Yet limited oversight capacity of the college	High	High	Medium
Competition	Area of separated responsibility in the hands of one DG and one Commissioner	Low	Low	Medium
Infringement	Pre-formal and informal procedures in the hands of legal service and individual DGs	High	Medium	Medium
External action	Hybrid status of High Representative makes coordination complicated	Medium	Low	Medium

TABLE 1: Commission's functions and internal coordination. Source: made by the author.

¹⁴ A-C Marangoni, 'Coordination of External Policies: Feudal Fiefdoms to Coordinate' in A Boening, J-F Kremer and A van Loon (eds), *Theoretical and Institutional Approaches to the EU's External Relations* (Springer 2013) 37 ff.

The varying levels of internal coordination procedures ultimately raise the question of how to safeguard institutional coherence and cohesion despite diversification. Moreover, they highlight a tension between an understanding of the Commission's role as a technical, neutral and impartial arbiter and its political, legislative and executive tasks. The frictions inherent in this functional fragmentation appears clearly if one looks at the Commission's competences and tasks in economic governance. In the rest of the *Article* I will consider economic governance as a test-case showing that functional diversification in the Commission matters and deserves careful examination.

III. ECONOMIC GOVERNANCE: A NEW DOUBLE-EDGED FUNCTION

III.1. THE COMMISSION IN THE POST-CRISIS REFORM: A PATCHWORK OF FUNCTIONS

The 2008 economic and financial crisis spurred a wave of regulatory and institutional reform in the EU. Because of the urgency of the situation, and given the virtual impossibility of revising the Treaties, reforms were adopted either as secondary EU law (e.g. the two- and six-Pack) or outside the EU legal framework by resorting to international agreements (e.g. Fiscal Compact and the European Stability Mechanism (ESM) Treaty).¹⁵ The post-crisis reform undoubtedly brought about the most significant changes in the Commission's functions and tasks in recent years. Many of these tasks were already within the Commission's competences in the EMU before the crisis, but they got enhanced by new provisions. In particular, the Commission today steers the European Semester, a "new governance architecture for socioeconomic policy co-ordination in the European Union".¹⁶ In the framework of the Semester, the Commission is responsible for reinforced surveillance of Member States' macroeconomic and budgetary policy. It monitors national public debts and expenditures under a strengthened Stability and Growth Pact (SGP). In addition, it manages the Macroeconomic Imbalance Procedure (MIP), newly introduced by the Two-Pack and Six-Pack legislation in order to address non-fiscal trade imbalances across European economies. In the assessment of imbalances, the Commission is left with considerable discretion. It can decide to submit the countries to special review (in-depth country reviews) and issues recommendations that can also lead to financial sanctions in case of non-compliance. The introduction of the "reversed qualified majority voting" for sanctions in case of non-compliance for both the SGP and the MIP has strengthened the Commission's position since it is now more difficult for Member States to oppose Commission recommendations. Moreover, the Commission is responsible for preliminary assessment of the conformity of national draft budgets with the SGP. As a result of this monitoring process, the Commission

¹⁵ B De Witte, 'Euro Crisis Responses and the EU Legal Order: Increased Institutional Variation or Constitutional Mutation?' (2015) *EuConst* 434.

¹⁶ A Verdun and J Zeitlin, 'Introduction: The European Semester as a New Architecture of EU Socioeconomic Governance in Theory and Practice' (2018) *Journal of European Public Policy* 137.

annually drafts country-specific Recommendations (CSRs), which also touch upon policy fields outside of the EU competence, such as pensions, education and healthcare.¹⁷ Finally, the Commission, as part of the Troika, participates in the negotiations over conditionality agreements with countries in financial trouble.

It is important to stress that the Commission does not decide on sanctions nor does it adopt the final country recommendations. This is the responsibility of the Member States in the Council. Yet the Commission conducts the full monitoring and assessment process on which the final decisions are based and is responsible for proposing them.¹⁸ This task has been entrusted to the Commission because of its neutral role as Guardian of the Treaties. The independence and expertise of the Commission is deemed to allow for a neutral assessment of the countries' economic performances. The DG for Economic and Financial Affairs (DG ECFIN) has long represented this neutrality and independence. As stressed by some authors, in the management of the euro-crisis a path-dependent choice was made to endow the supervision of Member States' budgetary performances to the Commission as a technocratic, independent body, that would ensure compliance with the commitments of the reform. "Actors have repeated the choice of the 'technical' profile of the Commission as an independent technical agency with functional authority in order to manage fiscal and economic governance".¹⁹ Mainly based on its neutral and technical nature the Commission has thus acquired new supervising and sanctioning functions in EMU.

Yet, considering these tasks to be purely administrative and technical matters is misleading. In fact, the Commission makes important political decisions on the methodology and on the approach to assess the countries, as well as on the actual advice provided to Member States on the direction and content of the reforms to be undertaken.²⁰ Many authors have pointed to the wide political discretion that the Commission enjoys in its recommendations, which have become increasingly prescriptive and intrusive.²¹ This is especially problematic as recommendations touch upon issues that fall within the competences of the Member States, thus giving the Commission unprecedented capacity to

¹⁷ P Vanheuverzwijn, 'How the Commission Fills in the Blanks of the European Semester: Incomplete Contracts and Supranational Discretion in the EU's Post-Crisis Economic Governance' (2017) *Politique Européenne* 8, 9 ff.

¹⁸ *Ibid.* 9 ff.

¹⁹ C Closa, 'Institutional Change in EU Macroeconomic and Fiscal Governance. The Reinforcement of the Commission' in F Amtenbrink, G Davies, D Kochenov and J Lindeboom (eds), *The Internal Market and the Future of European Integration* (Cambridge University Press 2019) 322, 326.

