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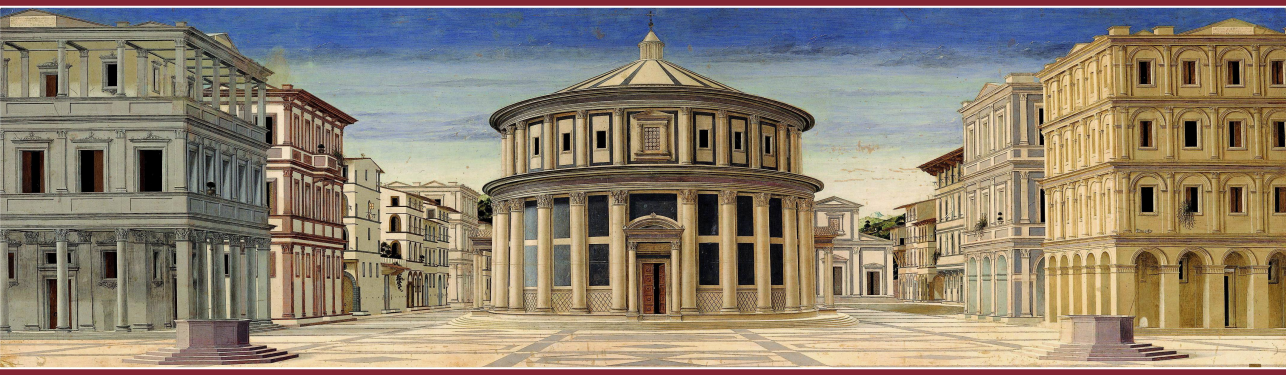

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EUROPEAN FORUM

Editorial

The Iran Nuclear Deal and the Future of the European Foreign Policy

Among the reactions to the decision of the US Presidency to withdraw from the Joint and Comprehensive Plan of Action (JCPOA) – a conventional scheme agreed upon in 2015 by the Islamic Republic of Iran and the E3/EU+3 group, namely (China, France, Germany, the Russian Federation, the United Kingdom and the United States, with the High Representative of the European Union for Foreign Affairs and Security Policy) – a declaration by the High Representative released on 8 May 2018 stands out for its legal and political relevance.

After regretting the US decision and reaffirming the EU commitment "[a]s long as Iran continues to implement its nuclear related commitments", the High Representative went on by saying: "the nuclear deal is not a bilateral agreement and it is not in the hands of any single country to terminate it unilaterally".

In these sentences, the High Representative distilled some basic assumptions on the nature and effect of the Deal. First, this document has the nature of an agreement governed by international law; second, it is a multilateral agreement designed to pursue collective objectives; third, the EU has a legal interest in its implementation and is entitled to claim compliance with it.

These assumptions shape the direction of EU foreign policy *vis-à-vis* the divergent course of the US administration. More generally, they unveil the determination of the EU to play an active role in the troubled context of the Middle East, in accordance with the principles and values that inspire its external action under the founding treaties.

Although sometimes presented as a mere political understanding, the Nuclear Deal appears rather to be a legal document. It is based on the common consent of its parties and formulates reciprocal commitments aimed at settling a long dispute on the peaceful nature of the Iranian nuclear program. As pointed out by the High Representative, only a breach of its commitments by Iran may justify a corresponding breach by the other parties.

The contrary view, of the non-binding political nature of the Deal, was put forward by the Obama administration at a time when it appeared to be highly unlikely that it would have garnered the "advise and consent" of two thirds of the members of the Senate, or even the less onerous alternative procedure of the consent of the two houses of the US Parliament expressed by simple majority (see *Contemporary Practice of the*

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US: Agreement on Iran Nuclear Program Goes into Effect, in *American Journal of International Law*, 2015, p. *874 et seq.*). Precisely this conception, strenuously fought in 2015 by the G.O.P. (the Republican Party), has been revived by the Trump administration to justify the unilateral repudiation of the Deal.

Beyond this political paradox, the idea that the legal nature of an agreement in international law depends upon the domestic procedure followed for its conclusion appears to be misplaced. The binding view of the Deal not only emerges from its commitments – that include the commitment by its parties, which are members to the UN Security Council, to lift the sanctions imposed by that organ on Iran – but also from its special system of implementation, the snapback procedure, that empowers the other parties to re-install these sanctions, in case of breach by Iran, without the need for a new resolution. Consequently, the implementation of the Deal required the endorsement by the Security Council, occurred with Resolution 2231 of 20 July 2015, UN Doc. 2231 (2015).

The multilateral character of the Deal makes it difficult for the US to justify its unilateral repudiation. A material breach of a bilateral treaty entitles the other party to terminate the treaty; but the termination of a multilateral treaty in consequence of a breach by one of its parties requires a concerted response by all the other parties. This principle is enshrined in Art. 60 of the 1969 Vienna Convention on the Law of Treaties and, at least with regard to agreements protecting collective interests, it is a logical corollary of their multilateral character.

The application of this principle would inexorably lead toward the conclusion that every party is entitled to claim that the unilateral repudiation of the Nuclear Deal by the US has no effect under international law. Unilateral measures taken by the US in pursuance thereof, in particular the adoption of sanctions, would amount to wrongful conduct and would justify protective countermeasures by the other parties to the JCPOA

By pointing out the illegality of the repudiation of the Nuclear Deal by the US, the declaration of the High Representative seems to announce a confrontation with the Trump administration to be held on the legal terrain. For a number of reasons, this appears to be a felicitous decision.

First, the EU appears to be entitled to claim compliance with the Deal and to take protective measures. In a joint declaration of 14 July 2015, the High Representative and the Foreign Minister of Iran announced that "we have reached an agreement on the Iran Nuclear issue", thus conveying the impression that the EU was regarded as a full-fledged party to that agreement. In a more cautious perspective, the EU can be deemed to have participated to the agreement through the High Representative as a honest broker and a guarantor of the Deal, as emerges from the Council Conclusions *on the Iran's nuclear programme*, of 20 July 2015, that endorse the JCPOA and commit to abide

by its terms and to implement it. Possibly by virtue of this limited involvement, the participation to the Deal could have been based on the prerogative conferred to the High Representative by Art. 18, para. 1, TEU to conduct the Union's common foreign and security policy, as mandated by the Council.

From a more general perspective, this EU stance could mark a new course of its foreign policy, departing from the unilateral approach, followed in the last decades even by some of its Member States, that failed to achieve its declared ends to stabilize the Middle East and, rather, has worked as a permanent source of instability, whose long-term effect have been largely experimented in Europe. The adoption of an alternative approach, based on confidence building and on a multilateral system of control, matches the interest of Iran to present itself as a responsive conventional partner; it may secure the implementation of the JCPOA even without the contribution of the US and, along this way, could considerably contribute to defuse the countless spots of tension in this troubled area.

In an even more general perspective, this course of action appears fully consistent with principles and values of the Union, enshrined in Arts 3, para. 5, and 21, paras 1 and 2, TEU, and can be regarded as their faithful implementation.

The normative and practical importance of these provisions can be hardly overshadowed. The founding treaties identify the objectives of the EU external action and determine the tools and means of action to attain them. External action must be used to promote the development of the system of international relations towards an ideal model based on the principles of peace and security, democracy and fundamental human right, inclusiveness and solidarity. This model must be realized using the instruments of action of international law, the multilateral cooperation and the institutional and normative system set up by the UN Charter.

If the EU did not deflect from this line, a chain of consequences could potentially ensue: although amputated of one of its main parties, the JCPOA would remain in force and could be brought to implementation; in spite of the sanctioning measures unilaterally taken by the US, whose effect could be reduced by protective measures taken by the other parties, the Deal could reveal to be a momentous driver of stability and prosperity in the region; in turn, this achievement could prevent further escalations of the multiple on-going crises in the region, first of all in the Syrian powder keg.

Ultimately, the EU would have experimented a new model of crises management, in application of its founding principles and values, that may open a new phase in the never-ending conflict in the Middle East.

E.C.

Overviews
Special Section – Democratising the Euro Area Through a Treaty?

Democratising the Eurozone: Some Lessons To Be Drawn from T-Dem

Table of Contents: I. Introduction. – II. Democratising the Eurozone, a creative thinking exercise. – II.1. *De lege ferenda*. – II.2. Working on concepts – II.3. Beyond national constitutional models – III. Democratising the Eurozone, a constrained exercise. – III.1. Democratisation by politicisation? – III.2. Democratising without disintegrating?

I. The Economic and Monetary Union (EMU) is in a process of restructuration. In December 2017 the Commission set out a *Roadmap for deepening the Economic and Monetary Union*, detailing concrete steps to be taken over the next 18 months. The document included a proposal to establish a European Monetary Fund, a proposal to integrate the substance of the Treaty on Stability, Coordination and Governance into the Union legal framework, a Communication on new budgetary instruments for a stable euro area within the Union Framework, and a Communication spelling out the possible functions of a European Minister of Economy and Finance who could serve as Vice-President of the Commission and chair the Eurogroup.[1] In President Juncker's vision, any reform of the EMU has to achieve efficiency and democracy at the same time: "Today's robust economic growth encourages us to move ahead to ensure that our Economic and Monetary Union is more united, efficient and democratic".[2]

Democracy in the Eurozone is the perspective chosen by four scholars, Stéphanie Hennette, Thomas Piketty, Guillaume Sacriste and Antoine Vauchez, who published in 2017 a Draft Treaty on the Democratisation of the Governance of the Euro Area ("T-

[1] Communication COM(2017) 827 final of 6 December 2017 from the Commission on a proposal for a Council regulation for the establishment of a European Monetary Fund; Communication COM(2017) 824 final of 6 December 2017 from the Commission on a proposal for a Council Directive laying down provisions for strengthening fiscal responsibility and the medium-term budgetary orientation in the Member States; Communication COM(2017) 822 final of 6 December 2017 from the Commission on new budgetary instruments for a stable Euro Area within the Union framework; Communication COM(2017) 823 final of 6 December from the Commission on a European Minister of Economy and Finance.

[2] J.-C. Juncker, *Deepening Europe's Economic and Monetary Union*, 6 December 2017, available at ec.europa.eu.

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Dem").[3] *European Papers* has invited scholars from different disciplines to comment this Draft Treaty. T-Dem is a stimulating project for at least two reasons. Its authors must be praised, first of all, for having moved away from the splendid isolation of theorists, and for taking the risk of drawing up a treaty draft. Academics are not naturally prone to writing contract drafts or treaty proposals. Secondly, T-Dem deserves to be provided a forum in consideration of its commendable ambition – the democratisation of the Eurozone. Democracy indeed remains to a certain extent a blind spot in the literature about the Eurozone reform. Yet, considering the enormous impact that economic conditionality had on the lives of million of citizens during the Euro Crisis, a project that takes democracy seriously can only be welcome. Of course, T-Dem is neither a definitive nor a perfect draft, but should be thought as a basis for reflection, its authors argue. We have decided to take them at their words, and to consider T-Dem as a starting point to reflect upon the best methods to democratise the Eurozone.[4]

T-Dem is a good starting point because now that the Euro Crisis is over, time has come to assess the Eurozone architecture, and to identify its main flaws. Admittedly, this assessment is not an easy task. Jurists who strive to understand the legal causes of the crisis describe a process of de-legalisation in the Eurozone, and emphasise the problematic unfolding, in the course of the crisis, of a state of exception.[5] EU law – and the guarantees it usually provides – was circumvented or avoided during the crisis. Resorting to international law instead of EU law instruments constitutes a first cause of the problem, while the Court of Justice's self-restraint in the *Pringle* case demonstrates another facet of the law retreat.[6] Additionally, the problematic imbalance in the distribution of powers between the EU and its Member States in the economic and monetary fields certainly played a role in the Euro Crisis. As Andrew Duff argues, the EMU could not give any sense of solidarity, and rather provides distrust, torn as it is between federal monetary policy and confederal economic policy.[7] For many observers indeed, the Eurozone crisis has revealed the limits of European unity.

[3] S. HENNETTE, T. PIKETTY, G. SACRISTE, A. VAUCHEZ, *Pour un traité de démocratisation de l'Europe*, Paris: Seuil, 2017. The first version was published in French. Then the authors circulated their Treaty draft in Europe. They opened a discussion on *Verfassugsblog*, and, in Italy, the text was presented in the *Corriere della sera*. Then Paul Magnette has initiated a discussion with the T-Dem team: P. MAGNETTE, *Démocratiser l'Europe: Paul Magnette répond à Thomas Piketty*, in *Alternatives Economiques*, 14 June 2017, www.alternatives-economiques.fr.

[4] T-Dem, I would argue, is more than what Olivier Rozenberg names a "realistic utopia": O. ROZENBERG, *The T-Dem as a Realistic Utopia: Why it Fits what We Know about Parliaments*, in *European Papers*, 2018, Vol. 3, No 1, www.europeanpapers.eu, p. 121 *et seq*.

[5] See C. *JOERGES*, *Integration Through De-Legalisation?*, in *European Law Review*, 2008, p. 291 *et seq*.

[6] Court of Justice, judgment of 27 November 2012, case C-370/12, *Pringle*. See also N. SCICLUNA, *Politicization without Democratization: How the Eurozone Crisis Is Transforming EU Law and Politics*, in *I-CON*, 2014, p. 545 *et seq*.

[7] A. DUFF, *Genuine Economic and Monetary Union Will Be Federal or It Will Not Be*, in *European Papers*, 2018, Vol. 3, No 1, www.europeanpapers.eu, p. 67 *et seq.*

While not ignoring any of these elements, the four authors of T-Dem, coming from three different disciplines (law, economics and political science), privilege another perspective, using democracy as their analytical grid. Their ambition is not to improve the efficiency of Eurozone, but to promote its democratisation. The "technocratic-intergovernmentalist" turn of the Eurozone, they argue, is highly problematic.[8] Admittedly, Eurozone governance has nothing in common with the "economic Government" supported by France during the negotiations of the Maastricht Treaty. The crisis has even increased its architectural defects, revealing that the Eurozone is directed by a "jumble of administration", with unaccountable entities – namely the Eurogroup and the European Central Bank (ECB) – taking the lead.[9] In addition, the reinforcement of the executive capacity of European institutions in the field of economic policy has taken place in the absence of any parallel development of parliamentary control. The European Parliament (EP) indeed remains largely excluded from the governance of the Eurozone. As for national parliaments, they are recognised – by the Treaty on Stability, Coordination and Governance (TSCG) – only as limited advisory powers. This is highly problematic given that this "intergovernmental network of bureaucratic entities" is making economic and monetary decisions that encroach upon national social pacts. Consequently, it is the *social acquis* of the Member States that is undermined by the Eurozone configuration.

T-Dem opens with this diagnosis. Then comes the prescription: the democratisation of the Eurozone is the only possible cure. To this end, Hennette, Piketty, Sacriste and Vauchez came up with a straightforward solution: the creation of a new Eurozone Parliamentary Assembly at the core of Eurozone governance. The proposed Assembly is composed of a maximum of four hundred members. Four-fifths of them are representatives appointed by national parliaments in proportion to their constituent groups, while the remaining one-fifth are to be appointed by the European Parliament. Arguing for their choice of a mix composition, the authors claimed that the next necessary steps towards deepened fiscal and social convergence, and economic and budgetary coordination within the Eurozone, will not be decided upon without the direct involvement of the representatives of national parliaments. Logically the new Assembly is vested with important powers in consideration of its central role: it shall set the political agenda by taking part to the preparation of the Euro summit meetings' program, as well as the work of the Eurogroup; it shall be endowed with legislative capacities, and, in the event of a disagreement with the Eurogroup, it shall have the final say on the vote of the Eurozone budget.

[8] Habermas refers to the notion of "post-democratic autocracy" and Lenaerts makes use of the expression "semi-intergovernmentalism", K. LENAERTS, *EMU and the European Union's Constitutional Framework*, in *European Law Review*, 2014, p. 753 *et seq.*

[9] The expression is borrowed from Sébastien Adalid's text, S. ADALID, *T-Dem Versus Economic Metapolicy: The Means and the Ends*, in *European Papers*, 2018, Vol. 3, No 1, www.europeanpapers.eu, p. 19 *et seq.*

In sum, T-Dem is an ambitious exercise of constitutional writing, which deserves to be critically assessed. A collection of essays on T-Dem, with different (positive, sceptical or critical) voices is published in this Issue of *European Papers*. Their authors examine every assumption and choice made by Hennette, Piketty, Sacriste and Vauchez. They scrutinize the treaty draft, focus on its flaws, and suggest improvements. These critical readings must be welcomed because the democratisation of the Eurozone represents a common objective for EU scholars. Undoubtedly, democratising is an ambitious undertaking. It requires creative thinking, which T-Dem assuredly provides.[10] At the same time, democratising the Eurozone constitutes a constrained exercise, for improving the conditions of a democratic debate has to go hand in hand with other ends – whether converging or conflicting.[11]

II.1. For the authors of T-Dem, reforming the Eurozone governance supposes institutional reorganization, and redistribution of power. Given the current EU law constitutional constraints, this would require significant revisions of the founding Treaties. Yet, the T-Dem drafters rightly acknowledged that such amendments are "strongly impracticable in the short term", as a consequence of the unanimity requirement, and of the traumatizing experience of the French and Dutch refusal of the European Constitution. Considering that the *status quo* was not an option, Hennette, Piketty, Sacriste and Vauchez have decided to "maximise the legal margins of *manoeuver* that could allow the creation of a truly democratic system of governance for the Euro Area, as a complement to the EU": they thus resolved to operate outside the European Treaties framework in order to avoid the legal obstacle that the revision procedures would imply.[12] T-Dem "replicates the modus operandi of both the TSCG and the European Stability Mechanism (ESM) Treaty", as validated by the Court of Justice in the *Pringle* ruling, but "does so in order to engage in a democratising effort".

The solution adopted by the T-Dem team required a dose of imagination: in the absence of legal solution within the realm of EU law, they started from what was an anomaly – even if it was legitimized by the Court of Justice –: resorting to international law instruments. The solution, of course, is not beyond criticism; but it gives the T-Dem drafters the possibility to democratise the Eurozone *de lege ferenda*.

II.2. T-Dem operates, simultaneously, at a concrete and a theoretical level. Changing the institutional system of the EU indeed requires both political and philosophical justifica-

[10] See *infra*, section II.

[11] See *infra*, section III.

[12] See on this part of the project, S. PLATON, *Democratising the Euro Area without the European Parliament and Outside the EU System. A Legal Analysis on the Draft Treaty on the Democratisation of the Governance of the Euro Ara ("T-Dem")*, in *European Papers*, 2018, Vol. 3, No 1, www.europeanpapers.eu, p. 103 *et seq.*

tion. Interestingly enough, Hennette and the other authors grounded their project on the concepts of "democratic emergency" and "democratic conditionality". There is a certain dose of provocation in the use of such notions: during the crisis, Member States and EU institutions referred to emergency in order to justify exception, to lessen legal guarantees and democratic control. Hence follows the strategy of the T-Dem team: proposing a "U-turn", where the concept of emergency justifies neither the suspension of the law nor the introduction of new derogation to the recognition of rights. Instead, in referring to emergency, they point at the absolute necessity of changing the rules of the game.[13] Unlike the notion of democratic deficit, which is a mere analytical tool in the literature, democratic urgency here constitutes a prescriptive notion: because of its peremptory nature, emergency justifies institutional reform.

Assuredly there is something subversive in this intellectual construction. This might be the reason why Christian Joerges considers that T-Dem reflects the "theoretical moment" EU integration is currently living.[14] The approach has also obviously triggered less enthusiastic reactions: urgency, Andrea Manzella claims, is irreconcilable, according to the general principles of the rule of law, with the creation of a new institutional setting.[15] Alternatively, one may view the notion of democratic emergency and democratic conditionality as slogans used to justify an endeavour to curb the political orientation of the Eurozone. Be that as it may, the authors of T-Dem must be praised for their effort in providing the Eurozone with new conceptual foundations.

II.3. In vesting the Eurozone Assembly with important powers, Hennette *et al.* chose to consolidate the role of the parliamentary in the EU system. Their aim is to inject a dose of parliamentary control in every locus where economic and monetary decisions are taken. Whenever the European executive pole makes a decision on convergence and conditionality, the parliamentary pole should intervene. Justifying their position, the T-Dem authors explain that their objective is neither to replicate "old models" by mimicking the procedures of the representative democracy, nor to put a "Government" and a "Parliament" face to face. Rather, they ambition to depart from the federalist projects that rely on a strong and accountable executive power. Needless to say, the harshest critiques to T-Dem came from federalist voices.[16]

[13] The expression is borrowed from C. JOERGES, *Comments on the Draft Treaty on the Democratisation of the Governance of the Euro Area*, in *European Papers*, 2018, Vol. 3, No 1, www.europeanpapers.eu, p. 75 *et seq.*

[14] *Ibidem*.

[15] A. MANZELLA, *Notes on the Draft Treaty on the Democratisation of the Governance of the Euro Area*, in *European Papers*, 2018, Vol. 3, No 1, www.europeanpapers.eu, p. 93 *et seq.*

[16] See A. DUFF, *Genuine Economic and Monetary Union Will Be Federal or It Will Not Be*, cit.; E. COHEN, J.-L. BOURLANGES, *T-Dem: l'urgence démocratique européenne selon le PS*, 21 March 2017, www.telos-eu.com.

But it is not a regime of Assembly either that the four authors are supporting. Unlike the French Revolution thinkers, they do not promote a regime whereby all the powers are concentrated in the hands of one dominant Assembly. Rather, they suggest that the legislative power should be shared between the Assembly and the Eurogroup. Luuk Van Middelaar and Vestert Borger offer to name this Assembly a "Congress".[17]

Noteworthy is the fact that the T-Dem team does not propose a mere transposition of existing constitutional solutions. Starting from the observation that the Eurozone governance is characterised by the intertwinement between the national and European levels of decision-making. If there was only one thing that the Eurocrisis has revealed, it is that economic decisions at the European and national levels are intimately connected. The phenomenon was even reinforced by the setting up of the European Semester as a cyclical and multilevel process.[18] Consequently, T-Dem tries to operate in the accountability gap between national and European institutions. Unsurprisingly L. Van Middelaar welcomes this perspective: when the power is located in the intermediary sphere between the national and European levels, we need to have institutions operating at this intermediary stage.[19] To him, the complex organisation of the T-Dem Parliamentary Assembly, where members of the European Parliament (MEPs) and members of national parliaments operate in the transnational political sphere, is an appropriate response. There is a vast literature in political science devoted to the transnational political space and inter-parliamentarianism in the EU.[20] T-Dem can be thus viewed as an endeavour to translate this approach into practise; as an effort to articulate democracy and the EU multi-level constitutional configuration?

The proposal has however met with fierce criticisms. The strongest recurrent critiques are relative to the creation of a Parliament limited to the Eurozone Member States, the mix composition of this Parliament, the fact that T-Dem concentrates only on the parliamentary and not on the governmental aspect of the EMU reform, the possible impact of T-Dem on national parliaments, and the political choices supported by the T-Dem authors.[21] This is not to deny that T-Dem has room for improvement. Several technical issues must be addressed, and the institutional design chosen for the future

[17] The Eurozone Congress "should operate as the parliamentary interlocutor of the 'chiefs'. Their political decisions or strategic orientations would require its consent": L. VAN MIDDELAAR, V. BORGER, *A Eurozone Congress*, in *European Papers*, 2018, Vol. 3, No 1, www.europeanpapers.eu, p. 127 *et seq.*

[18] B. CRUM, *Making Democracy the Priority in EU Economic Governance: Four theses on the Foundations of the T-Dem Project*, in *European Papers*, 2018, Vol. 3, No 1, www.europeanpapers.eu, p. 59 *et seq.*

[19] L. VAN MIDDELAAR, V. BORGER, *A Eurozone Congress*, cit.

[20] See *inter alia* N. LUPO, C. FASONE (eds), *Interparliamentary Cooperation in the Composite European Constitution*, Oxford: Hart, 2016; A. MANZELLA, *The European Parliament and the National Parliament as a System*, in S. MANGIAMELI (ed.), *The Consequences of the Crisis on European Integration and on the Member States*, Cham: Springer, 2017, p. 47 *et seq*.

[21] N. LUPO, *A New Parliamentary Assembly for the Eurozone: A Wrong Answer to a Real Democratic Problem?*, in *European Papers*, 2018, Vol. 3, No 1, www.europeanpapers.eu, p. 83 *et seq.*

democratic EMU remains questionable. But before drawing the constitutional design of the Eurozone, the authors should have reflected upon the means and ends of "democratisation", for democratising the Eurozone is indeed a very constrained exercise.

III. A number of commentators have criticized the side effects or the contradictions of T-Dem. What comes up from these criticisms is that the proposal underestimates the fact that democracy, in the EMU, is "only one element in a more complicated story".[22] The articulation of politicisation and democratisation in T-Dem remains indeed unclear. Also questionable is whether the proposal rightly articulates democratisation and integration.

III.1. The T-Dem's primary objective is to replace "intergovernmental bureaucracy" by democracy. This entails that independent authorities become accountable for their decision in the economic and monetary fields.[23] But the Eurozone system is also flawed because rules and numbers have gained importance over time. In line with Antoine Vauchez's works, the T-Dem drafters call for more "open political struggles and conflicts" in the EMU.[24] Democracy needs institutionalised and tamed political conflicts. The politicization of the Eurozone, under this view, is linked to its democratisation.

Hennette, Piketty, Sacriste and Vauchez do however not restrict their politicization ambition to the creation of a new Assembly. They also suggest a political reorientation of the EMU structures and founding principles. Unsurprisingly, many commentators have criticised T-Dem for its "politicisation".[25] Among them, Elie Cohen and Jean-Louis Bourlanges have put forward severe criticisms. They argue that the real objective of T-Dem is not to improve the Eurozone governance; rather, its disguised objective is political – not to say politician: what T-Dem really aims to do is to recycle hackneyed positions coming from left-wing political parties: Eurobonds, debt mutualisation, and the admissibility of deficits.

There is no denying that the first version of T-Dem was drafted in the context of the French presidential electoral campaign. Benoit Hamon, the Socialist party candidate, was the main supporter of the creation of a Eurozone Parliamentary Assembly, which he viewed as the best means in order to democratise the Eurozone. Further, in the French original version of T-Dem, the four authors have acknowledged their political preferences. Their ambition was to provide a democratic framework likely to outvote

[22] A. DUFF, *Genuine Economic and Monetary Union Will Be Federal or It Will Not Be*, cit.

[23] See P. CRAIG, *The Eurogroup, Power and Accountability*, in *European Law Journal*, 2017, p. 234 *et seq.*; D. CURTIN, *Accountable Independence of the European Central Bank: Seeing the Logics of Transparency*, in *European Law Journal*, 2017, p. 28 *et seq.* See also B. CRUM, D. CURTIN, *The Challenge of Making EU Executive Power Accountable*, in S. PIATTONI (ed.), *The European Union: Democratic Principles and Institutional Architectures in Times of crisis*, Oxford: Oxford University Press, 2015, p. 63 *et seq.*

[24] A. VAUCHEZ, Démocratiser l'Europe, Paris: Seuil, 2014, p. 97.

[25] E. COHEN, J.-L. BOURLANGES, *T-Dem: l'urgence démocratique européenne*, cit.

austerity, or at least to substantially modify the current balance of power. Consequently, T-Dem was fiercely criticized (and even rejected by some) for constituting a political program rather than a democratisation endeavour.

Even among supporters of the Eurozone Assembly, the introduction of political objectives in T-Dem is debated. L. Van Middelaar and V. Borger consider that the Assembly, acting as a legislator together with the Eurogroup, should not be granted competence allowing it to decide on the corporate tax policy or to pool public debts, for this would go way beyond the democratic "blind angle".[26] For Ben Crum, it is inconsistent and self-undermining to tie democratic reforms to a set of substantive proposals. In doing so, the project "adopts a typical technocratic language of necessity that has so much dominated the handling of Eurocris so far".[27] If democracy is the priority "then it cannot be premised on a particular set of policies that we require the democratic process to adopt". The majority of commentators hence contend that constitutional framework has to be neutral and should facilitate, and not preclude, policy choices.

To this critique, the authors of T-Dem would object that the current economic constitution of the EU is not policy neutral. The existing treaties have constitutionalised the socio-economic ordo-liberal order.[28] The Eurozone crisis has evidenced the limited array of political options available to decision-makers. T-Dem would only provide the legislative power with the possibility to opt for alternative economic policies, a possibility that does not exist under the current constitutional constraints. Be that as it may, T-Dem, in connecting democratisation and the debt mutualisation, affects the economic constitution of the EU. This would unquestionably require a democratic debate. At least, such a change calls for a more solemn reform than a surreptitious change of the Eurozone governance at the margin of the founding treaties.

III.2. Another range of critiques has pointed at the potential disintegrative effect of T-Dem, contending that the proposal would have a double impact on the EU integration project. Firstly, in accentuating – and institutionalising – the logic of differentiation, T-Dem would put the European integration process in jeopardy. Secondly, the central role given to national members of parliaments (MPs) in the Euro Area Parliamentary Assembly would create a risk of re-nationalization of the political debates and decisions in the Eurozone.

These two critiques are addressed to the authors of T-Dem in relation to their willingness to create a Parliamentary Assembly specific to the Eurozone. The European Parliament immediately refused to support the project; the Commission rapidly followed. Even Emmanuel Macron, who supported the idea of differentiation in his Sorbonne

[26] L. VAN MIDDELAAR, V. BORGER, *A Eurozone Congress*, cit.

[27] B. CRUM, *Making Democracy the Priority in EU Economic Governance: Four theses on the Foundations of the T-Dem Project*, cit.

[28] See J. GROSDIDIER, *"Une democratisation" européenne contre les politiques d'austérité? Le T-Dem ou le pari d'une zone euro à visage humain*, in *Juspoliticum*, 13 April 2017, blog.juspoliticum.com.

Speech, has not endorsed the idea of a Parliamentary Assembly devoted to the sole Eurozone matters. Finally, a majority of scholars has expressed its doubts on this proposition.

In addition to the complexity implied by the creation of another parliamentary institution in Europe, the main argument against the establishment of a specific assembly relies to its possible negative impact on the European Parliament. After all, the European Parliament is the democratic institution of the EU. And if a main architectural flaw of Eurozone is the limited role of the EP – as Hennette, Piketty, Sacriste and Vauchez have argued –, why not reinforcing it instead of creating another assembly? Moreover, the limited information about the relationship between the two assemblies is problematic: Art. 3, para. 2, of the T-Dem only provides that the Assembly should "work in close cooperation with the European Parliament", which is clearly insufficient.

It is far from certain that the T-Dem team has properly addressed the challenges related to the coherence of the institutional design of the EU, and to its unity. For instance, the uniqueness of economic policy provisions (Art. 120 *et seq.* TEU) pleads for the inclusion of MPs from non-Eurozone countries.[29] It is also clear from Art. 3, para. 4, TEU that the euro is the currency of the whole EMU, and not only of the Eurozone. Allemand's argument is in the same vein. Although the euro area represents a specific level of integration within the EU, it is not an autonomous entity separated from the Union: economic and monetary policies have to comply with EU values, principles and objectives.[30] In creating another assembly, T-Dem risks creating an irreversible gap between the countries of the two monetary areas. Nothing is organised to limit its divisive effects on the overall structure of the EU.

Moreover T-Dem opens the Pandora's box. As Brack, Costa and Crespy argue, the draft is institutionalising the differentiation of the EU at the parliamentarian level. In so doing, the proposal risks "to open a Parliamentarianism *à la carte*".[31] Why not then also creating a specific assembly for the Schengen area or an assembly for the Permanent Structured Cooperation on Security and Defence (PESCO)? Manzella adds to the critique with the mention of another difficulty: if a Eurozone parliament was created, the rules of the European Parliament would have to resolve the problem of the status of MEPs elected in different monetary areas according to the basic principle of equality among its members.

The reactions to T-Dem evidence the absence of a consensus on the logic of differentiation. T-Dem affronts a complex question: shall we democratise the part (the Eurozone governance) or the whole (the EU in general)? The four authors have justified their

[29] A. MANZELLA, *Notes on the Draft Treaty*, cit., p. 93 *et seq.*

[30] F. ALLEMAND, *Taking Democracy Seriously in the Euro Area: Reinvigorating the European Parliament's Functions and Responsibilities*, in *European Papers*, 2018, Vol. 3, No 1, www.europeanpapers.eu, p. 33 *et seq.*

[31] N. BRACK, O. COSTA, A. CRESPY, *The "T-Dem" for Democratising the Europe's Economic and Monetary Union – A critical Appraisal*, in *European Papers*, 2018, Vol. 3, No 1, www.europeanpapers.eu, p. 45 *et seq.*

choice by the specificity of the Eurozone governance. For them, the latter differs from the rest of European issues. It is not about organizing market; rather the aim is to coordinate economic policies, to harmonize fiscal legislation, and to organize the convergence of budgetary policies. In other words, it deals with Member States' social pacts. But the argument of a qualitative leap would need to be further substantiated, rooted as it is on a rather old-fashioned reading of the internal market. After all, the *Viking* and *Laval* cases have demonstrated that free movement rules also encroach Member States' social *acquis*.[32] Hennette, Piketty, Sacriste and Vauchez would also be more convincing if they explained why the alternative – to reorganize the functioning of the European Parliament – was not a better option. Alternatives are suggested: to reform the EP's rule of procedure and organise a special session devoted to Eurozone affairs, to create, like in Italy, a system of inter-parliamentary conference as an autonomous body procedurally linked to the EP and empowered to draft legislative proposals pertaining to the regulation of the Eurozone, etc. Be that as it may, in operating at the core of a *dissensus*, T-Dem could only generate reactions.

T-Dem is suspected to produce disintegrative effects for another reason. The composition of the Euro Area Assembly is likely to reinforce the current intergovernmental nature of the decision-process. Indeed, the Eurozone Parliament would be composed in majority of national MPs. The T-Dem team probably anticipated a process of transnational socialization and the emergence of a contradictory European public debate. But a different logic can also be predicted, whereby national MPs would vote along national lines. There is a risk that the mix composition, instead of creating a transnational public space, would replicate the opposition at the Council, thus reinforcing the governmental force in the EU construction. As Duff suggests, one may even doubt that most MPs will be either informed or sympathetic to the common interest of the Eurozone.[33] In other words, T-Dem could gear the system towards the representation of territorial – here national – interests.[34] Hence, while promoting a system whereby a strong parliament ensures a democratic decision beneficial to European citizens, it could in the meantime reinforce intergovernmentalism.

For the same reason, what is viewed as a creative and astute idea (to act at the margin of the EU treaties in order to avoid treaty amendment) could well have side effects. Isn't there a contradiction in using international law as a tool to democratise the EU? To work outside the treaty is problematic, Manzella argues, "because tools must al-

[32] Court of Justice, judgment of 11 December 2007, case C-438/05, *International Transport Workers' federation and Finnish Seamen Union v. Viking Line ABP* [GC]; Court of Justice, judgment of 18 December 2007, case C-341/05, *Laval und Partneri Ltd* [GC].

[33] A. Duff, *Genuine Economic and Monetary Union Will Be Federal or It Will Not Be*, cit.

[34] N. Brack, O. Costa, A. Crespy, *The "T-Dem" for Democratising the Europe's Economic and Monetary Union – A critical Appraisal*, cit.

ways be connected to the constitutional structure of the EU".[35] Such a connection emerges from the Fiscal Compact whose obligations largely coincide with measures taken at the EU level; it also emerges from the Treaty on the ESM, which, in reality, was devised as an implementing measure of Art. 136 TFEU. For decades, the EU has strived for its autonomy, for which EU law plays a major role. There is consequently no surprise that, for most commentators, the project to design an international treaty equates to a return to intergovernmentalism. Needless to say that this must sound paradoxical to scholars whose ambition was to depart from the bureaucratic intergovernmentalist structure of the EMU.

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Overviews
Special Section – Democratising the Euro Area Through a Treaty?

T-Dem *Versus* Economic Meta-policy: The Means and the Ends

I. "[A]xioms as simple as they are universal; the *means* ought to be proportioned to the *end*; the persons, from whose agency the attainment of any *end* is expected, ought to possess the *means* by which it is to be attained".[1]

The democratisation of the European Union is an old challenge. It is virtually impossible to trace back the origin of the notion. It has evolved into one of the Union's anthems, that everybody hears but that no one really listens to or believes in. In this context, the Treaty on the democratisation of the governance of the euro area is an important initiative.[2] All too often, debates on this topic have been too theoretical or abstract, while concrete solutions are needed. T-Dem offers us food for debate, a material starting point that calls for criticism and improvement. It has the merit of existing.

This *Overview* might be a biased one. During the fall of 2017, T-Dem drafters organized a series of seminars that the author attended. So, this *Overview* might be influenced by the interventions and debates of the different sessions.[3] T-Dem should not be seen as a definitive text, but rather as a process. No State signed it or even submitted it. So, this *Overview* is a contribution to this on-going process, with a view to improving T-Dem. The authors recognize that T-Dem was written quickly in the context of the French electoral campaign. So, the Treaty can be improved by examining the diagnosis in greater detail, so as to get a better understanding of the challenges to democracy in the Eurozone.

This draft Treaty raises many questions. Our goal is not to address all of them, but a specific one: are the powers vested in the Parliamentary Assembly of the Eurozone by

[1] A. Hamilton, *The Federalist, no. 23*, available at avalon.law.yale.edu.

[2] Hereafter T-Dem. In this contribution, reference will be made to the French version of the T-Dem: S. Hennette, T. Piketty, G. Sacriste, A. Vauchez, *Pour un traité de démocratisation de l'Europe*, Paris: Seuil, 2017.

[3] The ideas mentioned in this document are the author's and his only.

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the Treaty sufficient to deal with democratic issues in the coordination of national economic policies? This question is central because if the answer is no, adoption of T-Dem is useless. Of course, other issues will emerge along the way, such as the compatibility of T-Dem with the Founding Treaties.[4] But they are relevant only if T-Dem is concluded.

An ambivalence lies at the heart of T-Dem. The explanations given by its authors provide one of the clearest diagnoses of the problems that the Euro area is facing. But the solutions put forward by them are sometimes too simplistic. The problem lies at the heart of their diagnosis, which is not based on a proper understanding of the Economic and Monetary Union (EMU). The problem is a political one, linked with the question of mass politics. EMU disrupts the link between political choices and citizens by creating a "meta-policy" above national democracies.[5] This meta-policy evolves in an opaque administrative sphere, as T-Dem authors argue, but its foundation needs to be understood (II). Only then will it be possible to assess the solutions it puts forward (III).

II. The authors' diagnosis is more developed in the French version. It will be briefly summarized, outlining some of its contradictions (II.1), before pursuing the matter further by offering a new understanding of the significance of belonging in the euro area, which partially converges with the one made by T-Dem authors (II.2).

II.1. A biased recap of T-Dem arguments could be: "Blame it on the Euro Group". But a closer reading underlines the fact that the Euro Group is just the tip of a bureaucratic iceberg.

In the first page of the book, the Euro Group is presented as the "central institution" of the economic government of the Eurozone.[6] This affirmation needs to be qualified. Formally and politically, during the crises, the Euro Group played a greater role.[7]

Formally, reforms of the Economic Governance have expanded the tasks given to the Euro Group. The new macroeconomic imbalance prevention and correction procedure, created by the *Six Pack*, makes it responsible for the discussion of the Annual Report prepared by the Commission, "as far as it relates to Member States whose curren-

[4] For a first assesment, see: S. PLATON, *Democratizing the Euro Area without the European Parliament: Benoît Hamon's "T-Dem"*, in *Verfassungsblog*, 13 May 2017, verfassungsblog.de.

[5] See S. ADALID, *L'Union économique et monétaire: une méta-politique*, in *Revue de l'Euro*, 29 June 2017, resume.uni.lu.

[6] S. HENNETTE, T. PIKETTY, G. SACRISTE, A. VAUCHEZ, *Pour un traité de démocratisation de l'Europe*, cit., p. 5 ("central institution").

[7] Symptom of its increased importance, academic literature recently developed an interest for it, see: P. CRAIG, *The Eurogroup, Power and Accountability*, in *European Law Journal*, 2017, p. 234 *et seq.*; L. FROMONT, *L'Eurogroupe: le côté obscure de la gouverance de la zone euro*, in *Revue du droit de l'Union européenne*, 2017, p. 195 *et seq.*, after a long period of silence: J.-V. LOUIS, *The Eurogroup and Economic Policy Co-Ordination*, in *Euredia*, 2001-2002, p. 19 *et seq.*

cy is the euro".[8] The *Two Pack* ask the Member States to submit their "draft budgetary plan" to the Commission and the Euro Group.[9] It shall also discuss the opinion of the Commission on these plans and, eventually, make it public.[10] Moreover, the Board of Governors of the European Stability Mechanism can be chaired by the Euro Group President.[11] According to the European Fiscal Compact, the Euro Group is responsible for "the preparation and follow-up of the Euro Summit meetings".[12] But the Euro Group has no formal decisional power, as it is simply an "informal" gathering of the "Ministers of the Member States whose currency is the euro".[13]

Politically, the Euro Group always played a central role, which was broadened during the crisis. The Euro Group has become the negotiation forum for the Eurozone Member States. They agree within the frame of the Euro Group on a common position that they will defend during Ecofin meetings. The Euro Group work program reveals the priority of the economic policy coordination.[14] Moreover, for distressed countries, the Euro Group is the principal diplomatic debate area, where monetary assistance, and its conditions, are settled.[15]

This last task of the Euro Group might explain why T-Dem focuses on it. The crisis revealed the role played by it in times of crisis and shattered that, in the everyday life of the Economic Union, the Euro Group is part of a larger structure.[16]

So, the diagnosis of T-Dem authors seems rather accurate. But a careful reading of their arguments partially contradicts the centrality of the Euro Group. They mention the creation of a "hard core" by the "ever closer union of European and National economic and financial bureaucracies".[17] They add: "this is the place where the Euro Zone is 'ruled' and where all the coordination, conciliation and arbitration takes place".[18]

[8] Art. 3, para. 5, of Regulation (EU) 1176/2011 of the European Parliament and of the Council of 16 November 2011 on the prevention and correction of macroeconomic imbalances.

[9] Art. 6, para. 1, of Regulation (EU) 473/2013 of the European Parliament and of the Council of 21 May 2013 on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area.

[10] *Ibidem*, Art. 7, para. 5.

[11] Art. 5, para. 2, of the Treaty Establishing the European Stability Mechanism.

[12] Art. 12, para. 4, of the Treaty on Stability, Coordination, and Governance in the Economic and Monetary Union.

[13] Art. 1, para. 1, of Protocol no. 14 on the Euro Group.

[14] See P. CRAIG, *The Eurogroup*, cit., p. 236.

[15] *Ibidem*, p. 237; L. FROMONT, *L'Eurogroupe*, cit., pp. 204-205.

[16] This tendency to see in the crisis mechanisms the heart of the transformation of the EU is shared by others: M. IOANNIDIS, *Europe's New Transformations: How the EU Economic Constitution Changed During the Eurozone Crisis*, in *Common Market Law Review*, 2016, p. 1237 *et seq.*

[17] S. HENNETTE, T. PIKETTY, G. SACRISTE, A. VAUCHEZ, *Pour un traité de démocratisation de l'Europe*, cit., p. 6 ("noyau dur"; "union sans cesse plus étroite des bureaucraties économiques et financières nationales et européennes", author's translation).

[18] *Ibidem* ("c'est bien là que se 'gouverne' la zone euro et que s'exerce le travail proprement politique de coordination, de médiation et d'arbirtrage").

One of the key organs of this administrative jumble is the Economic and Financial Committee (ECF).[19] The drafters define it, in the Glossary, as "The more powerful administrative body of the Council".[20] One of ECF's main tasks is to: "keep under review the economic and financial situation of the Member States and of the Union and to report regularly thereon to the Council and to the Commission".[21] As it gathers representatives of the Commission, the Member States and the central banks, ECF is the place where most of the negotiations take place. But the text of T-Dem does not mention it.

The authors underline the lack of imputability of the decisions taken. For them, the "the Euro zone government" is "powerful and elusive".[22] This diagnosis is totally accurate. The number of institutions or forums has multiplied: the Ecofin Council, the Euro Group, the Euro Summit, the European Stability Mechanism (ESM), the European Central Bank (ECB), etc. Moreover, acts like the "memorandum of understandings" have no formal authors and no responsibility for their consequences cannot be assigned to anyone. The recent *Sotiropoulou* decision by the General Court is an excellent example. Although the Council adopted a formal decision translating a memorandum, there is no responsibility of the EU for the pensions reforms in Greece.[23]

This is the crucial problem of the new Economic Governance: it relies on new methods which do not correspond to the classic legal reasoning of the Court or to democratic principles. This "semi-intergovernmentalism" offers no real decisional institution to focus on or to blame for.[24] But this is not new, the whole economic coordination procedure is built around this goal. A global view of the Economic Union is necessary to make a proper diagnosis.

II.2. Our diagnosis converges with that of T-Dem's authors: the real power in the economic coordination procedure lies in this jumble of administrations. But we disagree on their sole focus on the Euro Group. Economic coordination does not work the way the rules seem to suggest. Official procedures are on the whole ineffective. Since the 2003

[19] Art. 134 TFEU. See I. Diez Parra, *Le Comité économique et financier*, in *Euredia*, 2000, p. 97 *et seq.*

[20] S. Hennette, T. Piketty, G. Sacriste, A. Vauchez, *Pour un traité de démocratisation de l'Europe*, cit., p. 6 ("l'organe administratif le plus puissant du Conseil de l'Union européenne").

[21] Art. 134, para. 2, TFEU.

[22] S. Hennette, T. Piketty, G. Sacriste, A. Vauchez, *Pour un traité de démocratisation de l'Europe*, cit., p. 7 ("gouvernement de la zone euro" is "puissant et insaisissable").

[23] General Court, judgment of 3 May 2017, case T-531/14, *Sotiriopoulou v. Council*.

[24] K. Lenaerts, *EMU and the European Union's Constitutionnal Framework*, in *European Law Review*, 2014, p. 753 *et seq.* There are deep contradictions between the traditional "Community method" and the integration through law process, and the economic coordination method, see: S. de la Rosa, *La gouvernance économique de l'Union et le sens de l'intégration*, in *Revue trimestrielle de droit européen,* 2016, p. 513 *et seq.*

crisis of the Stability and Growth Pact,[25] no sanctions have ever been imposed on a Member State, and the adoption of the *Six Pack* and the *Two Pack* has not changed this fact. In July 2016, the Commission cancelled the sanctions it had proposed against Portugal and Spain.[26]

Economic coordination avoids official procedure and institutions. This is a deliberate strategy. Its influence is more opaque. As J. Snell explained: "you cannot have at the same time a well-functioning EMU, mass politics and nation states".[27] Only two of the three can coexist. The choice has been made to preserve EMU and the nation states, specially their sovereignty, at the expense of mass politics. So, coordination needs to happen outside of official channels and transparent procedures.

"Meta-policy" simply means that mass politics is deprived of political choices, that are made above it by a jumble of transnational administrations. Choices are neither purely European – hence it is not a "supra-policy" – nor national. They are made in the opaque collaboration of technical European institutions – the Commission and the ECB – and national ones. These choices appear as vague technical standards, that only European institutions can define, before they are translated into national measures, under European, peer (II.2.1) and market pressure (II.2.2).

II.2.1. The main issue with economic coordination is the delegation of power to independent and technical institutions, especially the Commission. In theory, delegation is only supposed to happen in technical fields, not in very political ones such as economic policy.[28] By extending it to economic policy, EMU created a space for political choices to be made outside of mass politics.

Delegation is based on the classic political theory of principal and agents. According to it, powers can be delegated to independent and technical agencies as long as the

[25] Which ended by the first judgement of the Court of Justice: Court of justice, judgment of 13 July 2004, case C-27/04, *Commission v. Council*, and the revision of the Pact: Council Regulation (EC) 1055/2005 of 27 June 2005 amending Regulation (EC) 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies and Regulation (EC) 1056/2005 of the Council of 27 June 2005 amending Regulation (EC) 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure. For more details, see. R.M. LASTRA, J.-V. LOUIS, *European Economic and Monetary Union: History, Trends and Prospects*, in *Yearbook of European Law*, 2013, pp. 113-120.

[26] On this last example, and more generally on the feebleness of the rules, see: P. LEINO, T. SAARENHEIMO, *Sovereignty and Subordination: On the Limits of EU Economic Policy Co-ordination*, in *European Law Review*, 2017, p. 166 *et seq.*, specifically, pp. 176-181. See also D. ADAMSKI, *Europe's (Misguided) Constitution of Economic Prosperity*, in *Common Market Law Review*, 2013, p. 47 *et seq.*, specifically pp. 50-56.

[27] J. SNELL, *The Trilemma of European Economic and Monetary Integration, and Its Consequences*, in *European Law Journal*, 2016, p. 158. The author uses D. Rodrik's trilemma between "deep international economic integration, nation states, and mass politics" (D. RODRIK, *The Globalization Paradox: Why Global Markets, States, and Democracy Can't Coexist*, Oxford: Oxford University Press, 2011).

[28] See P. LEINO, T. SAARENHEIMO, *Sovereignty and Subordination*, cit., p. 178.

principal defines the goal pursued by the agent and controls the results of his action, using transparency and accountability.[29] But in the context of the EU, agents tend to gain political autonomy from the principal.[30] This process also happened in economic coordination because of the Commission's wide administrative power and the lack of specific goals assigned to it.

The Commission is the technical centre of EMU. In this, the Commission loses its political nature because it only acts as a technical actor, evaluating national policy choices, with no control of the European Parliament. Formally, assessment of national reports belongs to the Council, based on a simple recommendation by the Commission.[31] But the Council follows the Commissions assessment's unconditionally. A brief study of the last 10 years, shows that the Council's recommendation on France's National Reform Programs is a-word for-word copy of the Commission's recommendation. Only the Commission has the staff and the technical expertise to evaluate the different reports sent by Member States. Information and expertise asymmetry are among the main ways in which agents gain autonomy from the principal.

The other problem with the concept of "assessment" is the standards by which it is made and who is in charge of setting them, namely: the target assigned to the agent. Beyond the ratios of government debt and deficit,[32] there is no clear objective for the coordination of national economic policies. The day of the adoption of the Euro Plus Pact, the Council conclusions stipulated that: "Within the new framework of the European semester, the European Council endorsed the priorities for fiscal consolidation and structural reform. It underscored the need to give priority to restoring sound budgets and fiscal sustainability, reducing unemployment through labour market reforms and making new efforts to enhance growth".[33]

Every notion used by the Council is obscure and gives autonomous margins of interpretation to the Commission which is free to define "fiscal sustainability", "labour market reforms" or "structural reforms". The Treaty does not use the latter point, which appeared in 1997 with no clear definition,[34] but is now used quite systematically by the Commission. All these vague terms gives the Commission a discretionary power of interpretation.[35]

[29] For a theoretical and concrete overview in the context of the EU, see P. MAGNETTE, *The Politics of Regulation in the European Union*, in D. GERADIN, R. MUNOZ, N. PETIT (eds), *Regulation through Agencies in the EU*, Cheltenham: Edward Elgar, 2005, p. 3 *et seq.*

[30] It is a well know phenomenon, see F. SCHARPF, *The Joint Decision Trap: Lessons from German Federalism and European Integration*, in *Public Administration*, 1988, p. 239.

[31] Art. 121 TFEU.

[32] Art. 126 TFEU.

[33] European Council Conclusions of 24-25 March 2011, para. 2.

[34] European Council Resolution of 16 June 1997 on Growth and Employment Pact Amsterdam.

[35] P. LEINO, T. SAARENHEIMO, *Sovereignty and Subordination*, cit., pp. 173-174. These authors mention that: "soft law has pushed the substantive decisions to the stage of implementation and buttressed the

EMU acts as a "meta-political power", a supranational political agency that pre-empts national political choices. But the threat of sanctions has little to do with it. Economic coordination is more of a process of influence, than a forced one, except for States under pressure like Greece. The Commission sets standards by which Member States have to measure their policy. The standards are convincing because they meet the so-called "market demands".

Everyday economic coordination is an assessment process. Member States send reports to the Commission, which compares them to its standards and sends the result to the Euro Group or the Ecofin Council; those results that are discussed beforehand in the ECF.[36] The best example is the Macroeconomic Imbalance Procedure: the Commission published a set of indicators and national economies needs to converge on them.[37] So Member States have to justify their political choices according to norms defined by the Commission. Due to the absence of sanctions, Member States are free not to comply with the European standards. But they are encouraged to do so by the very existence of the report mechanism, that forces them – at least – to take those standards into account.

The independence of the central bank also encourages Member States to align their economic policy with the ECB monetary policy. In the EMU, no policy mix is possible. Member States and European Institutions are prevented from giving any instructions to the ECB Executive Board or Governing Council.[38] So, the States' economic policy has to be compatible with the monetary policy decided independently by the ECB. The ECB has repeatedly admitted that Member States have to make structural reforms.

Moreover, the standards are one of the expressions of market needs. Member States are encouraged to adopt them to favour economic growth by making "market-compliant" reforms. To finance their debt on the market, States have to convince them to buy it, by consenting to actions backed by large market actors, such as hedge funds.[39] The funding treaties organize this market pressure.

II.2.2. The market is not a concrete entity with a will of its own. It presents itself as a constraint on political power, which seems to react to its demands. But the market can-

institutional position of the body – the Commission – tasked to determine what kind of meaning can be attributed to each provision in each individual case".

[36] See S. ADALID, *La nouvelle gouvernance économique de l'UE: mesurer et rapprocher les politiques nationales*, in S. DORMONT, T. PERROUD (eds), *Droit et marché*, Paris: LGDJ, 2016, p. 145 *et seq.*

[37] Regulation (EU) 1174/2011 of the European Parliament and of the Council of 16 November 2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area.

[38] Art. 130 TFEU.

[39] W. Streeck reports an interview of PIMCO's President aknowledging that some Finances Ministers (like the Spanish one) regulary consult them, W. STREECK, *Gekaufte Zeit. Die vertagte Krise des demokratischen Kapitalismus*, Berlin: Suhrkamp Verlag, 2013, p. 336 (reference here and after is made to the French translation: *Du temps acheté. La crise dans cesse ajournée du capitalisme démocratique*, Paris: Gallimard, 2013).

not enunciate clear demands. Others speak for the market and interpret what seems to be its needs.

The correction of EMU's democratic deficit requires a better understanding of the role played by the market, and especially financial markets. Economic convergence is based on the forces given to the market by the Treaty. Moreover, the market has become the ultimate reference of economic choices, based on the widespread hegemony of the neoliberal doctrine.

Arts 123 to 125 TFEU subordinate political choices to the judgment of the financial markets, and especially of the sovereign debt markets.[40] Art. 123 prohibits monetary financing of the States. Art. 124 bans any form of privileged access of the States to financial institutions. Art. 125 impedes any financial solidarity between Member States, and between them and the Union. So, States have no other options but to present themselves to financial markets, with no special treatment. They are debtors like others. Of course, this is also the result of a more complex process of financial globalization and deregulation,[41] which transforms the State into a "debtor state".[42]

But this reliance of the States upon the market does not means that the market can make clear demands. The market is not an actor. It needs spokespersons. It has indeed three kinds of spokespersons: economists, independent institutions and lobbies. There is a multiplicity of economic doctrines, but one has become prominent: neoliberalism.[43] The core of neoliberalism is a total confidence in the market as the ultimate reference that neoliberal economists understand, so they can speak for it.[44] International organizations and independent institutions also became spokespersons for the market, the so-called "Washington consensus". Standards used by the Commission and the ECB like "structural reforms" or "market stability" have the ultimate goal of increasing the efficiency of the market, as neoliberals demand. Eventually, the claims of large companies are frequently mistaken for demands of the market itself, usually through lobbying.[45] And large financial market actors, like hedge funds, also appear as market representa-

[40] See F. MARTUCCI, *L'interaction dans l'espace financier mondialisé*, in L. BURGORGUE-LARSEN, E. DUBOUT, A. MAITROT DE LA MOTTE, S. TOUZÉ (eds), *Les interactions normatives droit de l'Union européenne et droit international*, Paris: Pedone, 2012, p. 14 *et seq.*; M. IOANNIDIS, *Europe's New Transformations*, cit., pp. 1249-1252.

[41] See J.-M. SOREL, *Les Etats face aux marches financiers*, in *Souveraineté étatique et marchés internationaux à la fin du XX*ème *Siècle – Mélanges en l'honneur de Ph. Khaan*, Paris: Litec, 2000, p. 407 *et seq*.

[42] As W. Streeck calls it, see W. STREECK, *Gekaufte Zeit*, cit.

[43] Among many references, see P. MIROWSKI, *Never Let a Serious Crisis Go To Waste – How Neoliberalism Survived the Financial Meltdown*, London: Verso, 2013.

[44] As F. Hayek explained, see F. HAYEK, *Law, Legislation and Liberty*, Chicago: University of Chicago Press, pp. 1973-1979 (reference here is made to the French translation: *Droit, législation et liberté*, Paris: PUF, 2013).

[45] See C. CROUCH, *The Strange Non-Death of Neoliberalism*, Gius: Laterza & Figli, 2005 (reference here is made to the French translation: *L'étrange survie du néolibéralisme*, Bienne-Berlin: Diaphanes).

tives. These three kinds of spokespersons are interdependent. In the field of monetary policy and economic coordination, the tasks of the ECB and the Commissions are mainly handled by economists, who sometimes come from private companies.[46]

During the crisis, European institutions used the debtor-States subordination to sovereign-bond markets to further push the neoliberal agenda via the "structural reform" standard. Markets were afraid to depend on some States, so they had to make market-friendly reforms to please the market. This is the kind of manipulation that makes believe that the market is real and has a will of its own, a will that limits the States' political room for manoeuvre.

There is no formal constraint on Member States but converging influences from the European administration and market actors. Mass politics is totally kept out of the process. National political actors have no real choices; no course of action is possible but the one chosen at the European Level. For example, with the prior approval of national budget plans at the European Level, what margin is left to National Parliaments? Hence, EMU is a policy that encompasses the others, a "meta-policy".

So, EMU result in a compression of democratic spaces, where choices are made by a jumble of technical authorities, based on the "market needs" represented by a bad summary of the neoliberal doctrine.[47] This is the result of multiple causes. T-Dem mentions only a few of them: national representatives act in an opaque space, mainly the Euro Group, where no accountability is possible, with a lack of powers of members of National Parliaments and the European Parliament. But they fail to see that the problem runs deeper. There is a "complex democratic dynamic of structural reforms",[48] that runs deeper than the most visible aporias that the T-Dem's authors pointed out. Consequently, not all their solutions are convincing.

III. The real question is: does this assembly have the adequate tools to counter this meta-policy? There is no definitive answer, as some of the solutions suggested by T-Dem seem relevant (III.1) while others are clearly insufficient (III.2).

III.1. We will not discuss every proposition of the T-Dem. We will focus only on the powers given to the Assembly. First of all, as we agree on the diagnosis, we agree on the main proposition: a transnational Assembly for the Eurozone. Moreover, this Assembly should have more information at its disposal, thus reducing information asymmetry between elected officials and technocrats.

[46] One of the T-Dem author studied this question of "revolving doors" in the field of law: P. FRANCE, A. VAUCHEZ, *Sphère publique Intérêt privés – Enquête sur un grand brouillage*, Paris: SciencePo Les Presses, 2017.

[47] On the intellectual diversity of the neoliberal doctrine, see S. AUDIER, *Néolibéralisme(s). Une archéologie intellectuelle*, Paris: Grasset, 2012.

[48] D. ADAMSKI, *Europe's (Misguided) Constitution of Economic Prosperity*, cit.

EMU seen as a meta-political entity is not a purely European one, it is a transnational one. Its formulation is not solely conducted at the Commission, but during the interaction of the Commission, the Members States, the Euro Group, the ECF, the ECB, etc. So, to democratise this space, it is necessary to have a transnational Assembly. None of the recommendations of the Commission or choices made by Member States at the European level are definitive. They still have to be approved by National Parliaments, but their political leeway is very limited.

In the classic conception of European Institutions, the interests of the Member States are represented by their Ministers at the Council.[49] But since the Lisbon Treaty, national Parliaments have had an official role in the Union, we may wonder who they actually represent. This raises the question of the disconnection between the executive branch and the legislative branch in Member States. At the national level, the executive branch has taken over most of the powers of the legislative one. Heads of the executive tend to personify the State.[50] States' interests tend to diverge from the populations', especially at the European Level. Citizens do not want austerity, but the Governments have endorsed it because it is deemed good for the State. The consecration of the formal power to national Parliaments in the EU is actually a consecration of this disconnection.

Moreover, the current state of economic governance leaves no space for national Parliaments. The Council or the Euro Group has turned into an opaque intergovernmental negotiation forum. Calculus is made, rather than decisions driven by general interest. It is necessary to re-integrate mass politics through a national election process.

But, due to economic interdependence, the issues of the Eurozone have become transnational. To represent this sphere, Members of the European Parliaments are necessary. It is, after all, their everyday job. So, the creation of a Parliamentary Assembly with representatives of both national and European Parliaments is a pertinent solution.

But reducing the information and expertise asymmetry between technocrats and elected official takes time and expertise. The risk is that members of the new Assembly lack this required time to carry out their duties properly. The drafters of the Treaty explain that only members of national Parliaments "have the necessary legitimacy to democratize the powerful intergovernmental bureaucratic network".[51]

We propose another solution, which meets this requirement. Members of the new Assembly could be elected at the same time as a national general election is held and thus have a dual status. They should be members of national Parliaments, but only for

[49] In the classification made by P. Pescatore, the Commission represents the Union, the Council interest of Member States and the Parliaments the citizens (P. PESCATORE, *Le droit de l'intégration*, Bruxelles: Bruylant, 2015, p. 15).

[50] See: P. ROSANVALLON, *Le bon gouvernement*, Paris: Seuil, 2015, p. 135 *et seq*.

[51] S. HENNETTE, T. PIKETTY, G. SACRISTE, A. VAUCHEZ, *Pour un traité de démocratisation de l'Europe*, cit., p. 10 ("disposent de la légitimité nécessaire pour démocratiser le puissant réseau bureaucratique intergouvernemental").

budgetary matters. The *Two Pack* already laid down a "Common budgetary timeline", which would be the base for the schedule of Members of the Assembly.[52] This solution has the advantage of guaranteeing a link between the European and the National phase of the budgetary procedure. This way, they would gain an expertise in economic matters and have enough time to perform their duties both at the National and the Euro level.

At this level, they would be assisted by a "Parliamentary Office for the Evaluation of European Economic Choices".[53] This office is the most innovative creation of T-Dem, and the most efficient in terms of changing the technocratic nature of EMU.

The Office should be responsible for "the production of an autonomous expertise and access to data and institutions of the Eurozone".[54] This way, when debating technical matters, members of the Assembly should be as informed and as competent as the representatives of the Commission and the Central Bank. T-Dem makes sure of this. Art. 11, para. 4, requires the ECB and the Commission to "supply to the Assembly all documents and data which the latter requires in the exercise of its powers". Moreover, "[a]s the case may be, these documents and data may be examined by a parliamentary committee which will meet in camera". This would be a major step. For example, the ECB could not hide itself behind professional secrecy.[55] Lack of accountability of the ECB stems from its refusal to publish critical information. This kind of control over information increases ECB's autonomy and makes it possible for it to choose the data to be made public.[56]

Creating a transnational Assembly and giving it enough expertise and information is the necessary first step, but it is not a sufficient one. The Assembly needs enough powers to influence the outcome of the negotiation. One important means is the control it should exert over the Euro Summit and the Euro Group agenda.

According to Art. 7, para. 1, the Assembly "prepares" the Euro Summits. More importantly, "it shall determine the semi-annual work programme of the Euro Group".[57] This last sentence is unclear. The Article states that it does it "in agreement" with the Euro Group Members". Does this imply that the Assembly has the last word or that the Euro Group has to agree with the programme drafted by the Assembly? Of course, the first solution is preferable. This way the Assembly can set the political priorities of the Eurozone.

[52] Art. 4 of Regulation (EU) 473/2013, cit.

[53] Art. 11, para. 1, of the T-Dem.

[54] S. HENNETTE, T. PIKETTY, G. SACRISTE, A. VAUCHEZ, *Pour un traité de démocratisation de l'Europe*, cit., p. 74 ("produire une connaissance autonome et lui permettant d'accéder aux données et aux institutions de la zone euro").

[55] Art. 37 of Protocol no. 4 on the Statute of the European System of Central Banks and of the European Central Banks.

[56] See D. CURTIN, *"Accountable Independence" of the European Central Bank: Seeing the Logics of Transparency*, in *European Law Journal*, 2017, p. 28 *et seq.*

[57] Art. 7, para. 2, of the T-Dem.

This is not the only article with an unclear wording. Others jeopardize the efficiency of the Treaty.

III.2. To counter an opaque administrative jumble, with no clear shared responsibility among its participants, the Assembly needs to have well defined powers, otherwise it will be sucked into the jumble. Furthermore, the Assembly needs powers at the heart of this jumble: the definition of economic standards underlying all its work. In the current version of T-Dem, it has none whatsoever.

Wording of T-Dem is too vague to produce real effects. Regarding Art. 8, the powers vested in the Assembly do not imply enough constraints.[58] They don't create new mechanisms to contradict the opaque techniques currently used.

Concerning the Commissions Alert Mechanism Report, the Assembly "shall adopt a position".[59] Concerning draft budgetary plan, "It shall take part in the monitoring of the discussions [...] and shall make recommendations".[60] Concerning structural reforms, "It shall hold regular exchanges of views".[61] First of all, T-Dem gives no definition of the terms it uses. For example, does "recommendation" in T-Dem means the same thing as "recommendation" in EU law?[62] The frequency of the "exchange of views" and its interlocutors are unknown. This leaves room for manoeuvre for EU institutions or Member States to circumvent the Assembly.

Today's economic governance is full of "soft" law: reports, recommendations, etc.[63] The new Assembly should produce more of it. This should not make procedures and their outcome clearer or easier to understand for ordinary citizens. Its absence of real power should merely produce a new voice, admittedly a contradictory one, but will not change the outcome.

Moreover, Art. 8, para. 3, states that: "it shall assess the recommendations and reports submitted by the Commission to the Council concerning the Euro area Member States subject to an excessive imbalance procedure". The use of the "assessment" technique, with no precision, is the outcome of the insufficient diagnostic outline in the first part. The drafters give no clarification as to on what basis this "assessment" should be made. More seriously, "assessment" as a concept and a tool is not neutral. It is, by itself, a social choice that means that everything can be compared, reduced to numbers.[64]

By using the same techniques – reporting and assessment – as economic governance, T-Dem fails to apprehend the deepest problem. The meta-policy of economic

[58] They only relate to "[c]onvergence and coordination of economic and budgetary policies".
[59] Art. 8, para. 1, of the T-Dem.
[60] Art. 8, para. 2, of the T-Dem.
[61] Art. 8, para. 4, of the T-Dem.
[62] Art. 288, para. 5, TFEU.
[63] P. LEINO, T. SAARENHEIMO, *Sovereignty and Subordination*, cit., pp. 173-176.
[64] See F. SIMONET, *L'évaluation: objet de standardization des pratiques sociales*, in *Cité*, 2009, p. 192 *et seq.*

governance is the symptom of the transformation of the modern art of governing. General interest fades away, replaced the neoliberal ideology that holds that everything can be reduced to numbers.[65]

The creation of the new Assembly should not, by itself, reverse this ongoing process of unpoliticisation, already deeply rooted in modern ideology.[66] The least it could do is bring back mass politics to the equation. The Assembly needs the power to call the standards of economic governance into question, as well as their definition. The permanent demand for "structural reforms" and its neoliberal content should be reconsidered. Coordination does not mean permanent justification of their choices by Member States. It means that each State has to take into account the specific needs of the Eurozone as a whole and of other Member States. The transnational Assembly should be the "common public authority" of the Eurozone, making the political choices.[67] This is a more radical proposition, but the only possible one. Considering the trilemma underlined before, it requires the surrendering of a large part of the States' sovereignty. However the present economic governance only leads to an illusion of sovereignty, with a real loss of democracy.

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[65] See A. SUPIOT, *La Gouvernance par les nombres – Cours au Collège de France (2012-2014)*, Paris: Fayard, 2015, p. 103 *et seq*.

[66] See D. SINGH GREWAL, J. PURDY, *Introduction: Law and Neoliberalism*, in *Law and Contemporary Problems*, 2015, p. 1 *et seq*.

[67] The concept was used by the Court of Justice, ruling of 14 November 1978, case 1/78, *Draft Convention of the International Atomic Energy Agency on the Physical Protection of Nuclear Materials, Facilities and Transports*, para. 27, and has been taken up by: S. DE LA ROSA, *La gouvernance économique de l'Union et le sens de l'intégration*, cit., p. 524.

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Overviews
Special Section – Democratising the Euro Area Through a Treaty?

Taking Democracy Seriously in the Euro Area: Reinvigorating the European Parliament's Functions and Responsibilities

Table of Contents: I. T-Dem or the democratic question put back at the heart of economic governance. – II. The European Parliament, rather than an assembly of the Euro area. – III. The ways of strengthening the powers of the European Parliament. – IV. Taking into account the interest of the Euro area as a whole. – V. From democratic frustration to parliamentary challenge.

I. A few days before the celebration of 60 years of the signing of the Rome Treaties and against the backdrop of the French presidential campaign, an interdisciplinary team led by Thomas Piketty and Antoine Vauchez published a short book on European economic governance: *Draft Treaty on the Democratisation of the Governance of the Euro Area* (or T-Dem).[1] In less than 100 pages, the book develops a reasoned critique of the economic governance of the Euro area, rightly stressing the weakness of the legislative and oversight powers of national and European parliaments. In order to initiate a political debate on concrete elements, the authors provide the readers with a draft Treaty long of twenty-two articles.

Thomas Piketty's initiative is to be welcomed in many ways. It puts the democratic question at the very heart of the debate on the functioning of the Economic and Monetary Union (EMU). Since its inception by the Maastricht Treaty (1992), EMU differs from the other policies of the European Union (hereinafter the Union) by the marginal responsibilities attributed to the national parliaments and the European Parliament. Sometimes referred to as the "Treaty of parliaments",[2] the Lisbon Treaty, which came into force in 2009, did not open a new era for democracy and citizenship in the EMU area.[3] The management of the sovereign debt crisis and the reforms of the governance of

[1] S. Hennette, T. Piketty, G. Sacriste, A. Vauchez, *Pour un traité de démocratisation de l'Europe*, Paris: Seuil, 2017.

[2] N. Lammert, *Europa der Bürger – Parlamentarische Perspektiven der Union nach dem Lissabon-Vertrag*, speech delivered at Humboldt University, Berlin, 2009.

[3] The legal position of the European Parliament remains largely unchanged in the Lisbon Treaty. Within the economic pillar, the adoption of the most important measures are still governed by specific

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EMU (including the Euro area) have brought out original flaws of the Maastricht Treaty.[4] The institutions and bodies already in charge of economic and monetary policy[5] (European Council/Euro Summit, Council/Eurogroup, Commission and European Central Bank, hereinafter ECB) gained more responsibilities. This is particularly true with respect to the *ad hoc* arrangements set up outside the scope of EU law to provide financial assistance to the Euro area Member States (European Financial Stability Fund, European Stability Mechanism, hereinafter ESM) and to enhance fiscal discipline (Fiscal Compact). The phenomenon is the exact opposite for the European Parliament and the national parliaments: they faced further relegation in the EU decision-making process. This observation, however, deserves to be tempered: parliaments benefited from a strengthening of their oversight powers.[6] On the model of the monetary dialogue between the ECB and the European Parliament,[7] the legislative reform package of November 2011 (Six Pack) establishes an economic dialogue between the representatives of the executive institutions (Council, Commission and, *where appropriate*, European Council and Eurogroup) and the European Parliament.[8] In the framework of the Banking Union, the ECB is bound by a specific obligation to report to the European Parliament,[9] as well as an obligation to inform the national parliaments.[10]

The T-Dem advocates the creation of an Assembly of the Euro area composed of representatives appointed by the national parliaments and by the European Parliament. It is inspired by the Interparliamentary Conference on Stability, Coordination and

procedures according to which the Parliament is consulted before (e.g. Art. 125, para. 2, TFEU; Art. 126, para. 14, TFEU, or Art. 140, para. 2, TFEU), informed after the decisions is taken by the Council (e.g. Art. 121, para. 5, TFEU, Art. 122, para. 2, TFEU) or totally ignored (e.g. Art. 138 TFEU).

[4] S. Hennette, T. Piketty, G. Sacriste, A. Vauchez, *Pour un traité de démocratisation de l'Europe*, cit., p. 47 *et seq*.

[5] See F. Allemand, *More or Less Intergovernmental Cooperation Within the New EMU?*, in L. Daniele, P. Simone, R. Cisotta (eds), *Democracy in the Aftermath of the Crisis*, Cham: Springer, 2017, pp. 73-99.

[6] F. Allemand, F. Martucci, *The Democratic Legitimacy of European Economic Governance: The Change of the Parliamentary Function*, in *Revue de l'OFCE*, 2014, p. 119.

[7] The monetary dialogue is based on the obligation of the ECB to report to the European Parliament, as provided for by Art. 284, para. 3, TFEU; its modalities laid out in Art. 126, para. 3 of the Rules of Procedure of the European Parliament.

[8] For example Art. 2-ab of Regulation (EC) 1466/97 of the European Council of 7 July 1997 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies; as last amended by Regulation (EU) 1175/2011 of the European Parliament and of the Council of 16 November 2011.

[9] Art. 20 of Regulation (EU) 1024/2013 of the Council of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions. The practical arrangements for the exchanges with the European Parliament are laid out in the Interinstitutional Agreement 2013/694/EU between the European Parliament and the European Central Bank of 6 November 2013 on the practical modalities of the exercise of democratic accountability and oversight over the exercise of the tasks conferred on the ECB within the framework of the Single Supervisory Mechanism.

[10] Art. 21 of Regulation 1024/2013, cit.

Governance (SCG), based on Art. 13 of the Treaty on SCG. This forum aims to promote debate on topics of common interest, primarily budgetary policies, and information exchange. This conference has no legislative or oversight powers and it has not yet demonstrated any usefulness. At most, it helps restore a regular link between national and European parliamentarians. The T-Dem intends to fill the gaps by giving the Assembly of the Euro area the traditional functions of a parliament.

Thomas Piketty and his co-authors are also right to relate this topic to some concrete issues.[11] The economic policies adopted by the Member States under the programmes agreed with the European authorities have major financial, economic and social consequences, without the national parliaments or the European Parliament really having the right to discuss the content and the scope of these policies. As the democratic debate cannot stand in the assemblies, it takes place in the streets[12] or before the courts.[13] These democratic deprivations have fuelled a sense of democratic denial, political dispossession and frustration among an ever-growing part of European citizens.[14] In the context of the French presidential debate, the authors' initiative took on a particular significance and we should be pleased that it aroused the interest of some candidates.

Finally, the four authors are inspired when they put a draft Treaty – and not general proposals on the democratic reinforcement of EMU – into the debate. Repeated calls for political consolidation of governance reforms in the Euro area through "sustainable, equitable and democratically legitimate solutions"[15] amount to ideas with fuzzy outlines. Opening the debate and taking democracy seriously imply to go beyond general principles and to imagine the details of the future EMU governance, as Thomas Piketty and the other authors did.

II. The establishment of a Euro area Assembly, with legislative and oversight powers, superimposed on existing parliamentary representations,[16] is interesting in many ways.

[11] S. HENNETTE, T. PIKETTY, G. SACRISTE, A. VAUCHEZ, *Pour un traité de démocratisation de l'Europe*, cit., p. 8.

[12] See the (violent) street demonstrations in Athens or the Indignados movement in Spain.

[13] C. FASONE, *Constitutional Courts Facing the Euro Crisis. Italy, Portugal and Spain in a Comparative Perspective*, in *EUI Working Papers*, no. 25, 2014.

[14] For the replacement of permissive consensus by public hostile reactions, see G. MAJONE, *Rethinking the Union of Europe Post-Crisis. Has the Integration Gone too Far?*, Cambridge: Cambridge University Press, 2014; also H. KRIESI, T. PAPPAS, *European Populism in the Shadow of the Great Recession*, Colchester: CEPR, 2015, who addressed the specific situation of the rise of populism in relation to the (mis)management of the economic crisis.

[15] European Commission, *Completing Europe's Economic and Monetary Union* – Report by J-C Juncker in close cooperation with D. Tusk, M. Draghi, J. Dijsselbloem and M. Schulz, 22 June 2015 (Report of the Five Presidents).

[16] F. ALLEMAND, F. MARTUCCI, *The Democratic Legitimacy of European Economic Governance: The Change of the Parliamentary Function*, cit., p. 121.

However, it does not seem appropriate to the specific features of the European integration process.

The governance of the Euro area is of course complex enough, so that it is not necessary to add a new institution even on a temporary basis. More fundamentally, the creation of such an Assembly runs counter to the principle of unity of the institutional framework and the representation of European citizens, as well as the unitary character of the European citizenship regime.[17] The Court of Justice ritually recalls that the Union's citizenship "is destined to be the fundamental status of nationals of the Member States".[18] The situation where the citizens of the Member States of the Euro area could be represented twice, once at the Assembly of the Euro area *and* at the European Parliament to discuss the same subject, for example the appointment of members of the Executive Board of the European Central Bank,[19] would thus be in clear conflict with EU law.

The duplication of parliamentary assemblies would also increase the risks of conflicts of competences, political contradictions and rivalries between them. Sixty years ago, the same considerations[20] led the authors of the Founding Treaties to establish an Assembly common to the three European Communities rather than a single Assembly for each Community.[21] One may observe that the Assembly of the Council of Europe already existed at the time of negotiating the Paris Treaty and then the Rome Treaties. However, it could not be drawn on this precedent, as the Council of Europe and the European Communities differ in their nature (cooperation *v.* integration organization). The situation is different in the present case: the Euro area represents a specific level of integration and cooperation between the Member States *within* the Union; it is not an autonomous entity separate from the Union. Economic and monetary policy is a Union policy and is subject to compliance with the values, principles and objectives set out in Arts 2, 3 *et seq.*, TEU. The European Parliament is one of the EU institutions and, as such, shall act within the

[17] European citizens can participate in the functioning of the Union via a dual channel of representation: directly through the European Parliament and indirectly through the European Council and the Council (Art. 10 TEU). *No other form of political representation of European citizens at Union level is envisaged.* This principle of representation is related to the right of the citizen to participate in the democratic life of the Union. Read in conjunction with the principle of equality (Art. 9 TEU), the right to be represented in the European Parliament means that no citizen can vote more than once (Art. 9 of the Act concerning the election of the representatives of the Assembly by direct universal suffrage of 20 September 1976). The opportunity for citizens of the Euro area Member States to be represented in other structures associated with the functioning of the Union, would contravene both the exclusive character of representations of channels referred to in Art. 10 and the principle of equality of citizens.

[18] Court of Justice, judgment of 20 September 2001, case C-184/99, *Grzelczyk*, para. 31.

[19] Art. 17 of the T-Dem and Art. 283, para. 2, TFEU.

[20] See for example: Working Group Memorandum of Joint Assembly of the ECSC on European revival, 7 January 1957, www.cvce.eu; Mémorandum de la délégation des Bureaux des trois Assemblées européennes, 2 February 1957, www.cvce.eu.

[21] Arts 1 and 2 of the Convention on certain institutions common to the European Communities, annexed to the Treaty establishing the European Economic Community.

limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them.[22] Its powers apply irrespective of the territorial scope of the policies or measures to be adopted by the Union.

Finally, one can reasonably question the reaction of the European citizens to the creation of this new assembly and the political impact on the European Parliament's image. This initiative highlights the little influence that the European Parliament has in the definition and conduct of the economic governance of the Euro area and it supports the establishment of a new transnational parliamentary institution rather than proposing improvements of the Parliament's powers. Is there not a risk of increasing voters' disaffection in the next European elections?

Once again, the T-Dem initiative should deserve serious consideration. However, multiple parliamentary assemblies, endowed with powers, coherent and complementary with one another, do not form *a* modern parliamentary institution that meets contemporary democratic requirements. The whole is not equal to the sum of the parts. The Court of Justice has devoted the "fundamental democratic principle that the peoples should take part in the exercise of power through the intermediary of a representative assembly".[23] According to this principle, the European Parliament must participate *effectively* in the EU legislative process.[24] The democratic principle also implies that the power to adopt a non-legislative act must be exercised by a European democratically accountable institution.[25] In a dispute over the voting rights of British citizens of Gibraltar in European elections, the European Court of Human Rights acknowledged the existence of a "truly democratic political system" in the Union, although of a *sui generis* nature.[26] The European Parliament was considered by the Court as the institution of the Union, which best reflects the need to ensure such a democratic regime.[27]

III. Taking seriously the issue of democracy in the functioning of the Euro area requires major efforts to strengthen the powers of the European Parliament, by using all the elements of flexibility contained in EU law. Many evolutions can take place without triggering a heavy revision procedure, which is always risky with regard to its political outcomes.

[22] Art. 13 TFEU.

[23] Court of Justice, judgment of 29 October 1980, case 138/79, *Roquette Frères v. Council*, para. 33; Court of Justice, judgment of 11 June 1991, case C-300/89, *Commission v. Council* (titanium dioxide), para. 20.

[24] Court of Justice, judgment of 30 March 1995, case C-65/93, *Parliament v. Council*, para. 21; Court of Justice, judgment of 6 November 2008, case C-155/07, *Parliament v. Council*, para. 78.

[25] Court of Justice, judgment of 12 September 2013, case C-270/12, *UK v. Council and Parliament*, para. 85.

[26] European Court of Human Rights, judgment of 18 February 1999, no. 24833/94, *Matthews v. United Kingdom*, para. 48.

[27] *Ibidem*.

The promotion of the European Parliament as a genuine legislative authority first requires to abstain from supplementing EU law with new instruments of international law. The intergovernmental logic exercises all its control over the negotiation modalities and the content of the agreement. In the light of experiences, such agreements were characterized by the marginalization of the European Parliament. After a hard-fought battle, the Parliament obtained to send four observers (including a substitute) to the intergovernmental conference on the Treaty on SCG and to present its position at the special meeting of the ministers of 18 February 2014 on the intergovernmental agreement establishing the Single Resolution Fund. However, its responsibilities remain minor in each of these agreements. This does not mean that using international law to complement EU legal framework should be definitely prohibited: we rather suggest that it should merely be considered as a last resort solution to think about to overcome deadlock negotiations at EU level.[28]

Secondly, the special legislative procedures for the implementation of economic and monetary policy should give way to the ordinary legislative procedure, through the application of the bridging clause of Art. 48, para. 7, TEU. This concerns Art. 125, para. 2, TFEU (definitions for the prohibitions stipulated in Arts 123 to 125, para. 1, TFEU), Art. 127, para. 6 (specific tasks to the ECB in the area of prudential supervision), Art. 128, para. 2 (measures to harmonize unit values and technical specifications of euro coins), Art. 129, para. 4 (revision of provisions of the Statute of the European System of Central Banks), Art. 132, para. 3 (powers of the ECB to impose sanctions) and Art. 134, para. 3 (Statute of the Economic and Financial Committee). All these special legislative procedures reflect political concerns expressed by the Member States in the early 1990s when nobody knew if the EMU would ever fly. Thirty years later, their relevance has to be reviewed in the light of the current developments and democratic requirements of the EMU.

The implementation of the bridging clause is a delicate exercise as there are many safeguards. The procedure requires a unanimous decision of the European Council. This difficulty can be mitigated by application of Art. 333 TFEU. This provision makes it possible to change the legislative procedure from special to ordinary when it comes to the adoption of legislative measures in the context of enhanced cooperation. Unanimity within the Council is still required to approve this change, although the vote is open only to those Member States participating in the enhanced cooperation.