²⁰ MW Bauer and S Becker, 'The Unexpected Winner of the Crisis: The European Commission's Strengthened Role in Economic Governance' (2014) *Journal of European Integration* 213 ff.

²¹ M Dawson, 'The Legal and Political Accountability Structure of "Post-Crisis" EU Economic Governance' (2015) *JComMarSt* 976, 980 ff.

shape and control national economic and social policy.²² Under this perspective, it has been argued that the Union has become a “redistributing political system” whereby the Commission is the “first place of account for the [national] budgetary proposals”.²³ These developments bear significant consequences for the balance between the Commission and the Member States, especially because the budgetary process is at the core of Member States’ parliamentary activity and of their ability to shape policies.²⁴

In conclusion, as a result of the regulatory overhaul of economic governance, the Commission has come to play a new role. The post-crisis setting has endowed the Commission with a new function in EMU, which can hardly be subsumed under any of the traditional ones – but which uses them in novel combinations. The Commission exercises its legislative initiative by proposing corrective measures, it acts as the watchdog of EU law and establishes the medium- to long-term vision for the development of EMU. Moreover, as it will be shown below, the EMU functions come close to resemble the tasks performed by the Commission in the field of competition, albeit with significant differences. As a result, economic governance perhaps represents the culmination of the functional diversification process that was described above. Arguably for this reason, the new Commission’s role in this area poses several problems for the overall institutional identity of the Commission. The patchwork of economic governance’s functions combines neutral, technical and independent assessment with political decisions that will have enormous impact on the Member States. All this within a single, collegial body.

In the following sub-sections, I will examine the main institutional changes both at the level of the college and of the Commission services and I will explain how they affect the institutional coherence of the Commission. I will show that there are significant variations in the functions performed within the EMU area. The polymorphous nature of these functions in turn reflects different perceptions of the role of the Commission in the EU institutional setting.

III.2. THE SUPER-OLLI PROCEDURE: AN EMU SUPER COMMISSIONER?

In 2011, the Commission’s Rules of Procedure (RoP) were amended to introduce a special written procedure for economic and budgetary policies. Art. 12.5 of the RoP states that:

“any Member wishing to suspend a written procedure in the field of the economic and budgetary policies of the Member States, in particular of the euro-area, shall send a reasoned opinion to that effect to the President, explicitly indicating the aspects of the draft

²² F Costamagna, ‘The Impact of Stronger Economic Policy Co-Ordination on the European Social Dimension: Issues of Legitimacy’ in M Adams, F Fabbrini and P Larouche (eds), *The Constitutionalization of European Budgetary Constraints* (Hart 2014) 359, 376 ff.

²³ D Chalmers, ‘The European Redistributive State and a European Law of Struggle’ (2012) ELJ, 667 and 686.

²⁴ F Fabbrini, ‘The Euro-Crisis, EMU and the Perils of Centralisation’ in L Daniele, P Simone and R Cisotta (eds), *Democracy in the EMU in the Aftermath of the Crisis* (Springer 2017) 121, 130 ff.

decision to which it relates, based on an impartial and objective assessment of the timing, structure, reasoning or result of the proposed decision".²⁵

The President can refuse the suspension if he or she believes that the request is not well founded. In fact, art. 12.5 RoP introduces an exception to the normal rules on written procedure laid out in art. 12.3 RoP. Whereas the principle of collegiality requires that any member can under normal circumstances request the oral discussion of a draft proposal, certain decisions in the field of economic and budgetary surveillance (such as proposing sanctions) undergo an accelerated written procedure that limits the possibility of oral discussion. The art. 12.5 procedure is known within the Commission as the Super-Olli procedure, in honour of Olli Rehn, former Commissioner for Economic and Monetary Affairs in the Barroso II Commission. The procedure is worth closer consideration as it offsets the balance of the College by *de facto* granting special powers to only one Commissioner.

The idea of strengthening the powers of the EMU Commissioner is not new. During the financial crisis, it was proposed to create a Super Commissioner in charge of fiscal policies, endowed with exclusive powers to veto national budgets.²⁶ The Super-Olli procedure is a lighter version of this proposal, which strengthens the autonomy of the Euro-Commissioner within the collegial institutional setting. The new special function of the EMU Commissioner was pushed through by those countries, such as Germany and the Netherlands, that were keen on ensuring strict compliance with fiscal discipline. It relied on the expectation that assessment of national fiscal and macroeconomic performance was essentially a technical matter, that would be decided upon by the EMU Commissioner in an independent and neutral manner – similar to competition policy.²⁷ In the words of the Commission, the objective of the special written procedure was to allow "for a more objective and effective decision-making".²⁸ Remarkably, however, there is no special decision-making procedure that applies to competition policy. The competition Commissioner and DG Competition (DG COMP) in practice act independently, but formally they need to respect normal collegial procedures. On paper, therefore, the EMU Commissioner under the Super-Olli procedure has even wider scope for independent assessment than the Competition Commissioner.

²⁵ Rules of Procedure of the Commission cit. art. 12.

²⁶ Y Karagiannis and M Guidi, 'Institutional Change and Continuity in the European Union: The Super-Commissioner Saga' (2014) *Acta Politica* 174.

²⁷ C Closa notes that "The German government already suggested the possibility of granting this Commissioner the power to veto national budgets, and Angela Merkel proposed that this position enjoy a status similar to that of the competition commissioner, whose decisions do not require the agreement of the rest of the members of the College of Commissioners", C Closa, 'Institutional Change in EU Macroeconomic and Fiscal Governance. The Reinforcement of the Commission' cit. 335.

²⁸ Communication COM(2012) 777 final from the Commission of 28 November 2012 on a Blueprint for a Deep and Genuine Economic and Monetary Union. Launching a European Debate, Footnote 24.