In addition, Art. 7 of the Treaty on SCG lays down a voting clause, under which the Contracting Parties whose currency is the euro commit to supporting proposals submitted by the Commission with regard to implementation of the excessive deficit proce-

[28] The T-Dem retains the opposite perspective, as well as Wolfgang Schäuble in his non-paper presented at the Eurogroup meeting of 15 September 2017: "As long as there is little willingness for treaty changes, we should follow a pragmatic two-step approach: intergovernmental solution now to be transposed into EU law later".

dure.[29] The Six-Pack has also introduced the principle of reversed qualified majority voting in Union law.[30] None of these two mechanisms could apply in a binding way to a voting procedure laid down in the Treaties: the first one is international law, while the other is secondary law. They could nevertheless be introduced in EU law as *soft law* under the form of a resolution of the Council or a political commitment taken by the Member States.

The T-Dem calls for a close association of the Euro Area Assembly with the implementation of economic and monetary policy in the Member States whose currency is the euro (Arts 8 and 9): review of the Commission's reports on the alert mechanism of the macroeconomic imbalance procedure, monitoring of the discussions on draft budget plans. These proposals could be applied for the benefit of the European Parliament, for those not yet provided for by EU law. In addition, a specific attention should be paid to the development of a fiscal stance[31] for the Euro area, as this new tool could eventually reverse the way budgetary discipline is implemented.[32]

Until recently, the fiscal stance resulted from the aggregation of the budgetary objectives defined by the Member States in the context of the economic policy coordination procedure. Such an approach leads to seeing what is going to happen rather than pointing the way forward in a timely and proactive manner. It does not favour the emergence of an optimal *policy mix* for the Euro area. Under the procedure for discussing draft budgetary plans, the Commission now recommends a prescriptive approach:[33] the Euro area's fiscal stance, developed in the light of the economic outlook for the Euro area as a whole, is the baseline from which the national fiscal stances must be drawn. Implemented since November 2016, this new approach where the common interest prevails over national interests has generated strong resistance from the Eurogroup. To prevent and counter criticism about the alleged economic and political bias of the stance, the Commission submits its draft position to the European Fiscal Board (EFB) –

[29] Under this provision, the contracting Member States undertake to support proposals or recommendations submitted by the Commission where it considers that a Euro area Member State is in breach of the deficit criterion in the framework of an excessive deficit procedure. This arrangement is to avoid any repetition of the political and legal crisis opened in the fall of 2003 between the Council and the Commission, following the suspension of the procedure against Germany and France.

[30] See for details: F. ALLEMAND, F. MARTUCCI, *La nouvelle gouvernance économique européenne (part 1)*, in *Cahiers de droit européen*, 2012, p. 75 *et seq.*

[31] The "fiscal stance" corresponds to the expected impact on the future economy due to fiscal and budgetary policy. See K. BAŃKOWSKI, M. FERDINANDUSSE, *Euro Area Fiscal Stance*, in *ECB Occasional Paper Series*, no. 182, 2017.

[32] F. ALLEMAND, *Les politiques budgétaires des États membres de la zone euro: nationales et communes*, in J.-M. FERRY (ed.), *Europe. Le partage public-privé en question*, Rennes: Presses Universitaires de Rennes, 2018 (forthcoming).

[33] Communication COM(2016) 727 final of 16 November 2016 from the Commission, *Towards a positive fiscal stance for the Euro area*.

an advisory committee set up in October 2015.[34] Composed of a chairperson – Niels Thygesen and four experts – the EFB must base its view on an "economic judgment" – hopefully without bias. As "science replaces politics", the European Parliament is not directly involved in the process of defining this new tool. At most, it assesses the fiscal stance for the Euro area in its resolutions on the European Semester.[35] The importance of the fiscal stance for the European *policy mix* and the conduct of fiscal policies would justify that the Commission submits it to the Eurogroup *and* the European Parliament as far upstream as possible of the opening of the national budgetary procedures, i.e. at the beginning of September and not in mid-November.

Finally, restoring the European Parliament's legislative and oversight functions would remain an uncomplete process, as long as no similar progress is made on its negotiation capacity with the Council. Some practical arrangements could be easily introduced in that way: the parliamentary committee responsible for economic and monetary affairs (ECON committee) could benefit from the support of external and multidisciplinary experts on economic governance on a more regular basis, for example prior to any discussion on a major topic or legislative proposal. A task force could be set up within the "ECON" committee for the duration of the mandate, with the mission to provide the rapporteurs with meaningful advice. It should be composed of Members of the European Parliament (hereinafter MEPs) appointed by their peers on the basis of their skills, experience and/or knowledge relevant to macroeconomics, public finances, financial services monetary policy, etc. These advisory tasks could also be conferred on a Parliamentary Office for the evaluation of economic choices, as proposed in the T-Dem (Art. 11, para. 1).

IV. If the powers of the European Parliament were reinforced, one may be surprised that all the members of the European Parliament could contribute to the exercise of the legislative functions, especially when measures applicable only to the Euro Area Member States are concerned. Unlike the situation of the representatives of non Euro area Member States within the Council, the Treaty provides for no limitation of the voting right for those MEP elected outside the Euro area. The same critique applies to the possible adoption of a Euro area budget,[36] as well as to the exercise of its oversight functions in respect of fora composed of the representatives of the Member States of the Euro area, e.g. meeting of Heads of State or Government of the Euro area, Eurogroup,

[34] Commission Decision (EU) 2015/1937 of the 21 October 2015 establishing an independent advisory European Fiscal Board, p. 37.

[35] European Parliament Resolution P8_TA(2017)0038 of 15 February 2017 on the European Semester for economic policy coordination: Annual Growth Survey 2017, paras 44-51.

[36] A. Von Bogdandy, C. Gallies, H. Enderlein, M. Fratzscher, C. Fuest, F.C. Mayer, D. Schwarzer, M. Steinbeis, C. Stelzenmüller, J. von Weizsäcker, G. Wolff ("Glienecker Gruppe"), *Towards a Euro Union*, in *Bruegel*, 25 August 2014, bruegel.org.

ESM.[37] This is paradoxical, given the current needs and trends to foster the Euro area's own interests within the EMU.

Again, EU law provides some resources to resolve this apparent conflict.[38] Nothing prevents that various accommodations be found in the European Parliament to allow MEPs elected in the Euro area Member States to address issues of common interest. The ECON committee could establish within it a sub-committee comprising its members elected in the Euro area.[39] During the parliamentary debates on the allocation of specific tasks on the ECB in prudential supervision, it was proposed that Parliament establishes a standing committee composed of members from the Member States whose currency is the euro: the function of this committee was to hear the chairman of the Supervisory Board and to examine issues related to the performance of supervisory tasks by the ECB.[40] In a similar vein, the EU regulation establishing the Single Resolution Fund provides that the Chair of the Single Resolution Board shall hold oral discussions behind closed doors with a small group of representative members of the ECON committee (e.g. chair and vice-chairs of the committee, accompanied by two members of Parliament's secretariat).[41] In addition, like the intergroup "Baltic Europe" which brings together MEPs coming from the Baltic Sea area, an intergroup "Euro area" could be established at the Parliament or at parliamentary committee level.[42] The legislative or initiative reports concerning the Euro area should also, as a matter of principle, be assigned to MEPs from Member States participating in the single currency… what is already being done in practice. For topics likely to affect non-Euro area Member States (e.g. competitiveness), a co-rapporteur from these countries would be appointed. Finally, only the parliaments of the Member States of the Euro area should ensure compli-

[37] The European Parliament's control can be exercised only in respect of institutions, bodies and fora established within the EU legal order. The control of the ESM would thus require amendment of the existing Treaty establishing it and the adoption of a Memorandum of Understanding between the ESM and the European Parliament. Another solution would be to incorporate the ESM into the legal framework of the European Union.

[38] See F. ALLEMAND, F. MARTUCCI, *The Democratic Legitimacy of European Economic Governance: The Change of the Parliamentary Function*, cit., p. 122 *et seq.*

[39] J.-C. PIRIS, *The Future of Europe: Towards a Two-Speed EU?*, Cambridge: Cambridge University Press, 2012.

[40] European Parliament, Committee on Economic and Monetary Affairs, Report COM(2012)0511 – C7-0314/2012 – 2012/0242(CNS) of 3 December 2012 on the proposal for a Council regulation conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions – Rapporteur Marianne Thyssen, Amendment No. 888 submitted by Werner Langen to Art. 21, para. 3.

[41] Art. 45, para. 7, of Regulation (EU) 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) 1093/2010.

[42] Art. 32 of the Rules of Procedure of the European Parliament.

ance with the principle of subsidiarity when legislative measures under review are based on Art. 136 TFEU. At present, parliaments of non-Euro area Member States have sufficient votes to request a review of measures applicable to the Euro area.[43]

V. The proposals outlined above do not exhaust the question of the democratisation of EMU. The European Union operates on the basis of a "constitutionally integrated structure" that interacts with its Member States.[44] The organisation of European and national competences by the EU creates an "overall responsibility" with regard to its own ability and the ability of the Member States to achieve shared goals, as laid down in Art. 3 TEU, or broad economic policy guidelines in the specific field of EMU. This overall responsibility does not lead to a blurring of roles: each party remains responsible for implementing the powers within its remit. In practice, however, the sharing of responsibilities based on the distribution of powers is a difficult task. The prevailing intergovernmental logic in EMU, with significant responsibilities attributed to institutions representing the interests of the Member States (the European Council, the Council and the Eurogroup) does nothing to disentangle these complexities. The perception is that everyone is responsible for everything, but no one is responsible for anyone else. We soon find ourselves in a situation where in fact no one is responsible for anything, except taking credit for various economic achievements.[45]

In this integration Union, the mechanisms of political responsibility are organized by each level, according to principles and arrangements of its own. Under Art. 4 TEU, the EU shall respect the national identities of Member States, inherent in their fundamental structures, political and constitutional. In this respect, it is up to each Member State to design its own oversight and accountability mechanisms. In general, over the past thirty years we have witnessed a constant erosion in the budgetary authority and oversight power of national parliaments,[46] as a result of the highly technical nature of debates and the influence of majority rule. This raises the risk that strengthening the supervisory powers of the European Parliament will only resolve the *European* aspect

[43] Each Parliament has two votes. The parliaments of the Member States outside the zone have a total of twenty votes. The threshold required to trigger the review procedure of a legislative proposal by the Commission is equal to the total number of votes in the third, namely sixteen.

[44] F. ALLEMAND, F. MARTUCCI, *La mutation de la fonction parlementaire: le rôle des parlements dans la gouvernance économique*, in L. IDOUX, J.-B. AUBY (eds), *Le gouvernement économique européen*, Brussels: Bruylant, 2017, p. 315.

[45] For a detailed analysis, see V. KLAUS, *Sauver les démocraties en Europe*, Paris: François-Xavier de Guibert Editeur, 2012.

[46] A. SCHICK, *Les parlements nationaux peuvent-ils retrouver un rôle effectif dans la politique budgétaire?*, conference *L'évolution du rôle du Parlement dans le processus budgétaire*, Senate, Paris, 24-25 January 2001.

of the democratic deficit in the Euro area and that the question of the national responsibility of governments will remain unanswered.

This point is addressed by the Six Pack and the Two Pack, which strengthen the requirements for transparency and sincerity imposed on Member States in the preparation and implementation of their budgetary policies.[47] Given the lack of technical expertise within national parliaments, the Member States have to set up independent advisory bodies responsible for monitoring budgetary rules.[48] In France, this body is the High Council for Public Finance attached to the Court of Auditors. More generally, EU law recommends that the national parliaments should be duly involved in the European Semester and in the preparation of the documentation submitted to the Commission for assessment (stability programmes, national reform programmes).[49] However, these rules are enacted in provisions with no binding effect. This incantatory character can be regretted. But we should remember that European integration is a gradual process. This invitation should therefore be seen as a sign of the EU's intention to address the matter again if no progress is observed. Indeed, a subsequent Council Regulation indicates that "reinforced coordination and surveillance should be accompanied by commensurate involvement of the European Parliament and of national parliaments as appropriate".[50] It is to be hoped that these concerns will not be forgotten in the forthcoming reforms of European economic governance. To this end, we may presume that the authors of the Draft Treaty on the democratisation of the governance of the Euro area will continue their efforts to raise the alarm as widely as possible that the Euro area is in a state of democratic emergency.

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[47] Arts 9 to 14 of Council Directive 2011/85/EU of 8 November 2011 on requirements for budgetary frameworks of the Member States.

[48] Art. 5 of Regulation (EU) 473/2013 of the European Parliament and of the Council of 21 May 2013 on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area.

[49] Recital 16 of Regulation 1175/2011, cit.

[50] Recital 6 of Regulation 473/2013, cit.

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Overviews
Special Section – Democratising the Euro Area Through a Treaty?

The "T-Dem" for Democratising the Europe's Economic and Monetary Union – A Critical Appraisal

Table of Contents: I. Introduction. – II. An intergovernmental parliamentarisation of the Euro area. – III. A new economic Constitution. – IV. Two sets of practical issues. – V. Conclusion: dark matters and alternative paths.

I. The Treaty on the democratisation of the governance of the Euro area (T-Dem) is both important and welcome. With their proposal for a Treaty on the democratisation of the governance of the Euro area, Stéphanie Hennette, Thomas Piketty, Guillaume Sacriste and Antoine Vauchez feed the crucially important, existential debate on the future of the European Union. This discussion as such is not new: democracy has been central in the debates on the EU legitimacy and the democratisation of the Eurozone has surfaced sporadically over the last 5 years, amongst scholars and political actors alike.

However, the authors of the T-Dem seek to open the door for a "fourth way" which is (arguably) more constructive and desirable than the stance of those who seek to muddle through the *status quo*, those who call for (some more explicitly than others) a *tabula rasa*, by abolishing supranational integration and reinstating international cooperation in Europe, and those who envision a federalist EUtopia, a Europe of democracy and solidarity shaped from the bottom up by citizens. This is a seductive vision which nevertheless seems, in many ways out of reach. In the current climate where EU affairs are increasingly polarizing political actors and citizens alike, we find it important to have a progressive reformist proposal which seeks to reconcile European integration and democracy. Too many social scientists, especially among specialists of EU integration, remain in their academic ivory towers observing the day-to-day functioning of the EU or, at best, making sceptical comments on the proposals for reform supported by politicians or practitioners. In today's dramatic times, where the political endeavours of the past 60 years could be undergoing a slow demise, it is more important than ever for scholars to engage with – admittedly more normative – political debates in a perspective that constructively puts forward both specific and ambitious reform proposals, designed to meet the acute challenges the EU is facing.

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Furthermore, we welcome that the four scholars take this seriously enough to propose an actual draft Treaty. This gives some fresh air to the debate on the future of the EU and reminds us that treaties are not set in stone. It is a brave way to engage with these discussions in the sense that, such a text which tries to imagine from scratch a new constitutional order (or parts of it), is likely to be criticised from all sides, and not least from the three camps (*status quo, tabula rasa*, EUtopia) mentioned above. The EU was often described as a "conservative" political system,[1] in the sense that its complex and unique features make it very hard to reform. The treaty reforms since the 1990s have evidenced this difficulty. In this regard, the T-Dem is part of an experiment which we expect to take place in vivo. We can also only welcome that the team authoring the T-Dem offers a pluri-disciplinary perspective on the matters at stake, with expertise in political science, economics and law. We see it as an attempt to challenge the exaggerated ownership of economists towards these issues, especially as far as the Economic and Monetary Union (EMU) is concerned. Asserting that democracy is the most pressing issue for the EU also means that alternative arguments offered by a large pool of social scientists should be heard.

It is easy and tempting to reduce the T-Dem to its key idea, namely the creation of an assembly composed of (mainly) members of national parliaments and which would control the policies adopted in the Euro area. Yet, the main thrust of the present commentary argues that it goes far beyond this – admittedly central – idea since it formulates proposals which, if adopted, would fundamentally change the EU's political and economic order. This, not surprisingly, makes them at the same time bold and problematic.

In the first two sections of this *Overview*, we will argue respectively that the T-Dem envisions a new parliamentary-intergovernmental political order as well as a new economic constitution for the EMU. We then move on to assess the practical issues we identify in the T-Dem in section 3. While we do not adopt the perspective of its political feasibility, we believe that discussing some practical institutional and legal implications of the T-Dem shed light on its desirability. It also addresses some unintended but potential effects of the creation of a parliamentary assembly of the Euro area. In the last section, we identify where the T-Dem could be further elaborated and claim that, given the difficulties identified in the T-Dem, we favour the alternative which consists of empowering the European Parliament (EP).

II. The T-Dem proposes to grant the parliamentary Assembly of the Euro area the power to fully govern the Euro area by strategically taking up the EU's legal vocabulary and categories and by calling for "democratic conditionality" for example.

[1] P. MAGNETTE, *Le régime politique de l'Union européenne*, Paris: Presse de Sciences Po, 2009.

Insofar, the authors aim to tackle the structural weakness of parliamentarism in the multi-level European order.[2] A large body of research shows that, notwithstanding important variation across national policies, European executives have gained autonomy *vis-à-vis* the legislative branch as national competences have been transferred to Brussels. Despite the constant empowerment of the EP and the greater involvement of national chambers in the EU policy making process over time, many key-decisions regarding European integration and EU policies remain in the hands of national executives – within the Council, the European Council and the Eurogroup. Those decisions are not subject to the control of the EP and most national legislatures prove unable to hold executive leaders accountable for their EU policy. Furthermore, the reforms of the EMU's governance introduced in the turmoil of the financial crisis, and in its aftermath, have clearly marginalised the EP and stopped the development of its powers.[3] The European Council has clearly exceeded its role in the management of the crisis, since the Art. 15, para .1, TEU states that it "shall not exercise legislative functions". Several studies have stressed the dominance of the executives in the (post)crisis management of the economic governance, leading to an erosion of representative democracy in the EU.[4] Thus, the imbalance between the executive and the legislative powers regarding European affairs, which led to the theorisation of the democratic deficit in the 1980s, is still there, despite the claim that "the functioning of the Union shall be founded on representative democracy" (Art. 10 TEU) and the new definition of the EP's role.[5] It is very clear that over the past decade, the politicisation of EU issues, especially on economic and budgetary policies, has taken place without a democratisation of the policy-making process as the EP has been side-lined in favour of intergovernmental solutions.

[2] C. HEFFTLER, C. NEUHOLD, O. ROZENBERG, J. SMITH (eds), *Palgrave Handbook of National Parliaments and the European Union*, Basingstoke: Palgrave, 2015; K. NEUNREITHER, *The Democratic Deficit of the European Union: Towards Closer Cooperation between the European Parliament and National Parliament*, in *Government and Opposition*, 1994, p. 299 *et seq.*; N. LUPO, C. FASONE (eds), *Parliaments in the Composite European Constitution*, Oxford: Hart Publishing, 2016; C. SPRUNGK, *A New Type of Representative Democracy? Reconsidering the Role of National Parliaments in the European Union*, in *Journal of European Integration*, 2013, p. 547 *et seq.*

[3] N. LUPO, C. FASONE (eds), *Parliaments in the Composite European Constitution*, cit.; C. FASONE, *European Economic Governance and Parliamentary Representation: What Place for the European Parliament?*, in *European Law Journal*, 2014, p. 164 *et seq.*; B. RITTBERGER, *No Integration without Representation. European Integration, Parliamentary Democracy and the Two Forgotten Communities*, in *Journal of European Public Policy*, 2006, p. 1211 *et seq.*

[4] B. CRUM, *Saving the Euro at the Cost of Democracy?*, in *Journal of Common Market Studies*, 2013, p. 614 *et seq.*; J. HABERMAS, *The Crisis of the European Union in the Light of a Constitutionalization of International Law*, in *The European Journal of International Law*, 2013, p. 335 *et seq.*; B. RITTBERGER, *Integration without Representation? The European Parliament and the Reform of Economic Governance in the EU*, in *Journal of Common Market Studies*, 2014, p. 1174 *et seq.*

[5] "The European Parliament shall, jointly with the Council, exercise legislative and budgetary functions. It shall exercise functions of political control and consultation as laid down in the Treaties [...]", Art. 14 TEU.

To address these flaws, the authors of the T-Dem propose to put the new Assembly of the Euro-area on an equal footing with the Eurogroup. They go even further by granting it stronger powers than the Eurogroup, in particular the capacity to propose legislation (right of initiative) and a new ordinary legislative procedure where the Assembly can eventually have the final say in case of disagreement with the Eurogroup. This prevailing prerogative of the former over the latter, also holds for the adoption of the Euro area's budget (in a similar fashion as the EP's powers on the annual budget of the EU). Finally, they consider that the Assembly should also draft the budget of the Euro-area, which exceeds in respect by far the existing competences of the EP and of most legislatures.

While seeking to strengthen European parliamentarism, the proposal is likely to reinforce above all the current intergovernmental nature of the decision-making process. The creation of an assembly made essentially of national Members of parliament (MPs) (precisely 4/5 of the either 130 or 400 Assembly's members). The authors claim that such an Assembly would better reflect the political spectrum as it would, for instance, now lean towards the left, but this is very much dependent on the context and the electoral cycle in each Member State. We believe that the Assembly is bound to reflect the same balance of power between political forces than the ones in the Eurogroup. If the Liberals, for instance, are in power in a given Member State (thus sending a liberal minister to sit in the Eurogroup), they will also have the greater number of seats among those allocated to that country within the Euro-area Assembly. Thus, only the fact that opposition would also be represented and that seats would be allocated in proportionality with Member States' populations, would introduce a change with regard to the constellation in the Eurogroup. We expect that most of the time this effect will be weak and the Assembly, composed of national MPs, will strengthen the structuring of political conflict along national lines, hence making EU more intergovernmental. One can expect MPs to have another approach than ministers to manage the Eurozone, but it is not very likely that MPs of a given country would take a position frontally opposed to that of their government; especially if they come in majority from the same party and if national interests are at play. In exceptional highly contested situations (such as discussions about the Greek bailout in Germany), national parliaments can stand up against their government, but this is the exception not the rule.

This, in fact, reflects a fundamental difficulty with the T-Dem. In a bicameral federation, like the US or Germany, the higher house of parliament represents federal states at national level, while the lower house represents citizens. The EU can be seen as a (genuine) type of bicameral system where both the Council and the EP share legislative powers with the former being the upper house representing territories and the latter being the lower house representing functional interests through political groups across

Europe.[6] This is clearly acknowledged by Art. 10 TEU that mentions a double logic of democratic representation: direct in the EP, and indirect in the Council. The EP can also be described as a supranational chamber in regard of three evolutions. First, European elections are increasingly "integrated" because of the convergence of electoral rules applied in each country, the growing role played by European parties (especially with the *Spitzenkandidaten* procedure) and of the allocation of seats that better takes into account the demography of Member States. Second, Art. 14 TEU now states that the EP represents European "citizens", and no longer European "peoples" (Art. 189 TEU, as after the Nice Treaty). Third, the EP has constantly claimed the "generality" of the European parliamentary mandate, meaning that all MEPs participate in deliberations about policies for which opt-outs exist.[7] The EP is thus increasingly called to represent citizens, and not Member States, even if European elections remain organised at the national level. The current discussions about the possibility to use part of the 73 British seats to create transnational lists for the 2019 elections follow the same trend.

The architecture put forward in the T-Dem would, on the contrary, gear the system towards the representation of territorial – here national – interests. Indeed, although the authors expect a socialisation of national MPs within the newly formed assembly, one can see from the EP's experience that this effect is quite limited when it comes to positions and votes. Nationality remains a key factor to understand legislative politics in the EP, especially on sensitive issues, even if this dimension is generally managed by political groups, and thus not very obvious in the public deliberations. If MEPs are supposed to represent European citizens and their political ideology, in practice, nationality does also matter.[8] We can therefore expect that national MPs will rather decide along national lines in a new assembly, especially when it comes to national budgets and national economic policies.

In a nutshell, the authors proposed that the T-Dem should be an intergovernmental Treaty like the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (TSCG, also called Fiscal Compact) and the European Stability Mechanism (ESM) thus further reinforcing intergovernmentalism at the root of the envisioned democratizing movement (this has further implications which we discuss below).

III. A second key dimension of the T-Dem is that alongside institutional reforms, it also implies far-reaching change in the socio-economic order of the EU. Whilst the existing EU Treaties (including the intergovernmental treaties) can be seen as constitutionalising

[6] A. KREPPEL, *Looking "Up", "Down" and "Sideways": Understanding EU Institutions in Context*, in *West European Politics*, 2011, p. 167 *et seq.*

[7] O. COSTA, *Les députés européens entre allégeances multiples et logique d'institution*, in *Journal of European Integration*, 2002, p. 91 *et seq.*

[8] J. PIRIS, *The Future of Europe: Towards a Two-speed EU?*, Cambridge: Cambridge University Press, 2012.

an ordo-liberal socio-economic order, the vision developed in the T-Dem tilts the balance towards a new order emancipated from the debt and inflation taboos.

A series of articles in the T-Dem grants the Assembly of the Euro area and the Eurogroup the right to vote over the financial assistance facility in case where the stability of the Euro area has to be preserved, like in 2010. The Assembly also takes the control of the procedures which are now falling under the surveillance cycle of the European Semester, namely the discussion of the Alert Mechanism report[9], the monitoring of national draft budgets, and recommendations for structural reforms (including their implementation). It is worth noting that the T-Dem does not mention the possible sanctions foreseen by the current legislative framework in the context of the Macro-Imbalance Procedure (MIP)[10] and the Excessive Deficit Procedure[11]. This notable absence is ambiguous: does it mean that the sanctions should not exist in the new envisioned economic order, therefore pointing to the kind of non-legally binding approach to fiscal coordination which had prevailed with the original Stability and Growth Pact (SGP)[12] from 1997? Or does it mean that the Assembly should have no say in the possible adoption of sanctions?

Overall, we find the further involvement of a parliamentary assembly in the convergence and coordination of national economies key with regard to ownership and democratic issues. First, it is the Member States – thus the governments – who are in charge of adopting policies to reach the objectives; thus it makes sense to balance this situation by the involvement of a representative assembly in the process. Also considering the importance of the decisions taken within the Eurogroup for each Member State involved, there is a need for a salient public debate legitimizing these decisions and fostering their actual implementation. Yet on-going research shows that, at the moment the coordination procedures remain a bureaucratic exercise and that ownership is strong among national administrations but much weaker among social partners and national parliaments,[13] not to mention ordinary citizens.

Another key proposal of the T-Dem is the creation of a budget of the Euro area financed by corporate tax, the base and rate of which would be determined by the Assembly. It seems that this is the only resource foreseen for the new Euro area budget. While the creation of new home resources is necessary, we suggest to also think about including existing ones, for instance the amount of the cohesion funds currently received by members of the Euro area. It seems wise that a budget should not rely on one tax alone. This proposal for a new corporate tax should be included in a boarder reflection over the way to share budgetary powers between the Assembly of the Euro Area and the EP. Again, this

[9] For more information on the Mechanism, see ec.europa.eu.

[10] For more information on the Macro-Imbalance Procedure, see ec.europa.eu.

[11] For more information on the Excessive Deficit Procedure, see ec.europa.eu.

[12] For more information on the Stability and Growth Pact, see ec.europa.eu.

[13] P. VANHEUVERZWIJN, A. CRESPY, *Macro-economic Coordination and Elusive Ownership in the European Union*, in *Public administration*, forthcoming.

is part of the coming debates about a far-reaching reshuffle of the EU budget, and the proposal could benefit from a better connection with ongoing debates on the EU's own resources (see for instance the proposals from the Monti group including ideas on a EU-wide environmental tax, financial tax or a tax on fuel). All of this is in line with the idea that the Euro area and its budget aim at improving social cohesion and convergence.

The same article stipulates that the Assembly and the Eurogroup vote to "pool public debts exceeding 60 per cent of each Euro Area Member State's GDP". This would be a major breakthrough which, as such, relates more loosely with the idea of democratizing the Euro area. The T-Dem provides no further information on which mechanism or policy should make this possible. From a formal point of view, it is surprising that such core and fundamental reforms such as the set-up of the budget and the mutualisation of debt are somehow hidden in an article on "Exercise of legislative competence". For these reasons, one may wonder whether the latter proposal in particular should really be included in the T-Dem and whether the authors should choose their battle: by including it, they possibly weaken their institutional reform proposals. At the very least, the explanatory statement should provide for the rationale underpinning the connection between democratisation and the mutualisation of debt, and the proposition should be fleshed out more in a dedicated article. If part of the debt is to be pooled for instance, one would like to know whether and how its reimbursement shall be performed via the above-mentioned budget of the Euro area.

Last but not least, the T-Dem sees a fundamental change in the way in which the European Central Bank (ECB) is currently operating. If our reading of Art. 10 is correct, it goes far beyond a simple political "dialogue". Rather, by voting for a resolution on "the interpretation of the price stability objective and the inflation target" and "approving by vote the annual report of the European Central Bank on the Single Supervisory Mechanism", it seems that the ECB would be largely supervised by the Assembly. This questions fundamentally the sacrosanct independence *vis-à-vis* majoritarian institutions. The logic of agency is at the basis of the creation of the ECB – and of most central banks – and is enshrined in the Treaties. While questioning this could be a desirable objective as such (given that the ECB does not enjoy sufficient legitimacy to play a key-role in the coordination and monitoring of Member States' budgetary policy), it seems again, oddly hidden in a short article rather than fully elaborated and endorsed by the authors.

IV. In our view, the T-Dem raises two series of issues relating to the composition of the envisioned Assembly as well as to legal/constitutional issues.

a) The proposed composition of the Parliamentary Assembly of the Euro area seems problematic in several respects.

First, while the French National Assembly for instance, has 577 members and the EP 751, the authors of the T-Dem propose an assembly composed of 400 members[14] which seems a very low number for a multi-national assembly. Since Art. 4 stipulates that one fifth of its members emanate from the EP, this would leave 320 members to represent 19 countries (for now), considering both the population and political groups. With an average of 5.5 seats or 16 seats by country and given that national parliaments have usually between 5-8 groups, this would mean that smaller groups cannot send representatives to the Assembly, which seems problematic from a democratic point of view. It seems therefore essential to include a large and pluralist sample of political actors to ensure the legitimacy of the decisions taken at the EU level.

Furthermore, the proposal assumes one main cleavage to be central: the left/right divide. While it has been true for a long time, recent research show that the pro-/anti-EU cleavage is increasingly relevant at the European level, especially when dealing with economic and budgetary issues.[15] In recent times, Social Democrats and Christian Democrats have voted together in around 90 per cent of the cases, especially because of the pressure exerted by a growing number of Eurosceptic members. After the 2014 elections, this tendency has been formalised by the emergence of the "block": for the first time since the creation of the EP, three political groups (European People's Party – EPP, Progressive Alliance of Socialists and Democrats – S&D, and Alliance of Liberals and Democrats for Europe group – ALDE) have indeed decided to form a *de facto* coalition. This agreement was challenged in December 2016 as the new EP President was elected without the votes of the Social Democrats. Those groups continue nevertheless to vote along in most cases. This gives a strong indication that that an Assembly of the Euro area would not likely work mainly along the left-right cleavage.

The problem of the allocation of seats is even more acute as far as the involvement of MEPs is concerned. A fifth of the assembly amounts to 80 seats. With currently eight political groups and 19 national delegations, one cannot understand how a fair representation would be possible. This raises major questions with regard to the link between constituencies and seats and would require a major change in the way in which we conceive representation at supranational level. Moreover, it would also fundamentally raise questions as to the democratic legitimacy of the delegations from the EP. We see from the trilogues which take place in the framework of the ordinary legislative procedure, that the involvement of only a limited number of delegated MEPs in the decision making process further increases the influence of larger and dominant political groups, thus affecting the representativeness of these small delegations.

[14] In other versions of the T-Dem proposal, the authors even suggest an Assembly restricted to 130 members. Cf. S. HENNETTE, T. PIKETTY, G. SACRISTE, A. VAUCHEZ, *Pour un traité de democratisation de l'Europe*, Paris: Seuil, 2017.

[15] S. OTJES, H. VAN DER VEER, *The Eurozone Crisis and the European Parliament's Changing Lines of Conflict*, in *European Union Politics*, 2016, p. 242 *et seq*.

Creating a new institution in the already very complex European political system certainly generates an additional bureaucratic burden and we understand the point in limiting the number of members of the new assembly. Yet, there is not really a way to go around an important number of seats if the objective is to ensure fair representation and the respect of Member States' demography (see below). The cost associated with the creation of a new parliamentary assembly may well also be a major weakness of this proposal.

Second, the authors propose to step away from degressive proportionality used so far to determine the number of seats in the EP. Although this calculation system is by far not the panacea, it has the merit of ensuring a fair representation of smaller Member States and of allowing the general use of proportional representation. In the current proposal of the T-Dem, the four largest Member states (France, Germany, Spain and Italy) would have the majority of the seats (around 57-58 per cent), namely 228 out of 400 members. Such a potential permanent domination of large Member states seems problematic, especially if, as we mentioned earlier, there are doubts that MPs would be able to consider Euro area issues from a European perspective rather than their customary national lenses.[16] It is even less judicious as one of the recurring criticism throughout the Eurozone crisis has been the domination of Germany or the double standards (in favour of large Member States) applied by the EU institutions when deciding over breaches of the Stability and Growth Pact. Moreover, this approach of the share of seats would limit the representation of smaller states, like Malta and Luxembourg, to one MP. This does not make sense if proportional representation of political forces is the rule, and it would increase the tendency of those MPs to act along national lines, in coordination with their government.

A last issue regarding the composition of the chamber relates to the election or nomination of the MPs. The T-Dem does not stipulate how they would be selected and whether they would keep a dual mandate. If so, this would be a step bringing us back to the pre-1979 situation where parliamentarians had to combine a national and a European mandate. While, in theory, it was supposed to maintain the link between citizens and Europe through those parliamentarians, in practice it was inefficient because of their lack of involvement at European level. It is not realistic for politicians to be fully involved in two assemblies: inevitably one of the two mandates suffers. So, assuming national MPs in the Eurozone parliament would still have to fulfil their national mandate and in most cases be concerned about their re-election, it goes beyond the limits of feasibility. A potential reduced involvement of MPs in the Assembly of the Euro area also creates a higher risk of sensitivity to lobbying, which would be a major issue in terms of legitimation. Finally, at a time when the holding of multiple offices is challenged even in the countries where this possibility has been tolerated and pervasive (France, Belgium),

[16] See also S. VERHELST, *The Sense and Nonsense of Eurozone level Democracy*, *Egmont Paper*, no. 70, 2014.

creating a new assembly based on the principle of a dual-mandate does not seem in line to current citizens' concerns. However, if MPs were to be elected solely for representing their constituency in the Assembly of the Euro area, their added value compared to MEPs in terms of connection with the national space would be less clear. One would also then wonder whether an indirect election (through national parliaments) is indeed more likely to bring legitimacy to the EU economic governance compared to a direct election as it takes place for MEPs.

b) A second main difficulty we see in the T-Dem relates to its legal/constitutional implications.

We are not lawyers and do accept that decision makers and treaty framers have consistently proved creative from a legal point of view once they had agreed on a political objective. Yet, two aspects raise important questions.

In the explanatory statement, the T-Dem is presented as a "complement" to the existing EU as well as other intergovernmental Treaties. Yet, many provisions in the T-Dem clearly clash with some fundamental aspects of the existing Treaties. This is the case for the mutualisation of debt, the creation of a new ordinary legislative procedure (or does it imply a reform of the existing one within the EU Treaties?), the new operating of the ECB etc. With respect to the article relating to the ECB for example, the phrase "in compliance with the Treaties on which the European Union is founded" seems void since the proposed reform fundamentally questions the principles established in the EU Treaties. Therefore, the adoption and implementation of the T-Dem does *de facto* require a reform of the EU Treaties. This goes against the authors' key point that a modification of the EU Treaties is currently not possible, and that the adoption of the T-Dem by the 19 members of the Eurozone would be easier. In fact, the adoption of the T-Dem and modification of existing Treaties would be needed, and so would be the consent of the 8 Member States who are not currently participating in the Euro.

Finally, the ratification method suggested in Art. 20 should help overcoming possible vetoes from certain Member States. If the T-Dem could be adopted, as foreseen, by only 10 out of 19 members (representing at least 70 per cent of the Euro area's population) this would create a reinforced cooperation within an already reinforced cooperation. Art. 21 states that it should be enforced only "in the contracting parties which have ratified it". But, if we interpret both articles correctly, it is virtually impossible to apply most of the foreseen provisions (Assembly, budget, pooling of debt, control of ECB, etc.) only in some Euro countries and not others, as a Monetary Union must operate uniformly. This imposes a requirement of unanimity which cannot be ignored. Another possibility is, of course, to decide that the T-Dem shall be applied everywhere once ratified by at least half of the Member States (representing at least 70 percent of the population). But, in that case, the threshold is too low given what is at stake, and, in fact, there would certainly be no political will to engage with such a procedure and no legal way to enforce it.

V. To conclude this discussion, we would like to stress why we find that further elaborations of the T-Dem should shed more light on two areas in particular, namely the new economic constitution it seems to imply, on the one hand, and the issue of the interactions between the new Euro area Assembly and the EP, on the other.

As we have already argued above, the T-Dem would gain in persuasion if the bold innovations relating to the Euro area's economic constitution were more consistently elaborated. Furthermore, we would find it interesting if the drafters of T-Dem took a stance in the crucial debate which is currently developing on the future of the EU. There are basically two approaches on that respect, starting from the same initial observation: the EU is currently deeply divided between the 19 and the 8, and this situation is no longer sustainable, as it implies economic dumping between the West and the East, due to asymmetric budgetary obligations and huge discrepancies in terms of labour costs. Hence, J.-C. Juncker proposed to integrate all EU members in the Eurozone, so as to subject them to the same obligations and to favour a convergence of their economies and social policies, and to integrate in the EU Treaty the main provisions of the fiscal compact (see his discourse on the state of the Union – 16 September 2017 – and his communication of the 6th December 2017)[17]. E. Macron, on the contrary, proposed to institutionalise a multi-speed Europe, and to develop new policies within the Euro area (Sorbonne, 26 September 2017)[18]. Since its purpose is to promote convergence and social cohesion, it seems important to know whether the T-Dem is meant to apply to 19 or 27 Member States.

Furthermore, we see the issues surrounding the EP as the main problem area of the project. Besides the fact that one fifth of the seats in the new Assembly of the Euro area should be allocated to MEPs, Art. 3, para. 2, mentions that the Assembly "shall work in close cooperation with the European Parliament" without further specification. The creation of a new assembly would have major implications with regard to, for example its established prerogatives in the framework of the European Semester or in the adoption of the EU budget. The question therefore arises as to whether the EP should be "stripped" of some of its competences. It also relates to the issue of interparliamentary cooperation within the EU. So far, it has been less than a successful endeavour as national parliaments and the EP see themselves more as competitors than as potential allies.[19] The EP has always been reluctant to embrace the involvement of national parliaments and the recent efforts of interparliamentary cooperation in the field of eco-

[17] See European Commission, *President Jean-Claude Junker's State of the Union Address 2017*, 16 September 2017, europa.eu; *Commission sets out Roadmap for deepening Europe's Economic and Monetary Union*, 6 December 2017, europa.eu.

[18] See Elysée, *Initiative pour l'Europe – Discours d'Emmanuel Macron pour une Europe souveraine, unie, démocratique*, 26 September 2017, www.elysee.fr.

[19] N. LUPO, C. FASONE (eds), *Parliaments in the Composite European Constitution*, cit.

nomic governance have been far from efficient.[20] It is difficult to imagine that this will change with the creation of a new assembly.

More fundamentally, the creation of a new assembly involving the large majority of the EU's Member States (19 out of 27) raises the question of the overall philosophy of Europe's political system. Would it be possible to re-conceive such parliamentarism in terms of upper and lower houses? In the envisioned constellation, legislative competences would be fragmented across four institutions instead of three, even five considering the Eurogroup as an additional, new institution emanating from the Council. The EU would also be equipped with no less than 5 chambers: the EP, the Council (described by the Lisbon treaty as a legislative organ), the Committee of Regions, the Economic and Social Committee, and the new Assembly of the Euro area. Implementing the T-Dem's proposal would undeniably make the overall institutional architecture of the EU more complex and this is bound to have political costs in terms of accountability, expenditures, and intelligibility of the system – and thus legitimation. It will also contribute to further institutionalise the differentiated mode of integration, but this time at the parliamentary level. The Eurozone is not the only example of differentiated integration and therefore is not the sole area where a subgroup of states is involved (Schengen, EU citizenship, enhanced cooperations etc.). It could thus open the way to parliamentarism *à la carte*.[21]

An easier, alternative path to the T-Dem would consist in empowering the EP with the type of competences foreseen for the Assembly. Some propose to empower an enlarged version of the Committee on Economic and Monetary Affairs (ECON). Another, simple, option would be to allow the EP to seat in a "Euro" configuration, that is only with the MEPs pertaining to the Euro area, and thus challenging the principle of the generality of the EU parliamentary mandate. This would be possible with a minor revision of the EU Treaties and of the internal rules of the EP, and at a low symbolic and financial cost.

In parallel, national parliaments could be granted further competences with regard to key aspects of the Euro area governance. Having systematic and detailed information about the discussions going on in the Eurogroup and the EP-Euro would allow national chambers to better control the Euro-policy of their respective government. They could be granted rights similar to those which they already own in the framework of the Area of Freedom, Security and Justice (Art. 69 TEU) and for the Police Cooperation (Art. 81 TEU). Finally, the Conference of Parliamentary Committees for Union Affairs of Parliaments of the European Union (COSAC) could also meet in a "Euro" set-up, so as to favour a good communication between national parliaments and the EP-Euro.

[20] D. FROMAGE, *European Economic Governance and Parliamentary Involvement: Some Shortcomings of the Article 13 Conference and a Solution*, in *Les Cahiers européens de Sciences Po*, 2016, p. 1 *et seq.*

[21] C. FASONE, *European Economic Governance and Parliamentary Representation*, cit.

While less bold and (arguably) less likely to create a "political shock" in the EU political system, we believe that most – if not all – the objectives spelled out in the T-Dem could be achieved in a more efficient way through this path.

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Overviews
Special Section – Democratising the Euro Area Through a Treaty?

Making Democracy the Priority in EU Economic Governance: Four Theses on the Foundations of the T-Dem Project

Table of Contents: I. Introduction. – II. Democracy and economic reforms. – II.1. Democracy needs to take priority over effectiveness in Eurozone governance. – II.2. Disentangle democratisation of the Eurozone from any particular policy program. – III. What kind of parliamentarization? – III.1. The parliamentarization of Eurozone governance requires an integrated approach. – III.2. Empower and refocus existing parliamentary institutions instead of creating new ones.

I. The T-Dem project aims to provoke a transnational debate about how the economic arrangements set up in the wake of the Eurocrisis can be put under effective democratic control; how they can be (re-)appropriated by the European people. Fundamentally, the initiative insists on the need to reverse the priority that has been given in the handling of the crisis to considerations of effectiveness over considerations of democracy; or more broadly, to reverse the priority of economic argument over political argument. Indeed, while the Economic and Monetary Union (EMU) has been saved and European economies are growing again, democracy and particularly the ability to exercise collective political choice over economic policies seems to remain the main lasting victim of the Eurocrisis. It is in this sense that the T-Dem is rightly premised on "a situation of democratic emergency".[1] For these reasons, this comment aims first of all to applaud the T-Dem project, to underline its perspective and objective, and to carry the conversation forward. At the same time, I believe that the T-Dem project, and the chances of it coming to actual political realization, are severely handicapped by two features of the project. Below I develop this claim by way of two sets of two theses, where the first thesis in each set essentially seeks to reinforce the message of the T-Dem project and to establish a ground of agreement, while the second theses mark the points on which I

[1] Direct references to the T-Dem project are to the English version of S. Hennette, T. Piketty, G. Sacriste, A. Vauchez, *Draft Treaty on the Democratisation of the Governance of the Euro Area* («T-Dem») and its explanatory statement, March 2017, as available at piketty.pse.ens.fr.

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find the strategy adopted by the T-Dem project problematic and, even, self-undermining.

II.1. Typically, the issue of democratic legitimacy only emerges as a kind of afterthought to the economic reforms that are considered essential to the stability of the Eurozone. This is particularly visible in the way that as good as all of the many reports on handling the Eurocrisis leave the question of democratic legitimacy to the final section.[2]

Also, in practice, we see that many important reforms in Eurozone policy have been introduced with democratic arrangements lagging behind. This has clearly been the case with the establishment of the European Financial Stability Facility (EFSF) and the European Stability Mechanism (ESM), and was also quite apparent in the adoption of the Fiscal Compact. And even if the European Parliament has been involved in the revision of the excessive deficit procedure and the setting up of the macroeconomic imbalances procedure and the European Semester (through the adoption of the six-pack and the two-pack), its own role in the execution has remained extremely marginal and non-binding; essentially the issue has been deferred to further consideration in the future.

Even more striking is the fact that many of the proposals that have been circulating for further Eurozone reforms, and that many consider to be inevitable in one way or another – typical examples are the introduction of an European Monetary Fund, of Eurobonds, of a European fiscal capacity and of an European unemployment reinsurance regime –, are considered to be justified by their presumed effects alone and include little or no consideration of the democratic basis on which they are to be adopted.

Obviously, however, both the reforms that have been adopted as well as those that are still floating around are deeply political in nature. They have redistributive consequences; some, hopefully many, EU citizens will benefit, but for some there will also be costs, if only in the short term. What is more, all these proposals touch upon value issues; at a minimum, they reflect different value positions on the value of European integration itself. For that reason, these policies can only become legitimate and viable if they are the product of a proper democratic process in which the whole range of political pros and cons are fully represented before an eventual decision is taken.

[2] European Council, *Towards a Genuine Economic and Monetary Union* – Report by H. Van Rompuy, in close collaboration with J. M. Barroso, J-C Juncker, M. Draghi, Brussels: European Council, 5 December 2012, available at www.consilium.europa.eu, Section V; Communication COM(2012) 777 final of 28 November 2012 from the Commission *A blueprint for a deep and genuine economic and monetary union. Launching a European Debate*, Section 4; European Commission, *Completing Europe's Economic and Monetary Union* – Report by J-C Juncker in close cooperation with D. Tusk, M. Draghi, J. Dijsselbloem and M. Schulz, 22 June 2015 (Report of the Five Presidents), Section 5; Communication COM(2015)600 final of 21 October 2015 from the Commission on steps towards Completing Economic and Monetary Union, Section 6; Commission, *Reflection Paper on the Deepening of the Economic and Monetary Union*, COM(2017) 291, Section 4.5.

It is exactly the absence of such a democratic process, which is essential for facilitating agreement on further Eurozone reforms and for evaluating the ones that have been adopted, that the T-Dem project addresses. In doing so, it does not only prioritize democracy, but it also seeks to bring into place the institutional preconditions without which any further reforms are unlikely to be adopted or, if they are somehow carried through, to be effectively implemented.

II.2. If we take the preceding argument to its logical conclusion that democratisation needs to take priority, then it is inconsistent, and indeed self-undermining, to tie such democratic reforms to a set of substantive policy proposals. As it is, that is however exactly what the T-Dem project does as it takes up a twofold objective: creating democratic accountability in the Eurozone and taking the "next necessary steps towards deepened fiscal and social convergence and economic and budgetary coordination within the euro arena". In doing so, the project adopts the typical technocratic language of necessity that has so much dominated the handling of the Eurocrisis so far. However, if democracy is indeed our priority then it cannot be premised on a particular set of policies that we require that democratic process to adopt. In the end, the critical feature of democracy, and the one that has been so dearly lost in the Eurocrisis, is the capacity to exercise political choice. And political choice requires the possibility to adopt a policy but also the option not to do so, or to adopt an alternative policy.

In other words, there may be good reasons for a Euro-area budget and for the Europeanization of corporate taxation; however, as part of these reasons is inevitably of a political nature, democratic reforms of the Eurozone should not be premised upon them. Instead, in line with common constitutional procedure, the proper way to proceed is to first democratise and only in a second stage engage in the political process to ensure the adoption of the policies desired.

Possibly the combination of these two objectives in the T-Dem project reflects the way the thinking of its authors has evolved: starting from the recognition that certain policies were highly desirable and then proceeding to the implication that these would need to be based on a much stronger democratic framework than available at present. However, as I argue, if one takes that implication seriously, it requires that one actually kicks away the ladder that has brought one there. Indeed, as the T-Dem project connects its democratic proposals to a particular policy program, they and their credibility risk being politically contaminated. Also, if people do not necessarily subscribe to an Euro-area budget, one still wants them to take the democratic reforms seriously and, potentially, subscribe to them. What is more, the present combination risks suggesting that substantial democratisation only becomes necessary once, and because, there is Eurozone budget. In contrast, I would argue that it is essential to insist on Eurozone democratisation regardless of whether future reforms are envisaged. Hence, insisting

on the priority of democratisation, I would call upon the T-Dem authors to decouple it from any policy preferences that they may have.

III.1. A major virtue of the T-Dem project is that it approaches the governance of the Eurozone in an integrated way, linking the different policy aspects as well the different levels of political decision-making. In doing so it breaks with much of the prevalent approach which, partly due to the crisis circumstances, has been markedly piecemeal and incremental in character. Typically, initiatives in economic surveillance (the European Semester) have been decoupled from crisis management (ESM) as well as from financial regulation (banking union). In terms of democratic accountability, the prevailing approach has been to separate any reforms at the national level from those at the European level. This was expressed well in the widely-echoed dictum of Herman van Rompuy that "democratic control and accountability should occur at the level at which the decisions are taken".[3] Critically, this claim presumes that the levels at which the decisions are taken can be easily disentangled.

However, if anything should have been clear from the Eurocrisis – and was indeed reinforced by the setting up of the European Semester as a cyclical and multilevel process – it is that economic decisions at the European and the national level are intimately connected. More precisely, as I have argued at length elsewhere,[4] while the European Semester has formally left national sovereignty in fiscal mattes intact, in practice it subjects national parliaments to a much-reinforced two-level game in which they are under great pressure to confirm whatever policies the government has committed to in the supranational context. At the same time, as the T-Dem project recognizes as well, we have seen a "significant strengthening of the executive capacity" at the European level. Crucially, however, much of that European executive capacity is exercised in a way that is formally non-binding and operates only in the long-term shadow of authority. In other words, while penalties are unlikely to be imposed, they always lurk somewhere in the background. At the same time, the political responsibility at the European level remains suspended between the Commission (which tries to apply the rules as good as it can) and the collective of governments where political authority ultimately continues to reside. As a consequence, it remains unclear who can be held accountability for Eurozone governance, as there remains a major accountability gap between the two institutions.

A defining feature of the T-Dem project is exactly the recognition of the deep intertwinement between national and European level decision-making in Eurozone governance. As a consequence, it is a central premise of the project that democratic accounta-

[3] European Council, *Towards a Genuine Economic and Monetary Union* – Report by H. Van Rompuy, in close collaboration with J. M. Barroso, J-C Juncker, M. Draghi, cit., p. 16.

[4] B. Crum, *Parliamentary Accountability in Multilevel Governance: what Role for Parliaments in Post-crisis EU Economic Governance?*, in *Journal of European Public Policy*, 2018, p. 268 *et seq*.

bility can only be achieved by democratic reforms that speak to both levels and improve the coordination between them. This reasoning comes to be fully embodied in the new Parliamentary Assembly the project proposes, which is composed for four-fifths by national parliamentarians and for the remaining fifth by members of the European Parliament. However, the question is whether adding a new institution is necessary and whether it would indeed benefit the Eurozone institutional order as a whole.

III.2. From a political-strategic point of view, proposing a new political institution for the EU is probably one of the surest ways to relegate one's proposals to the dustbin. But, of course, such considerations should not prevent academics from reaching that conclusion, if it really emerges as the best option available. A Parliamentary Assembly might be a great solution if we could expect it to command great authority, credibility and feelings of political identification among the citizens of the Eurozone. However, entering the game as a third institution, after the national parliament and the European Parliament, and indeed it being composed of delegates from these institutions rather than having direct elections of its own, makes it extremely unlikely that it will be able to do so.

Instead, I rather expect national parliaments to remain the primary sites of democratic identification and that the limited credibility that the European Parliament has been able to build up so far may well still surpass anything that a new Parliamentary Assembly for the Eurozone could achieve. While I thus expect the actual legitimacy gains of this Parliamentary Assembly to be limited, it may well have severe negative fallout on the performance of the existing parliamentary institutions: it will essentially take the European Parliament out of the core of EU economic governance and it offers an easy excuse for national parliaments to renege on being actively involved in Eurozone governance and relegate that to those few parliamentarians that participate in the Eurozone Assembly.

Contrary to the T-Dem project, I believe that much more democratic control can be realized by beefing up the powers of the parliamentary institutions that we have: the national parliaments, the European Parliament, and also the Interparliamentary Conference on Economic Governance that has been established for them to coordinate with each other and to dialogue with European executives. The central question is how these institutions are best empowered to bring the strengthened executive capacity in EU economic governance under democratic control again.

As I hinted already above, a crucial preliminary step in this process is that this executive capacity and its political nature are made visible; strengthening parliamentary control only makes sense if it is clear what and who needs to be controlled. As it is, EU economic governance has come to suffer from *the problem of many hands* – responsibility is shared between many actors while nobody can ultimately be *held* responsible: national governments can point to "Brussels" (and *vice versa*) and the Commission points to the Council (and *vice versa*). Hence, rather than creating new parliamentary bodies, institutional reforms are needed that underline the political nature of the decisions that are being taken

and that make it possible to attribute responsibility for them. Indeed, if there is no clear assignment of political responsibility, then increasing parliamentary powers – and certainly establishing new parliamentary institutions – is bound to be aimless. Only once it is clear where executive responsibility lies, can rights be assigned to the relevant parliamentary institutions to direct and control the exercise of those responsibilities.[5]

At the national level this requires that national governments take full responsibility for the National Reform Programmes and the Stability (or, for non-EMU members, Convergence) Programmes they adopt as part of the European Semester and that they are also fully accountable for them to their national parliament. Thus, these programmes need to be discussed in parliament before they are submitted to Brussels with parliamentary rights to amend and approve them. At this point, we know that about one-third of the EU parliaments is not even properly informed about these programmes and that only the Latvian *Saeima* effectively has the power to amend and approve the plans before they are send off.[6]

At the European level, the same strategy underlines the importance of the proposal to establish a "European minister of economy and finance".[7] Rather than that such a figure is seen as a means towards further economic centralization, it needs to be regarded as an essential step to give a face and a voice to the central economic and financial decisions that are already taken by the executive complex of Council and Commission. The presence of such a Minister, who would be subject to the accountability procedures of the Commission at large, is an essential precondition for the European Parliament to get any effective involvement in and leverage over the EU's economic strategy. The Minister can also ensure the full involvement of the European Parliament in the yearly definition of the EU's economic policy priorities, which ideally would be subject to political approval of both the Member States in the Council and the European Parliament.[8]

Even if one adds to the T-Dem programme this focus on assigning executive responsibility, there remain two aspects for which one may still want to insist on the desirability of a new Parliamentary Assembly. The first of these is the fact that the European Parliament also includes members from non-EMU countries, while the new Parliamentary Assembly would only include delegates from the Euro area. Naturally, it would be odd if the decisive votes on EMU-matters would be struck by delegates from non-EMU States. Hence, if the European Parliament is to get any effective powers in the gov-

[5] See also B. CRUM, *Parliamentary Accountability in Multilevel Governance*, cit., p. 278 *et seq*.

[6] European Parliament, Directorate-General for Internal Policies, *Involvement of the National parliaments in SCPs and NRPs – 2014, 2015 and 2016* – Study by the Economic Governance Support Unit, Brussels: European Union, 2017, PE 497.743, available at www.europarl.europa.eu.

[7] Commission, *A European Minister of Economy and Finance*, COM(2017) 823 final.

[8] Cf. the European Parliament's own proposal for so-called "Convergence Guidelines" in: European Parliament Resolution P8_TA(2015)0238 of 24 June 2015 on the review of the economic governance framework: stocktaking and challenges.

ernance of the Euro area, it is logical to require it to establish a format, "a Euro-plenum", in which it convenes only with the Euro area delegates. Notably, however, Europarliamentarians resist such a partitioning of its membership, insisting that it undermines their self-understanding as representatives of the EU people as a whole rather than as delegates of national constituencies. This position is reinforced by the fact that many Euro area decisions (think for instance of the containment of financial sector risks) have significant spillover effects on non-Euro members. For this reason, it makes sense to complement the establishment of an Euro-plenum by some kind of oversight procedure for the European Parliament as a whole. Indeed, in an ever more differentiating Union, the European Parliament is well-advised to develop such devices if it is not to be left out in the cold on many newly emerging European powers.

The second remaining concern involves the coordination between, and intertwinement of, national and European powers. With its mixed composition, the Parliamentary Assembly appears to address exactly this defining feature of Euro governance. Then again, experience shows that it is extremely difficult to define a voting key within such an institution that is deemed legitimate by all (national and European) parliaments involved, with the risk that in the end so many veto-positions are built in that decision-making becomes effectively impossible.[9] More fundamentally, however, there is no corresponding across-level executive actor for such an across-level parliamentary assembly to address. Instead, it is rather to call upon both European-level and national-level actors, whose main accountability forums remain their own, European or national, constituencies. In this light, the governance of the Euro area certainly calls for much more coordination between parliaments at the national and the European level. This should indeed be the vocation of the Interparliamentary Conference on Economic Governance, and its purpose will be much strengthened if its constituent members attain more substantial powers. However, the assignment of any concrete powers over a Eurozone budget and a corporate tax rate to an intermediate body like the proposed Parliamentary Assembly risks only contributing to the fudge that the governance of the Euro-area is already at present.

Ben Crum*

[9] Cf. C. FASONE, *Ruling the (Dis-)Order of Interparliamentary Cooperation? The EU Speakers' Conference*, in N. LUPO, C. FASONE (eds), *Interparliamentary Cooperation in the Composite European Constitution*, Oxford: Hart Publishing, 2016, p. 269 *et seq*.

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Overviews
Special Section – Democratising the Euro Area Through a Treaty?

Genuine Economic and Monetary Union Will Be Federal or It Will not Be

Table of Contents: I. Introduction. – II. Genuine EMU. – III. Wrong Method. – IV. Right Direction.

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.

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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 Valery 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 are 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 parliamentarian 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 democratisation 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.

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[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.

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Overviews
Special Section – Democratising the Euro Area Through a Treaty?

Comments on the Draft Treaty on the Democratisation of the Governance of the Euro Area

Table of Contents: I. The main concerns of the T-Dem initiative. – II. Europe in troubled waters. More Europe the solution? – III. No alternative?

I. The explanatory statement to the Draft Treaty on the Democratisation of the Governance of the Euro summarises in less than 1000 words the uneasiness with the *praxis* of European crisis politics.[1] The outrageousness which Böckenförde observed back in 2010 has become a trademark of a plethora of measures taken since then.[2] Suffice it here to emphasise three points:

a) The first concerns the equality and political dignity of the Member States of the EU. This is a principle which defines the Union as Union. Sadly and tellingly, it has not only been disregarded by European politics, but it has also – in particular – been neglected by the German Constitutional Court in its judgment on the rescue package for Greece of 11 September 2011,[3] where it defended the budgetary power of the German *Bundestag* while, by the same token, not caring at all for the rights of the Greek Parliament.[4] More widely noticed are the measures – all too euphemistically called memorandums of understanding. To be sure, they were legalised by the amendment of Art. 136 TFEU in 2011.[5] My

[1] Explanatory statement to the Draft Treaty on the Democratization of the Governance of the Euro, available at piketty.pse.ens.fr.

[2] E.-W. Böckenförde, *Kennt die europäische Not kein Gebot? Die Webfehler der EU und die Notwendigkeit einer neuen politischen Entscheidung*, in *Neue Züricher Zeitung*, 2010, p. 305 *et seq*.

[3] German Federal Constitutional Court, judgment of 7 November 2011, 2 BvR 987/10.

[4] C. Joerges, *Der Berg kreißte – gebar er eine Maus? Europa vor dem Bundesverfassungsgericht*, in *WSI-Mitteilungen*, 2012, p. 560; M. Everson, *An Exercise in Legal Honesty: Rewriting the Court of Justice and the Bundesverfassungsgericht*, in *European Law Journal*, 2015, p. 474 *et seq*.

[5] European Council Decision of 25 March 2011 amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro, Art. 1, para. 3: "The Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole. The granting of any required financial assistance under the mechanism will be made subject to strict conditionality".

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point here is that the *praxis* of conditionality is irreconcilable with the foundational values of the European project. Europe is not to transform the principles of equality, mutual respect and co-operation into command-and-control relationships. This constitutes an unacceptable intrusion into the practice of democratic political will-formation.[6]

b) Democracy was not, and could not be, in the DNA of the Treaty of Rome and the European Economic Community (EEC). However, it has been a shared understanding throughout both the affirmative and critical assessment of the technocratic legacy of the integration project that Europe must not pervert democratic constitutionalism into technocratic rule. It has to justify, and, by the same token, to de-limit the resort to non-majoritarian institutions. The executive summary highlights a significant strengthening of the executive capacity of European institutions in the field of economic policy. The upshot here is the strengthening of the power of the European Central Bank. The assumption that a Bank or the European System of Central Banks, which is not legitimated by a democratic vote and cannot be held accountable by Europe's citizens, can be empowered to take far-reaching distributional decisions and intervene even if it is only indirectly or behind a veil of public inadvertedness in policy fields in which the Union lacks powers, is simply indefensible.[7]

c) A comprehensive list of queries would be much longer.[8] The *de facto* by far most important means by which the constitutional transformation was accomplished was the replacement of the Community method by what the German Chancellor has characterised as the Union method. To be sure, resort to international law has occurred throughout the history of the integration project. However, it has never been so spectacular and so obviously beyond the commitments of the Union to the rule of law and democracy.

The Union method is for very good reasons the focus of the explanatory memorandum. The response to it is a U turn: "the 'T-Dem' replicates the *modus operandi* of both the TSCG and the ESM Treaty [the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union and the Treaty Establishing the European Stability Mechanism] (as validated by the Court of Justice of the European Union in its *Pringle* ruling from November 2012) to address the financial crisis but does so in order to engage in a democratising effort".[9] Alternative conditionality is the submitted alternative to the TINA (There Is No Alternative) message repeated *ad nauseam* by Chancellor Merkel throughout the long years of crisis politics. It is a response with analytical and normative strength. This strength stems from the implicit acknowledgement that the finan-

[6] A. Albi, *Erosion of Constitutional Rights in EU Law: A Call for 'Substantive Co-Operative Constitutionalism'*, in *Vienna Journal of International Constitutional Law*, 2015, p. 151 *et seq.*

[7] J. White, *Authority After Emergency Rule*, in *Modern Law Review*, 2015, p. 589.

[8] C. Joerges, *Pereat iustitia, fiat mundus: What is Left of the European Economic Constitution After the OMT-Litigation*, in *Maastricht Journal of European and Comparative Law*, 2016, pp. 112-116.

[9] Explanatory statement, cit., p. 2.

cial crisis has generated an emergency.[10] Quite obviously, a "return to the rules" as they had been established prior to both the crisis and nearly a decade of hectic activities and the production of hundreds of pages of legal texts.[11] It cannot be made undone, but it can be changed. This message is encouraging. But how about its normative credentials and its political realism?

II. The life of the integration project has been a life with crises which at the end have always strengthened the Union. We know this mantra. Whenever Europe is in difficulties, the proper reaction has always been and should be: more Europe. What sounds so familiar has become essentially unbelievable. The cascade of crises to which we are exposed is of such magnitude and depth that we cannot count on some miraculous constitutional moment but should first expose ourselves to a theoretical moment, long enough to discuss intensively the conditions and prospects of a re-invention of our project. Pertinent efforts are under way. The one on which I focus in the following remarks is Daniel Innerarity's *Philosophy of the European Union*, because of both the inherent qualities of this study and also because of its theoretical orientation.[12] Innerarity's ambition resonates perfectly well with the intentions of the T-Dem initiative. He provides us with a new vision of the future of democracy in the Union. However, this is by no means a one-sided relationship. The T-Dem may open avenues for a realisation of this Philosophy of the European Union.

The indicators of such complementarity are manifold. Among the countless proposals for the future of Europe, T-Dem is the one most credibly pursuing a commitment to democracy. This credibility stems from the exposure of all the involved disciplines, law, political science, sociology, even economics, to democratic values and claims. In its institutional suggestions, the T-Democracy proposal takes up the main concerns of the critics, namely, the critique of technocratic rule with its pretence of infallible or incontestable, sacrosanct expert knowledge; the insolation of this type of rule against democratic objections and accountability claims by the establishment of a co-operative parliamentary body (the "Parliamentary Assembly of the Euro" entrusted with "the final say on the vote of the Euro area budget, the base and rate of corporate tax, and any other

[10] Böckenförde's (see *supra*, note 2) reference to this category is by now no longer exceptional; cf. K. Dyson, *Sworn to Grim Necessity? Imperfections of European Economic Governance, Normative Political Theory, and Supreme Emergency*, in *Journal of European Integration*, 2013, p. 207 *et seq.*; J. White, *Emergency Europe*, in *Political Studies*, 2015, p. 659 *et seq.*; C. Kilpatrick, *On the Rule of Law and Economic Emergency: The Degradation of Basic Legal Values in Europe's Bailouts*, in *Oxford Journal of Legal Studies*, 2015, p. 325 *et seq.*; C. Kreuder-Sonnen, *Beyond Integration Theory: The (Anti-)Constitutional Dimension of European Crisis Governance*, in *Journal of Common Market Studies*, 2016, p. 1350 *et seq*.

[11] The compilation of *The Key Legal Texts of the European Crises* by Fernando Losada and Agustín José Menéndez comprises 795 pages. The collection is available at www.sv.uio.no.

[12] D. Innerarity, *Democracy in Europe. A Political Philosophy of the EU*, London: Palgrave Macmillan, 2018 (forthcoming).

legislative act foreseen by the T-Dem").[13] As already underlined, the idea of an alternative conditionality does not seek to do away with the co-ordination within European economic governance, but exposes its exercise to political contestation and requirements of democratic accountability.

Daniel Innerarity's *Political Philosophy of the EU* operates on more abstract theoretical levels and over much longer time horizons. His analysis is not restricted to the last decade but identifies a series of deficiencies of the integration project, which were partly dormant for a long time, and partly triggered by the conflict constellations of the recent crises. Innerarity is, of course, not the first philosopher to build bridges between the debates on Europe as they unfold in the various disciplines – law, political science, sociology, political economy – and philosophical enquiries into the legitimacy of a transnational polity. His philosophical agenda is, in significant aspects, indebted to the Habermasian theory of deliberative democracy and Habermas' anti-technocratic normativism. However, he is much more specific and realistic in his democratic visions than Habermas with the latter's ideas about the dual national and European citizenship as the basis and source of a transnational European democracy.[14] Throughout his discussion of the various dimensions of the *problématique* of a democratisation of Europe, he underlines that this project has to do justice to both the complexity of the European system and the interdependencies which the integration process has generated. The message of the book throughout the whole range of issues that it addresses is inspired by the analytical and normative implications of these insights: the complexity of Europeanisation has a democratic potential, which needs to be spelled out analytically and used politically. Implicit in this message is a critical stance. The lack of such perspectives in so many domains of European studies contributes to their fallacies and impasses in their responses to the critical state of the EU and of transnational governance in general.

In these perceptions, Innerarity's arguments deploy significant affinities with the *Draft Treaty on Democratisation*. What we are witnessing today is a regressive re-establishment of strict disciplinary boundaries. While economists have become the principle advisors of political leaders, they tend to restrict themselves to functionalist arguments; political scientists try to polish up their outlived integration theories; lawyers forget about the normative *proprium* of their medium and content themselves with meticulous descriptive accounts of ongoing transformations. Under such conditions, a philosophical voice, which insists on the need for renewed analytics and concepts, is a valuable interlocutor for the protagonists of a democratic conditionality. While they will appreciate Innerarity's normative concerns, the latter can draw upon their institutional suggestions in the further elaboration of his visions.

[13] Explanatory statement, cit., p. 2.

[14] J. HABERMAS, *European Citizens and European Peoples: The Problem of Transnationalizing Democracy*, in *The Lure of Democracy*, Cambridge: Polity Press, 2015, p. 29 *et seq*.

III. Should all of these affinities imply a common deficiency when reminded of Hegel's *Ohnmacht des Sollens*? Such concerns have indeed to be taken seriously. They can be specified with the help of a passage from Karl Polanyi's *Great Transformation*. What Polanyi tried to explain was the destruction of liberal economic ordering by Fascism and Nazism. However, the end of the Second World War nurtured hopes in a better national and international future.

> "[W]ith the disappearance of the automatic mechanism of the gold standard, governments will find it possible to [...] tolerate willingly that other nations shape their domestic institutions according to their inclinations, thus transcending the pernicious nineteenth century dogma of the necessary uniformity of domestic regimes within the orbit of world economy. Out of the ruins of the Old World, cornerstones of the New can be seen to emerge: economic collaboration of governments *and* the liberty to organize national life at will".[15]

The passage is extraordinary for three reasons. For one, it replicates the Polanyian argument that the capitalist market economy is not an evolutionary accomplishment, let alone an autonomously functioning machine, but a political product – "*laissez-faire* was planned"[16] – which requires institutional backing and continuous political management. "The political" is inherent in "the economic" – markets are "polities".[17] A second insight follows from this: capitalist market economies will exhibit varieties, which mirror a variety of political preferences and socio-economic conditions. This is what he means when he says that our societies enjoy the "liberty to organize national life at will. The third is only alluded to in half a sentence: Polanyi advocates a "collaboration of governments". This is a political vision below or beyond the elimination of divergences. Let us first glance briefly at the second insight.

Since the varieties of capitalism studies were initiated by Peter A. Hall and David Soskice in 2011, Polanyi's second point has become common knowledge. These studies both confirm and underline that the operation of market economies is not uniform because their institutional configurations vary significantly. What they neglect are ideational commitments, cultural traditions and normative aspects, which accompany and orient the ordering of the economy.[18] Both the authors of the Draft Treaty on the De-

[15] K. POLANYI, *The Great Transformation: The Political and Economic Origins of Our Time*, Boston: Beacon Press, 2001, pp. 253-254 (emphasis in original).

[16] "[...] planning was not", *ibid.*, p. 147.

[17] F. BLOCK, *Towards a New Understanding of Economic Modernity*, in C. JOERGES, B. STRÅTH, P. WAGNER (eds), *The Economy as Polity: The Political Construction of Modern Capitalism*, London: Cavendish, 2005, p. 3 *et seq*.

[18] The democracy notion captures these aspects in similar ways; cf. K. NICOLAÏDIS, M. WATSON, *Sharing the Eurocrats' Dream: A Democratic Approach to EMU Governance in the Post-Crisis Era*, in D. CHALMERS, M. JACHTENFUCHS, C. JOERGES (eds), *The End of the Eurocrat's Dream,* Cambridge: Cambridge University Press, 2016, p. 50 *et seq.*; F. CHENEVAL, F. SCHIMMELFENNIG, *The Case for Democracy in the European Union*, in *Journal of Common Market Studies*, 2013, p. 334 *et seq*.

mocratisation of the Governance of the Euro and Daniel Innerarity in his *Political Philosophy of the EU* seem in this respect to be more sensitive. Be that as it may, I do believe that these aspects have to be taken into account. They are, in my view, an indispensable element of an adequate understanding of the economic, in particular in view of the diversities within the European space. The work of economic historians such as Werner Abelshauser and the path-breaking comparative law studies of Gunther Teubner emphasise that culture tends to be remarkably resistant to imposed change.[19] Both underline that interventions into the respective social and institutional fabric of European economies can hardly be subtle and fine-tuned enough to accomplish the desired re-orientation.[20]

Against this background, the difficulties of European crisis politics with the imposition of structural, convergence of the southern with the northern economies of the Eurozone is anything but surprising. There is a normative side to these historical, sociological and legal findings: command-and-control interventions, which are guided by the presumption that one size will fits all, are accompanied by the risk of destructive effects. The imposition of changes with disintegrative impact is not only unwise it is also illegitimate. I submit that the normative fabric of the economic orders within Member States on which the proper functioning of their economies rests deserves to be recognised as a "*social acquis*".[21] The *social acquis* is a moving target. To respect it would not mean to petrify national constellation but to strengthen the political autonomy of political preferences and social orientations, generated and formed by specific historical experiences, political contestation and societal learning and continuous political decision-making. It has to be added that the *social acquis* has not only been threatened by European crisis politics of 2007-2008 but also by the jurisprudence of the CJEU which, only shortly prior to the beginning of the financial crisis, subjected the labour law and related welfare of the Member States to the economic freedoms.[22] A protection of the *social acquis*

[19] W. ABELSHAUSER, *Kulturkampf. Der deutsche Weg in die neue Wirtschaft und die amerikanische Herausforderung*, Berlin: Kadmos, 2003; W. ABELSHAUSER, D. GILGEN, A. LEUTZSCH, *Kultur, Wirtschaft, Kulturen der Weltwirtschaft*, in W. ABELSHAUSER, D. GILGEN, A. LEUTZSCH (eds), *Kulturen der Weltwirtschaft*, Göttingen: Vandenhoek & Ruprecht, 2012, p. 9 *et seq.*; G. Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Differences*, in *Modern Law Review*, 1998, p. 11 *et seq.*

[20] A. HASSEL, *Adjustments in the Eurozone: Varieties of Capitalism and the Crisis in Southern Europe*, in *LSE Europe in Question Discussion Paper Series*, no. 76, 2014.

[21] Cf. F.W. SCHARPF, *After the Crash. A Perspective on Multilevel European Democracy*, in *European Law Journal*, 2014, p. 384 *et seq.*; M. HÖPNER, A. SCHÄFER, *A New Phase of European Integration: Organized Capitalisms*, in *West European Politics*, 2010, p. 344 *et seq.*; W. STREECK, *E Pluribus Unum? Varieties and Commonalities of Capitalism*, in *MPIfG Discussion Papers*, no. 12, 2010.

[22] Cf., (in)famously, Court of Justice, judgment of 11 December 2007, case C-438/05, *International Transport Workers' Federation, Finnish Seamen's Union v. Viking Line ABP, OÜ Viking Line Eesti* [GC]; Court of Justice, judgment of 18 December 2007, case C-341/05, *Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan und Svenska El-*

would require a European judicial restraint in labour law issues, which, according to the Treaty, remain a prerogative of the Member States.[23]

Further queries follow from this. One concerns the effect of democratisation. The opening up of by now authoritatively ordered vertical and horizontal conflict constellations in the realms of economic and financial policies would lay bare conflicts of interests and of policy preferences among the affected national and European actors and institutions. It is the specific characteristic of democratic processes and political contestation that their outcome is unpredictable. It seems also quite likely that such openness would require a loosening of the disciplining powers of the common currency.[24] The unwillingness to embark on such an unchartered sea, however, is by no means a guarantee for political and social peace, not even for economic stability.[25]

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ektrikerförbundet [GC]; Court of Justice, judgment of 3 April 2008, case C-346/06, *Rechtsanwalt Dr. Dirk Rüffert v. Land Niedersachsen*.

[23] For an elaboration of this point, J. BAST, F. RÖDL, J. TERHECHTE, *Funktionsfähige Tarifvertragssysteme als Grundpfeiler von Binnenmarkt und Währungsunion*, in *Zeitschrift für Rechtspolitik*, 2015, p. 230 *et seq*.

[24] See on these implications and conceivable responses F.W. SCHARPF, *Vom asymmetrischen Euro-Regime in die Transferunion und was die deutsche Politik dagegen tun könnte*, in *MPIfG Discussion Papers*, no. 15, 2017; F.W. SCHARPF, *Forced Structural Convergence in the Eurozone*, in *MPIfG Discussion Papers*, no. 15, 2016; F.W. SCHARPF, *De-Constitutionalization and Majority Rule. A Democratic Vision for Europe*, in *MPIfG Discussion Papers*, no. 14, 2016; most recently, F.W. SCHARPF, *International Monetary Regimes and the German Model*, in *MPIfG Discussion Papers*, no. 1, 2018.

[25] The T-Dem initiative has recently gained prominent support: D. RODRIK, *Sans la création d'un budget européen, Macron ne peut réussir*, in *La Tribune*, 12 May 2017, www.latribune.fr. Rodrik underlined his agreement with the characterization of Macron's "yesterday's Europe" in T. PIKETTY, *Straight Talk on Trade. Ideas for a Sane World Economy,* Princeton and Oxfords: Princeton University Press, 2018, p. 73. Piketty added: "If European democracies are to regain their health, economic integration and political integration cannot remain out of sync. Either political integration catches up with economic integration or economic integration needs to be scaled back". *Ibid.*, p. 76.

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Overviews
Special section – Democratising the Euro Area Through a Treaty?

A New Parliamentary Assembly for the Eurozone: A Wrong Answer to a Real Democratic Problem?

Table of Contents: I. A crucial European debate. – II. The nature of the democratic problems of the European Union and the Eurozone. – III. Five limits of the proposed new Parliamentary Assembly.

I. The book *Pour un traité de démocratisation de l'Europe*[1] by Stéphanie Hennette, Thomas Piketty, Guillaume Sacriste, and Antoine Vauchez has a very important merit. It raises and frames a debate on what probably is "the" problem of European democracy in the recent years. The book correctly places itself at the European level, as it has been published in many European languages (French, Italian, German, Dutch, and Portuguese; not yet in English) and diffused by several first-class publishing houses. In France, the book is well known and the proposal therein has been debated during the 2017 presidential electoral campaign. It was firstly supported by Benoît Hamon and then used, although less explicitly, by Emmanuel Macron. In Italy, the book has been distributed in a bundle with a daily newspaper, *Corriere della Sera*. The distribution in a bundle with such a daily newspaper was a channel that until the last ten to fifteen years ago, i.e. before the internet revolution and the diffusion of social media, was deemed as the best way to reach a high and medium level public, contributing to the formation of public opinion. There is a reason for the book's success, as it clearly addresses a crucial issue of current political debate and offers a solution.

In my opinion, the first part of the book, which identifies the democratic problems in the Eurozone, is well conceived and should be read widely both within the academic world (possibly stimulating interdisciplinary debates, consistently with the different academic fields covered by the four authors) and amongst the general public. As is remarked below (see *infra*, section II), the democratic problems of the EU and of the Eurozone have been often depicted in the wrong way. An incorrect diagnosis has not avoid-

[1] S. Hennette, T. Piketty, G. Sacriste, A. Vauchez, *Pour un traité de démocratisation de l'Europe*, Paris: Seuil, 2017.

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ed the production of the negative effects on the features and the dynamics of European and national democracies. This book, instead, proposes a correct diagnosis of the European democratic problems.

The second part of the book proposes a new "Draft Treaty on the democratization of the governance of the Euro area" (T-Dem). This part is less convincing. Although well-presented and carefully drafted, the proposal to establish a new assembly for the Eurozone, composed of four fifth of national members of Parliament (MPs) delegated by national parliaments from the Eurozone and of one fifth of members of the European Parliament (MEPs), presents a series of limits. These limits are highlighted in section III. Nevertheless, the proposal has at least the merit to move the debate to concrete grounds. Thereby avoiding an overly abstract discussion on a question that needs a real solution in the near future.

II. The book begins with a clear and effective analysis of the democratic problems of the Eurozone. The book criticizes the democratic credentials of the Eurozone institutions; the Eurozone governance developed in a dead corner of the political oversight, in a kind of a democratic black hole. Moreover, it poses the right questions: who assesses the decisions taken by the Euro-summit (the body composed of the Heads of State and government of the Eurozone); and who knows what is negotiated within the Eurogroup and its working committees? The book provides a sad, but absolutely correct answer to these questions: neither national parliaments nor the European Parliament. National parliaments, in fact, manage to oversee, in the best of cases, their own Government, while the European Parliament is placed in a marginal position of the Eurozone governance.

According to the book, this institutional setting affects the features and priorities of the economic policies pursued in the Eurozone. In fact, it overestimates the mechanisms aimed at pursuing financial stability and trust of the markets and underestimates issues that are more interesting for most, such as employment, growth, fiscal convergence, social cohesion and solidarity. Finally, the Eurozone governance is not "a Europe like the others". It is no longer suited to organize a big market, but to coordinate economic policies, harmonise taxation and ensure the convergence of budgetary policies. Thus, it influences and alters the core of the Member States' social pacts.[2]

Furthermore, there is almost no reference to the expression that is commonly used, in Italy and elsewhere, to identify the democratic problems of the EU and the Eurozone, the so-called "democratic deficit".[3] This expression and the diagnosis that it entails are

[2] These two paragraphs synthetize, in English, some of the contents of the first chapter of the book (taken from the original French version).

[3] Indeed, the expression "democratic deficit" appears a couple of times in the comments of the T-Dem draft Treaty; with reference to the dismantling of the EU and to the budgetary process.

partial, if not wrong, and have led to some remedies that did not solve the democratic problems of the EU.

"Deficit" means that something is lacking. If we look at the "amount" of democracy in the EU, its institutions and Member States, it would be difficult to affirm, especially when comparing Europe with other parts of the globe, that in Europe, there is not enough democracy or a lack thereof. On the contrary, some could even remark, especially when observing Europe from the outside, that there are even too many elections and democratic moments that matter for the definition of the general political direction of the EU. Thus, that there is a kind of "democratic surplus", according to a "deliberative-participatory democracy" model, through civil society participation to administrative bodies and policymaking;[4] or at least, more plausibly, a problem in coordinating the many different and coexistent democratic dynamics within the EU.

The fact that the "democratic deficit" diagnosis was partial, if not mistaken, is demonstrated by the deceiving results generally achieved by the main solutions utilized. The process of constant and progressive empowerment of the European Parliament, although important for legitimising the EU legal order and its normative acts, has not been sufficient to get rid of the democratic problems of the EU. This is demonstrated by the constantly declining turnout to the European Parliaments' election.[5]

The EU democratic problems need to be identified not as a lack of democracy, but as a failure of traditional democratic instruments to work with the EU dynamics. Since the beginning, the European integration process has endangered and hollowed out the mechanisms and procedures of political responsibility and parliamentary accountability at the Member State level. Thanks to the good functioning of these mechanisms, the decisions taken by each national Government were deemed legitimate due to their indirect roots in general will, deriving from the link between the Government and the Parliament. Indeed, the crisis of political responsibility and parliamentary accountability has vital consequences for the democratic legitimacy of the EU, as the foundation of its legitimacy still depends on the "legitimising structures and normative principles" of the post-war constitutional settlement of administrative governance. Consequently, instead of a "democratic deficit", it is more correct to speak of a "democratic disconnect".[6]

[4] A. PSYGKAS, *From the Democratic Deficit to a Democratic Surplus: Constructing Administrative Democracy in Europe*, New York: Oxford University Press, 2017, p. 3 *et seq.* (where there are also references to the previous debate about the existence of a "democratic deficit").