The procedure is arguably illegal because it infringes the equal rights of Commissioners to put an item on the college agenda. The Treaties give the Commission President the power to determine the working guidelines of the Commission and to decide on its internal organization. As a consequence, the President has extensive agenda-setting powers.²⁹ Nonetheless the right of college members to request that an issue be discussed by the full college remains one of the few prerogatives of the collegial architecture of the Commission. The very concept of collegial responsibility implies a right to participate in decision-making from the beginning and a *droit de regard* on the activities of the fellow Commissioners.³⁰ Therefore the cabinet structure is particularly important in the Commission and is built around horizontal policy fields, so that virtually every area of Commission activity is covered by each cabinet, beyond and in addition to their special portfolios.³¹ Secondly, collegial responsibility is a consequence of collective adoption. For this reason, the normal adoption procedure in the Commission is the oral procedure, where all Commissioners sit around the table and express their preferences. For obvious efficiency concerns related to the high number of files treated by the Commission, lighter procedures were established, such as the written procedure. Yet, they all foresee the possibility for any member of the college to request a decision to be discussed orally in the presence of specific concerns or sensitivities. The limits established by the Super-Olli to this rule seem therefore to violate the basic principle of equality between Commissioners and their right to contribute to agenda-setting. This case is implicitly also recognised by the Commission, who in its 2012 "Blueprint for a deep and genuine EMU" notes that "within the Commission, any steps designed to reinforce even further than today the position of the Vice President for Economic and Monetary Affairs and the euro, would require adaptations to the collegiality principle and, hence, treaty changes".³² The legality of the Super-Olli was never challenged in court, but it would not be surprising if the CJEU would rule against the procedure if ever referred with the matter. After all, since the 1980s jurisprudence of the CJEU has recognised substantial consequences to the violation of the principle of collegiality, as constituting a procedural flaw leading to the annulment of the adopted decision.³³

The controversial nature of the procedure is reflected in the fact that the Super-Olli procedure was barely used in the Juncker Commission, or at least it was used in a significantly weakened form. The prerogatives of the Super-Olli were shared between the Vice-President in charge of the Euro, Dombrovskis, and the Economic and Financial Affairs Commissioner Moscovici. If they agreed on the measures to be taken, the provisions could go

²⁹ Art. 17(6) TEU.

³⁰ J Brauneck, 'EU-Kommission: Ist die neue Macht der Vizepräsidenten unionsrechtswidrig?' (2015) DÖV 904 ff.

³¹ N Nugent and M Rhinard, *The European Commission* cit. 144.

³² Communication COM(2012) 777 cit. 38.

³³ Case C-5/85 *AKZO Chemie v Commission* ECLI:EU:C:1986:328; Case C-137/92 P *Commission v BASF and Others* ECLI:EU:C:1994:247; Case T-33/01 *Infront WM v Commission* ECLI:EU:T:2005:461.

through the accelerated written procedure, otherwise they needed to be adopted by oral procedure. Testimonies converge in observing that in practice, decisions on fiscal surveillance are always discussed in the college and are often very lively.³⁴ Although it may be too early to say, this state of affair seems to be replicated in the Von der Leyen Commission. The collective and cohesive nature of the Commission's decision-making is reiterated throughout the new *Working Methods* and in the *Mission Letters* addressed to members of the college.³⁵ In particular, the mission letter to Commissioner Gentiloni, in charge of economic affairs, assigns him important tasks in the supervision of the Semester and in ensuring macroeconomic stability, yet these tasks have to be fulfilled "under the guidance of the Executive Vice-President for an Economy that Works for People".³⁶ There is no mention of the super-Olli procedure or of any special status of the Economy Commissioner.

Ultimately, divergent views on the super-Olli procedure mirror two different ideas for the role that the Commission should play in economic governance: the technical and independent arbiter and/or the political decision-maker. The super-Olli was introduced during the first phase of the post-crisis EU reaction, which was mainly centred on fiscal discipline. A second, more flexible approach followed, championed by Juncker, which aimed to integrate economic considerations with the specific conditions of each country as well as with the macro-economic impact on the Euro-area.³⁷ Juncker's and Von der Leyen's preference for collegial discussions thus reflects a choice for a political approach to economic governance. In fact, it can be argued that precisely a policy area such as economic governance requires an even higher level of collegiality and political guidance, as it may be very difficult to "sell" – and get the Council to adopt – controversial decisions on sensitive matters such as the economic performance of Member States if they are not widely discussed and shared.³⁸

This political approach to economic governance has made the super-Olli procedure less suitable to deal with Member States' economic and budgetary surveillance. Interestingly, more recent Commission's reform proposals for EMU point in the direction of a more "political" role of the Commissioner in charge of economic governance. In its 2017 reform package on EMU the Commission proposed the creation of a European Minister of Economy and Finance, that would also be the Chair of the Euro Group and would rep-

³⁴ Interview with Member of Commission Cabinet, Brussels (28 September 2017); Interview with Member of Commission Cabinet, Brussels (29 August 2018).

³⁵ Communication P(2019) 2 from the President to the Commission of 1 December 2012 on the Working Methods of the European Commission.

³⁶ U Von der Leyen, Mission Letter to Paolo Gentiloni, Commissioner-Designate for Economy of 10 September 2019, 4.

³⁷ P Vanheuverzwijn, 'How the Commission Fills in the Blanks of the European Semester: Incomplete Contracts and Supranational Discretion in the EU's Post-Crisis Economic Governance' cit. 17.

³⁸ Interview with Member of Commission Cabinet, Brussels (22 June 2018).

resent a new central economic policy actor with wide executive powers for the coordination of European fiscal and economic policies.³⁹ Although the proposal does not stand many chances of being adopted in its current form, it vouches for the shift towards a political approach to economic governance initiated by the Juncker Commission.

III.3. THE EUROPEAN SEMESTER: INDEPENDENT ECFIN OR INCLUSIVE DECISION-MAKING?