[5] See, for all, O. ROZENBERG, *L'influence du Parlement européen et l'indifférence de ses électeurs: une corrélation fallacieuse?*, in *Politique européenne*, 2009, p. 7 *et seq.* On the insufficiency of the empowerment of the European Parliament, also at the light of Art. 10 TEU, see A. MANZELLA, *The European Parliament and the National Parliaments as a System*, in S. MANGIAMELI (ed.), *The Consequences of the Crisis on European Integration and on the Member States*, Cham: Springer, 2017, p. 47 *et seq.*

[6] See P.L. LINDSETH, *Power and Legitimacy. Reconciling Europe and the Nation-State*, New York: Oxford University Press, 2010, spec. p. 12 *et seq.* (identifying a "disconnect between supranational regulatory power

The mechanisms and procedures of political responsibility and parliamentary accountability face difficulty in adapting to EU dynamics. The EU Executive is "fragmented, as it is composed of the Commission, the Council, the European Council, each national Government, and the European Central Bank".[7] This means that it is weak, as it requires complex and burdensome procedures to reach an actionable decision, but at the same time powerful, as it is extremely easy for any of its components to escape from political responsibility and parliamentary accountability. The game of "shifting the blame" has become attractive and frequently practiced in the EU. Clearly, it inserts a series of hurdles in the very delicate democratic mechanisms of European democracy.[8]

The EU integration process has significantly altered even the times and the rhythms of parliamentary democracy. As it has been remarked by political scientists, in the EU, there is the "absence of a dominant overarching cycle, comparable to the electoral cycle in national democratic systems". Simultaneously, the EU institutions are "highly sensitive to influences from the member states, notably the timing of elections in major member states".[9] Reciprocally, at the Member State level, the traditional rhythms of parliamentary democracy no longer function: "moments of decision-making become irregular and unpredictable, leaving opposition at a significant disadvantage"; "though the rhythms characteristic of representative democracy do not disappear, they are marginalized, disrupted and squeezed, and lack synchrony with one another, leaving political oppositions weak and fragmented".[10]

Of course, this kind of – qualitative, not quantitative – democratic problem while still bearable for the original aims of the EU and the limited number of policies required to achieve them, has become intolerable when the aims of the European project have expanded. The choice to adopt a common currency, and therefore, a common monetary

on the one hand, and national democratic and constitutional legitimacy on the other"). See also the *Special Book Review Symposium* on this book hosted by *European Constitutional Law Review*, 2012, p. 128 *et seq*.

[7] See D. CURTIN, *Executive Power of the European Union. Law, Practices, and the Living Constitution*, Oxford: Oxford University Press, 2009, spec. p. 28 *et seq.*; D. CURTIN, *Challenging Executive Dominance in European Democracy*, in *Modern Law Review*, 2014, p. 1 *et seq.*; B. CRUM, D. CURTIN, *The Challenge of Making EU Executive Power Accountable*, in S. PIATTONI (ed.), *The European Union: Democratic Principles and Institutional Architectures in Times of Crisis*, Oxford: Oxford University Press, 2015, p. 63 *et seq.* See also European Parliament, Directorate General for Internal Policies, Policy Department C: Citizens' Rights and Constitutional Affairs, *Democratic Control in the Member States of the European Council and the Euro Zone Summits* – Study by W. Wessels, O. Rozemberg, Brussels: European Union, 2013, and, more specifically on the Eurozone, B. CRUM, *Parliamentary Accountability in Multilevel Governance: What Role for Parliaments in Post-Crisis EU Economic Governance?*, in *Journal of European Public Policy*, 2018, p. 268 *et seq.*

[8] S.B. HOBOLT, J. TILLEY, *Blaming Europe? Responsibility Without Accountability in the European Union*, Oxford: Oxford University Press, 2014.

[9] K. GOETZ, *Political Leadership in the European Union: A Time-Centred View*, in *European Political Science*, 2017, p. 48 *et seq.*

[10] J. WHITE, *Politicizing Europe: The Challenge of Executive Discretion*, in O. CRAMME, S.B. HOBOLT (eds), *Democratic Politics in a European Union Under Stress*, Oxford: Oxford University Press, 2014, p. 87 *et seq*.

policy, and to set up a coordination of fiscal and budgetary policies would have required a steady enhancement of the democratic legitimacy of the decisions taken in this way. Unfortunately, this has not happened and the establishment of the European Monetary Union was accompanied only by further but limited expansions of the powers of the European Parliament.[11] This means that these policies, strategic in the view of every European citizen, are to be determined by the already recalled "fragmented Executive", through a complex and multi-level procedure called "European semester", by the same set of institutions originally conceived for building and regulating the internal market. If you then add that only 19 out of 28 EU Member States are fully taking part in this process, it is easy to understand why neither the traditional mechanisms of representative democracy at the national level nor the European Parliament are able to ensure an acceptable level of democratic legitimacy.

If the democratic problem of the EU and the Eurozone does not consist in a lack of democracy, but in a malfunctioning of current democratic institutions, at both the EU and national level, then, the treatment has to be different. It should aim at distinguishing the responsibility for the policies designed and results obtained.

As the economic governance is a rather complex issue, in which many institutions – some more political, others more impartial – are involved, the intermediation between public opinion and executives that is ensured by parliaments is necessary. In this element, there is the allure of the proposal advanced by T-Dem. Setting up a new parliamentary assembly ("Parliamentary Assembly for the Euro area") called upon to "assume functions of political control" over the economic governance is a clear objective that undoubtedly moves along the right direction: to identify an institutional setting to debate, politically and democratically the big and crucial choices regarding budgetary policies that are so often said to be decided "in Brussels".

III. The diagnosis offered by the book under analysis is correct. The treatment, broadly speaking, seems to go along the right direction, as it seeks to strengthen parliamentary dynamics within the Eurozone. However, the concrete proposal to establish a new "Parliamentary Assembly for the Eurozone" does not seem acceptable for a series of reasons. A brief recap of the main structural and functional features of the proposed new Assembly according to the envisaged draft treaty is needed before explaining the reasons for the unacceptability of the new Assembly.

Indeed, the authors of the book provide two possible alternative versions of the Assembly, depending on its dimension. It may be guessed that this part has been among the most thought and discussed among the group of authors. On the specific institutional features of this Assembly, in fact, there has been an evolution since the first doc-

[11] C. Fasone, *European Economic Governance and Parliamentary Representation. What Place for the European Parliament?*, in *European Law Journal*, 2014, p. 164 *et seq.*

uments signed by Thomas Piketty. To illustrate, a manifesto published on May 2014 was rather vague on this matter, referring to "a new chamber based on grouping a portion of the members of the national parliaments (e.g. 30 French MPs from the National Assembly, 40 members from the German Bundestag, 30 Italian deputies etc., based on the population of each country, according to a simple principle: one citizen, one vote)".[12]

The current proposal is definitely more precise regarding the structural features of the new Parliamentary Assembly. According to Art. 4 T-Dem, four fifths of its members would be composed of representatives designated by national parliaments in proportion to the groups existing within each of them and with due regard to political pluralism in accordance with a procedure laid down by each Eurozone State (the parliaments of the other EU Member States could be represented only as observers). The last one fifth of its members are representatives designated by the European Parliament in proportion to the groups within it, with due regard to political pluralism, and in accordance with a procedure laid down by the European Parliament. Therefore, nothing is defined regarding the exact procedure for the appointment of these members. It is, however, correctly established that only the procedure for the designation of the representatives of the European Parliament will be defined at EU level.[13]

In the enlarged version, the Assembly would be composed of 400 members, of which 320 would come from national parliaments and 80 from the European Parliament. In the more restricted version, the Assembly would be composed of 130 members, of which 105 would come from national parliaments and 25 from the European Parliament. The respective percentages of national parliamentarians and MEPs would not change in both versions, as the former would represent 80 per cent of the total, and the latter 20 per cent thereof.

From a functional view, the T-Dem seeks to provide the new Assembly with a wide range of powers aimed at placing it within the main decisions regarding fiscal policies. The effort is original and intriguing, and confirms the already remarked fragmented nature of the EU Executive. Among others, it would be called upon to prepare Euro Summit meetings; determine the working program of the Eurogroup; follow the procedures of the European semester, making recommendations; approve the mechanisms of financial assistance by the European Stability Mechanism; approve the annual report of the European Central Bank (ECB); establish committees of inquiry and hold hearings of the institutional actors of the Eurozone; and vote on the candidates for the Executive Board of the ECB.

[12] See *Our Manifesto for Europe*, in *The Guardian*, 2 May 2014, signed by Thomas Piketty and other 14 intellectuals.

[13] One option could be to specify that the representatives designated by the European Parliament should be elected in an overall European "constituency". Unless, of course, new mechanisms for electing members of European Parliament will be imagined.

In particular, budgetary powers are under focus. Regarding the expenditures, the power to establish the Eurozone budget would be jointly conferred to the new Assembly and to the Eurogroup (according to a special legislative procedure, even imagining a conciliation committee, and giving the last word to the Assembly). Regarding the incomes, a new-pooled company tax is foreseen, with a tax rate jointly determined by the new Assembly and the Eurogroup (according to an ordinary legislative procedure, with the possibility for each Member State to further raise the tax rate).

If compared with other similar proposals, the new Assembly would get the maximum range of powers that is conceivable. It would not only have advisory and oversight powers, but also substantial legislative and fiscal powers (jointly with the Eurogroup). These powers would make this Assembly a bailout approver and a budgetary sovereign able to raise revenues.[14] However, there are at least five reasons that in my opinion would advise against the adoption of such a proposal.

First, it would clearly bring into question the role played by the European Parliament and the overall EU institutional balance. This is probably the most apparent problem of the proposal to set up any new parliamentary assembly within the boundaries of the EU. In the last three decades, the proposal for a new assembly is supported by France, facing strong opposition directly or indirectly from the European Parliament. It is far from surprising that the European Parliament, as one of the main supporters of the "democratic deficit" diagnosis, is also one of the main opponents of establishing any other supranational parliamentary assembly.[15] The fact that a quota of 20 per cent of the members of the new Assembly would be also members of the European Parliament does not seem to change much, especially as they would represent a minority of the members.

Second, it is uncertain that a new Assembly would be beneficial for national parliaments. This statement sounds a bit more awkward, as such proposals are normally formulated and supported by some national parliaments. The doubt arises from a twofold consideration. Firstly, on the theoretical level, one thing is attributing some powers to each national parliament – or even to a chamber thereof – and another is attributing a "double hat" to a limited number of its members (in many cases, very limited, indeed: in the restricted version, for instance, eight Member States would be represented only by one parliamentarian each). Secondly, on the practical level, the recognition of a double

[14] See I. COOPER, *A Separate Parliament for the Eurozone? Differentiated Representation, Brexit, and the Quandary of Exclusion*, in *Parliamentary Affairs*, 2017, p. 655 *et seq.*, spec. 659. For further comparative analysis, see V. KREILINGER, M. LARHANT, *Does the Eurozone Need a Parliament?*, Berlin: Jacque Delors Institute, 2016 (available also in French and in German at www.delorsinstitut.de); D. FROMAGE, *European Economic Governance and Parliamentary Involvement: Some Shortcomings of the Article 13 Conference and a Solution*, in *Les Cahiers européens de Sciences Po*, 2016, available at www.tepsa.eu; D. CURTIN, C. FASONE, *Differentiated Representation: Is a Flexible European Parliament Desirable?,* in B. DE WITTE, A. OTT, E. VOS (eds), *Between Flexibility and Disintegration*, Northampton: Edward Elgar, 2017, p. 118 *et seq.*

[15] D. CURTIN, C. FASONE, *Differentiated Representation*, cit., p. 138 *et seq.*

mandate to a not-so-small number of members of each national parliament (for instance, in the enlarged version of the Assembly, 42 members would come from the Spanish Parliament, that is around 6 per cent of its members) would have a significant impact on the functioning of these parliaments. To quote just one example, it would imply the reservation of time-allotments to allow the actual and regular attendance of the national parliaments' members in the meetings of the Assembly. In other terms, to be effective, this new Assembly would require a series of adaptations on the part of national parliaments to establish procedures to give a mandate to their representatives and to organise their activities in a way that allows them to also be members of another body. This recalls the issues that arose when the members of the European Parliament were also national parliamentarians. Up to a certain extent, this is also what still happens with the memberships of some international assemblies, such as the Parliamentary Assembly of the Council of Europe, which has a lower intensity of meetings than the new Eurozone Assembly.

Third, the structure of the Assembly would hardly be in a condition to solve the democratic problem, as its members would be designated indirectly by national parliaments or by the European Parliament, and so hardly as actual representatives of Eurozone citizens. It is true that almost the totality of them would in some way be elected directly by the citizens (although it is not to be excluded the designation of non-elected members, coming from non-directly-elected Chambers or chosen among the non-elected members of mainly elective Chambers).[16] However, the choice of its representatives would be entirely left to each Parliament. Although, this is not a decisive argument, in my opinion, it is a suitable point to rely on by the populist and anti-EU parties the democratic credentials of the new Assembly[17] Indeed, it would be rather easy to depict it as a new interparliamentary conference with a more "democratic" name, but far from the citizens' actual interests.

Fourth, the setting up of an Assembly for "Eurozone members only" would inevitably stiffen the rather loose and open borders between the Eurozone and the rest of the EU. Consistent with, but even more clear than a new Treaty signed only by Eurozone States, an Assembly composed only by their representatives would mark a strong difference amongst EU Member States. Although a "Two-Speed Europe" could be a scenario that some politicians and scholars support,[18] it would result in a longer and more difficult process of inclusion of new members in the Eurozone. In synthesis, it would make

[16] Obviously, the first could be the case of members coming from the German Bundesrat; the second, the one of Italian life senators.

[17] A similar criticism was raised against the reform of the Italian Senate. Formulated by the Renzi Government, then rejected by a referend held in December 2016, as most of its members would have been elected by the Regional Councils within their (elected) members.

[18] Among many, see J.C. Piris, *The Future of Europe. Towards a Two-Speed EU?*, Cambridge: Cambridge University Press, 2012, and S. Fabbrini, *Which European Union?: Europe after the Euro Crisis*, Cambridge: Cambridge University Press, 2015.

narrower a process that is kept open by current EU law and more distinct a border which is currently left rather blurred.

Finally, a series of practical issues would arise in the organization of the new Assembly. These issues would relate to its external relations (its relationship with the European Parliament, with each national parliament and with the existing bodies of interparliamentary cooperation)[19] and its internal organization. In particular, the groups within the new Assembly would hopefully be based on political affiliations. However, it is clear that nationality and institutional membership would matter in the design of committees. Even the location of this new body would likely be contested. Nevertheless, it is easy to argue in favour of using the currently underutilized structures of the European Parliament in Strasbourg. If one considers the organizational issues that have arisen regarding the setting up of the new interparliamentary conferences, it is clear that they would multiply in this case. This is because of the difficulty of putting together, in a much more powerful and frequently-meeting body, different kinds of representation, all to be reconciled and called upon to vote in the same assembly.

From what we have observed, it is clear that the democratic problems of the EU and the Eurozone cannot be easily remedied. The fortunes of representative democracy, which are currently facing existential challenges, in Europe and elsewhere, are still inevitably dependent on the traditional format of parliaments. A format that was shaped in the XVIII and XIX centuries and that currently needs to coexist with a different reality under a political and an institutional viewpoint. In this regard, the EU and the Eurozone can be seen as some of the most advanced experiences of this difficulty. The adaptation to this new reality will probably be an extremely long process whose final outcome is hard to predict. Unfortunately, what is certain is that multiply the number of overlapping parliaments will not resolve this challenge.

Nicola Lupo*

[19] It can be imagined that this new Assembly would substitute the Art. 13 Conference, but surely not the Conférence des Organes Spécialisés dans les Affaires Communautaires (COSAC) and, most of all, the Speakers' Conference, which is trying to play a coordinating role for the bodies of interparliamentary cooperation. See, with different approaches, C. FASONE, *Ruling the (Dis-)Order of Interparliamentary Cooperation? The EU Speakers' Conference*, in N. LUPO, C. FASONE (eds), *Interparliamentary Cooperation in the composite European Constitution*, Oxford: Hart, 2016, p. 269 *et seq.*, and I. COOPER, *The Emerging Order of Interparliamentary Cooperation in the EU: Functional Specialization, the EU Speakers Conference, and the Parliamentary Dimension of the Council Presidency*, in *EUI Working Paper*, no. 5, 2017.

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

NOTES ON THE "DRAFT TREATY ON THE DEMOCRATIZATION OF THE GOVERNANCE OF THE EURO AREA"

TABLE OF CONTENTS: I. Introduction. – II. Practice and proposals on interparliamentary cooperation following the approval of Art. 13 FC. – III. Criticism on the draft. – IV. Possible alternative solutions under the existing Treaty provisions. – V. Conclusion.

I. The "democratization of the Euro area governance" is an essential objective that has become more and more relevant as a consequence of the "twin" crises – the financial and the migrant crises – that have hit Europe. However, the attainment of this objective is complicated by the variety of views, at the institutional and socio-political level, about the means to be employed.

On the one hand, at the institutional level, there is a strong demand for increasing the "verticalization" of the EU governance, with a view to responding promptly and efficaciously to the pressing urgency of the moment.[1] On the other hand, at socio-political level, precisely this process of concentration of the power entailed by the EU intergovernmental turn, prompted the insurgence of wide protest movements, denouncing the worsening of the existing democratic deficit.[2]

The problem of democratization eventually happens to coincide with that of a more intense parliamentarization.[3] This is also the objective pursued by the Treaty on the democratisation of the governance of the Euro area (T-Dem). The solution that the draft Treaty proposes, however, is affected by a methodological shortcoming. It almost com-

[1] D. JANCIC, *National Parliaments and EU Fiscal Integration*, in *European Law Journal*, 2016, p. 225 *et seq*.

[2] B. CRUM, *Parliamentary Accountability in Multilevel Governance: What Role for Parliaments in Post-Crisis EU Economic Governance?*, in *Journal of European Public Policy*, 2018, p. 268 *et seq*.

[3] See A. MANZELLA, *The European Parliament and the National Parliaments as a System*, in S. MANGIAMELI (ed.), *The Consequences of the Crisis on European Integration and the Member States. The European Governance between Lisbon and Fiscal Compact*, Berlin: Springer, 2017, p. 47 *et seq*. and European Parliament, Directorate-General for Internal Policies, Policy Department C: Citizens' Rights and Constitutional Affairs, *The Role of National Parliaments in the EU after Lisbon: Potentialities and Challenges* – Study by O. Rozemberg, Brussels: European Union, 2017, www.europarl.europa.eu.

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pletely ignores the operational tools and procedures that the EU has already put in place to handle the democratic problem as well as the directions provided by the EU officials documents.

These underlying facts and directions can be sum up through the formula of the interparliamentary cooperation between national parliaments and the European Parliament. This solution considers that the "democratisation" of the Union entails primarily filling the existing gap between these two levels of democratic representation (insisting on the same territory, though on a different scale).

This perspective is not immune from criticism, also due to its insufficiency or lack of implementation. However, to disregard or to abandon the perspective of interparliamentary cooperation before putting it at trial, lends itself to some methodological objections and evidences a little dose of realism.

II. There is an element of positive law on which, until now, the proposals for the "democratisation" of the European Union, in its basic and crucial features, have revolved around: the Euro area. Art. 13 of the Fiscal Compact (FC) – completing "the overall architecture of the Euro area governance" (composed, under Art. 12, of the "European summit", the "Eurogroup" and the European Commission)[4] – foresees the setting up of a "Conference of representatives of the relevant committees of the European Parliament and representatives of the relevant committees of national Parliaments".[5]

The organisation of such Conference is to be determined together by the European Parliament and the national Parliaments of the Contracting of the FC.

A further legal basis of this interparliamentary Conference – in its peculiar intertwining between that international Treaty and EU primary law – is to be found in Title II of Protocol no. 1 on the Role of National Parliaments in the European Union.[6] This legal basis refers, in almost identical terms, to Art. 12 TEU, which determines the mode in which "National Parliaments contribute actively to the good functioning of the Union".

It is important to stress that Art. 12 TEU is included in Title II: "Provisions on democratic principles". The four articles within this Title, hinging on four pillars (citizenship, representative democracy, participatory democracy and interparliamentary cooperation), define the essential elements of the Union's "democratization" process.

[4] Fiscal Compact is the denomination currently used to refer to the Treaty on stability, coordination and governance in the Economic and Monetary Union and it is also the name of its Title III.

[5] See A. MANZELLA, *La cooperazione interparlamentare nel "Trattato internazionale" europeo*, in *Astrid Rassegna*, 23 February 2012, www.astrid-online.it.

[6] See E. GRIGLIO, N. LUPO, *Towards an Asymmetric European Union, without an Asymmetric European Parliament*, in *LUISS SoG Working Paper Series*, no. 20, 2014, p. 1 *et seq*., and I. COOPER, *The Interparliamentary Conference on Stability, Economic Coordination and Governance in the European Union (the "Article 13" Conference)*, in N. LUPO, C. FASONE (eds), *Interparliamentary Cooperation in the Composite European Constitution*, Oxford: Hart Publishing, 2016, p. 247 *et seq*.

The interparliamentary cooperation established by this complex set of provisions, meant to lay down a form of control of the governmental function on a supranational scale. Indeed, the need to hold a "regular" interparliamentary cooperation "within the Union" (Art. 9 of Protocol no. 1) has to be interpreted in direct relation to what is stated in the Preamble of the same Protocol no. 1. The reference to the "way in which national parliaments scrutinise their governments in relation to the activities of the Union" must in fact be combined with the meaning of the other clauses of the Protocol and of the Treaties. On the one hand, they tend "enhance their ability to express their views on draft legislative acts of the Union as well as on other matters which may be of particular interest to them" (in the Protocol). On the other hand, the organisation of the interparliamentary Conference is meant "to discuss budgetary policies and other issues covered by this Treaty on stability, coordination and the governance of the economic and monetary Union" (Art. 13 FC).

It can thus be concluded that Art. 13 FC is aimed at the institutionalization of an interparliamentary oversight of the governance of the Euro area: a control "by debates", that should increase the transparency and the influence in the decision-making processes.

A reference to these objective is made in the so-called "Four Presidents' Report", that speaks of "new mechanisms [...] founded [...] on Art. 13 FC, (which) could contribute to the enhancing democratic legitimacy and accountability" (5 December 2012).[7]

In the subsequent so-called "Five Presidents' Report" (22 June 2015),[8] the reference to Art. 13 FC is implicit in highlighting the "new form of interparliamentary cooperation which materialises in the 'European parliamentary week', organised by the European Parliament with the national parliaments, in which the representatives of the national parliaments are involved in-depth discussions on policy priorities". This sentence appears under the section titled: "A fundamental role for the European Parliament and national parliaments", that is part of Chapter V, on "Democratic control, legitimacy and democratic strengthening". The reference to the "European parliamentary week" is due to the fact that, in such context, the interparliamentary Conference, as provided for in Art. 13 FC, meets in the first semester of the year.

The position of the European Parliament on interparliamentary cooperation is spelled out – quite consistently – in three resolutions, voted on 16 February 2017.

Even though declaring itself "not in favour of the creation of joint parliamentary organs with decision-making powers"[9] the European Parliament "underlines the im-

[7] European Council, *Towards a Genuine Economic and Monetary Union* – Report by H. Van Rompuy, in close collaboration with J. M. Barroso, J-C Juncker, M. Draghi, Brussels: European Council, 5 December 2012, www.consilium.europa.eu.

[8] European Commission, *Completing Europe's Economic and Monetary Union* – Report by J-C Juncker in close cooperation with D. Tusk, M. Draghi, J. Dijsselbloem and M. Schulz, 22 June 2015 (Report of the Five Presidents), ec.europa.eu.

[9] European Parliament Resolution P8_TA(2017)0049 of 16 February 2017 on improving the functioning of the European Union building on the potential of the Lisbon Treaty (2014/2249(INI)).

portance of the cooperation between the European Parliament and national parliaments in joint organs like [...] the Conference as provided for in Art. 13 FC, according to the principles of consensus, information-sharing and consultation, in order to exercise control over their respective administrations".

In Resolution no. 2344,[10] adopted on the same date, the European Parliament expressed its hope for "a reform of the Conference provided for in Art. 13, to give it more substance in order to develop a stronger parliamentary and public opinion". The above sentence in included significantly in the paragraph "Governance, democratic accountability and control".

Lastly, in Resolution no. 2248[11] the "further development of the interparliamentary Conference foreseen by Art. 13 FC is called for to allow substantial and timely discussions between the European Parliament and national parliaments where needed".

Five years after the coming into force of the FC (2013) – and hence at the beginning of the "assessment of the experience with its implementation", "with the aim of incorporating the substance of this Treaty into the legal framework of the European Union" (Art. 16 FC) – the reference to the concept of interparliamentary cooperation provided for in Art. 13 FC is thus maintained in the official EU documents.

Since then there have been no further developments with a view to reduce the democratic deficit of the Euro area.[12] In particular, the proposals of setting up of a so-called "Euro area parliament", which circulated for some time,[13] suddenly disappeared from the political debate in the last few months.[14]

By no means, however, the setting up and the first activities of the interparliamentary Conference as provided for in Art. 13 have gone unquestioned.[15]

[10] European Parliament Resolution P8_TA(2017)0050 of 16 February 2017 on budgetary capacity for the euro area (2015/2344(INI)).

[11] European Parliament Resolution P8_TA(2017)0048 of 16 February 2017 on possible evolutions of and adjustments to the current institutional set-up of the European Union (2014/2248(INI)).

[12] See V. KREILINGER, *Inter-Parliamentary Cooperation and Its Challenges: The Case of Economic and Financial Governance*, in F. FABBRINI, E. HIRSCH BALLIN, H. SOMSEN (eds), *What Form of Government for the EU and the Eurozone?*, Oxford: Hart Publishing, 2015, p. 271 *et seq*. and A. MANZELLA, *The European Parliament and the National Parliaments as a System*, cit., p. 56 *et seq.*

[13] V. KREILINGER, M. LAHRANT, *Does the Eurozone Need a Parliament?*, in *Jacques Delors Institut Policy Paper*, no. 176, 2016, www.institutdelors.eu and D. CURTIN, C. FASONE, *Differentiated Representation: Is a Flexible European Parliament Desirable?*, in B. DE WITTE, E. VOS, A. OTT (eds), *Between Flexibility and Disintegration: The State of EU Law Today*, Northampton: Edward Elgar Publishing, 2017, p. 118 *et seq*.

[14] See for example, E. Macron, *Initiative for Europe*, speech delivered at the Sorbonne University, Paris, 26 September 2017, international.blogs.ouest-france.fr, and J-C Juncker, *State of the Union 2017*, speech to the European Parliament, Brussels, 13 September 2017, ec.europa.eu.

[15] V. KREILINGER, *Inter-Parliamentary Cooperation and Its Challenges*, cit. and I. COOPER, *The Interparliamentary Conference on Stability, Economic Coordination and Governance in the European Union (the "Article 13" Conference)*, cit.

On the contrary, they met with considerable hurdles that produced water-down compromises. Although the Conference met quite regularly, its output is rather modest, to the point that it is openly regarded as a mere forum for an exchange of views among members of parliaments, European commissioners and experts.

Three elements seem to have prevented this project from developing into a form of advanced interparliamentary cooperation.

First, the on-going conflict between the European Parliament and national parliaments.[16] The new phase of interparliamentary cooperation opened by Art. 12 TEU comes after the phase of the "personal union" between the status of the members of Parliament (MPs) and that of the members of European Parliament (MEPs), dating back to the first European parliamentarianism (1957-1979) and the phase of the silent contrast between (national and European) parliamentary authorities (1979-2012).

Thus, the effectiveness of the interparliamentary cooperation has been fiercely hampered by two apparently contradictory fears: on the one hand, the fear of the European Parliament (and of its bureaucracy) to lose the monopoly of the assessment of the "European interest" in the adoption of the Union's policies; on the other hand, the fear of national parliaments (and of their administrations) to lose the monopoly of the "democratic" control over the decisions taken "in" college by the respective government (on the basis of the myth that democracy can be effective only within the "exclusive" boundaries of the national States).

Second the creeping conflict between National parliaments of the Eurozone countries and those of the countries outside the Euro area. For the formers, it is improper that a body designed to deal with the most delicate aspect of national economic policies – and related to the consequences of the European Central Banks (ECB's) monetary decisions – can include also parliaments of countries outside the Eurozone. For non-Eurozone countries, on the contrary, the uniqueness of the economic policy provisions (Arts 120-126 TFEU), applicable to all the Member States, and their inevitable correlations with the stability conditions of the Eurozone, plead for the inclusion in the Conference of the MPs of these Countries.

Third a latent conflict within the European Parliament, between the MEPs elected in countries that are members of the Eurozone and those elected in the non-Euro area countries. This conflict involves an extremely sensitive issue such as that of the equal status of the MEPs.[17] Unsurprisingly, the question is handled with great care in the offi-

[16] C. FASONE, *More Engaged European Commission and European Parliament with National Parliaments in the European Semester*, paper presented at the workshop *Beyond the Inter-Governmental Union? Towards the Accountable and Sustainable Integration of Core State Powers*, Berlin: Hertie School of Governance, 2017.

[17] On this issue, see D. CURTIN, C. FASONE, *Differentiated Representation: Is a Flexible European Parliament Desirable?*, cit.

cial documents of the Union, that constantly refer to the power of the European Parliament to self-regulate its internal organisation and procedures.[18]

The cumulative effect of these three conflicts inevitably affected the composition, the procedural arrangements and the functions of the Conference set up by Art. 13 FC.[19]

The underlying duality in the nature and role of the Conference also emerges from the Rules of Procedure. After proclaiming in Art. 2, para. 1, from a the tutiorist perspective, that the Conference constitutes a simple "core reference framework for the discussion and exchange of information and best practices for the implementation" of the FC, the same provision goes on to identify as the final objective of the Conference, "to contribute to and ensure democratic accountability in economic governance and budgetary policies of the Union, especially the economic and monetary Union".

In the first semester of the year, the Conference takes place within to the so-called "European Parliamentary Week", held in Brussels. In the second semester, the Conference is held in the Member State holding the Council rotating presidency. In Brussels the Conference is co-chaired by the European Parliament and the parliament of the State holding the Council presidency. In the second semester, the presidency of the Conference is exclusively ensured by that national parliament. "Non-binding conclusions" are foreseen as a possible result of the meetings (Art. 6, para. 1). With regard to the *modus operandi*, the Conference functions on the basis of "consensus" (Art. 3, para. 7), that is now consistently used within the organs of interparliamentary cooperation. Indeed, "consensus" stands in between majority rule and unanimity, so that possible reservations expressed during the debate are not then voiced when the decision is taken.

[18] See the Five Presidents' Report, p. 17: "the European Parliament should organise itself to assume its role in matters pertaining especially to the Euro area". Speaking of its own *interna corporis*, the above mentioned Resolution no. 2344 is more explicit under Chapter III, titled "Governance, democratic accountability and control": "The European Parliament should review its rules and organisation to ensure the full democratic accountability of the fiscal capacity to MEPs from participating Member States". See nevertheless also the European Commission, *Reflection Paper on Deepening the Economic and Monetary Union*, 31 May 2017: "some argue that mechanisms should be set up to allow the Member States of the Euro area to take decisions among themselves [...] in the European Parliament".

[19] These underlying tensions are mirrored in the Conference's Rules of Procedure approved in November 2015 (that is, almost three years after the entry into force of the FC). These Rules of Procedure (Art. 4) extend the composition of the Conference – in contrast with Art. 13 FC, which reserves it to the "contracting parties" – as to let the parliamentary delegations of the two States that did not sign the FC participate in it (Czech Republic and United Kingdom): MPs from the UK Parliament continue to be represented even after the Brexit announcement (cf. the Tallinn meeting, 30-31 October 2017). Furthermore, with a questionable provision departing from the previous experience and practice of interparliamentary conferences (and, in the first place, from the *Conférence des Organes Spécialisés dans les Affaires Communautaires* (COSAC), provided for in Art. 10 of the above Protocol no. 1) – the size of the delegations is decided by each national parliament. What is more – in the perspective of a prospective reform of Conference "with flexible formations", the Rules of Procedure entrust each national parliament to determine which "relevant" parliamentary committees are to be represented in the Conference ("relevance" which, in the context of Art. 13 FC, instead seems to be anchored to economic/financial matters).

III. The draft Treaty seems to overlook the terms of this long debate on the "democratization" of the Euro area, whose starting point is to be traced back to Art. 13 FC and to the first (uneven) implementation of the Conference. While not entirely ignoring it, the draft labels this provision as "insufficient"[20] and the attributions of the Conference as a "modest consultative opinion".[21] Although this assessment may sound correct by itself, it does not grasp the legal potential inherent in the interparliamentary Conference that has acted in a highly tensed context such as the Euro area and that is still in operation. Instead of exploiting these potentialities, the authors of the draft propose the establishment of a brand-new parliamentary institution by an international Treaty, with a second degree "political composition" (varying from 130 to 400 members appointed by national parliaments and the European Parliament).

Such proposal raises a number of concerns.

a) At the outset it should be noted that gradualism has been constantly considered as part of the European integration political philosophy. In turn, the search for gradualism has taken the shape of a "constitutional convention".[22] Nothing prevents the Member States (MS) from taking a different road, but only in the presence of a clear political will, unanimously supported by the MS. Furthermore, from a legal policy perspective, the use of international law as a tool for promoting "democratization" of the EU is likely to create backlashes and to weaken the degree of democratic legitimation so laboriously achieved – with the direct election of the European Parliament, the experience of the *Spitzenkandidaten*, and the various instruments of parliamentary oversight.

b) The precedents in which the MS used international instruments instead of amending the founding Treaties, show that, in order to work properly, these *extra ordinem* tools must be somehow connected to the constitutional structure of the Union. Such connection emerges from the FC, stipulated for the well-known difficulties to achieve unanimous consent amongst the Member States, and whose obligations largely coincide with measures already taken at the EU level. It also emerges from the Treaty on the European Stability Mechanism, invoked as a precedent by the drafters of the T-Dem, which, in reality had been devised as an implementing measure of Art. 136 TEU.[23]

The drafters of the T-Dem chose to go along a different road. The only "constitutional" reference in that text is Protocol no. 14 on the Eurogroup which, according to the need for a "strengthened dialogue" among the States of the Euro area, foresees the "informal" Eurogroup.

[20] See the explanatory volume published by the same proponents of the T-Dem: S. HENNETTE, T. PIKETTY, G. SACRISTE, A. VAUCHEZ, *Pour un traité de démocratisation de l'Europe*, Paris: Seuil, 2017, p. 28.

[21] *Ibid.*, p. 52.

[22] As termed by A.V. DICEY, *Introduction to the Study of the Law of the Constitution*, London: Macmillan and Co., 1885, Preface.

[23] Subsequently amended through the simplified revision procedure, under Art. 48, para. 6, TEU, 25 March 2011.

Such a quick reference does not appear capable to establish a link with the Constitutional acquis of the Union and seems to significantly attenuate the very idea of a "democratic pact" as the focal point of the T-Dem.[24] The reasons for claiming that the T-Dem lacks a solid constitutional anchoring in the EU Treaties are the following. First, it assumes that an "external" measure, of an international nature, can introduce the "value of democracy" into the Eurozone, as a "new centre of European power": a value that, however, intrinsically permeates the entire legal system of the Union from Art. 2 to the Democratic Principles of Title II of the TEU. Second, is presumes that an international treaty, and the new institutions it should set up, is capable to bestow upon national parliaments a democratic legitimacy that, at the internal EU level, relies on the "European clauses" contained in the respective national constitutions. By the same token, the "democratic urgency", mentioned by the proponents as the inspiring factor for the draft, is unfortunately not limited to the Eurozone. It also concerns other, and arguably more vital, areas of the process of integration. The recent activation of the procedure provided for in Art. 7 TEU for the serious violation of the founding values of the Union, shows that the democratic question is a problem of a general nature and far too important for the very survival of the Union to be resolved *una tantum* with extraordinary procedures. In any case, an urgency procedure is irreconcilable, according to general principles of the rule of law, with the creation of a new institutional setting.

c) The establishment by an international Treaty of a Eurozone parliamentary Assembly would create an irreversible gap between the countries of the two monetary areas.[25] The problem of the control and democratic accountability of the Euro area can be hardly solved with procedures and institutions having a divisive effect within the overall structure of the Union. The contention, in Art. 3, para. 4, TEU, that the Euro is, aspirationally at least, the currency of the whole economic and monetary Union (and not only of the Eurozone) is a principle that should guide every institutional solution, even in an deeply divided Union.[26]

Interparliamentary cooperation is undoubtedly the way to the "democratization" of the Euro area. It must therefore be gone along both to check the MS economic and fiscal policies and to "accommodate" the social policies of the MS with the economic and monetary restraints deriving from EU law. In the constitutional architecture of the Union, featured by close interdependence and inclusiveness (reference must go to the presidency of the Euro Summit, entrusted for long time to a non-Euro area representative) that

[24] S. HENNETTE, T. PIKETTY, G. SACRISTE, A. VAUCHEZ*, Pour un traité de démocratisation de l'Europe*, cit., p. 61.

[25] I. COOPER, *A Separate Parliament for the Eurozone? Differentiated Representation, Brexit, and the Quandary of Exclusion*, in *Parliamentary Affairs*, 2017, pp. 655 *et seq*.

[26] D. CURTIN, C. FASONE, *Differentiated Representation: Is a Flexible European Parliament Desirable?*, cit. and L. LIONELLO, *Does the Eurozone Need Its Own Parliament? Legal Necessity and Feasibility of a Eurozone Parliamentary Scrutiny*, in L. DANIELE, P. SIMONE, R. CISOTTA (eds), *Democracy in the EMU in the Aftermath of the Crisis*, Berlin-Torino: Springer-Giappichelli, 2017, pp. 179 *et seq*.

roadmap must be closely interconnected with the general direction of the integration process. Relatedly, also national parliaments, which "contribute to the good functioning of the Union" (Art. 12 TEU), step in as components of the enlarged "institutional framework".

d) A final critical remarks regards the "assemblearistic" nature of the functions provided for in Art. 7.[27] This provision assigns to the Assembly both the preparation of the "meetings of the Euro Summit" and the drawing up of the "six-monthly work programme of the Eurogroup". It therefore conflates the role of governmental institutions and that of bodies discharging control and oversight functions, and are likely to create confusion if not a paralysis in the governance of the Euro area. Indeed, the Parliamentary Assembly is deemed to play at the same time the scrutiny and oversight function on the Eurogroup and the Euro Summit and to have the final say in the event of disagreement with the Eurogroup on legislation and on the budget for the Euro area: in other words, it plays at the same time the role of final decision-maker and of controller.[28] Its powers to ultimately disregard the will of the Eurogroup can trigger a problematic clash between the Parliamentary Assembly and the governments of MS.

The risk of such ambiguous implications is further increased by the lack of clarifications regarding the future relationship of the prospective parliamentary assembly with the European Parliament. The "close cooperation" to which Art. 3, para. 2, and Art. 11 refer, is a very generic formula as it is that of the previous transmission of legislative proposals to the European Parliament "for an opinion".

IV. The draft T-Dem constitutes, assuredly, a useful exercise if its various proposals were framed in the context of a correct, complete and consistent implementation of Art. 13 FC in its full potential. To achieve this purpose, a contribution could come from a reform of the Rules of Procedure of the European Parliament and of the Council of Ministers. First, the European Parliament's Rules should resolve the problem of the status of MEPs elected in different monetary areas, according to the basic principle of substantive equality among its members and to its corollary of the unsustainability of equal rights for unequal national status.

Second, after the incorporation of Art. 13 FC into the Union's legal order, the Rules of Procedure of the EP could "decentralize" in the hands of the interparliamentary Conference many of the new competences established by the draft treaty for the Parliamentary Assembly; in particular the power, either expressed or implied, to control over the governance of the Euro area.

[27] Apart the surprising inclusion of the Court of Justice among the institutions of governance (see section 2 of the Preamble of the cited draft T-Dem, see *supra*, section I).

[28] C. FASONE, *More Engaged European Commission and European Parliament with National Parliaments in the European Semester*, cit.

From a technical and legal viewpoint, the "decentralization" of legislative powers to the interparliamentary Conference is more problematic. Nonetheless – once the Eurogroup (Protocol no. 14) has been transformed into a "formal" configuration of the Council – it would be possible to devise a mechanism analogous to the one devised, at constitutional level (even if not yet implemented), in the Italian legal system to regulate the relations between national parliament and regions (Art. 11, *legge costituzionale* of 18 October 2001 no. 3). In this system the interparliamentary Conference would be considered as an autonomous body, although procedurally linked to the European Parliament – like a special committee, empowered to draft legislative proposals pertaining to the regulation of the Euro area in case of favourable examination or of procedural aggravation in the event of reservations. Moreover the Conference should have a flexible composition dependent on the subject-matter under examination.

This approach is in accordance with the principle of gradualism featuring the process of European integration and with the on-going reflection on the further developments on the nature and role of the interparliamentary Conference established by Art. 13 FC. It may trigger a desirable leap forward towards the "democratization" of the Euro area with the full involvement of national parliaments, that constitutes one of the major goal of the T-Dem project.

V. In conclusion, there is certainly a black hole in the net of the elective assemblies that ensure political representation in Europe, from the municipalities to the EU itself.

This gap is not only perceived when looking at the implementation of EU norms already in force in the EU legal system. It is likewise detected in the actual deployment of the European parliamentary practice. The malaise of the European citizen – who feels the European Parliament as an alien and far away from his own interests – is perfectly equivalent to the discomfort of the MEPs. Indeed, after the election day MEPs lose their contacts with their voters and constituency: it is extremely difficult to combine diverging interests together as to shape the "European public interest".

To create a new parallel EU institution next to the European Parliament would make things more complicated rather than filling this gap.[29] By contrast, to work for strengthening the already existent representative network may help build a better solution.

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[29] As observed by G.L. TOSATO, *Note critiche sul "Progetto Piketty"*, in *RIDIAM*, 5 June 2017, www.ridiam.it, who also highlights the problems with the compatibility between the T-Dem and EU law.

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

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

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

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

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

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

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

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

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

[2] Protocol no. 14 on the Euro Group (Protocol no. 14).

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

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

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

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

[3] J.-C. Piris, *The Future of Europe: Towards a Two-Speed EU?*, Cambridge: Cambridge University Press, 2012.

[4] R. Aline, *Hamon Plans Radical Departure from EU "blabla"*, in *EurActiv*, 13 March 2017, www.euractiv.com.

[5] Art. 4 of the T-Dem.

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

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

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

[6] Art. 8 of the T-Dem.

[7] Art. 126, para. 3, of the Rules of Procedure of the European Parliament, January 2017.

[8] Art. 284, para. 3, TFEU.

[9] Art. 11 of the T-Dem.

[10] O. Clerc, P. Kauffmann, *L'union économique et monétaire européenne. Des origines aux crises contemporaines*, Paris: Pedone, 2016, p. 318.

[11] Mário José Gomes de Freitas Centeno has replaced Jeroen Djisselbloem on the 13th January 2018.

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

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

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

[12] *After Snub, EU Lawmakers Urge Dijsselbloem To Quit as Eurogroup Head*, in *Reuters*, 3 April 2017, www.reuters.com.

[13] Art. 41 of the Charter of Fundamental Rights of the European Union (Charter).

[14] Art. 283, para. 2, TFEU.

[15] Art. 139, para. 2, let. h), TFEU.

[16] Art. 5, para. 7, of the ESM Treaty.

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

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

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

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

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

[17] Art. 5, para. 1, of the ESM Treaty.
[18] Art. 2 of the ESM Treaty.
[19] Art. 13 of the T-Dem.
[20] Art. 294 TFEU.
[21] Art. 13, para. 4, of the T-Dem.
[22] Art. 13, para. 2, of the T-Dem.

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

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

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

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

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

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

[23] Art. 12, para. 1, of the T-Dem.
[24] Art. 12, para. 2, of the T-Dem.
[25] Art. 12, para. 4, of the T-Dem.
[26] Art. 15 of the T-Dem.
[27] Art. 314 TFEU.
[28] Art. 15, para. 2, of the T-Dem.

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

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

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

[29] Protocol no. 1 on the role of national parliaments in the European Union (Protocol no. 1).

[30] See Protocol no. 2 on the application of the principles of subsidiarity and proportionality (Protocol no. 2).

[31] Information Report no. 381 (2000-2001) of 13 June 2001 of M. Daniel Hoeffel, on behalf of the Senate delegation for the European Union.

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

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

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

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

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

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

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

[35] Parliamentary debate, session of 21 April 1998.

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

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

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

[36] Art. 4, para. 2, of the T-Dem.

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

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

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

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

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

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

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

[38] Court of Justice, judgment of 6 March 2018, case C-284/16, *Achmea.*

[39] P. Craig, *The Stability, Coordination and Governance Treaty: Principle, Politics and Pragmatism*, in *European Law Review*, 2012, p. 239.

[40] F. Fabbrini, *A Principle in Need of Renewal? The Euro-Crisis and the Principle of Institutional Balance*, in *Cahiers de droit européen*, 2016, p. 288.

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

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

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

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

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

[41] Court of Justice, judgment of 27 November 2012, case C-370/12, *Pringle*.
[42] *Ibid.*, para. 158. Emphasis added.
[43] *Ibid.*, para. 161. Emphasis added.

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

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

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

[44] Court of Justice, opinion 1/91 of 14 December 1991, para. 61.

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

[46] German Federal Constitutional Court, judgment of 7 September 2011, 2 BvR 987/10. See an English version at www.bundesverfassungsgericht.de.

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

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

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

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

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

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

[48] See *Pringle*, cit.

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

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

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

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

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

[50] See for example Art. 2 TEU and Court of Justice, judgment of 23 April 1986, case 294/83, *Parti écologiste "Les Verts" v. European Parliament*, para. 23.

[51] See Court of Justice, judgment of 27 February 2018, case C-64/16, *Associação Sindical dos Juízes Portugueses*, para. 30 *et seq.*

[52] Opinion 1/91, cit.

[53] *Ibid.*, para. 61.

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

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

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

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

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

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

[55] See on this subject P. Craig, *The Stability, Coordination and Governance Treaty: Principle, Politics and Pragmatism*, cit.

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

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

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[56] *Ibid*.

[57] *In Athens, Macron Outlines "Roadmap" for European Democratic Revival*, in *EurActiv*, 8 September 2017, www.euractiv.com.

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Overviews
Special Section – Democratising the Euro Area Through a Treaty?

The T-Dem as a Realistic Utopia: Why It Fits with What We Know About Parliaments

Table of Contents: I. Introduction. – II. An Assembly fitted with the multifunctional nature of legislatures. – III. An insurance against free-riding. – IV. A fair share for the European Parliament. – V. The devil is in the details. – VI. Conclusions.

I. The fact that the draft Treaty on the Democratisation of the Governance of the Euro Area (T-Dem) is a utopia will not be discussed in what follows. The project faces the opposition of both Germany and the majority of the European Parliament (EP), two of the most powerful players at the EU level. The fact that President Macron ceased to call for creating an Assembly for the Eurozone between his election in June 2017 and his Europe speech in La Sorbonne in September 2017 is indicative of the difficulty to implement such an idea. It seems therefore better to consider whether the T-Dem is a "realistic utopia" to follow Rawls's expression. If the Treaty were implemented tomorrow, would it succeed in facing contemporary challenges? I shall answer this question by taking into account the parliamentary politics perspective. Are the provisions of the T-Dem consistent with what we know about parliaments and parliamentarians? I believe it does for four reasons that I develop hereafter. In other words, the features which make a parliament functional are present in this project – be it regarding legislatures and MPs in general, as it will be developed in the first two points, or regarding more specifically interparliamentary cooperation as addressed by the last two points. In that sense, the scope of this paper is modest. It does not question whether a Euro area parliament would democratize the EU or whether such democratization could threaten the functioning of the EMU. The scope of this *Overview* is focused more on the parliamentary dimension itself: does it make sense to give responsibility to an *ad hoc* transnational Assembly for economic issues? Which kind of parliamentary involvement should be expected? And, more precisely, which interparliamentary cooperation between representatives from national legislatures and the EP should be designed in the light of past (failed) experiences?

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II. First, the T-Dem gives many explicit – but also implicit – roles to the Parliamentary Assembly of the Euro area (PAE). Not all the explicit roles will be mentioned again here, as they are numerous. Implicitly, the political functions given to the PAE are also diverse. Four elements may be distinguished. (1) Officially, the main point of the Assembly is to democratise economic decisions through public debates and votes by different kinds of elected representatives. This is a consensual aim – which explains why it has been highlighted so much. (2) Another purpose of the PAE can be identified through the proposal to form it from 80 per cent of members of national parliaments (MNPs) and only 20 per cent of members of the European Parliament (MEPs). This clearly translates the concerns to grant popular legitimacy to EU economic decisions in a context of rising populism. (3) One of the aims of the T-Dem is also to create a budgetary capacity for the Economic and Monetary Union. Taking the opposite view to the classical moto "no taxation without representation", we could summarize their bet by "no representation without taxation". There is indeed in the T-Dem the claim that an official Assembly could, through its mere existence, induce Member States to devote further financial resources to an EU budget. (4) Some provisions of the text as well as past public commitments of the proponents also make clear that a major aim of the T-Dem is to settle a new balance of power at the EU level that could give more credit to anti-austerity supporters.

I will not comment on whether or not a common budget or Keynesian policies are needed, or even on whether such Assembly could help to that end. Instead, I would like to make the point that the multifunctional ambition of the PAE is generally coherent with the multifunctional nature of legislatures. This is one of the main characteristics of parliaments, and even of human gathering: the unicity of the place where people meet contrasts with the diversity of what they do. There is one parliamentary place but several functions. Walter Bagehot famously made this point during the XIXth century when he listed the functions filled by Westminster – showing that legislation was only one political dimension among others, like public communication or elite selection.[1] Therefore, the multiplicity of the activities and roles of the PAE – and even the ambiguity of its political finalities – perfectly fit with such a multifunctional nature. It can also be added that a legislature is influential through a great variety of means:[2] legislative proposals, legislative amendments but also public controversies, expert scrutiny as well as the anticipatory effects of the legislators' formal decisions. In that sense, the numerous provisions of the T-Dem mirror such diversity of instruments and political effects.

III. The second point relates to the motivations of politicians – a classical issue dating back to, at least, Bentham. Modern political systems tend to select and judge politicians

[1] W. Bagehot, *The English Constitution*, Oxford: Oxford University Press, 1963, p. 1867.

[2] M. Russel, D. Gover, *Legislation at Westminster. Parliamentary Actors and Influence in the Making of British Law*, Oxford: Oxford University Press, 2017.

according to their acts rather than general moral qualities. Consequently, Members of Parliament (MPs) productiveness can be challenged through artificial means, playing with what they seek to maximize. In European affairs, the question of motivation is not theoretical as some legislatures find difficulties to genuinely involve their members in the scrutiny of EU draft legislation.[3] This is even more relevant for interparliamentary business.[4] Among the many possibilities to motivate MPs to attend and work, a central and intercultural incentive is to give them significant matters to decide. The sense that there are decisions to take and that the game is not played in advance constitutes indeed a strong incentive for action. Therefore, it is essential that the PAE would not be a mere *talking shop* but instead granted with important cyclical (budget) and not cyclical (bailout plans) matters to decide on. By contrast, the European Semester procedure finds difficulty in attracting attention within National Parliaments (NPs), given the (usual) limited possibility for MPs to influence the decisions taken.[5] Similarly, the early warning mechanism introduced by the Lisbon Treaty hardly ever motivated MPs due to limited formal rights once the threshold has been reached.[6]

Likewise, the unusual nature of the PAE in terms of party composition, and therefore of party discipline, could make its decisions more challenging for its members. During the first years, the outcome of collective decisions will likely be difficult to anticipate. Some members will vote according to party lines and others will follow their government's instructions. Some will stick to national interests, others to what they think the European interest is. In such a complex setting, members of the PAE who are active, respected and credited with expertise could gain some influence and weight on the final outcome. This is a strong insurance against free riders.

The two last points are more practical and have to do with the composition of the Assembly.

IV. Third, the share of MEPs foreseen for composing the PAE correctly reflects the need for embedding some of them – but only to a limited extent. MEPs are needed in such a setting for many reasons: their level of expertise, their full-time involvement in EU affairs,

[3] O. ROZENBERG, *Les députés français et l'Europe. Tristes hémicycles ?*, Paris: Presses de Sciences Po, 2018.

[4] N. LUPO, C. FASONE (eds), *Interparliamentary Cooperation in the Composite European Constitution*, Oxford: Hart Publishing, 2016.

[5] B. CRUM, *Parliamentary Accountability in Multilevel Governance: What Role for Parliaments in Post-Crisis EU Economic Governance?*, in *Journal of European Public Policy*, 2018, p. 268 *et seq.*; M. HALLERBERG, M. BENEDICTA MARZINOTTO, G.B. WOLFF, *Explaining the Evolving Role of National Parliaments under the European Semester*, in *Journal of European Public Policy*, 2018, p. 250 *et seq.*; V. KREILINGER, *National Parliaments, Surveillance Mechanisms and Ownership in the Euro Area*, in *Jacues Delors Institut Studies and Report*, March 2016.

[6] European Parliament, Directorate-General for Internal Policies, Policy Department C: Citizens' Rights and Constitutional Affairs, *The Role of National Parliaments in the EU after Lisbon: Potentialities and Challenges* – Study by O. Rozemberg, Brussels: European Union, 2017.

their professional skills in consensus seeking, their monopoly over the European Commission' censure… Yet, it is good that they do not monopolise the composition of the Assembly and even that they are in minority. The experience of the last two decades has shown indeed that the EP was unable to provide genuine popular legitimacy to the EU despite the greater share of legislative power given to it from Maastricht to Lisbon.[7] Contrary to conventional wisdoms, the lack of legitimacy of the EP does not originate from popular participation to European elections – in fact, voter turnout is rather stable once the effect of the enlargement of the EU is put aside. More simply, it derives from the mechanical remoteness of the institution: as a mean, there is one MEP for 533,000 inhabitants in Europe, versus one for 110,000 in the most populated Member States of the EU. Such a distant electoral link makes it difficult for the EP to mediate between voters and decision makers. In addition, the consensual and informal ways of doing politics at the EP do not help to develop a politicised public debate capable of interesting ordinary citizens.[8]

Most of the NPs are not more trusted than the EP – although there is, as a mean, 25 points more of electoral participation for national parliamentary elections. However, they have a more important position in public debates than the EP. For instance, almost all NP's organise committee or floor debates before European Councils that constitute key moments in the accountability process for the Heads of government's European policy.[9] Most of the top and visible politicians of each Member State belong to their national parliament. Whether it will be them who participate to the PAE or MPs with a more specialised profile, the activity of PAE will benefit from the proximity of those major political figures from all important political parties – including Eurosceptic ones that tend to be put aside within the EP.[10]

V. Fourth, the level of detail of the provision mentioning the share of MNPs and MEPs is commendable. A text mentioning vaguely the need for NPs and the EP to cooperate without further details would run the risk of experiencing the hopeless story of the interparliamentary conference foreseen by the fiscal pact.[11] It is known that the Art. 13 was obtained through the lobbying of some MNPs on national governments when the

[7] O. Rozenberg, *L'influence du Parlement européen et l'indifférence de ses électeurs : une corrélation fallacieuse ?*, in *Politique européenne*, 2009, p. 7 *et seq*.

[8] S. Bendjaballah, *Des illutions perdues? Du compromis au consensus au Parlement européen et à la Chambre des représentants américaines*, Brussels: Éditions de l'Université de Bruxelles, 2016.

[9] European Parliament, Directorate General for Internal Policies, Policy Department C: Citizens' Rights and Constitutional Affairs, *Democratic Control in the Member States of the European Council and the Euro Zone Summits* – Study by W. Wessels, O. Rozemberg, Brussels: European Union, 2013.

[10] N. Brack, Opposing Europe in the European Parliament. Rebels and Radicals in the Chamber, Basingstoke: Palgrave, 2018.

[11] V. Kreilinger, *Inter-Parliamentary Cooperation and Its Challenges: The case of Economic and Financial Governance*, in F. Fabbrini, E. Hirsch Ballin, H. Somsen (eds), *What Form of Government for the EU and the Eurozone?,* Oxford: Hart Publishing, 2015, p. 271 *et seq*.

pact was discussed but that, once it was implemented, the EP adopted a rather non-cooperative attitude. MNPs turned out to be less influential at that stage given their divided feature that contrasted with the capacity of MEPs to fight collectively for their institutional interest. The conclusion to be drawn from that example is that any interparliamentary forum not designed in detail by constitutive rules will fail to be a genuine decision-making body.

VI. To conclude, it can be said based on the four points developed that the idea to give an active and new Assembly to the Euro area as proposed by the T-Dem appears to be relevant in the light of past surveys and cases related to legislatures in general, and the European activities of NPs and the EP. Yet, following the same line of reasoning, it should be added that the proposal makes sense only if the main features of parliamentary matrix are followed in the building and the functioning of the PAE. Three important elements can he distinguished in that perspective: pluralism, transparency and permanence.[12] The *pluralism* of the Assembly should be sought not only at the global level but also regarding each national delegation – as the main justification for involving MNPs is providing debates at the domestic level. Therefore, the proposal that there could be just one representative by Member State is unacceptable to me.[13] It could even be envisaged that at least one representative belonging to the main opposition party should form the national parliamentary delegation to the PAE. *Transparency* of the debates and votes is also an obvious necessity of such parliamentary setting that must be highlighted in the text in order to contrast the PAE with the secrecy of the Euro area summits and Eurogroup meetings. *Permanency* means that an Assembly should meet with a minimal frequency in order to establish a sense of community among its members. The socialisation of the members as well as the credibility of their collective decisions depend on the fact that they know each other and have developed habits to talk and work together. Consequentially, a Treaty could mention a minimal number of regular sessions by year.

Under those conditions, the T-Dem appears indeed to be a realistic utopia – although it remains to be said that it is still, or just, (the reader will pick) a utopia.

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[12] K. PALONEN, *The Politics of Parliamentary Procedure,* Olpaden: Barbara Budrich Publishers, 2014.
[13] Art. 4, para. 2, T-Dem "Each national Parliament sends at least one representative".
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Overviews
Special Section – Democratising the Euro Area Through a Treaty?

A Eurozone Congress

Table of Contents: I. Introduction. – II. Summit and Congress. – III. Ministers and Congress. – IV. Treaties and Congress. – V. To conclude.

I. Between spring 2010 and summer 2012, the euro was at least three times close to collapsing, but in a sustained effort of fire-fighting and improvisation, European Union leaders and institutions managed to save it.[1] Five years after the emergency, public support for the currency zone is again solid. Especially Emmanuel Macron's victory in the 2017 French election has reenergized ideas for reforming the monetary union, even if operational follow-up has had to wait due to German coalition building. This lull is a good moment for reflection on the euro's democratic future.

The European Commission, stepping into the debate in December 2017 with a series of proposals, wishes to prune the Eurozone of its messy branches and strange crisis outgrowths. It aims to bring the rescue-funds of the European Stability Mechanism within the Treaty-remit as a European Monetary Fund, to "repatriate" the Fiscal Compact, and to give the Eurogroup of Finance Ministers a permanent chair who also is a Commission Vice-President and hence accountable to the Parliament – all in the name of efficiency and democracy.[2] Unsurprisingly, the Juncker-Commission rejects ideas of a separate Eurozone parliament.[3] Such a body upsets the Brussels doctrine; this is true for both the "Macron", Members of the European Parliament-only variant and perhaps even more for the "T-Dem" composite version.[4]

[1] This *Overview* has originally been written as a contribution to S. Hennette, T. Piketty, G. Sacriste, A. Vauchez, *T-Dem*, Harvard: Harvard University Press, 2018.

[2] Communication COM(2017)821 of 6 December 2017 from the Commission, *Further Steps Towards Completing Europe's Economic and Monetary Union: A Roadmap*.

[3] In European Commission, Speech SPEECH/17/3165 of 13 September 2017, *President Jean-Claude Junker's State of the Union Address 2017*, europa.eu, Juncker said: "The parliament for the eurozone is the European Parliament" (his Strasbourg audience applauded).

[4] Art. 4 of the Draft Treaty on the Democratization of the Governance of the Euro Area (T-Dem).

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Whereas the Commission prefers to treat currency politics as just any other Union policy, the authors of T-Dem rightly contend: "The government of the eurozone is not a Europe as the others: it's not just about organizing a continental market, it's henceforth about coordinating economic policies, harmonizing tax policies and converging the budgetary policies of the states, in short to enter the heart of the social pacts of the member states".[5]

Most of the economic and budgetary policy competences have until now remained in the hands of the Member States, and for good reason. At the same time, the crisis made clear to the public at large that the euro is also a common good. The Eurozone becomes stronger if this specific nature of its politics is acknowledged.

We therefore warmly welcome the "T-Dem proposal" for a Eurozone assembly composed of national and European parliamentarians. We also agree with the authors that such a body should have substantial powers in order not to become a "talking shop". In our view, it should concentrate on the newly emerged highest political authority in the currency union, serving in fact more as a "Eurozone Congress" (II). For both political and constitutional reasons, its powers should not interfere in the already crowded field of European and national law-making, by setting the corporate tax rate and pool public debt (III). And its purpose might be better served with a legal basis in the Union Treaties, instead of a new treaty (IV).

II. Since the negotiations on the Treaty of Maastricht some Member States, in particular France, have stressed the need for a *gouvernement économique*, a highest political authority for the currency union, embodied by the heads of state or government. Due to resistance of other Member States, in particular Germany, these efforts have not found their way into the Union Treaties. Hence, the finance ministers, halfway the technical and political level, were attributed most powers in coordinating economic and budgetary policies (Arts 121 and 126 TFEU).

The financial and sovereign debt crises have exposed the shortcomings of this arrangement. As of 2008, at the initiative of French President Sarkozy, the political vacuum has been "filled" by the Eurosummit. From an *ad hoc* meeting at the height of the banking crisis to a series of "summits of the truth" in 2010 and 2011, it was accorded legal recognition in the 2012 Fiscal Compact.[6] In the line of authority, the Eurosummit takes precedence over the Eurogroup, as became very visible for the public at large during the more recent Greek debt saga in the summer of 2015. But it was no different

[5] S. Hennette, T. Piketty, G. Sacriste, A. Vauchez, *Pour un traité de démocratisation de l'Europe*, Paris: Seuil, 2017, p. 9.

[6] Art. 12 of the 2012 Treaty on stability, coordination and governance in the Economic and Monetary Union (hereinafter Fiscal Compact).

during earlier key episodes in the crisis.[7] In emergencies and for strategic decisions, the "chiefs" are in charge, either in full European Council format or in euro area composition. Contrary to what the authors argue, it is therefore the joint presidents and prime ministers in their various constellations who bear primary responsibility for Eurozone politics *vis-à-vis* their electorates.

The creation of the Summit forms an expression of the political nature of the currency union where national economic policies and central steering go hand-in-hand. Some observers conclude that the currency union, in its present form, cannot survive: either it should develop into a Federal entity or it will collapse. We don't share this view. The blend of national and central features corresponds to the Union's constitutional nature, in which constituent power lies with the Member States whose governments also play a central role at the level of constituted power. This is a historical and political reality governments are aware of, but which is often missed, or dismissed, by economic commentators and legal scholars. And yet, political leaders in this set-up not only act on their own national interests, but also in concert, in support of the common good, as representatives of *Member* States.[8]

This political awareness at the executive level of a common bond is difficult to create or reproduce at the level of democratic representation and control. National leaders sit around the same table, national parliamentarians do not. Hence the present conundrum, in which neither the European Parliament nor national parliaments are capable of adequately acting in this 'intermediate sphere', where national and common interests meet;[9] it is the source of the "blind angle" the authors identify.[10] This is where their case for a Eurozone parliament, with its composite membership, is strongest. The body would control the political decisions that the Eurosummit takes, such as the green-lighting of financial assistance, the initiation of new constructs like the Banking Union, the setting of economic priorities and personnel issues such as the nomination of the Eurogroup president who should become a full-time chair.

In light of its major interlocutor and its dual composition, this parliamentary assembly should perhaps not be called "Eurozone parliament" but rather "Eurozone Congress". Already in 2003, then European Convention president Valéry Giscard d'Estaing coined the

[7] See in this regard L. VAN MIDDELAAR, *De nieuwe politiek van Europa*, Groningen: Historische Uitgeverij, 2017, pp. 256-259 (discussing the involvement of political leaders in the Cypriot assistance operation of 2013), and V. BORGER, *The Transformation of the Euro: Law, Contract, Solidarity* (dissertation thesis, defended at Leiden University on 31 January 2018, pp. 220-229 (discussing the steering role of the leaders in relation to the establishment of the temporary rescue facilities European Financial Stability Facility and European Financial Stabilization Mechanism in the weekend of 7-9 May 2010).

[8] Either through Institutions like the European Council or international agreements like the Fiscal Compact or the 2012 European Stability Mechanism Treaty (hereinafter, ESM Treaty).

[9] This is a key argument in L. VAN MIDDELAAR, *The Passage to Europe: How a Continent Became a Union*, New Haven, London: Yale University Press, 2013.

[10] S. HENNETTE, T. PIKETTY, G. SACRISTE, A. VAUCHEZ, *Pour un traité de démocratisation de l'Europe*, cit., p. 7.

term "European Congress" for an assembly consisting of national and European parliamentarians which would gather for important occasions.[11] But whereas the body envisaged by Giscard would be little more than an applauding machine, legitimizing the authority of the European Council and its president, the Eurozone Congress would have teeth.

In sum, the Eurozone Congress should operate as the parliamentary interlocutor of the "chiefs". Their political decisions or strategic orientations would require its consent.

III. The Eurogroup stands below the Summit in the line of authority. Under the radar, it has witnessed a major increase in its powers. It no longer only operates as an informal body,[12] it also takes legally binding decisions when its members meet in their capacity of Governors of the European Stability Mechanism.[13] The Governors approve of assistance and its payment in tranches, control the drafting of Memoranda of Understanding and decide on increases in the capital of the fund.[14] Here too, there is no adequate joint parliamentary control and there is a role to play by the Eurozone Congress. In our view this role would still exist if and when the European Stability Mechanism would be "repatriated" in the EU Treaties. The politics of the currency union, after all, would continue to demand dual legitimacy.

However, we do not agree that the Eurozone assembly, acting as "legislator" together with the Eurogroup, should acquire competences allowing it to set the corporate tax rate or to pool public debt (Art. 12, paras 2-4, T-Dem). This goes way beyond addressing the democratic "blind angle". It would amount to a fundamental change in the division of responsibilities between the national and central level. The authors make no secret in this regard of their wish to break Germany's hold on the direction of economic policy, spelling out the assembly's capacity to outvote a recalcitrant bloc of German deputies. This is surprising since they themselves wish to avoid that "the institutions of

[11] Note that one could argue that the Union's constitutional set-up already contains a (legislative) "Congress", consisting of the Council and the European Parliament.

[12] Strictly speaking, the Eurogroup *de facto* also has the capacity to adopt legally binding decisions under the EU Treaties, as States outside the currency union are excluded from voting in the Council on certain economic policy decisions (see Art. 139, paras 2 and 4, TFEU).

[13] Art. 5 ESM Treaty.

[14] Since the entry into force of the "Two-Pack" (*id est*, Regulation (EU) 472/2013 of the European Parliament and of the Council of 21 May 2013 on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability, and Regulation (EU) 473/2013 of the European Parliament and of the Council of 21 May 2013 on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area) the main elements of economic policy conditionality linked to assistance of the European Stability Mechanism also have to be approved by the Council (see Art. 7 of regulation 472/2013).

a national democracy operate in a vacuous space".[15] This move cannot be compensated by "associating" national parliamentarians, in their capacity as members of the Congress, with such decisions. It would bereave national parliaments of a vital power, and thus meet with political as well as constitutional obstacles and concerns.

In sum, the Eurozone Congress could also act as the parliamentary interlocutor of euro area finance ministers, be it in the forum of the Eurogroup or in the European Stability Mechanism Board of Governors, and in particular of their full-time president (who in our view should not also be a Commission Vice-President). This in itself warrants its existence, for which a major transfer of budgetary competences is not required and which will in practice form a major hurdle to its coming about.

IV. How to establish the Eurozone assembly? The authors of T-Dem opt for a new treaty. And they have the law on their side. Member States can exercise their economic policy competences individually but also jointly, through the conclusion of an international treaty, as was (re)confirmed by the Court in *Pringle* when it approved of the Europan Stability Mechanism.[16] But what are the benefits of this approach over amendment of the Union Treaties? The authors argue that the latter is an arduous process as it requires the consent of all Member States, yet the conclusion of a new treaty is not without obstacles either. Such a treaty too needs to be approved and ratified by the Eurozone States in line with their constitutional requirements, which means that it may become the subject of a referendum, as happened with the Fiscal Compact in Ireland, or a constitutional challenge, notably in Germany. As the hurdles to the establishment of a Eurozone assembly will consequently be significant anyhow, it is best to take the royal road: amendment of the EU Treaties.

This is not to say that we reject the use of international treaties altogether. During the crisis it proved a valuable tool when the situation called for *instant action.* The argument of a "democratic urgency"[17] has its appeal but cannot be equated with moments of sheer survival.

V. Establishing a Eurozone Congress will not be easy. Neither proud national parliaments nor the prickly European Parliament like to see new rivals on their turf. The authors seem to underestimate this potential for on-the-ground resistance (which has effectively killed the interparliamentary forum foreseen by Art. 13 of the Fiscal Compact). The best way to overcome this resistance to its creation is to stress the complementary nature of the Congress.

[15] S. HENNETTE, T. PIKETTY, G. SACRISTE, A. VAUCHEZ, *Pour un traité de démocratisation de l'Europe*, cit., p. 10.

[16] Court of Justice, judgment of 27 November 2012, case C-370/12, *Pringle*.

[17] S. HENNETTE, T. PIKETTY, G. SACRISTE, A. VAUCHEZ, *Pour un traité de démocratisation de l'Europe*, cit., p. 26.

In many cases existing institutions can adapt to the demands of a new situation. In general, prudence is therefore in order before engaging in institutional engineering. But the authors are fully right that the existing parliaments have not been able to fill the void of democratic control, and – we would add – are unlikely to do so in the near future. Their case for a Eurozone assembly is therefore strong.

The Eurozone Congress would be a forum bringing together the various debates *in* and *on* the currency union, which now often take place within the confines of national boundaries. But the objective of energizing the political debate should not be confounded with achieving certain policy outcomes. At some points the T-Dem authors seem to favour the latter over the former, emphasizing the chance for the Left to depart from the "politics of austerity" of the crisis years. The beauty of the Congress, however, lies in its representative function, both echo chamber and a place forging a stronger common bond. It would be a pity to pre-empt and close these functions of openness by ascribing it an *a priori* economic destination.

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ARTICLES

MAPPING THE SCOPE OF APPLICATION OF EU FUNDAMENTAL RIGHTS: A TYPOLOGY

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ABSTRACT: A number of scholars have attempted to delineate the scope of application of EU fundamental rights with regard to the Member States. The present *Article* aims to establish a particularly comprehensive typology of situations in which Member States are bound by EU fundamental rights. It is based on an extensive assessment of the CJEU's case law. Developing its own interpretation of the Court's criteria, the *Article* establishes a number of "clusters" of cases. At the same time, it shows the principles for the application of EU fundamental rights which can be observed in action. Some loose ends remain, however, that the Court is called to address.

KEYWORDS: EU fundamental rights – scope of application of EU fundamental rights – Art. 51 of the Charter of Fundamental Rights of the European Union – scope of EU law – EU competences – EU Constitutional law.

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I. Introduction

One of the many debated issues in EU fundamental rights law is the extent to which EU fundamental rights apply to the Member States. In its decision in *Åkerberg Fransson*[1] in 2013, the Court of Justice held that the scope of EU fundamental rights – fundamental rights forming part of the general principles of EU law and fundamental rights enshrined in the Charter of Fundamental Rights of the European Union (Charter) – was coextensive with the scope of EU law.[2] The case prompted many reactions. Observers disagreed to what extent the Court had indicated that the scope of application of EU fundamental rights with regard to the Member States had changed or remained the same as before.[3] The present *Article*, while agreeing with the latter position, does not intend to enter in this particular debate. Rather, it aims to examine by means of a comprehensive analysis of the case law whether the Court has achieved its goal of a coherent jurisprudence on the topic.[4] The *Article* finds that most of the case law can be fitted into a convincing categorization. Certain developments, however, remain that do not fit into the otherwise coherent picture and ought to be addressed by the Court.

Subsequently, the *Article* sets out a comprehensive typology of situations in which Member States act respectively within or outside of the scope of EU law. Simultaneously, it scrutinizes the CJEU's case law as to whether it accurately provides reasons why EU fundamental rights apply or do not apply.

[1] Court of Justice, judgment of 26 February 2013, case C-617/10, *Åkerberg Fransson*, paras 21-22.

[2] As becomes clearer subsequently, the scope of application of both kinds of fundamental rights is mostly the same – with the exception of Charter rights aimed exclusively at the EU to the exclusion of the Member States (see *infra*, section IV.9).

[3] See, e.g. for a reading that the decision broadened the scope of application of EU fundamental rights N. Lavranos, *The ECJ's Judgments in Melloni and Åkerberg Fransson: Une ménage à trois difficulté*, in *European Law Reporter*, 2013, p. 139; P. Gooren, *Geltung und Anwendung der EU-Grundrechte-Charta (Anmerkung zu Åkerberg Fransson)*, in *Neue Zeitschrift für Verwaltungsrecht*, 2013, p. 564. See for the opposite view L. Ohlendorf, *Grundrechte als Massstab des Steuerrechts in der Europäischen Union*, Tübingen: Mohr Siebeck, 2015, p. 73. See for appraisals that read the decision as a continuation of the previous case law F. Fontanelli, *Hic Sunt Nationes: The Elusive Limits of the EU Charter and the German Constitutional Watchdog*, in *European Constitutional Law Review*, 2013, p. 315; M. Szwarc, *Application of the Charter of Fundamental Rights in the Context of Sanctions Imposed by Member States for Infringements of EU Law: Comment on Fransson Case*, in *European Public Law*, 2014, p. 239; D. Ritleng, *De l'articulation des systèmes de protection des droits fondamentaux dans l'Union – Les enseignements des arrêts Åkerberg Fransson et Melloni*, in *Revue trimestrielle de droit européen*, 2013, p. 275; A. Epiney, *Le champ d'application de la Charte des droits fondamentaux: l'arrêt Fransson et ses implications*, in *Cahiers de Droit Européen*, 2014, p. 293.

[4] Due to the massive amount of case law to be discussed, the present contribution remains necessarily selective and emphasizes the most crucial and illustrative decisions. The present survey is based on a larger study examining the whole relevant case law of the CJEU up until the summer of 2017, see B. Pirker, *Grundrechtsschutz im Unionsrecht zwischen Subsidiarität und Integration*, Baden-Baden: Nomos, 2018.

II. The existing approaches and the reasons for a comprehensive typology

A number of scholars have undertaken the task of categorizing the case law of the CJEU on the scope of application of EU fundamental rights. The present *Article* suggests going beyond the approaches used to date by creating an exhaustive typology of when Member States are bound by EU fundamental rights.

In the literature, many observers continue to adhere to a classic approach distinguishing two constellations based on two important decisions handed down by the Court of Justice.[5] Thus, two categories are used to describe when EU fundamental rights apply. In *Wachauf*, the Court held that the requirements of EU fundamental rights were binding on the Member States "when they implement" EU rules.[6] The doctrine coined the term of an "agency situation" for this constellation.[7] In *Elliniki Radiophonia Tiléorassi AE (ERT AE)* the Court found that when Member States relied on a justification provided by EU law for measures that were liable to obstruct a fundamental freedom, such a justification had to be interpreted in light of EU fundamental rights. This means that Member States were bound by EU fundamental rights.[8] The "two-constellations" approach, however, necessarily neglects a variety of situations that do not fit within its perspective, but can also lead to the applicability of EU fundamental rights.[9]

Certain more refined categorizations have been developed in the literature over the years.[10] However, they tend to suffer from the perceived need to create as few categories as possible. As an example, *Sarmiento* distinguishes between a limited number of types of "triggering" rules of EU law, namely mandating, optioning, remedial and exclusionary

[5] See M. Borowsky, *Artikel 51 Anwendungsbereich*, in J. Meyer (ed.), *Charta der Grundrechte der Europäischen Union – Kommentar*, Baden-Baden: Nomos, 2014, para. 24; J. Bergmann, *Grundrechtecharta der EU*, in J. Bergmann (ed.), *Handlexikon der Europäischen Union*, Baden-Baden: Nomos, 2012, p. 478 *et seq.*; F. Schorkopf, *Grundrechtsverpflichtete*, in Ch. Grabenwarter (ed.), *Europäischer Grundrechtsschutz,* Baden-Baden: Nomos, 2014, paras 18 *et seq.*; B. van Bockel, P. Wattel, *New Wine into Old Wineskins: The Scope of the Charter of Fundamental Rights of the EU after Åkerberg Fransson*, in *European Law Review*, 2013, p. 877; M. Holoubek, *Ein Grundrechtskatalog für Europa*, in U. Becker, A. Hatje, M. Potacs, N. Wunderlich (eds), *Verfassung und Verwaltung in Europa*, Baden-Baden: Nomos, 2014, p. 121 *et seq*.

[6] Court of Justice, judgment of 13 July 1989, case 5/88, *Wachauf*, para. 19.

[7] J.H.H. Weiler, *Fundamental Rights and Fundamental Boundaries: On Standards and Values in the Protection of Human Rights*, in N. Neuwahl, A. Rosas (eds), *The European Union and Human Rights*, Den Haag: Martinus Nijhoff Publishers, 1995, p. 67.

[8] Court of Justice, judgment of 18 June 1991, case C-260/89, *Elliniki Radiophonia Tiléorassi AE (ERT AE)*, para. 43. On the criticism of this constellation see *infra*, section IV.2.

[9] See for a concise overview and criticism also E. Hancox, *The Meaning of "Implementing" EU Law under Article 51(1) of the Charter: Åkerberg Fransson*, in *Common Market Law Review*, 2013, p. 1418 *et seq*.

[10] See N. Lazzerini, *The Scope and Effects of the Charter of Fundamental Rights in the Case Law of the European Court of Justice*, in G. Palmisano (ed.), *Making the Charter of Fundamental Rights a Living Instrument*, Leiden, Boston: Brill Nijhoff, 2014, p. 40 *et seq*.

rules.[11] This categorization is already more refined and helpful as a matter of principle. However, it again leaves out certain topics in the case law that arguably would have merited their own category or a reasoned inclusion in an existing category, such as the situation of minimum harmonization by EU law or of Charter rights not addressed to the Member States. It is thus submitted that the desire to create an all-too limited number of categories ought to be overcome.[12] Instead, a comprehensive typology provides a more realistic and more exhaustive overview of the scope of application of EU fundamental rights to the Member States. The suggested typological approach thus deliberately identifies a larger number of constellations.

Moreover, the typological approach chosen in the present paper intentionally creates "clusters" of typical situations in which EU fundamental rights apply. The notion of "clusters" is used to accentuate that the main objective is exhaustiveness in categorizing the Court's case law rather than absolute precision in delimitating categories. Due to the various ways in which EU law impacts on national law, any categorization will suffer from penumbral effects at the borders of each category. For example, EU law will sometimes give discretion to national law, e.g. in implementing a directive. In other cases (or even the case of that very same directive), it will require from national law and national judges that they guarantee the effectiveness of rights and obligations derived from EU law, e.g. through the application of adequate procedural guarantees. It is hard to see a clear-cut qualitative difference between the two situations. One will in all likelihood even find borderline cases between the two situations. The "cluster" approach is a reaction to this feature of EU law. It aims to emphasize the core arguments used by the Court to argue that EU fundamental rights do or do not apply. However, it abandons all pretences that clear-cut categories can be developed.

Finally, in its endeavour, the present study intentionally leaves aside two aspects. First, much ink has been spilled on the details of Art. 51, para. 1, of the Charter, its wording, context and purpose.[13] Arguably, not much would be gained from rehearsing these

[11] D. Sarmiento, *Who's Afraid of the Charter?*, in *Common Market Law Review*, 2013, p. 1279 *et seq*.

[12] See for another example J. Nusser, *Die Bindung der Mitgliedstaaten an die Unionsgrundrechte*, Tübingen: Mohr Siebeck, 2011, p. 146, who tries to rely on one particular term (*"Beruhen"* in the German original) to capture all the complexity of the topic, but ultimately must resort to a broader set of criteria.

[13] See e.g. on the history of the provision T.C. Ludwig, *Zum Verhältnis zwischen Grundrechtecharta und allgemeinen Grundsätzen – die Binnenstruktur des Art. 6 EUV n. F.*, in *Europarecht*, 2011, p. 722; S. Barriga, *Die Entstehung der Charta der Grundrechte der Europäischen Union*, Baden-Baden: Nomos, 2003, p. 61; on the explanations accompanying the provision J. Snell, *Fundamental Rights Review of National Measures: Nothing New under the Charter?*, in *European Public Law*, 2015, p. 291 *et seq*.; on the wording F. Picod, *La hiérarchisation des sources au sein de l'article 6 TUE*, in R. Tinière, C. Vial (eds), *La protection des droits fondamentaux dans l'Union européenne*, Brussels: Bruylant, 2015, p. 81; F. Kirchhof, *Nationale Grundrechte und Unionsgrundrechte – Die Wiederkehr der Frage eines Anwendungsvorranges unter anderer Perspektive*, in *Neue Zeitschrift für Verwaltungsrecht*, 2014, p. 1538; on the context M. Cartabia, *Article 51 – Field of Application*, in W. Mock, G. Demuro (eds), *Human Rights in Europe – Commentary on the Charter of Fundamental Rights of the European Union*, Durham: Carolina Academic Press, 2010, p. 320

arguments; so the Court of Justice will thus be taken at its word when it states in *Åkerberg Fransson* that the provision merely "confirms" the Court's previous case law.[14] Second, in order to keep a limited scope of inquiry, the much debated follow-up question of the discretion that Member States still enjoy once they are bound by EU fundamental rights will also be left aside.[15]

III. The structure of the typology and the four *Iida*-criteria

There are different ways to establish a typology of the Court's case law. A helpful starting point is given by the CJEU itself. After some earlier remarks on the topic,[16] in *Iida* the Court of Justice enumerated criteria that it supposedly used to establish the applicability of EU fundamental rights to the Member States.[17] It established a set of four criteria for this purpose:[18]

– the character of a rule of national law and whether it is intended to implement a provision of EU law (called for the present purposes the "criterion of the character of the rule of national law");

– whether the rule of national law pursues objectives similar to those covered by EU law (hereinafter the "criterion of the convergence of objectives");

– whether the rule of national law is capable of affecting EU law (hereinafter the "criterion of the impact on EU law"); and

– whether there are specific rules of EU law on the matter or capable of affecting said matter (hereinafter the "criterion of the density of EU regulation").[19]

For the following typology, nothing speaks against using these criteria as the basis. However, a number of *caveats* are required. First, the criteria remain vague and the

et seq.; on the objectives see M. Zuleeg, *Zum Verhältnis nationaler und europäischer Grundrechte. Funktionen einer EU-Charta der Grundrechte*, in *Europäische Grundrechtezeitschrift*, 2000, p. 514.

[14] *Åkerberg Fransson*, cit., para. 18.

[15] See Court of Justice, judgment of 26 February 2013, case C-399/11, *Melloni*; judgment of 30 May 2013, case C-168/13 PPU, *Jeremy F.*; and most recently judgment of 5 December 2017, case C-42/17, *M.A.S. and M.B*. See also out of virtually innumerable contributions A. Pliakos, G. Anagnostaras, *Fundamental Rights and the New Battle over Legal and Judicial Supremacy: Lessons from Melloni*, in *Yearbook of European Law*, 2015, p. 97 *et seq.*; L. Besselink, *The Parameters of Constitutional Conflict After Melloni*, in *European Law Review*, 2014, p. 531 *et seq.*; A. Torres Pérez, *Melloni in Three Acts: From Dialogue to Monologue*, in *European Constitutional Law Review*, 2014, p. 308 *et seq.*; see also on a follow-up decision by the German Constitutional Court J. Nowag, *EU Law, Constitutional Identity, and Human Dignity: A Toxic Mix? – Bundesverfassungsgericht: Mr R*, in *Common Market Law Review*, 2016, p. 1441 *et seq*.

[16] Court of Justice, judgment of 18 December 1997, case C-309/96, *Annibaldi*, paras 21-23.