The diversity of the tasks performed by the Commission in EMU is reflected in its internal work organisation when it comes to the European Semester. The Commission has progressively developed a holistic approach to economic governance with one single package that looks simultaneously at the country-specific and at the EU-wide dimension, at the fiscal and at the structural side. However, substantial differences remain between the hard-law fiscal and macro-economic surveillance side (SGP and MIP) and the softer structural surveillance side (the Semester's CSRs) of the Commission's work. Whereas the fiscal side is dominated by an independent DG ECFIN, the structural side is steered by the Secretariat-General (SG) and features a more collaborative approach. The two surveillance dimensions are both part of the Semester, but they foresee different decision-making processes.

a) Fiscal and MIP surveillance.

With the strengthening of the economic governance system after the crisis, DG ECFIN acquired new responsibilities.⁴⁰ The DG now oversees EMU budgetary surveillance. In this role DG ECFIN traditionally enjoys wide independence as the repository of economic and technical expertise. For instance, DG ECFIN prepares the Autumn and Spring economic forecasts for each country. Based on the forecasts and on Eurostat data, DG ECFIN steers the whole preparatory work for SGP and MIP budgetary surveillance.⁴¹

As shown in Figure 2, DG ECFIN prepares for each country the initial technical analysis as well as a strategic document outlining the preferred way forward. Based on these documents, the EMU Commissioner, in coordination with the responsible Vice-President and the President, issues a college document, in which he either agrees with DG ECFIN's position or proposes a new strategic way forward. Only at this stage, the documents are sent to all services with an interest for interservice consultation – generally the SG, the Legal Service and Eurostat. After the interservice consultation, the documents reach the college level, where they are discussed by the Heads of Cabinets and then usually adopted by oral procedure or, in some cases, by written procedure.

³⁹ See further M Patrin and P Schlosser, 'The European Finance Minister and the EMU Reform Conundrum', (2019) *Capital Markets Law Journal* 274; N Xanthoulis, 'The Commission's Proposal for a European Minister of Economy and Finance: Institutional Empowerment, Constitutional Tensions and the Ministerial Taboo' (CERiM Online Paper Series 7- 2018).

⁴⁰ A Verdun and J Savage, 'Strengthening the European Commission's Budgetary and Economic Surveillance Capacity since Greece and the Euro Area Crisis: A Study of Five Directorates-General' (2016) *Journal of European Public Policy* 101, 110.

⁴¹ Interview with Commission Official of DG ECFIN, Brussels (22 June 2018).

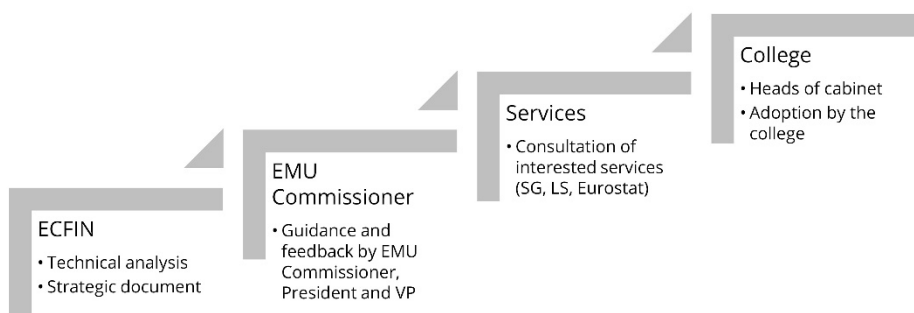


FIGURE 2: Internal decision-making for fiscal and MIP surveillance. Source: made by the author.

Whereas vertical coordination between the services and the college is well integrated into the decision-making process of MIP and SGP surveillance, horizontal coordination between the services is less so. Overall, ECFIN's technical knowledge and assessment are central and inform the final decisions of the college. There are frequent bidirectional exchanges between DG ECFIN and the cabinets, with the EMU Commissioner providing strategic guidance and oversight. However, involvement of departments at the horizontal level is limited. DG ECFIN works autonomously in the development of the technical analysis and of the economic assessment, with only a few services associated through the interservice consultation.

b) Structural surveillance.

The preparation of the CSRs in the framework of the European Semester follows a different logic. The process is more collegial, engaging the horizontal involvement of different actors at an early stage, and it is centrally steered by the Secretariat General. It involves the adoption of country reports in February and of the CSRs in May.

At the beginning of the process several DGs meet to discuss the country reports in Country Teams under the direction of the SG.⁴² On this basis – and considered also the position of the concerned countries – services draft the recommendations. CSRs and country reports are submitted to a Core Directors Group, composed of the SG and the DGs ECFIN, Employment (EMPL) and Growth (GROW), which heads the Semester at the services level. Above the Core Directors Groups is the Core Group, a joint strategic committee of DGs and cabinets in charge of Economic and Financial Affairs, of Internal Market and of Employment and Social Affairs. Once endorsed by the Core Group, the final CSRs and country reports are then passed on to the college for final adoption. Figure 3 summarises this decision-making process.

⁴² A Verdun and J Savage, 'Strengthening the European Commission's Budgetary and Economic Surveillance Capacity since Greece and the Euro Area Crisis: A Study of Five Directorates-General' cit. 111.