[17] Court of Justice, judgment of 8 November 2012, case C-40/11, *Iida*, para. 79.

[18] Although not all commentators rely on these criteria, see D. Sarmiento, *Who's Afraid of the Charter?*, cit., p. 1279. See, by contrast, M. Dougan, *Judicial Review of Member State Action under the General Principles and the Charter: Defining the "Scope of Union Law"*, in *Common Market Law Review*, 2015, p. 1232.

[19] Confirmed in: Court of Justice, judgment of 6 March 2014, case C-206/13, *Siragusa*, para. 25; judgment of 10 July 2014, case C-198/13, *Hernández*, para. 37.

Court, apart from announcing them, never provides a closer definition in its case law. One can thus base a typology only on one's own interpretation of the mentioned criteria. In the present study, the whole relevant case law of the Court is assessed and categorized under the author's interpretation of each of the four criteria. The aim is to achieve a coherent picture in classifying the Court's decisions, without any final claim to have successfully "read the mind" of the Court. Nonetheless, the vagueness of the criteria leaves discretion for alternative readings. For example, one could argue that the first criterion designates cases of implementation of EU law by the Member States with or without discretion granted by EU law.[20] Alternatively, the second criterion could also be read as overlapping with the constellation of the implementation of EU law through procedures and sanctions established by the Member States.[21] The present approach is thus but one suggestion on how to read the criteria, namely as labels that allow to group together parts of the case law and provide an overall logic for the Court's jurisprudence. Its main benefit is arguably its exhaustiveness in capturing all the Court's *dicta*.

As a second aspect, there is an overwhelming emphasis on one of the four criteria in the jurisprudence. Consequently, the following sections focus strongly on the fourth criterion which does the bulk of the work to create the intended typology of situations in which EU fundamental rights are applicable, the before-mentioned clusters.[22] Nevertheless, there remain some elements of the case law that can only be fitted under the other criteria.

Lastly, the Court never expressly clarifies how the four criteria interact. The presently suggested reading of the case law indicates – apart from the mentioned importance of the fourth criterion – that the first criterion of the character of the rule of national law stands somewhat apart from the others. This criterion merely assembles a number of relevant characteristics closely related to the national rule at issue and does not establish the applicability of EU fundamental rights on its own.[23] Furthermore, criterion two and three on the convergence of objectives and the impact on EU law also stand somewhat apart. As a closer analysis of their treatment in the case law shows, the Court seems to use them as safety valves when the analysis under the fourth criterion does not yield a satisfactory result. Their exact relationship to one another and their content remain, however, unsatisfactorily blurred.[24]

On this basis, the following survey shows that the case law of the Court can be fitted within the corners of the mentioned criteria. The Court has thus indeed achieved a certain degree of coherence. Nonetheless, there remain some worrying elements in this picture, as will be shown.

[20] See *infra*, sections IV.1 and IV.2.
[21] See *infra,* section IV.3.
[22] See *infra,* section IV.
[23] See *infra,* section V.
[24] See *infra,* sections VI and VII.

IV. The criterion of the density of EU regulation

Based on the large amount of decisions of the Court of Justice, a number of loose categories or clusters can be formed to structure the assessment. For this purpose, one can move from situations of "higher" to "lower" density of EU regulation, establishing a spectrum of density. As an initial *caveat*, the applicability of EU fundamental rights and the jurisdiction of the Court often overlap, but must not be conflated. There can be situations, e.g. in the field of the Common Foreign and Security Policy, where rules of EU law exist and imply the applicability of EU fundamental rights, but the Court is not competent because express rules exclude its jurisdiction.[25]

IV.1. Implementation of EU law by the Member States without discretion

There is hardly any doubt that EU fundamental rights are applicable whenever Member States simply apply EU rules without any *interim* steps of law-making in national law.[26] Examples are manifold.[27] Already in this rather clear constellation the Court emphasizes that there is no need for an express clause to render EU fundamental rights applicable.[28]

IV.2. Margins of discretion granted to the Member States by EU law

In a number of situations EU law leaves discretion to Member States regarding its implementation. EU fundamental rights apply in these cases. Commentators have doubted whether EU fundamental rights should apply in these situations of discretion granted by EU law, focusing most prominently on the scenario of Member States justifying their action under one of the public interest grounds for restricting the fundamental freedoms of the internal market. The central point of criticism is that there is no need for a uniform application and/or interpretation of EU law that would justify applying EU fundamental rights.[29] However, it appears more coherent to apply EU fundamental rights, as arguably

[25] See, also on the interpretation of such clauses: Court of Justice, judgment of 28 March 2017, case C-72/15, *Rosneft*, para. 74.

[26] Typically, this will be the case of provisions with direct effect, although they must not necessarily provide rights to individuals, as seen in the following examples.

[27] See e.g. on the application of the Union Customs Code: Court of Justice, judgment of 18 December 2008, case C-349/07, *Sopropé*, para. 35; see, moreover, judgment of 15 January 2013, case C-416/10, *Križan*, paras 111-112; judgment of 2 December 2014, joined cases C-148/13, C-149/13 and C-150/13, *A, B and C*, para. 53.

[28] Court of Justice, judgment of 3 July 2014, joined cases C-129/13 and C-130/13, *Kamino International Logistics*, para. 31.

[29] See Th. Kingreen, R. Störmer, *Die subjektiv-öffentlichen Rechte des primären Gemeinschaftsrechts*, in *Europarecht*, 1998, p. 283; R. Kanitz, P. Steinberg, *Grenzenloses Gemeinschaftsrecht? Die Rechtsprechung des EuGH zu Grundfreiheiten, Unionsbürgerschaft und Grundrechten als Kompetenzproblem*, in *Europarecht*, 2003, p. 1023; W. Cremer, *Der programmierte Verfassungskonflikt: Zur Bindung der Mitgliedstaaten an die Charta der Grundrechte der Europäischen Union nach dem Konventionsentwurf für eine Europäische Verfassung*, in *Neue Zeitschrift für Verwaltungsrecht*, 2003, p. 1455; Th. Kingreen, *Artikel 51 GRCh*, in C. Calliess, M. Ruffert (eds), *EUV/AEUV Kommentar*, Munich: C.H.Beck, 2011, para. 17. In the past, some scholars also had

Member States still act within the scope of EU law in these circumstances. They still have to abide by the conditions imposed by EU law, namely by the fundamental freedoms, on their action.[30] This also becomes visible in form of the applicability of the principle of proportionality[31] and the interpretive authority of the Court of Justice.[32] It remains, however, unfortunate that the Court has not clearly spelled out these reasons in its case law and left this task mostly to doctrinal debate.

Several scenarios of discretion granted by EU law exist. First, as indicated, Member States are acting within the discretion granted by EU law when they are justifying their action under one of the public interest grounds for restricting the fundamental freedoms of the internal market.[33]

Second, Member States are acting within the discretion granted by EU law whenever they rely on fundamental rights as a ground of justification for actions that restrict EU fundamental freedoms. In the classic *Schmidberger* constellation, a Member State fulfills

argued that a distinction should be drawn between written and unwritten grounds of justification, M. RUFFERT, *Schlüsselfragen der Europäischen Verfassung der Zukunft: Grundrechte – Institutionen – Kompetenzen – Ratifikation*, in *Europarecht*, 2004, p. 177 *et seq.*; G. DAVIES, *Can Selling Arrangements be Harmonised?*, in *European Law Review*, 2005, p. 376 *et seq*.

[30] A. WALLRAB, *Die Verpflichteten der Gemeinschaftsgrundrechte: Umfang und Grenzen der Bindung der Europäischen Gemeinschaft und der Mitgliedstaaten an die Grundrechte des Europäischen Gemeinschaftsrechts*, Baden-Baden: Nomos, 2004, p. 91 *et seq.*; A. GROßE-WENTRUP, *Die Europäische Grundrechtecharta im Spannungsfeld der Kompetenzverteilung zwischen Europäischer Union und Mitgliedstaaten: eine Untersuchung am Beispiel von Art. 14 und Art. 16 EuGRC*, Berlin: Duncker & Humblot, 2003, p. 60 *et seq*.

[31] E. SPAVENTA, *Federalisation Versus Centralisation: Tensions in Fundamental Rights Discourse in the EU*, in M. DOUGAN, S. CURRIE (eds), *50 Years of the European Treaties – Looking Back and Thinking Forward*, Oxford: Hart Publishing, 2009, p. 350 *et seq*.

[32] J.H.H. WEILER, N. LOCKHART, *"Taking Rights Seriously" Seriously – The European Court of Justice and Its Fundamental Rights Jurisprudence*, in *Common Market Law Review*, 1995, p. 77.

[33] *ERT*, cit., para. 43; Court of Justice, judgment of 5 October 1994, case C-23/93, *TV 10*, paras 24-26; judgment of 26 June 1997, case C-368/95, *Familiapress*, paras 24-25; judgment of 11 July 2002, case C-60/00, *Carpenter*, paras 40-41; judgment of 29 April 2004, joined cases C-482/01 and C-493/01, *Orfanopoulos*, para. 97; judgment of 27 April 2006, case C-441/02, *Commission v Federal Republic of Germany*, para. 108; judgment of 23 November 2010, case C-145/09, *Tsakouridis*, para. 52; judgment of 22 December 2010, case C-208/09, *Sayn-Wittgenstein*, para. 89; judgment of 2 June 2016, case C-438/14, *Bogendorff von Wolffersdorff*, para. 71. See also with regard to unwritten grounds of justification Court of Justice, judgment of 30 April 2014, case C-390/12, *Pfleger and others*, paras 35-36; judgment of 11 June 2015, case C-98/14, *Berlington Hungary*, para. 74; judgment of 10 March 2016, case C-235/14, *Safe Interenvios*, para. 109; judgment of 21 December 2016, case C-201/15, *AGET Iraklis*, para. 65; judgment of 14 March 2017, case C-157/15, *Achbita*, para. 38.

a positive obligation[34] to protect fundamental rights and at the same time restricts a fundamental freedom.[35] It is somewhat debated how exactly fundamental rights are to be categorized as a ground of justification.[36] The reasons for the applicability of EU fundamental rights are, however, the same as in the context of justifications for restrictions of fundamental freedoms.[37]

Third, Member States are acting within the discretion granted by EU law where EU secondary law grants them such discretion. In the case of regulations, their provisions can be so detailed and clear that there is no discretion and EU fundamental rights apply because there is simply an implementation of EU law without discretion.[38] Apart from this scenario, however, a regulation can also allow for room regarding its implementation that has to be filled by the Member States' choices. In these cases, as far as EU law permits,[39] Member States have to take measures e.g. to complement a regulation in accordance with EU fundamental rights.[40] A more limited form of discretion is left where only specific, pre-defined options for action are given by a regulation. Nonetheless, EU fundamental rights apply for the same reasons.[41] In certain situations, the discretion granted

[34] See on the ensuing margin of discretion W. RENGELING, P. SCZCEKALLA, *Grundrechte in der Europäischen Union: Charta der Grundrechte und allgemeine Rechtsgrundsätze*, Cologne: C. Heymann, 2004, para. 417.

[35] Court of Justice, judgment of 12 June 2003, case C-112/00, *Schmidberger*, para. 74.

[36] The Court classified it as part of the ground of public order, see Court of Justice, judgment of 14 October 2004, case C-36/02, *Omega*, para. 34. See with a similar view M. BULTERMAN, H. KRANENBORG, *What if Rules on Free Movement and Human Rights Collide? About Laser Games and Human Dignity: The Omega Case*, in *European Law Review*, 2006, p. 100 *et seq.*; in favour of a category of its own J. MORIJN, *Balancing Fundamental Rights and Common Market Freedoms in Union Law: Schmidberger and Omega in the Light of the European Constitution*, in *European Law Journal*, 2006, p. 39; M. BLECKMANN, *Nationale Grundrechte im Anwendungsbereich des Rechts der Europäischen Union*, Tübingen: Mohr Siebeck, 2011, p. 92 *et seq*. See for some indications in this direction Court of Justice, judgment of 11 December 2007, case C-438/05, *Viking*, para. 77; judgment of 18 December 2007, case C-341/05, *Laval*, paras 93 and 103.

[37] See W. FRENZ, *Handbuch Europarecht – Band 4 Europäische Grundrechte*, Berlin: Springer, 2009, para. 263; R. STREINZ, W. MICHL, *Artikel 51 GR-Charta*, in R. STREINZ (ed.), *EUV/AEUV Kommentar*, Munich: C.H.Beck, 2012, para. 12.

[38] See *supra*, section IV.1.

[39] Court of Justice, judgment of 11 June 2009, case C-33/08, *Agrana Zucker*, para. 31.

[40] See e.g. in the field of agricultural policy Court of Justice, judgment of 13 April 2000, case C-292/97, *Karlsson and others*, para. 35; judgment of 17 December 1998, case C-186/96, *Demand*, para. 35. See also Court of Justice, judgment of 12 June 2014, case C-314/13, *Peftiev*, paras 24-25; judgment of 9 january 2015, case C-498/14 PPU, *Bradbrooke*, paras 51-52.

[41] *Wachauf*, cit., paras 21-22; Court of Justice, judgment of 15 February 1996, case C-63/93, *Duff and others*, para. 29; judgment of 4 July 1994, case C-351/92, *Graff*, para. 18; judgment of 2 October 2014, case C-101/13, *U*, paras 47-49. See also K. LENAERTS, *La Vie après l'Avis: Exploring the Principle of Mutual (Yet not Blind) Trust*, in *Common Market Law Review*, 2017, p. 810.

can become narrowed down to such an extent that it effectively transforms into a positive obligation to act in a particular manner in order to comply with EU fundamental rights.[42]

In the case of directives, *per definitionem* they are supposed to leave the choice of means for their implementation to the Member States.[43] In practice, some directives can be very detailed, with the consequence that the margins of discretion granted to Member States are rather narrow. In such cases, it is hard to distinguish them from regulations offering a certain margin of discretion for their implementation; the Court has thus also applied the same basic reasoning to them. In the case of directives, the Court has thus found that Member States are bound by EU fundamental rights when they implement the directive, e.g. when they use options or explicit exceptions contained in the directive.[44] Discretion for implementation can be created by express provisions, but also by omissions and silence within a directive.[45] When implementing directives, Member States must use the discretion granted to them to achieve a result compliant with EU fundamental rights[46] and balance the protection of fundamental rights with other regulatory goals if necessary.[47] They may be obliged to implement a directive in a manner that allows for the balancing of the goal of the rule of national law and EU fundamental rights.[48] They are prohibited from relying on an interpretation of the directive that is contrary to EU fundamental rights.[49]

Directives are not only implemented by means of legislative action. All other competent authorities in Member States are bound by directives, too. For example, courts and administrative authorities have to interpret national law in conformity with directives.[50] At the same time, in these situations such authorities must act in accordance with EU fundamental rights, because they are acting within the scope of EU law. This can lead to

[42] Court of Justice, judgment of 21 December 2011, case C-411/10*, N.S.*, para. 68; judgment of 16 July 2015, case C-681/13, *Diageo Brands*, para. 50; judgment of 25 May 2016, case C-559/14, *Meroni*, para. 44;, judgment of 5 April 2016, joined cases C-404/15 and C-659/15 PPU, *Aranyosi and Căldăraru*, para. 88; see in favour of categorizing this scenario as a separate case of application of EU fundamental rights I. CANOR, *My Brother's Keeper? Horizontal Solange: "An Ever Closer Distrust among the Peoples of Europe"*, in *Common Market Law Review*, 2013, p. 388.

[43] See more generally on the binding force of EU fundamental rights in this context B. MAIER, *Grundrechtsschutz bei der Durchführung von Richtlinien*, Baden-Baden: Nomos, 2014, p. 65 *et seq*.

[44] See Court of Justice, judgment of 22 September 2016, case C-110/15, *Nokia Italia and others*, para. 44.

[45] *Jeremy F.*, cit., para. 37.

[46] Court of Justice, judgment of 27 June 2006, case C-540/03, *Parliament v. Council*, para. 104.

[47] Court of Justice, judgment of 2 April 2009, case C-421/07, *Damgaard*, paras 25-27. This includes the scenario of conflicting fundamental rights, see Court of Justice, judgment of 29 January 2008, case C-275/06, *Promusicae*, para. 68; judgment of 15 September 2015, case C-484/14, *Mc Fadden*, para. 83.

[48] Court of Justice, judgment of 19 October 2016, case C-582/14, *Breyer*, para. 63.

[49] See e.g. *Promusicae*, cit., para. 68; Court of Justice, judgment of 2 December 2015, case C-528/13, *Léger*, para. 41; judgment of 16 July 2015, case C-580/13, *Coty Germany*, para. 34.

[50] Court of Justice, judgment of 13 November 1990, case C-106/89, *Marleasing*, para. 8. See also W. SCHALLER, *Die EU-Mitgliedstaaten als Verpflichtungsadressaten der Gemeinschaftsgrundrechte*, Baden-Baden: Nomos, 2003, p. 44 *et seq*.

situations where, due to EU fundamental rights, a national court must *not* interpret national law in light of a directive, because this would lead to an extension of the criminal offences contained in the national law and thus a reading *contra reum*.[51] While there is less case law on regulations in this regard, it appears safe to say that these points also apply in the case of their implementation.

IV.3. The implementation of EU law through procedures and sanctions established by the Member States

In many situations, EU law creates claims such as rights for individuals or requirements such as obligations that the Member States must ensure compliance with; at the same time it leaves it to the Member States' law to establish the mechanisms of enforcement.[52] The principle of effectiveness is one overarching binding legal guideline for the Member States in these situations.[53] EU fundamental rights, however, apply, too. This constellation concerns norms of civil, but also of criminal or administrative procedure law.[54] In the case of claims, Member States enjoy procedural autonomy, but EU fundamental rights apply; in the case of requirements, Member States are bound by the principle of loyalty to ensure their respect by means of sanctions.[55]

The first group of situations involves claims established by EU law. It has been dealt with by the CJEU in two ways. In some decisions, the Court relied predominantly on the notion of procedural autonomy; EU fundamental rights are found to apply as a limit to this autonomy.[56] In others, Art. 47 of the Charter provides the central argument for the

[51] Court of Justice, judgment of 12 December 1996, joined cases C-74/95 and C-129/95, *Criminal proceedings against X.*, paras 61-63.

[52] There is no need that there be rights in a narrow sense in EU law. For example, the principle of effectiveness requires Member States to grant access to a court not only where individual rights in a narrow sense are concerned, but also where the interests of individuals are protected more broadly, which may include public interests, see e.g. Court of Justice, judgment of 25 July 2008, case C-237/07, *Janecek*, para. 39. See generally A. Epiney, *Primär- und Sekundärrechtsschutz im Öffentlichen Recht*, in *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer*, 2002, p. 386 *et seq*.

[53] See on its effect in concrete cases e.g. Court of Justice, judgment of 30 November 2006, case C-432/05, *Unibet*, paras 65, 77 and 83; judgment of 5 October 2006, case C-232/05, *Commission v. France*, paras 49 *et seq.*; judgment of 18 March 2010, joined cases C-317/08, C-318/08, C-319/08 and C-320/08, *Alassini*, para. 67.

[54] A. Epiney, *Le champ d'application de la Charte des droits fondamentaux*, cit., p. 296.

[55] C. Latzel, *Die Anwendungsbereiche des Unionsrechts*, in *Europarecht*, 2015, p. 660.

[56] See Court of Justice, judgment of 10 April 2003, case C-276/01, *Steffensen*, paras 71-72; judgment of 10 September 2013, case C-383/13 PPU, *G. and R.*, paras 35-37; judgment of 6 October 2015, case C-61/14, *Orizzonte Salute*, paras 46 and 49; judgment of 17 March 2016, case C-161/15, *Bensada Benallal*, para. 23; judgment of 30 June 2016, case C-288/14, *Ciup*, para. 51; judgment of 30 June 2016, case C-205/15, *Toma*, para. 28. Even non-procedural rules can be subject to the application of EU fundamental rights. See on rules of substantive civil law case Court of Justice, judgment of 11 October 2007, case C-117/06, *Möllendorf and Möllendorf-Niehuus*, para. 78.

Court to find EU fundamental rights applicable.[57] The argumentative strategy chosen by the Court does not appear to make a difference regarding the result. Crucially, EU fundamental rights are not applicable in cases where Member States' measures are not applied to pursue goals of EU law. Take the example of *Ymeraga*, where the national legislation on the free movement of persons was applied, but the case did not fall within the reach of EU law on Union citizenship.[58] The relationship between national law and EU law, including the reach of EU secondary law, thus needs to be examined in detail to clarify whether EU fundamental rights apply.[59]

The second group of situations concerns requirements established by EU law for Member States. These must be enforced by means of sanctions in national law. Again, EU fundamental rights apply.[60] Member States must respect EU fundamental rights when legislating in such situations, but also when adjudicating through their courts.[61] The Court of Justice decided in favour of the applicability of EU fundamental rights where it found an objective clearly anchored in EU law that, because of the principle of loyalty, the Member States were obliged to pursue by means of their sanctioning powers.[62] In other cases, the Court found no interest of EU law that was protected by the Member States' sanctioning measures at issue. It decided, therefore, that EU fundamental rights were not applicable.[63]

[57] See Court of Justice, judgment of 28 January 2010, case C-264/08, *Direct Parcel Distribution Belgium*, paras 33-34; *Alassini*, cit., para. 49; judgment of 22 December 2010, case C-279/09, *DEB*, paras 28 and 31; judgment of 12 February 2015, case C-662/13, *Surgicare*, para. 33; judgment of 6 October 2015, case C-362/14, *Schrems*, para. 64; judgment of 5 November 2014, case C-166/13, *Mukarubega*, para. 50. Less convincing in this regard the judicial self-restraint of the Court of Justice, judgment of 17 January 2013, case C-23/12, *Zakaria*, paras 39-40. There is no need for an express provision on fundamental rights as was the case in Court of Justice, judgment of 15 May 1986, case 222/84, *Johnston*, para. 20; see judgment of 15 September 2016, joined cases C-439/14 and C-488/14, *Star Storage*, para. 42.

[58] Court of Justice, judgment of 8 May 2013, case C-87/12, *Ymeraga*, paras 42-43. See also Court of Justice, judgment of 19 April 2005, case C-521/04 P (R), *Tillack v. Commission*, para. 38; judgment of 10 April 2003, case T-353/00, *Le Pen v. European Parliament*, para. 91, confirmed in judgment of 7 July 2005, case C-208/03 P, *Le Pen v. European Parliament*; judgment of 27 March 2014, case C-265/13, *Torralbo Marcos*, para. 37.

[59] See Court of Justice, judgment of 18 December 2014, case C-562/13, *Abdida*, para. 39.

[60] See in this regard on sanctions and the limits of competences E. NEFRAMI, *"Within the Scope of European Union Law", Beyond the Principle of Conferral?*, in J. VAN DER WALT, J. ELLSWORTH (eds), *Constitutional Sovereignty and Social Solidarity in Europe*, Baden-Baden: Nomos, 2015, p. 90 *et seq*.

[61] Court of Justice, judgment of 10 November 2011, case C-405/10, *Garenfeld*, para. 48; judgment of 21 December 2016, case C-119/15, *Biuro podróży Partner*, para. 25.

[62] See Court of Justice, judgment of 4 July 2006, case C-212/04, *Adeneler*, paras 93-94; *Åkerberg Fransson*, cit., para. 27; judgment of 1 October 2015, case C-290/14, *Skerdjan Celaj*, paras 31-32; judgment of 8 September 2015, case C-105/14, *Taricco*, paras 36-37; judgment of 17 December 2015, case C-419/14, *WebMindLicenses*, paras 66-67; judgment of 5 April 2017, joined cases C-217/15 and C-350/15, *Orsi and Baldetti*, para. 16. See for the case of express provisions in EU law on the sanctions to be imposed Court of Justice, judgment of 26 September 2013, case C-418/11, *Texdata*, paras 74-75.

[63] Court of Justice, judgment of 13 June 1996, case C-144/95, *Maurin*, paras 11-12; judgment of 29 May 1997, case C-299/95, *Kremzow*, para. 17.

This jurisprudential development has not remained uncontested. EU fundamental rights are applicable to a high number of situations of Member State action in this scenario.[64] Some commentators fear that the applicability of these rights unduly restricts the Member States' procedural autonomy.[65] The Court's solution nonetheless appears justified, as national law clearly serves EU law in these cases.[66] Judges asked to interpret national procedural rules in light of EU fundamental rights are in a similar way fulfilling their duty to pursue the goal of e.g. an EU directive, as the latter always implies compliance with EU fundamental rights.[67] It should also be noted that in many cases,[68] the obligations arising from EU fundamental rights do not go beyond what is already prescribed by the principles of equivalence and effectiveness.[69]

IV.4. Minimum harmonization by EU law

In cases where EU law only provides for minimum harmonization of a particular subject area, Member States are entitled to go beyond EU regulation. The Court was called to decide to what extent such Member State action is bound by EU fundamental rights. In the doctrine, authors argue against the applicability of EU fundamental rights beyond the part regulated by EU rules, as this would comply with the general rule established by the Court that only the extent of the exercise of competences by the EU determines the scope of application of EU fundamental rights.[70] Others counter that the situation of Member

[64] See in particular on EU fundamental rights concerning criminal procedure law H. Jarass, *Die Bindung der Mitgliedstaaten an die EU-Grundrechte*, in *Neue Zeitschrift für Verwaltungsrecht*, 2012, p. 460. See for a positive assessment J. Kühling, *Fundamental Rights*, in A. Von Bogdandy, J. Bast (eds), *Principles of European Constitutional Law*, Oxford, Munich: Hart C.H. Beck, 2010, p. 499; A. Epiney, *Le champ d'application de la Charte des droits fondamentaux*, cit., p. 296.

[65] W. Schaller, *Anmerkung zu Case C-276/01 (Steffensen)*, in *Europäische Zeitschrift für Wirtschaftsrecht*, 2003, p. 672.

[66] C. Ladenburger, *Artikel 51 GRCh (Art. II – 111 VVE) Anwendungsbereich*, in P. Tettinger, K. Stern (eds), *Kölner Gemeinschaftskommentar zur Europäischen Grundrechte-Charta*, Munich: C.H.Beck, 2006, p. 35 *et seq*.

[67] D. Scheuing, *Zur Grundrechtsbindung der EU-Mitgliedstaaten*, in *Europarecht*, 2005, p. 165.

[68] See, however, also Court of Justice, judgment of 16 July 2009, case C-12/08, *Mono Car Styling*, para. 49; judgment of 19 March 2015, case C-510/13, *E.ON Földgáz Trade*, para. 50; judgment of 28 April 2015, case C-456/13 P, *T & L Sugars*, para. 50.

[69] See e.g. *Alassini*, cit., para. 49; Court of Justice, judgment of 17 July 2014, case C-169/14, *Sánchez Morcillo*, para. 35; judgment of 30 June 2016, case C-200/14, *Câmpean*, para. 70; judgment of 6 October 2015, case C-69/14, *Târşia*, para. 41; see also in the literature M. Bleckmann, *Nationale Grundrechte im Anwendungsbereich des Rechts der Europäischen Union*, cit., p. 69; B. Maier, *Grundrechtsschutz bei der Durchführung von Richtlinien*, cit., p. 124; M. Safjan, D. Düsterhaus, *A Union of Effective Judicial Protection: Addressing a Multi-level Challenge through the Lens of Article 47 CFREU*, in *Yearbook of European Law*, 2014, p. 15; E. Neframi, *"Within the Scope of European Union Law", Beyond the Principle of Conferral?*, cit., p. 105 *et seq*.

[70] C. Ladenburger, *Artikel 51 GRCh (Art. II – 111 VVE) Anwendungsbereich*, cit., para. 35; H. Jarass, *Charta der Grundrechte der Europäischen Union – Kommentar*, Munich: C.H. Beck, 2013, para. 25, Article 51; B. Maier, *Grundrechtsschutz bei der Durchführung von Richtlinien*, cit., p. 92.

States is comparable to the one where EU law provides for discretion regarding its implementation, as the Member States' action cannot be considered to be completely autonomous in such a scenario. Ultimately, for them this situation thus falls within a margin of discretion established by EU law and EU fundamental rights ought to be applicable.[71]

The Court's case law is not fully consistent,[72] but at a close reading the Court has achieved a differentiated and generally convincing solution.[73] It found that, in the case of a shared competence, EU fundamental rights applied where the Member States exercised the competence only to create minimum harmonization.[74] By contrast, where the relevant EU competence is limited to mere minimum harmonisation[75] EU law is prohibited from influencing Member States' law through its principles beyond the reach of the harmonized area. This also means that EU fundamental rights are not applicable.[76]

IV.5. Partly exercised EU competences

In a number of cases, the Court clarified that the scope of application of EU fundamental rights corresponds to the actual exercise of EU competences, not their potential future exercise or mere existence. One could say that this cluster of cases develops the same point in general for all areas of shared competences that the Court has developed with regard to minimum harmonization in a more specific context.[77] The mere existence of an EU competence[78] or of a general EU law provision on a subject matter similar to the topic regulated in national law[79] is insufficient to trigger the applicability of EU fundamental

[71] H. Weyer, *Gemeinschaftsrechtliche Überprüfbarkeit mitgliedstaatlicher Regelungen der Verkaufsmodalitäten*, in *Europäische Zeitschrift für Wirtschaftsrecht*, 2004, p. 457; M. Bleckmann, *Nationale Grundrechte im Anwendungsbereich des Rechts der Europäischen Union*, cit., p. 42.

[72] See Court of Justice, judgment of 14 April 2005, case C-6/03, *Deponiezweckverband Eiterköpfe*, para. 63.

[73] See the evasive reasoning in Court of Justice, judgment of 25 March 2004, case C-71/02, *Karner*, para. 34; the Court seemed to turn to the free movement of goods to avoid the question of minimum harmonisation.

[74] See, despite the terse reasoning, Court of Justice, judgment of 10 July 2003, joined cases C-20/00 and C-64/00, *Booker Aquaculture*, paras 88-90; see for a clearer expression judgment of 7 July 2016, case C-447/15, *Muladi*, para. 51.

[75] See e.g. Art. 153, para. 2, let. b), TFEU on social policy.

[76] Court of Justice, judgment of 17 December 1998, case C-2/97, *Borsana*, paras 35 and 40; *Hernández*, cit., paras 45-46. See for a different reading of the latter case S. Bucher, *Die Bindung der Mitgliedstaaten an die EU-Grundrechtecharta bei Ermessensspielräumen, insbesondere in Fällen der Richtlinienumsetzung und unter Berücksichtigung der Folgerechtsprechung zu "Åkerberg Fransson"*, in *Zeitschrift für europarechtliche Studien*, 2016, p. 229.

[77] See *supra*, section IV.4. It is mainly due to this specific context (minimum harmonization) that the two clusters of cases have been separated in the present account.

[78] See e.g. *Maurin*, cit., paras 11-12; Court of Justice, judgment of 16 January 2008, case C-361/07, *Polier*, paras 11 and 14;, judgment of 27 November 2012, case C-370/12, *Pringle*, para. 180.

[79] See e.g. on Art. 151 and 153, para. 2, TFEU on the objectives and competence of the EU legislator in the field of social policy and national legislation on probation periods during employment contracts of indefinite duration Court of Justice, judgment of 5 February 2015, case C-117/14, *Nisttahuz Poclava*, paras

rights. Crucially, the Court of Justice examines whether EU law creates binding obligations in a particular subject area.[80] This includes rights created for Member States by EU law against other Member States[81] and the creation of obligations in the field of a mere supporting competence of the EU.[82] The scope of existing secondary law is at the same time not modified merely by the applicability of EU fundamental rights.[83] The objectives enshrined in a piece of secondary legislation constitute one important criterion to determine the scope of exercise of a competence.[84] If, by contrast, no obligations of EU law are created in a particular subject area, EU fundamental rights are not applicable.[85]

Directives containing rules on fundamental rights constitute a somewhat special case. As a matter of principle, the Court held that there were limits to their interpretation in light of EU fundamental rights. Notably, it held that a directive could not be interpreted broadly to encompass a ground of discrimination not expressly laid down in that directive's text.[86] By contrast, in the field of data protection the Court proved more than

40-41; see also judgment of 23 September 2008, case C-427/06, *Bartsch*, para. 18; judgment of 17 July 2014, case C-459/13, *Široká*, para. 19.

[80] See e.g. *Siragusa*, cit., paras 26-27; *Nisttahuz Poclava*, cit., paras 35-37; Court of Justice, judgment of 4 June 2015, case C-579/13, *P and S*, paras 38-39; judgment of 17 September 2015, case C-416/14, *Fratelli De Pra*, para. 53; judgment of 21 December 2016, case C-539/15, *Bowman*, para. 19; judgment of 9 March 2017, case C-406/15, *Milkova*, para. 50. See also on differing criteria for the application of primary and secondary law to the same set of facts Court of Justice, judgment of 15 July 2010, case C-271/08, *Commission v. Germany*, paras 48-50.

[81] Court of Justice, judgment of 22 October 2013, case C-276/12, *Sabou*, para. 26.

[82] Court of Justice, judgment of 17 September 2014, case C-562/12, *Liivimaa Lihaveis*, para. 65. See also on an EU exercise of competences that requires the support of the Member States which in turn are bound by the duty of loyalty judgment of 4 February 2015, case C-647/13, *Melchior*, para. 29; judgment of 10 September 2015, case C-408/14, *Wojciechowski*, para. 53; see in more detail on the applicability of EU fundamental rights in these cases Opinion of AG Mengozzi delivered on 16 October 2014, case C-647/13, *Melchior*, para. 59; Opinion of AG Mengozzi delivered on 11 June 2015, case C-408/14, *Wojciechowski*, para. 65.

[83] Court of Justice, judgment of 21 September 2016, case C-221/15, *Etablissements Fr. Colruyt*, para. 30.

[84] See on data collection for different purposes and secondary law Court of Justice, judgment of 16 April 2015, joined cases C-446/12 to C-449/12, *Willems*, para. 50.

[85] See as examples out of a large number of cases Court of Justice, judgment of 15 September 2011, joined cases C-483/09 and C-1/10, *Gueye and Sánchez*, paras 50-51; judgment of 8 May 2014, case C-483/12, *Pelckmans Turnhout*, para. 23; judgment of 11 November 2014, case C-333/13, *Dano*, para. 91; judgment of 2 June 2016, case C-122/15, *C*, paras 25 and 30; judgment of 7 March 2017, case C-638/16 PPU, *X. and X.*, paras 44-45; see expressly on the problem that national courts submit requests for a preliminary reference and suggest the application of the Charter without clarifying the actual link to EU law, Court of Justice, order of 16 January 2014, joined cases C-614/12 and C-10/13, *Dutka*, para. 14.

[86] Court of Justice, judgment of 18 December 2014, case C-354/13, *Kaltoft*, paras 37 and 39.

willing to interpret the structure and provisions of the Data Protection Directive[87] in light of fundamental rights to establish a broad scope of application for the Directive.[88]

IV.6. References in EU law to the regulation by means of national law

In the Charter, a number of provisions recognize rights in accordance with "national laws and practices".[89] Similarly, in secondary legislation EU law sometimes expressly assigns the task of regulating certain questions to national law. In this regard, the case law of the Court of Justice draws a distinction between two scenarios for the purpose of examining the applicability of EU fundamental rights.

First, a reference to the regulation by national law can mean that EU law fully defers a preliminary decision to national law. In these cases, the application of national law leading up to said decision is not subject to the application of EU fundamental rights.[90] Second, EU law can merely grant a margin of discretion for implementation by means of a reference to the regulation by national law. In that scenario, as indicated earlier, EU fundamental rights remain fully applicable.[91]

IV.7. EU soft law

There are many different forms of soft law in EU law.[92] The Court of Justice decided very clearly that such soft law cannot have binding effects and also cannot create rights that individuals can enforce before national courts.[93] Nonetheless, national courts are bound to take into consideration such soft law in order to decide disputes, in particular where soft law casts light on the interpretation of national measures adopted as binding norms implementing guidelines or recommendations enshrined in soft law or where it is designed to supplement binding norms of EU law.[94] Soft law such as recommendations thus

[87] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

[88] Court of Justice, judgment of 20 May 2003, joined cases C-465/00, C-138/01 and C-139/01, *Österreichischer Rundfunk*, para. 70; see on data processing in non-economic contexts judgment of 6 November 2003, case C-101/01, *Lindqvist*, paras 39 *et seq.*; judgment of 13 May 2014, case C-131/12, *Google Spain*, para. 68.

[89] See Art. 16 on the freedom to conduct a business, Art. 28 on the right of collective bargaining and action, and Art. 30 on protection in the event of unjustified dismissal.

[90] See Court of Justice, judgment of 5 October 2010, case C-400/10 PPU, *McB*, para. 42.

[91] See *supra*, section IV.2. In the case law, see e.g. Court of Justice, judgment of 24 April 2012, case C-571/10, *Kamberaj*, paras 78 and 80; judgment of 6 October 2015, case C-650/13, *Delvigne*, paras 31-33. On the scope of application of EU fundamental rights in such contexts see also *Torralbo Marcos*, cit., paras 41-42.

[92] See for an overview J. Schwarze, *Soft Law im Recht der Europäischen Union*, in J. Iliopoulos-Strangas, J.-F. Flauss (eds), *Das soft law der europäischen Organisationen*, Baden-Baden: Nomos, 2012, p. 234 *et seq*.

[93] Court of Justice, judgment of 13 December 1989, case C-322/88, *Grimaldi*, para. 16; *Alassini*, cit., para. 40.

[94] *Grimaldi*, cit., para. 18.

cannot trigger the applicability of EU fundamental rights on its own.[95] However, it is capable of contributing to finding the meaning of binding norms of EU law. These norms, in turn, then establish the scope of application of EU fundamental rights.

IV.8. Member State action in areas outside of the scope of EU law

Certain areas are excluded from the application of EU fundamental rights by express provision in EU law or by the structure of EU law. One central example for the latter constellation is reverse discrimination. Even if a Member State decides to ensure equal treatment of its own citizens in comparison to EU citizens, it is not bound by EU fundamental rights in this scenario.[96] In another constellation, certain areas are expressly excluded from the application of EU law. For example, the provisions on the free movement of workers do not apply to "employment in the public service" as stated in Art. 45, para. 4, TFEU.[97] This is not an area where EU law leaves discretion to Member States; EU law simply does not apply at all within the boundaries of this provision, although the Court is called to define said boundaries.[98]

IV.9. Charter Rights not addressed to the Member States

One of the "least dense" forms of determination of national law by EU law are Charter rights that are explicitly not aimed at the Member States as addressees.[99] In a dogmatic sense, such rights constitute a deviation from the rule enshrined in Art. 51, para. 1, of the Charter.[100] Art. 41 of the Charter, for example, enshrines the right to good administration, but mentions the institutions and bodies of the Union as only addressees of the right in Art. 41, para. 1. Observers have been divided as to whether this means that the right is

[95] R. Stotz, *Die Beachtung der Grundrechte bei der Durchführung des Unionsrechts in den Mitgliedstaaten – Von Stauder über Wachauf zu Åkerberg Fransson*, in D. Heid, R. Stotz, A. Verny (eds), *Festschrift für Manfred A. Dauses zum 70. Geburtstag*, Munich: C.H.Beck, 2014, p. 424.

[96] See, though somewhat cautiously phrased, Opinion of AG Van Gerven delivered on 22 October 1992, case C-206/91, *Poirrez*, para. 13; see also H. Jarass, *Charta der Grundrechte der Europäischen Union*, cit., para. 24. See also on Art. 345 TFEU and its reservation with regard to the Member States' system of property ownership Opinion of AG Cosmas delivered on 2 October 1997, case C-309/96, *Annibaldi*, paras 21-23.

[97] See, summarizing its own jurisprudence on the subject in: Court of Justice, judgment of 10 September 2014, case C-270/13, *Haralambidis*, paras 43 *et seq*.

[98] M.-C. Fuchs, *Die Bereichsausnahmen in Art. 45 Abs. 4 AEUV und Art. 51 Abs. 1 AEUV – Eine Gesamtbetrachtung unter besonderer Berücksichtigung des Notariats und der freiwilligen Gerichtsbarkeit*, Baden-Baden: Nomos, 2013, p. 115.

[99] See for an overview J. Gerkrath, *Als krönender Abschluss des Grundrechtsschutzes in der EU verlangt die Charta nach einer breiten und dezentralisierten Anwendung*, in J. Masing, M. Jestaedt, D. Capitant, A. Le Divellec (eds), *Strukturfragen des Grundrechtsschutzes in Europa*, Tübingen: Mohr Siebeck, 2015, p. 11.

[100] F. Schorkopf, *Grundrechtsverpflichtete*, cit., para. 28; M. Holoubek, U. Lechner, M. Oswald, *Artikel 51*, in M. Holoubek, G. Lienbacher (eds), *Grundrechtecharta-Kommentar*, Vienna: Manz, 2014, para. 11.

applicable to the Member States or not.[101] After some rather inconclusive decisions,[102] the Court ultimately clarified that Art. 41 only addresses the EU's institutions and bodies to the exclusion of the Member States.[103] Nonetheless, this does not necessarily mean that no EU fundamental right applies to Member States in this scenario. The Court also clarified in later case law that the parallel[104] EU fundamental right that forms part of the general principles of EU law can fill the lacuna and apply to Member State action.[105]

V. The criterion of the character of the rule of national law

This criterion is perhaps best understood as assembling a number of characteristics closely related to the national rule at issue that the Court examines. In its case law, the Court scrutinizes national law for the purpose of this criterion, but insists on the general rule that it is not competent to interpret national law.[106] Also, the elements discussed below show that the scope of application of EU fundamental rights is determined by EU law and cannot be determined by features of national law that might differ across Member States.[107]

One first aspect is whether national law intends to implement EU law.[108] For this purpose, the Court does not examine the subjective intent of the national legislator, but relies on the overall content of national legislation.[109] Under a formalist examination of the

[101] See in favour of applying Art. 41 to the Member States Opinion of AG Wathelet delivered on 23 August 2013, case C-383/13 PPU, *G. and R.*, para. 52; Conclusions of AG Mengozzi delivered on 13 January 2016, case C-161/15, *Bensada Benallal*, para. 32; Opinion of AG Mengozzi delivered on 3 May 2016, case C-560/14, *M.*, para. 27; S. Bogojević, X. Groussot, M. Medzmariashvili, *Adequate Legal Protection and Good Administration in EU Asylum Procedures: H.N. and Beyond – Case C-604/12, H.N. v. Minister for Justice, Equality and Law Reform, Judgment of the Court (Fourth Chamber) of 8 May 2014, EU:C:2014:302*, in *Common Market Law Review*, 2015, p. 1654; see for the opposing view Opinion of AG Sharpston delivered on 12 December 2013, joined cases C-141/12 and C-372/12, *Y.S.*, paras 89-90.