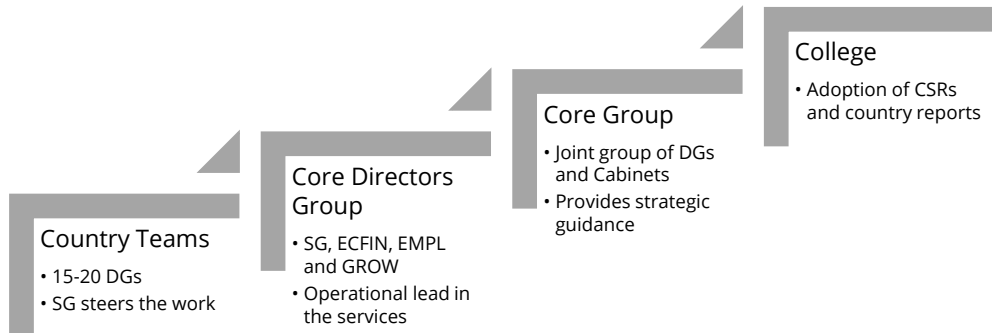


FIGURE 3: Internal decision-making for the European Semester. Source: made by the author.

The procedure for the adoption of CSRs is certainly more inclusive than the SGP/MIP procedure. It is built upon a bottom-up cooperative work between departments with close top-down oversight and guidance. Scholars note that the process has become increasingly collaborative. Political scientists such as Zeitlin and Vanhercke show that the involvement of sectoral DGs, such as DG EMPL and DG SANTE, at an early stage of the process has resulted in a “socialisation of the semester”: “The progressive opening up of the CSRs to social issues reflects the fact that the process of drafting them became increasingly collaborative within the Commission itself”.⁴³

The need for a more inclusive and collegial approach is mainly due to the nature of the recommendations that the Commission handles. As noted above, CSRs are not only about public debt and deficit, but they touch upon fields of limited EU competence, such as education and health. In particular, through the recommendations economic policy has penetrated into the realm of social policy, with significant consequences for the role that the Commission – and more generally the EU – plays in national distributive policies.⁴⁴ To provide just one example, 2019 country-specific recommendations to France addressed issues such as pension reform, labour market integration, investment-related economic policy on

⁴³ J Zeitlin and B Vanhercke, ‘Socializing the European Semester: EU Social and Economic Policy Co-Ordination in Crisis and Beyond’ (2018) *Journal of European Public Policy* 149, 159.

⁴⁴ M Dawson and A Durana, ‘Modes of Flexibility: Framework Legislation v “soft” Law’, in B De Witte, A Ott and E Vos (eds), *Between Flexibility and Disintegration: The Trajectory of Differentiation in EU Law* (Edward Elgar 2017) 92, 114 ff.

research and innovation, renewable energies and digital infrastructure, as well as the simplification of the tax system.⁴⁵ Although the technical assessment is at the basis of the recommendations, political leadership is needed to balance the different priorities in areas ranging from macro-economic imbalances, to social matters and investments. There, ECFIN's independent judgment is often replaced by the political guidance of the college.⁴⁶

CSRs are certainly only "recommendations": they are not binding, and they belong to the sphere of soft-law. However, several authors point to the fact that the margin of manoeuvre of Member States to reject or to oppose the Commission's recommendations is often limited.⁴⁷ CSRs are embedded in the overall Semester process that carries "hard" elements because of the link with MIP and Excessive Deficit Procedure (EDP) procedures.⁴⁸ Member States not complying with the recommendations could eventually be subject to penalties and sanctions – the hard law instrument par excellence – under the MIP and the SGP. In this respect the Semester creates a framework "that reaches across the entire spectrum of Member States' economic and social policies, by putting them under supranational control".⁴⁹ On the one hand, a more collaborative approach both inside the Commission and in the relation with the supervised Member States fits well the fluid character of soft law. On the other hand, it is also necessary because the Commission is arguably here stepping outside the remit of its formal competences. It is venturing in the risky arena of prescriptive indications on matters close to the heart of Member States sovereignty. Inclusive and collegial decision-making represents a guarantee that a broader representation of views and positions is integrated in the Commission's approach. However, this hybridization of soft and hard law, of recommendations and prescriptions, is problematic because it masks hard law prescription with soft guidance. It thus creates a short circuit in the Commission's function of economic governance, whereby the role of the hard-law technical enforcer of budgetary discipline overlaps with the soft-law coordination of national economic and social policies.

⁴⁵ Recommendation COM(2019) 510 final from the Commission for a Council Recommendation of 5 June 2019 on the 2019 National Reform Programme of France and delivering a Council opinion on the 2019 Stability Programme of France.

⁴⁶ A Verdun and J Savage, 'Strengthening the European Commission's Budgetary and Economic Surveillance Capacity since Greece and the Euro Area Crisis: A Study of Five Directorates-General' cit. 110.

⁴⁷ F Costamagna, 'The Impact of Stronger Economic Policy Co-Ordination on the European Social Dimension: Issues of Legitimacy' cit.; M Dawson, 'The Legal and Political Accountability Structure of "Post-Crisis" EU Economic Governance' cit.; C Closa, 'Institutional Change in EU Macroeconomic and Fiscal Governance. The Reinforcement of the Commission' cit.

⁴⁸ See further on the "de-flexibilization" of soft-law under the Semester: M Dawson and A Durana, 'Modes of Flexibility: Framework Legislation v "soft" Law' cit.; M Dawson and F De Witte, 'Constitutional Balance in the EU after the Euro-Crisis' (2013) *ModLRev* 817.

⁴⁹ F Costamagna, 'The Impact of Stronger Economic Policy Co-Ordination on the European Social Dimension: Issues of Legitimacy' cit. 370.

III.4. PRELIMINARY CONCLUSIONS: TECHNICAL ASSESSMENT AND DISCRETIONARY CHOICES IN POLYFUNCTIONAL ECONOMIC GOVERNANCE

Surely, the introduction of the European Semester has changed substantially the internal Commission's decision-making process and has affected the role of DG ECFIN. Whereas prior to the crisis budgetary surveillance under the TFEU and the SGP was fully centred on DG ECFIN, the Semester brought new DGs into the decision-making process.⁵⁰ I have shown just above that, as a result, the European Semester system has become more collegial, involving DGs and cabinets that were previously not associated to economic governance decisions. Ultimately the case study on economic governance shows that there is a tension over the role to be attributed to DG ECFIN. In the Semester, this tension was resolved by diversifying the procedures, and thus the role that DG ECFIN plays within them. On the fiscal side of the Semester the technical level is in the lead, and on the structural side, it is the political level that provides guidance and manages the process through the SG. However, given the increasing involvement of the EU in the economic policies of the Member states at large, the issue remains topical.

At the beginning of this *Article* I argued that economic governance represents a new function for the Commission. I can now qualify this statement by saying that this new function is in some ways multi-functional in itself. It brings together the tasks of a technical entity (DG ECFIN) in providing neutral and independent assessment of the Member States fiscal performance and those of a political executive with large discretionary powers in directing the reforms that the different countries must implement. As observed by A. De Streel, however, there is confusion inside the Commission about these tasks and the current framework does not sufficiently distinguish between technical assessment (performed by DG ECFIN) and the discretionary choices of the college.⁵¹ The fact that technical assessment and discretion are ultimately responsibility of the same collegial body adds to this confusion. The distinction between technical (DG ECFIN) and discretionary (college) may somehow be drawn in the internal decision-making process. Yet the imperatives of institutional coherence – that were shown to be so important for an independent supranational body such as the Commission – require that both sides must eventually be attributed to and endorsed by a single body. Ultimately, all decisions – be it the result of the technical or of the discretionary functions of the Semester – must be reconducted to the only college of Commissioners who is politically and legally responsible for them. Therefore, the ambition to perform several functions of very different nature at once puts the cohesion of the Commission's decision-making under strong pressure and cannot but become dysfunctional if pushed too far.

⁵⁰ A Verdun and J Savage, 'Strengthening the European Commission's Budgetary and Economic Surveillance Capacity since Greece and the Euro Area Crisis: A Study of Five Directorates-General' cit. 108.

⁵¹ A De Streel, 'The Confusion of Tasks in the Decision-Making Process of the European Economic Governance', in F Fabbrini, E Hirsch Ballin and H Somsen (eds), *What Form of Government for the European Union and the Eurozone?* (Hart 2015) 79, 88.

In the next section I will illustrate in more detail that at the basis of this functional heterogeneity lie different rationales of the Commission's role and I will explore their consequences for the institutional legitimacy of the Commission's output at large.

IV. FUNCTIONAL DIVERSIFICATION, DEMOCRATIC LEGITIMACY AND THE COMMISSION'S PARADOX

In addition to challenging the institutional coherence of the Commission, functional confusion as identified above also risks blurring the picture about the role that the Commission should play within the field of economic governance. Juggling between the different functions can be dangerous for the Commission and raises significant concerns about the legitimacy basis and the democratic mandate of its action. These concerns are two-fold. They relate first to the Commission's lack of legitimacy as unelected body (the legitimacy that the Commission does not have); and secondly to the risk of losing the legitimacy that the Commission actually enjoys as an independent, impartial and technocratic authority (the legitimacy that the Commission in fact has).

First, scholars have stressed the democratic and accountability shortcomings of the current economic governance framework. The political discretion enjoyed by the Commission in policy areas that touch upon the distributive competences of the Member States raises the questions of the lack of electoral accountability of the Commission. This is even more the case if one considers that the Commission is shielding *de-facto* hard powers behind soft-law recommendations. It has been noted that there is an obvious disjunction between where the power is exercised (the supranational – EU – Commission level) and the electoral accountability that mainly resides at the national level – considering the very weak powers of control and decision of the European Parliament.⁵² As summarised by Dawson and De Witte the problem in a nutshell is that “the institutional actor that is deliberately insulated from any direct democratic link – the Commission – has been offered the main role in deciding on national budgets, expenditure, and specific cuts, at the expense of the most directly legitimate one”.⁵³ It was also pointed out that in this patchwork of functions and legal instruments judicial review becomes difficult, in particular when it comes to addressing abuses of power by the supranational executive.⁵⁴

The second concern emerging from the shifting role of the Commission has to do with its increasing political discretion. The legitimacy of the Commission has historically

⁵² P Craig, 'The Financial Crisis, the EU Institutional Order and Constitutional Responsibility' in F Fabbrini, E Hirsch Ballin and H Somsen (eds), *What Form of Government for the European Union and the Eurozone?* cit. 19; M Dawson, 'The Legal and Political Accountability Structure of "Post-Crisis" EU Economic Governance' cit.; D Chalmers, 'The European Redistributive State and a European Law of Struggle' cit.

⁵³ M Dawson and F De Witte, 'Constitutional Balance in the EU after the Euro-Crisis' cit. 833.

⁵⁴ M Dawson, 'The Legal and Political Accountability Structure of "Post-Crisis" EU Economic Governance' cit. 988.

lied with its independent and technical nature, that is with the capacity to enforce and propose law in an impartial manner, thus upholding the interest of the Union. Now, the increasing intrusion of the Commission in policy fields and decision-making processes that are at the core of the political sovereignty of the Member States can undermine this legitimacy, as the Commission cannot be at the same time a credible technocratic authority and a legitimate political decision-maker.⁵⁵ The tensions between the twofold roles of the Commission due to its increasing politicisation have been extensively addressed by the literature and remain a major controversial issue for the institutional reform of the Commission (and of the EU in general).⁵⁶ In its report for the European Parliament on a “New Governance for the European Union and the Euro”, M.P. Maduro observes that the increasing politicisation of the Commission is an inevitable development of the current stage of the EU integration project:

“The politicization of the Commission is bound to affect its perceived neutrality and the authority it derives from being conceived as a semitechnocratic body. But the reality is that the latter authority is already under attack. The expansion of EU and Commission powers into the core of social and economic policy issues is bound to immerse the Commission in politics. The only question is the nature of this politics. As what is happening in some Member States is already making clear, the Commission will not succeed in preserving an appearance of technocratic neutrality in the face of deeply contested political issues. It will simply come across as a limit on democracy and politics.”⁵⁷

Although these observations are certainly accurate, the issue of the Commission’s politicisation is trickier than one might think at first sight and demands some counterintuitive reflections. The problem is that, as I have shown in section III, the Commission has been entrusted extensive tasks and functions in economic governance – tasks that often imply a great amount of political discretion in its choices and assessments – precisely because of its technocratic, independent character. Only because of its neutrality, the Commission was in the first place allowed to get involved into politics. As was pointed out above, the Commission was the obvious candidate for the supervision and enforcement of the European Semester, because those tasks were seen as technical in nature, and because the Member States in the Council were formally and politically responsible for

⁵⁵ RD Keleman, ‘Towards a New Constitutional Architecture in the EU?’ in F Fabbrini, E Hirsch Ballin and H Somsen (eds), *What Form of Government for the European Union and the Eurozone?* cit. 214.

⁵⁶ Just to mention few contributions: J Ege, MW Bauer and S Becker (eds), *The European Commission in Turbulent Times: Assessing Organizational Change and Policy Impact* (Nomos 2018); N Nugent and M Rhinard, ‘Is the European Commission Really in Decline?’ (2016) *JComMarSt* 1199; AC Wille, *The Normalization of the European Commission: Politics and Bureaucracy in the EU Executive* cit.; H Kassim, J Peterson, MW Bauer, S Connolly, R Dehousse, L Hooghe and A Thompson, *The European Commission of the Twenty-First Century* (Oxford University Press 2013).

⁵⁷ LM Poiares Maduro, ‘A New Governance for the European Union and the Euro: Democracy and Justice’ (RSCAS Policy Paper 11-2012) 19.

them. In sum, the Commission was entrusted these tasks precisely for the same reasons why it was created as an independent, supranational authority in the first place – to guarantee impartial assessment and fair involvement of all the Member States.⁵⁸

From this point of view, despite widespread criticism and divergent views about the Commission's role, little has changed over fifty years in the relation between the Member States and the Commission. And yet there is a clear paradox in this path-dependent development at the present stage of European integration, especially in economic and social policies. These policy-fields are indeed of national competence essentially because there lies electoral accountability. Redistributive choices must be made by national politicians accountable to their electorate. At the European level, to the contrary, the logic seems to be inversed: coordination and surveillance of national economic and social policies must not be a political matter but mainly be based on the technical assessment and the recommendations of the impartial and independent Commission (of course endorsed and adopted by the Council). In practice, however, these assessments and recommendations cannot be apolitical, and the Commission would therefore need a solid democratic mandate to intervene in these fields. From there stems the paradox for the Commission. It will never have the political legitimacy to act, because it was chosen on the basis of the absence of this political legitimacy, and yet it is called to act and get involved in fields which are of high political relevance to the Member States and that often imply redistributive choices. In short, the reason why it is getting involved is that same neutrality and apolitical nature that prevents it to be legitimate.

This is obviously a very serious dilemma, that extends well beyond the realm of economic governance to embrace the institutional identity of the Commission. In the first part of this *Article* I have in fact shown that there is a sort of schizophrenia in how the Commission is supposed (and lends itself) to perform several – often opposing – duties at the same time and within the same collegial body. What emerges blatantly in the case of economic governance is in fact an underlying issue affecting the multifunctionality of the Commission in general. This institutional shifting of the Commission has repercussions at many levels. First, it can alter the institutional balance of the Union, as the Commission is positioned differently, depending on the functions and tasks it is fulfilling. Second, it is at the core of the difficulties to reform the Union. Going forward, the role of the Commission will have to be rethought, its institutional scope and remit determined, its nature clarified. And this is not only an internal institutional matter, but it touches upon the very legal and institutional concerns that the EU is facing today. Clarity in this regard would provide increasing democratic legitimacy and thus also better equip the Union to face contestation at the national level.

⁵⁸ C Closa, 'Institutional Change in EU Macroeconomic and Fiscal Governance. The Reinforcement of the Commission' cit. 335.

V. CONCLUSIONS: THE FUTURE OF THE EUROPEAN COMMISSION (OR THE EUROPEAN COMMISSION OF THE FUTURE)

This *Article* has addressed the phenomenon of functional diversification in the Commission through the lens of its institutional coherence. It has shown that the Commission is performing a multitude of tasks often following diverging decision-making paths, despite the need to ensure unitary and cohesive output. To explore the consequences of functional diversification, I have delved into the Commission's role in economic governance, which I argue constitutes a newly acquired function of the Commission, that hardly resemble any other. I have shown that decision-making processes differ within the same policy area (economic governance) and in the framework of the same package of measures (the European Semester). Partially, this patchwork of functions and tasks is due to the chaotic way in which the current EU regulatory framework for economic governance came into existence. The urgency of the crisis and disagreement on the legal instruments led to provisions being adopted at different stages and under different legal bases, as hard and soft law – sometimes incorporated into EU law, sometimes as international agreements. Assuredly, the role of the Commission reflects this heterogeneity.

However, the *Article* puts forward a second, less obvious argument for the multifunctional role of the Commission in economic governance – and more broadly for the diversification of the Commission's functions– that lies with the very institutional nature of the Commission. It originates in the fact that the Commission, because of its independent and neutral status, is entrusted tasks that are of an essentially political nature, without however being equipped with the democratic legitimacy normally needed to fulfil these tasks. This goes back to the widely debated problem of the Union's democratic legitimacy but considers it under a slightly different perspective: the issue is that the Commission as it is today cannot possibly legitimately absolve all the functions it is entrusted precisely because these functions have been endowed to the Commission in virtue of its essentially apolitical nature. The question then becomes: was the Commission a real executive responsible in front of a parliamentary majority, would Member States have relied on it to supervise their financial and economic conditions?

This raises the issue of what the overarching role of the Commission in the EU should be. Eventually, the question is not whether the Commission is technical or political, but rather that it should be clear about the role it is playing. Functional diversification is a reality that one cannot deny. The Commission is now embedded into a political system, whether one likes it or not. At the same time, its independent and impartial regulatory functions are still very needed in the EU. Yet, functional confusion ultimately damages the Commission because it does not provide with a clear representation of what the institution should be doing, thus enhancing legitimacy and democratic concerns and weakening the Commission's resistance to political contestation. More clarity should be provided on the functions that the Commission is playing, whether it is acting in its political cloak or as an enforcer. The two functions in fact rely on different types of legitimacy:

democratic accountability in the former and independence and neutrality of judgment in the latter. Shifting from one legitimacy channel to the other can be detrimental, as it is now the case in the field of economic governance, where the rationale for the Commission's intervention is not always clear.

There is some irony in writing about the future of the EU amidst possibly the worst crisis that Europe (and the world) is facing since World War II. While I am writing this *Article* in my Covid 19 confinement in Florence, everything seems to be highly uncertain, but one thing: the crisis that the pandemic is spreading around will have many serious repercussions for our political systems, not least the EU. The painful and controversial negotiations over the EU response to the crisis showed that the eurozone once again is very vulnerable to external shocks. That it requires new emergency mechanisms and tools, because the old ones, although just recently adopted, are not sufficient to cope with the urgency and intensity of the turmoil. This time again *ad hoc*, temporary instruments were adopted. After four days and four nights of negotiations, EU leaders agreed in July on a three-year recovery fund of €750 billion, composed of €390 billion in grants and €360 billion in loans, and attached to a 1,074.3 billion Multiannual Financial Framework (MFF).⁵⁹ The deal was greeted as ground-breaking not only for the unprecedented size of the fund, but more importantly for the fact that the Commission will borrow funds on behalf of the Union on the capital markets.⁶⁰ Indeed, this may be a huge step forward towards increasing EU fiscal integration. This approach, however, also adds to the EU legal and institutional creativity, thus aggravating the inconsistency, complexity and multi-functionality of a system that is struggling to find its stability and resilience.

It certainly also exacerbates the multi-functional hysteria of the Commission, which is becoming the centre of the financial architecture that will help countries out of the crisis. The new instrument will add new tasks and functions to the already polymorphous Commission. The newly created Recovery and Resilience Facility, will be financed, managed, and supervised by the Commission itself, thus enhancing the already extended Commission's powers in the area of economic governance. Even more intriguingly, spending supervision will be linked to the European Semester. Member States will submit a national recovery and resilience plan explaining how they will use the financing in conformity with the priorities of the Semester: "The criteria of consistency with the country-specific recommendations, as well as strengthening the growth potential, job creation and economic and social resilience of the Member State shall need the highest score of the assessment".⁶¹ Similar to the CSRs, the Commission's proposal for the assessment of the plans will need to be approved by the Council by qualified majority. However, the deal

⁵⁹ European Council Conclusions of 21 July 2020, Special meeting of the European Council.

⁶⁰ J-P Vidal, 'The EU Recovery Package and What's Next' (Online Seminar, Florence School of Banking and Finance, 28 July 2020).

⁶¹ European Council Conclusions of 21 July 2020 cit., A19.

also provides for an emergency mechanism whereby one or several Member States can hold up funds if they believe that relevant milestones and targets have not been fulfilled and refer the matter to the European Council.⁶²

It is too early to assess the consequences of these new developments. It remains to be seen how the plan will be implemented in practice, as well as where the institutional balance between Commission and Council will lean.⁶³ However, it is likely that the management of an emergency mechanism of such magnitude, although temporary, will empower the Commission beyond the soft-low Semester's recommendations, and it will also increase its capacity to penetrate and have a say on the Member States internal economic and social policies. As noted by Costamagna and Goldmann in a *Verfassungsblog* post: "Much will depend on how the Commission will define [...] objectives and how it will manage conflicts and tradeoffs between them".⁶⁴ In other words, the discretion of the Commission in deciding on the reform agendas of Member States will grow, albeit under the veil of – certainly needed and legitimate – soft conditionality about the use of funds. Once again, the neutral, technical and independent nature of the Commissions will provide the basis for interference in sensitive political fields, with the related concerns for the legitimacy and democratic basis on which this interference is based.

Yet this temporary instrument might also be the first step towards a more permanent legal reform of the institutional balance of the EU, which would address some general inconsistencies of the system, including the issues raised by this *Article* about the Commission's role. For decades we have gone forward with ad hoc reforms, driven by the imperative to avoid Treaty revision. The time may be ripe for at least attempting to put again on the table the option of a serious Treaty reform. Among the many tasks, such a revision may for once provide some clarity about the several idiosyncrasies that characterise the current institutional profile of the one and only European Commission.

⁶²*ibid.* This mechanism, introduced upon request of the so-called Frugal Four (Austria, Denmark, the Netherlands and Sweden) to increase control on spending, is one of the major question marks of the deal. It is unclear what would happen in effect if the Member States refer the matter to the European Council as the mechanism, as it is formulated by the Council Conclusions, does not amount to a real veto.

⁶³ In addition, also the Parliament has a say, since the deal is linked to the MFF. See M De La Baume and DM Herszenhorn, 'Sidelined on Recovery, Parliament Plans Battle over EU Budget' (22 July 2020) Politico www.politico.eu.

⁶⁴ F Costamagna and M Goldmann, 'Constitutional Innovation, Democratic Stagnation?' (30 May 2020) *Verfassungsblog* verfassungsblog.de.