[102] Court of Justice, judgment of 22 November 2012, case C-277/11, *M.*, paras 81-89; judgment of 8 May 2014, case C-604/12, *H.N.*, para. 49.

[103] Court of Justice, judgment of 21 December 2011, case C-482/10, *Cicala*, para. 28; more explicitly confirmed in judgment of 17 July 2014, joined cases C-141/12 and C-372/12, *Y.S.*, para. 67; judgment of 9 March 2017, case C-141/15, *Doux*, para. 60.

[104] Although there are doubts whether this right is similar in its content to the Charter right, see K. Kecsmar, *Arrêt Mukarubega: droit à une bonne administration à deux vitesses?*, in *Revue de l'Union européenne*, 2016, p. 244.

[105] *Mukarubega*, cit., paras 44-45.

[106] See e.g. *McB*, cit., paras 51-52; Court of Justice, judgment of 5 March 2015, case C-343/13, *Modelo Continente Hipermercados*, para. 19.

[107] See e.g. Opinion of AG Bot delivered on 2 March 2016, case C-241/15, *Bob-Dogi*, para. 95.

[108] Or is "at its service", as D. Ritleng, *De l'articulation des systèmes de protection des droits fondamentaux dans l'Union,* cit., p. 274, phrases it.

[109] Court of Justice, judgment of 7 September 2006, case C-81/05, *Cordero Alonso*, para. 33. See also C. Ohler, *Grundrechtliche Bindungen der Mitgliedstaaten nach Art. 51 GRCh*, in *Neue Zeitschrift für Verwaltungsrecht*, 2013, p. 1434.

intent of the legislator, only cases of national law explicitly expressing its intent to implement EU law would be covered. As a result, for example in the field of Value Added Tax (VAT) collection only a system specialized in collecting the "EU share" of VAT would be covered, rather than the general VAT collection system in a Member State.[110]

Moreover, the Court does not draw a formal distinction with regard to what type of EU legal act is being implemented by national law.[111] As shown above, it is the regulatory density of EU law that might lead to differences regarding the applicability of EU fundamental rights. Some scholars have argued that in the case of margins of discretion left by directives, EU fundamental rights should not be applicable to a Member State's action because there was no need to ensure the uniform application of EU law.[112] However, this would mean that EU law could rely on national law for the protection of fundamental rights, although the core of a potential violation of such rights would be found in the provisions of EU law that have to be implemented by the Member States.[113] The Court thus continues to rule that EU fundamental rights limit and guide the use of the discretion the Member States enjoy under such EU rules.[114]

National law can also fall within the scope of EU law at a later stage in time after its adoption. As a consequence, the national law at issue becomes a measure implementing EU law at that stage only.[115] For the situation of directives, a further parallel can be drawn with the general case of implementing measures of EU directives adopted ahead of time that are subject to certain obligations before the deadline of implementation.[116] Such measures face a rather superficial scrutiny as to whether they are liable to seriously compromise the result prescribed by a directive. There are only certain indications on this matter in the case law. Arguably this scrutiny could, however, include elements of EU

[110] E. HANCOX, *The Meaning of "Implementing" EU Law under Article 51(1) of the Charter*, cit., p. 1427.

[111] See first on regulations Court of Justice, judgment of 24 March 1994, case C-2/92, *Bostock*, and subsequently, based on a comparable reasoning, on directives, judgment of 27 June 2006, case C-540/03, *Parliament v. Council*. On other legal acts see e.g. judgment of 27 February 2007, case C-354/04 P, *Gestoras Pro Amnistía*, paras 53-54; judgment of 3 May 2007, case C-303/05, *Advocaten voor de Wereld*, para. 47; *Gueye and Sánchez*, cit., para. 55.

[112] See TH. KINGREEN, *Artikel 51 GRCh*, cit., para. 12; D. THYM, *Europäischer Grundrechtsschutz und Familienzusammenführung*, in *Neue Juristische Wochenschrift*, 2006, p. 3250.

[113] J. KÜHLING, *Fundamental Rights*, cit., p. 498; A. EPINEY, *Zur Reichweite der Grundrechtsbindung des Gemeinschaftsgesetzgebers*, in *Zeitschrift für Ausländerrecht und Ausländerpolitik*, 2007, p. 63 *et seq*.

[114] N. MATZ-LÜCK, *Europäische Rechtsakte und nationaler Grundrechtsschutz*, in N. MATZ-LÜCK, M. HONG (eds), *Grundrechte und Grundfreiheiten im Mehrebenensystem – Konkurrenzen und Interferenzen*, Berlin: Springer, 2012, p. 170.

[115] The very entry into force of EU law always remains a clear temporal border for the applicability of EU fundamental rights, see Court of Justice, order of 12 July 2012, case C-466/11, *Currà and others*, paras 22-23; judgment of 6 October 2016, case C-218/15, *Paoletti and others*, para. 40.

[116] Court of Justice, judgment of 18 December 1997, case C-129/96, *Inter-Environnement Wallonie*, paras 44-45; judgment of 22 November 2005, case C-144/04, *Mangold*, para. 67. See, however, on measures that do not implement a directive *Bartsch*, cit., paras 24-25.

fundamental rights as a benchmark if the relevant directive encompasses the realization of EU fundamental rights among its goals.[117]

Sometimes, directives may contain provisions that are applicable to factual situations that emerged after the entry into force of a directive, but before the end of its implementation period, insofar as national implementing measures have been taken before the end of the implementation period. In such a case, EU fundamental rights apply to the implementing measures.[118] For the Court of Justice, the perspective of the individual seems to be the main concern in these cases. The protection of an individual should be ensured whether national law has been adopted to implement a directive at the exact moment of the end of the implementation period or not.[119]

A last question related to the character of a rule of national law arises where national law outside the scope of EU law refers to EU law, namely EU fundamental rights, to achieve a parallel interpretation of national law.[120] Thus, internal situations of national law ought to be treated in the same way as situations e.g. with a cross-border element where EU law would be applicable. The Court held that in these situations EU fundamental rights apply. It emphasized, however, that there had to be a very clear, unambiguous reference to EU fundamental rights in the national rules at issue that led to the displacement of national law for the relevant situation.[121]

VI. The criterion of the convergence of objectives

As another criterion, the Court of Justice insists on a certain degree of convergence between the objectives pursued by EU law and the national rules at issue. As shown above, this does not mean that national law must have been adopted expressly to implement EU law.[122] For the purpose of this criterion, the Court appears to compare the goals of national law and potentially relevant EU law rather than to examine whether national law pursues one particular goal of EU law.[123]

In *Annibaldi*, the Court held that EU fundamental rights were not applicable to a national law for a number of reasons. One of them was that the national law at issue pursued the objectives of protecting the environment and cultural heritage of a particular region, and not the objectives of the common organization of agricultural markets under

[117] Court of Justice, judgment of 27 October 2016, case C-439/16 PPU, *Milev*, para. 35.

[118] *Cordero Alonso*, cit., para. 32; Court of Justice, judgment of 17 January 2008, case C-246/06, *Velasco Navarro*, paras 28-29.

[119] M. Bleckmann, *Nationale Grundrechte im Anwendungsbereich des Rechts der Europäischen Union*, cit., p. 51; B. Maier, *Grundrechtsschutz bei der Durchführung von Richtlinien*, cit., p. 131.

[120] See Court of Justice, judgment of 16 March 2006, case C-3/04, *Poseidon Chartering*, para. 15.

[121] *Cicala*, cit., para. 28; Court of Justice, judgment of 7 November 2013, case C-313/12, *Romeo*, paras 32-33.

[122] See *supra*, section V.

[123] See *supra*, section IV.3.

the applicable rules of EU law.[124] A very limited overlap in objectives is also not sufficient. In *Siragusa*, the Court found that EU fundamental rights did not apply to a national law aiming at the protection of the landscape. Landscape protection was only one factor for the relevant rules of EU law at issue; the latter focused on environmental impact assessments, so that the Court saw no sufficient overlap of objectives.[125]

It remains, however, difficult to clearly determine the content of the criterion. There is to date no decision in favour of the application of EU fundamental rights based on the criterion.[126] Moreover, its contours remain vague. For example, in *Hernández* the Court discussed the differing objectives of EU and national law, but then resolved the case based on the criterion of density of EU regulation without explaining its approach.[127] Lastly, there appears to be a very close, but nonetheless blurry relationship with the criterion of the impact on EU law that national rules must have, as is examined in the subsequent section.

VII. The criterion of the impact on EU law

In a further number of cases, the Court of Justice judged EU fundamental rights as not applicable on the basis of the lack of an impact on EU law caused by national rules. The Court thus rejected to apply EU fundamental rights when there were simply matters "closely related" or having an "indirect impact" on each other regulated in EU and national law[128] or merely hypothetical connections to rights regulated in EU law.[129]

A number of vague features of the criterion gives rise to concern. First, in the absence of a positive decision applying EU fundamental rights it remains unclear under what circumstances the Court will find the criterion to be fulfilled. Moreover, in some cases the Court seems to mix its assessment with another question, namely whether the protection of national fundamental rights based on a level of protection different from EU law might undermine the unity, primacy and effectiveness of EU law.[130] This unduly conflates two distinct questions; the applicability of EU fundamental rights should be established in the first place before the problem of different standards of fundamental rights protection in EU law and national law is addressed.[131]

Second, there is a somewhat blurry relationship between the criterion of convergence of objectives and the one of the impact on EU law. Although it is not explicitly set

[124] *Annibaldi*, cit., para. 21. See also *Hernández*, cit., paras 38-41.

[125] *Siragusa*, cit., para. 28.

[126] See also M. Dougan, *Judicial Review of Member State Action under the General Principles and the Charter*, cit., p. 1235.

[127] *Hernández*, cit.

[128] *Hernández*, cit., para. 34; *Liivimaa Lihaveis*, cit., para. 62.

[129] *Kremzow*, cit., para. 16; *Iida*, cit., paras 76-77.

[130] As set briefly at the end of section II.

[131] See also M. Dougan, *Judicial Review of Member State Action under the General Principles and the Charter*, cit., p. 1242 *et seq*.

out in the Court's jurisprudence, the most convincing reading appears to be that there is a balancing exercise between the two criteria. The result is that if one criterion is clearly not fulfilled, even partial fulfilment of the second criterion will not render EU fundamental rights applicable. In *Siragusa*, the Court seemed to see a close connection between the two criteria. It found that the objectives between EU law and national law did not sufficiently overlap and seamlessly added that an indirect impact on EU law was not sufficient to establish the applicability of EU fundamental rights.[132] In *Annibaldi*, the Court made its views somewhat clearer. It held that even if the national law at issue was able to indirectly affect the operation of EU rules, the law nonetheless pursued different objectives from EU law.[133] It thus appears that for the Court, a certain impact on EU rules is irrelevant if the national rules at issue pursue objectives substantially different from those of the relevant rules of EU law.[134]

Summing up, the two criteria of the convergence of objectives and the impact on EU law are perhaps best understood as a *safety valve*. The Court may have taken this road as it was uncertain whether the criterion of the density of EU regulation would be sufficient to convincingly categorize all the various situations where EU fundamental rights apply to the Member States. To date, the Court has not yet activated the safety valve to trigger the applicability of EU fundamental rights. Its underlying motive is thus understandable. However, the Court fails to adequately explain the doctrinal underpinnings of this line of case law and leaves too many loose ends, as set out above.

In conclusion, the two criteria examined in the present and the previous section may effectively blur the picture more than they actually help. It can thus arguably be suggested that the Court may need to reconsider their usefulness.

VIII. Conclusion

An overview over the Court's case law on the scope of application of EU fundamental rights shows that a fairly convincing case law has emerged. There may be a large amount of decisions that have been handed down. Nonetheless, the resulting jurisprudence can be grouped in a mostly coherent manner. Contrary to existing suggestions on how to categorize the Court's relevant case law, the present paper argued in favour of deliberately identifying a larger number of constellations and creating clusters of typical situations in which EU fundamental rights apply rather than seemingly clear categories. The overall aim is exhaustiveness rather than absolute precision. In this vein, a particular interpretation has been suggested for the four criteria that the Court has announced in its case law to create a typology of the case law. The most important and convincing criterion is the density of EU regulation of a particular area. Under this section, the Court of Justice

[132] *Siragusa*, cit., para. 29.
[133] *Annibaldi*, cit., para. 22.
[134] See with a similar view H. Jarass, *Charta der Grundrechte der Europäischen Union*, cit., para. 25.

applies a fine-grained analytical scheme to justify the application of EU fundamental rights to the Member States. Nonetheless, there remain some loose ends. For example, it is rather unfortunate, although perhaps understandable in light of future unpredictable cases, that the Court insisted that the criteria it applies are non-exhaustive.[135] The criteria of convergence of objectives between national and EU law and the impact on EU law remain difficult to grasp and potentially overstep the line between examining the applicability of EU fundamental rights and the consequences of their applicability. Moreover, the relationship between the criteria also remains unclear, e.g. whether all of them need to be fulfilled or to what extent one criterion must be fulfilled.[136] It will thus be up to the Court to continue to adhere to its own jurisprudential *acquis* where it has reached coherence and to continue to refine it where it lacks such coherence. Nonetheless, there seems to be no reason at present for fatalistic assessments that in the past have expressed the view that the applicability of EU fundamental rights should simply be assumed wherever there is any link of any nature to EU law.[137]

Post scriptum: Between the drafting and the publication of this piece, the Court handed down its decision in *Associação Sindical dos Juízes Portugueses*. The Court found that it could scrutinize the application of general salary-reduction measures to a Member State's judiciary, a seemingly purely internal situation, using the benchmark of the principle of judicial independence.[138] While the decision is ground-breaking with regard to its result, one might at a first glance wonder whether the Court has left behind the constraints of looking for situations of "implementation" of EU law under Art. 51, para. 1, of the Charter. In particular, the Court strongly relies on the principle of effective judicial protection of individual's rights under EU law, derived as a general principle of EU law from Art. 6 and 13 of the European Convention on Human Rights and reaffirmed in Art. 47 of the Charter.[139] As the essence of the decision, the Court can scrutinize whether "courts or tribunals" of the Member States meet the EU law requirements of effective judicial protection if they are operating in "fields covered by" EU law, i.e. in situations of a much looser link between national and EU law than under Art. 51, para. 1, of the Charter.[140] However, at a closer look, what the Court is doing with regard to the scope of EU law and EU fundamental rights appears to be much closer to what it did in the context of EU citizenship in *Zambrano*. There, it held that under certain circumstances Art. 20 TFEU

[135] *Siragusa*, cit., para. 25. The Court seems to not have resorted to other criteria to date.

[136] M. Holoubek, U. Lechner, M. Oswald, *Artikel 51*, cit., para. 31; see also S. Bucher, *Die Bindung der Mitgliedstaaten an die EU-Grundrechtecharta bei Ermessensspielräumen, insbesondere in Fällen der Richtlinienumsetzung und unter Berücksichtigung der Folgerechtsprechung zu "Åkerberg Fransson"*, cit., p. 223.

[137] See, referring to a recommendation of the Scientific Service of the German *Bundestag*, M. Borowsky, *Artikel 51 Anwendungsbereich*, cit., para. 30b.

[138] Court of Justice, judgment of 27 February 2018, case C-64/16, *Associação Sindical dos Juízes Portugueses*, paras 34 and 37.

[139] *Ibid.*, para. 35.

[140] *Ibid.*, para. 37.

could be applicable even in an *a priori* internal situation.[141] Similarly, the Court seems to establish an autonomous scope of application for Art. 19, para. 1, TFEU that covers certain *a priori* internal situations,[142] while distinguishing the situation from that of Member States "implementing" EU law under Art. 51, para. 1, of the Charter.[143] It remains to be seen whether in subsequent decisions the Court will interpret the scope of application of Art. 19, para. 1, TFEU as restrictively as it did in the *Zambrano* constellation.[144] For the scope of application of EU fundamental rights, like in *Zambrano,* this jurisprudential development only produces an indirect effect. The Court has simply interpreted the scope of EU law to be somewhat broader, so that EU law and with it EU fundamental rights also apply in the particular situation defined in *Associação Sindical dos Juízes Portugueses*. Nonetheless, the fundamental *dictum* of the Court that the scope of application of EU fundamental rights is dependent on and follows the scope of EU law remains valid.[145]

[141] Court of Justice, judgment of 8 March 2011, case C-34/09, *Zambrano*, para. 42.

[142] The Advocate General in his conclusions speaks of situations where national courts are "likely" to exercise their judicial activity in areas covered by EU law, see Opinion of AG Saugmandsgaard Øe delivered on 18 May 2017, case C-64/16, *Associação Sindical dos Juízes Portugueses*, para. 41. Note, nonetheless, that in contrast to the Court the Advocate General found that the national measures also fell within the scope of application of EU fundamental rights, see para. 53.

[143] *Associação Sindical dos Juízes Portugueses*, cit., para. 29.

[144] Court of Justice, judgment of 15 November 2011, case C-256/11, *Dereci*; judgment of 5 May 2011, case C-434/09, *McCarthy*.

[145] *Åkerberg Fransson*, cit., para. 22.

ARTICLES

THE DANISH *AJOS* CASE: THE MISSING CASE FROM *MAASTRICHT* AND *LISBON*

HELLE KRUNKE* AND SUNE KLINGE**

ABSTRACT: In the Danish *Ajos* case the Danish Supreme Court rejected to follow the guidance from the Court of Justice. This *Article* will provide an analysis of the case and reflect on the implications on the European integration and the ongoing dialogue between the European Courts. We will also provide a background and an introduction to the Danish Constitutional Reservations to Union law and the scope and development of the case law regarding the accessions to the European Union treaties. It is considered; whether the *Ajos* case was the "missing case" from the *Lisbon* judgment. Furthermore, the case will be analysed from a comparative legal perspective relating it to developments seen by other constitutional courts, for instance the Italian *Taricco II* case and the German *Honeywell* case both of which can be interpreted as more open toward Union law and European integration.

KEYWORDS: application of Art. 21 of the Charter of Fundamental Rights of the European Union – horizontal relationships – judicial dialogue – constitutional reservations to Union law – comparative legal analysis – political implications.

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I. Introduction and structure

The *Ajos* judgment from the Court of Justice dealt with the scope of Directive 2000/78/EC,[1] the EU Employment Directive, and the general EU-law principle of non-discrimination on grounds of age, adding another case to the Court of Justice's *Mangold* and *Kücükdeveci* line of jurisprudence.[2] The importance of the case from a national political and European integrational perspective cannot be understated. *Ajos* is not only relevant as interpretation of Danish law but as a case reflecting the difficulties in the ongoing dialogue between the CJEU and the national courts.

The questions in the preliminary reference made by the Danish Supreme Court (DSC) to the Court of Justice regarded the requirement for national courts to suspend national law and set aside statutory law that breaches the EU law principle of age discrimination and have major effect on the relationship between national and EU law. The concern from the DSC was that by setting aside national law the court would violate the principle of legal certainty for private individuals.

The main proceedings began in the Danish Maritime and Commercial High Court that specialises in labour law cases.[3] The High Court took a labour law approach using the principle of equal treatment from Union law and consistent interpretation of the national law, and ruled in favour of the employee stating that the employer had to pay severance allowance. The High Court referenced both to the *Mangold* and *Kücükdeveci* case law, in addition to *Ole Andersen*, a Danish preliminary reference, where the Court of Justice found that the Directive precluded the same national rules as were disputed in *Ajos*, only in a vertical relationship, in a case against the Member State.[4]

Ajos appealed the case to the DSC, which decided to make a preliminary reference to the Court of Justice even though none of the parties to the case had asked for it.[5] Thereby, *Ajos* was turned into a matter of public interest touching upon elements of legal certainty, foreseeability and the dialogue between the CJEU and the national constitutional courts.

This *Article* is structured as follows. First, a brief account of *Ajos* is provided. This is followed secondly by interpreting the judgment in light of the DSC's case law before the *Ajos* judgment in regard to the accession to the EU and EU integration along with the national political response to *Ajos*.

[1] Directive 2000/78/EC of the Council of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

[2] Court of Justice: judgment of 19 April 2016, case C-441/14, *Dansk Industri (on behalf of Ajos A/S) v. Estate of Karsten Eigil Rasmussen* [GC]; judgment of 22 November 2005, case C-144/04, *Werner Mangold v. Rüdiger Helm* [GC]; judgment of 19 January 2010, case C-555/07, *Seda Küküdeveci v. Swedex GmbH & Co.* [GC].

[3] See Danish Maritime and Commercial High Court, judgment no. F-0019-12.

[4] Court of Justice, judgment of 12 October 2010, case C-499/08, *Ingeniørforeningen i Danmark (on behalf of Ole Andersen) v. Region Syddanmark* [GC].

[5] Danish Supreme Court, order of 22 September 2014, case 15/2014.

Finally, *Ajos* is placed in a comparative context, drawing primarily upon recent case law from the Italian courts in the *Taricco II* case handed down on 5 December 2017. This case has many similarities to *Ajos*, but the Court of Justice here chose another path in the dialogue with national constitutional courts.

II. Brief account on *Ajos*

II.1. The reference to the Court of Justice

The DSC referred two questions to the Court of Justice in *Ajos*. The first related to the compliance of the national rules implementing the Directive and the application of the principle of non-discrimination on grounds of age. The second question referred to the balancing of principles. The DSC wanted clarification on whether it was possible to weigh the principle of equal treatment (and the issue of its direct effect) against the principle of legal certainty, and to conclude on that basis that the principle of legal certainty must take precedence over the principle prohibiting discrimination on grounds of age – and thereby not set aside the national legislation.

The framing of the question posed by the DSC can be interpreted as being somewhat rhetorical given it wanted to solve the case with reference to Union law and relieve the employer, in accordance with national law, of its obligation to pay the severance allowance. The Court of Justice openly rejected the solution offered by the DSC in its judgment, and refused to let the national courts balance the principles against each other, and instead the Court gave clear guidance on how the DSC was to settle the case. The Court of Justice left the DSC with two options. Firstly, to apply national law in a manner consistent with the Directive, or secondly, to disapply any provision of national law contrary to Union law.

The DSC had also put forward an option that the employee could claim damages from the Member State in order to mitigate a result that the employee would not get the severance payment that he was entitled to under EU law. The solution was rejected with no further argumentation by the Court of Justice along with the question about the balancing of the conflicting principles regarding legal certainty.

The Court of Justice firmly stated that "[n]either the principles of legal certainty and the protection of legitimate expectations nor the fact that it is possible for the private person who considers that he has been wronged by the application of a provision of national law that is at odds with EU law to bring proceedings to establish the liability of the Member State concerned for breach of EU law can alter that obligation".[6]

[6] *Dansk Industri (on behalf of Ajos A/S) v. Estate of Karsten Eigil Rasmussen*, cit., para. 43.

II.2. The reasoning of the Supreme Court

Upon the Court of Justice's judgment going back to the national court, the reasoning by the DSC was divided in two parts in its final judgment.[7] The first part of the reasoning related to the question on if it was possible to interpret national law in conformity with the Directive. The second part was whether the EU principle of prohibiting discrimination on the grounds of age, an unwritten principle, could take precedence over national law.

The DSC held that the legal position under Danish law was clear, and that it would not be possible to arrive at an interpretation of national law that was consistent with the Directive as interpreted in *Ole Andersen* using the methods of interpretation recognised under Danish law. The DSC in its judgment explained in detail the position under Danish law that it was clear and not only relying on established case law and the interpretation of national law made by the DSC itself. This was a focal point in the answers provided in the preliminary reference from the Court of Justice, in which the Court stated that "[...] the requirement to interpret national law in conformity with EU law entails the obligation for national courts to change its established case-law".[8]

The disputed national position was that an employee was not entitled to a severance allowance when, at the time of severance, the employee was entitled to an old-age pension from an employer, irrespective of whether an employee opted to avail himself of the entitlement to a pension. The DSC stressed that the position had been reaffirmed over the years since the Parliament introduced the rule in 1971, and had kept the same wording of the provision in the later amendment in 1996. Consequently, it was not only established case law, but also the will of the Parliament that had decided on the national position on severance payment.

Another argument was put forward by the employee regarding the Act Prohibiting Discrimination on the Labour Market, the implementation of the Employment Directive's rules on discrimination on grounds of age, in the 2004-Act.[9] The argument was, that this Act was to take precedence over the older Act on Salaried Employees due to the principles of "*lex posterior* and *lex specialis*".[10]

The DSC rejected that argumentation and found that it was assumed in the preparatory works (*travaux préparatoires*) that the Directive's rules did not result in the need for amendments to para. 2a of the Act on Salaried Employees.[11] Consequently, the DSC found that the Act could not take precedence over the more senior Act on Salaried Em-

[7] Danish Supreme Court, judgment of 6 December 2016, case 15/2014.

[8] *Dansk Industri (on behalf of Ajos A/S) v. Estate of Karsten Eigil Rasmussen*, cit., para. 33.

[9] Danish Act no. 1417 of 22 December 2004 implementing Employment Directive's rules on discrimination.

[10] See Danish Supreme Court, judgment of 11 August 2015, no. 104/2014, *Skibby Supermarked*, concerning a handicapped persons' access to employment.

[11] See *travaux préparatoires* in the Parliament's Gazette 2004-05, collection 1, Annex A, L 92, p. 2701.

ployees, and therefore the DSC concluded that it could not follow the guidance from CJEU by using the methods of interpretation recognised under national law.

The DSC found that it would be "*contra legem*" to interpret para. 2a, sub-para. 3, of the Act on Salaried Employees in conformity with the Directive since the national legal position was clear. In this first part of the reasoning, the DSC acted unanimously.

In the second part of the judgment's reasoning, the majority of eight out of the nine judges concluded that the DSC could not set aside national law. Thus, the DSC found that the Danish Accession Act (DAA) did not confer sovereignty to the extent required for the unwritten EU principle prohibiting discrimination on the grounds of age to take precedence over national law. The DSC made a distinction between the role of the Court of Justice as interpreter of Union law following an Art. 267 TFEU preliminary reference, and the role of national courts to interpret whether Union law can be given direct effect in national law, relying on the DAA by which Denmark acceded to the European Union. Consequently, the DSC stated that it is for the Court of Justice to rule on whether Union law has direct effect, and takes precedence over a conflicting national provision, including in disputes between individuals, but the effect of this decision is for the national courts to decide. The DSC found: "[t]he question whether a rule of EU law can be given direct effect in Danish law, as required under EU law, turns first and foremost on the Law on accession by which Denmark acceded to the European Union".[12]

The reasoning focuses on the lack of legal basis in the DAA, which sets the limits of the conferred sovereignty to the Union, in line with Art. 20 of the Danish Constitution and Art. 5 TEU. The DSC then went on to perform an in-depth analysis of the *travaux préparatoires* of the DAA, and the subsequent amendments to the DAA.[13] Accordingly, the DSC found that principles developed, and established on the basis of Art. 6, para. 3, TEU have not been made directly applicable in Denmark.

After analysing the *Mangold* and *Kücükdeveci* case law, the DSC found that the situation like *Ajos*, in which a principle at treaty level under Union law is to have direct effect could thereby create obligations. Thus, the question was whether this was allowed to take precedence over conflicting national law in a dispute between individuals, without the principle having any basis in a specific treaty provision. The DSC said this was not foreseen in the DAA, and consequently the principle was not applicable in Denmark.

Reflecting further on the temporary issue and the fact that *Mangold* was handed down in 2005, the DSC also noted that *Mangold* was not mentioned in the preparatory works during the latest amendment of the DAA following the Treaty of Lisbon, and, therefore, the case could not alter the interpretation on the DAA. Furthermore, the DSC

[12] Danish Supreme Court, judgment no. 15/2014, cit., p. 45.

[13] An in-depth analysis of the accession act was made by P. LACHMANN, *Grundlovens § 20 og traktater, der ændrer EU's institutioner*, in *Juristen*, 2012, p. 259 before the Lisbon case about the Amendments to the Accession Act was decided.

stated that the CJEU in *Mangold* did not balance legal certainty and the protection of legitimate expectations against the prohibition of discrimination on grounds of age, which might have changed the outcome.

Lastly, the DSC recalled that, the facts of the case, the dismissal of the employee, took place before the Treaty of Lisbon entered into force on 1st December 2009. Consequently, the DSC stressed that the application of any Charter of Fundamental Rights of the European Union (Charter) provision was not legally binding, thereby disregarding the argument that the employee could rely on the Charter provisions. The Charter was mentioned *en passant* in the preliminary ruling from the Court of Justice: "[the principle of equal treatment], now enshrined in Article 21 of the Charter of Fundamental Rights of the European Union, must be regarded as a general principle of EU law".[14]

The DSC noted that the provisions in the Charter could not be invoked in horizontal relationships. This can be marked as *obiter dictum* regarding future cases were the dismissal of an employee had taken place after the Treaty of Lisbon had entered into force.[15]

After concluding that the DAA did not provide a legal basis in a horizontal relationship to give precedence to an unwritten Union law principle, the DSC added that: "[t]he Supreme Court would be acting outside the scope of its powers as a judicial authority if it were to disapply the provision in this situation",[16] thus finding that the national court could not disapply para. 2a, sub-para. 3 of the Act on Salaried Employees as then in force, *Ajos* could thus rely on the national provision. The scope of the DSC's powers will be returned to later.

Finally, the dissenting judge voted to follow the directions by the Court of Justice, who found that Union law should take precedence over national law, and that following the argumentation in the Danish *Maastricht*[17] and *Lisbon* judgments, there was no conflict with the DAA.[18]

III. *Ajos* in light of DSC's practise about accession to EU

In order to understand the *Ajos* judgment and its scope, we turn to DSC practice before *Ajos*. The DSC is traditionally reluctant and shows restraint in relation to the political institutions. For instance, only in one judgment has the Supreme Court found a piece of legislation unconstitutional.[19]

[14] *Dansk Industri (on behalf of Ajos A/S) v. Estate of Karsten Eigil Rasmussen*, cit., para. 22.

[15] See also J. Kristiansen, *Grænser for EU-rettens umiddelbare anvendelighed i dansk ret – Om Højesterets dom i Ajos-sagen*, in *Ugeskrift for Retsvæsen*, 2017, pp. 81-82, and F. Fröhlich, *Retssammenlignende perspektiver på Højesterets kompetencekontrol i Ajossagen*, in Ugeskrift for Retsvæsen, 2017.

[16] Danish Supreme Court, judgment no. 15/2014, cit., p. 48.

[17] Danish Supreme Court, judgment of 6 April 1998, no. 361/1997.

[18] Danish Supreme Court, judgment of 11 January 2011, no. 366/2009.

[19] Danish Supreme Court, judgment of 19 February 1999, no. 295/1998.

This restraint has also applied to the area of EU integration. This is clear in two important Supreme Court judgments in the field of EU integration: the *Maastricht* judgment and the *Lisbon* judgment. Both judgments concerned constitutional review of legislation with regard to the Danish accession to respectively the Maastricht Treaty and the Lisbon Treaty. In both judgments the Supreme Court found that the Constitution had not been violated. However, the question is whether a shift of thought is on its way. In order to answer this the Supreme Court's approach beginning with the *Maastricht* judgment, over the *Lisbon* judgment to the recent *Ajos* judgment, will be analysed.

The hypothesis is that during this period from 1998 to 2016 we see a move towards a more active Supreme Court stepping increasingly into a role as protector of the Constitution, general legal principles and the people.

First, we will provide some background on the Danish context regarding constitutional review. Second, we will test the hypothesis by analysing the relationship between the DSC and the Danish legislator in the light of the three most important judgments on Denmark's participation in EU cooperation:

– The *Maastricht* judgment;
– The *Lisbon* judgment;
– The *Ajos* judgment.

Third, we will discuss the possible reasons for and the scope of this development.

III.1. Background on the Danish constitutional context as regards review of constitutionality of legislation

A key to understand the *Maastricht*, *Lisbon* and *Ajos* judgments is the prevailing interpretation of the separation of powers between the legislative and judicial authorities in the Danish constitutional setting. The constitutional tradition is to have a strong Parliament and restraint courts. Denmark has no constitutional court. However, the ordinary courts can carry out a constitutional review even though such a competence is not directly mentioned in the Constitution. Danish courts will only set aside legislation if it clearly violates the Constitution. The courts do not carry out abstract reviews. This means that that a plaintiff must have a specific legal interest to bring a case before the courts. This tradition of cautious courts and a strong Parliament can also be found in some of the other Nordic countries, but the other Nordic countries amend their constitutions more frequently which leaves a little less room for constitutional interpretation than in Denmark.[20]

Another important observation is that the Danish Constitution has only been revised four times. The last substantial revision was in 1953, and some provisions still have the same wording as the Constitution of 1849. The Constitution is very difficult to amend and it requires both an election and a referendum in which a majority of the

[20] See H. Krunke, *The Danish Lisbon Judgment: Danish Supreme Court, Case 199/2012, Judgment of 20 February 2013*, in *European Constitutional Law Review*, 2014, p. 545 *et seq*.

persons taking part in the voting, and at least 40 per cent of the electorate, have voted in favour of the amendments. Since the Constitution must function in a modern constitutional context the interpretation of the Constitution is important. By focusing on *not* making "political" decisions or interfering in the legislative process, the courts in practise leave much room for the political institutions Parliament and the Government. This relationship between the legislature and the courts is directly reflected in several paragraphs in the *Maastricht* and *Lisbon* judgments.

III.2. Analysis of case law: *Maastricht* judgment, *Lisbon* judgment and *Ajos* judgment

With the *Maastricht* judgment the Supreme Court widened the scope of ordinary citizens' access to court in cases in which they have no specific legal interest. The Supreme Court defined the following criteria for legal standing in such cases:[21]

– Involvement of a transfer of legislative powers in a number of general and important public policy areas;

– An impact on ordinary people's lives and thus on the Danish population in general.

This was a very dynamic development at the time. Following Denmark's accession to the EC in 1972 citizens had previously wanted to bring a case on the constitutionality of Denmark's accession to European Community Treaties to the courts.[22] However, the courts had found that since they had no specific legal interest in the case the Court could not treat the substance of the case.[23]

Moving on to the substance of the case, the Supreme Court stated that transfer of powers under Art. 20 must not mean that Denmark is no longer an independent state.[24] The Court concluded that this constitutional precondition had not been breached by the Maastricht Treaty. However, it did not define what is meant by an "independent state". The Court stated that the limits to transfers under Art. 20 must primarily rely on considerations of a political character.

The plaintiffs had also argued that so much sovereignty had been ceded, that the constitutional precondition for a democratic form of government had been nullified. According to the Supreme Court any transfer of legislative powers implies a certain encroachment on the Danish democratic form of government, but that was taken into consideration when Art. 20 was designed.

The Court further stated that "it is for the Danish Parliament to decide whether the Government's participation in the European cooperation should be conditional on more democratic control".

[21] Danish Supreme Court, judgment of 12 August 1996, no. 272/1994.
[22] Danish Supreme Court, judgment of 28 June 1973, no. 321/1972.
[23] *Ibid.*
[24] Danish Supreme Court, judgment of 6 April 1998, no. 361/1997.

These statements of the Supreme Court are in line with the traditional role of the political actors in interpreting the Danish Constitution, in a constitutional setting in which the courts only declare legislation unconstitutional if it manifestly violates the Constitution. This form of separation of powers is based on the idea that the legislature is legitimised by popular elections, whereas the courts in Denmark have no such democratic legitimacy.

The *Lisbon* judgment from 2013 is innovative to the extent that, while the Court upheld the traditional relationship between the legislature and the courts, it also emphasised that the political actors' comprehensive powers go hand in hand with responsibility.[25]

In relation to the indirect transfer of powers, the Court said that the Danish authorities must ensure that there is no creeping transference of powers and ensure that the constitutional assumption that the approval of the Lisbon Treaty did not require an Art. 20 procedure is respected.

The Supreme Court also emphasised that the Court of Justice may not expand the powers of the EU by means of its interpretations:

> "The Court of Justice of the European Union is charged with settling any disputes on the interpretation of EU law, but this must not result in widening of the scope of Union powers. As mentioned above, Denmark's implementation of the Lisbon Treaty was based on a constitutional assessment that it will not imply delegation of powers requiring application of the s. [Art.] 20 procedure, and the Danish authorities are obliged to ensure that this is observed".[26]

In other words, the political actors are bound by the constitutional preconditions for the assessment and must act as a watchdog.[27]

If they do not adequately fulfil this role, the Supreme Court can review the constitutionality of (secondary) EU law in specific cases.

Furthermore, the Supreme Court referred to its jurisdiction to carry out judicial reviews "if an Act or a judicial decision that has a specific and real impact on Danish citizens etc. raises doubts as to whether it is based on an application of the Treaties which lies beyond the surrender of sovereignty according to the Accession Act".

The same will apply if EU acts are adopted or if the CJEU delivers judgments based on such applications of the Treaties by reference to the Charter.

Finally, we reach the *Ajos* judgment from December 2016.[28] This judgment is very interesting because the Supreme Court chose not to follow a preliminary ruling from the CJEU. The reason for this is the following:

[25] Danish Supreme Court, judgment of 20 February 2013, no. 199/2012.

[26] Danish Supreme Court, judgment no. 199/2012, cit.

[27] As regards Art. 352 TFEU and Art. 6, para. 1, TEU, both in the *Maastricht* judgment and in the *Lisbon* judgment the Supreme Court emphasised that the Government must prevent decisions that would lead to further surrender of sovereignty.

– it is not possible within the DAA to give precedent to the unwritten EU principle on age discrimination;

– the Supreme Court would be acting outside the limits of its powers as a judicial authority if it was to disapply the national provision in this situation.

One dissenting judge refers to the argumentation laid out in the *Maastricht* judgment and the *Lisbon* judgment and reaches the conclusion that there is no conflict with the directive and that Union law should take precedence over national law:[29]

> "By judgment of 6 April 1998 (UfR 1998.800) on the Maastricht Treaty and by judgment of 20 February 2013 (UfR 2013.1451) on the Lisbon Treaty, the Supreme Court ruled on those two treaties in relation to inter alia Paragraph 20 of the Constitution on delegations of sovereignty by statute and within specified limits. In that connection it is assumed inter alia that it is not in itself incompatible with the specificity requirement in Paragraph 20 of the Constitution or contrary to the premises forming the basis of the Law on accession that the EU Court of Justice, in interpreting the Treaty, also attaches weight to interpretative factors other than a provision's wording, such as the Treaty's purpose. The same holds true for the EU Court of Justice's law-making activity.
> The following was stated on the EU Court of Justice's jurisdiction in the judgment on the Maastricht Treaty under point 9.6 (as reiterate in the judgment on the Lisbon Treaty) and point 9.7:
> '9.6. The appellants have submitted that the EC Court of Justice's jurisdiction under the Treaty, read in the light of the principle of primacy of Community law, means that Danish courts are prevented from enforcing the limits on the delegation of sovereignty that has taken place through the Law on accession and that this must be taken into consideration in the determination of whether the specificity requirement in Paragraph 20(1) of the Constitution has been observed.
> By the Law on accession, it is recognised that jurisdiction to rule on the lawfulness and validity of an EC legal act lies with the EC Court of Justice. This means that Danish courts cannot hold an EC legal act to be inapplicable in Denmark without the question of its compatibility with the Treaty having been the subject of a ruling by the EC Court of Justice, and that Danish courts can generally assume that decisions by the EC Court of Justice on that point come within the scope of the delegated sovereignty. The Supreme Court finds, however, that it follows from the specificity requirement in Paragraph 20(1) of the Constitution, together with Danish courts' jurisdiction to rule on the statute's constitutionality, that the courts cannot be stripped of their jurisdiction to rule on the question whether an EC legal act goes beyond the limits of the sovereignty delegated through the Law on accession. Therefore, should *the extraordinary situation* arise in which it can be held, with the requisite certainty, that an EC legal act upheld by the EC Court of Justice is based on an application of the Treaty that falls outside the scope of the delegation of sovereignty effected by the Law on accession, Danish courts must hold that EC legal act

[28] Danish Supreme Court, judgment of 6 December 2016, no. 15/2014.
[29] Dissenting opinion in Danish Supreme Court, judgment no. 15/2014, cit.

> to be inapplicable in. The same holds true in respect of EC legal rules and legal principles, which are based on the EC Court of Justice's case-law [emphasis added by authors].
> 9.7. In the light of the foregoing, the Supreme Court finds that neither the additional powers conferred on the Council under Article 235 of the EC Treaty nor the EC Court of Justice's law-making activity can be held to be incompatible with the specificity requirement in Paragraph 20(1) of the Constitution'.
> The EU Court of Justice's law-making activities within the framework of the Treaty and its interpretative style were known when Denmark became a member of the EC on 1 January 1973. These hallmarks of the EC Court's activities were part of the debate before the decision (and referendum) on Denmark's accession to the EC. Thus attention in the debate focused inter alia on the Court's development of the principle of primacy of Community law over national law: see inter alia judgment in Case 6/64, Costa v ENEL, ECLI:EU:C:1964:66. When the Court developed and established that principle, the primacy of Community law was not referred to in the Treaty.
> The Court has also, in the time leading up to the most recent amendments to the Law on accession, further developed that style of interpretation, holding, for example, that treaty provisions as well can have direct effect on individuals by imposing duties on them: see judgment of 8 April 1976, 43/75, Defrenne, ECLI:EU:C:1976:56, in which the Court held that Article 119 [of the EEC Treaty] as then in force imposed a duty on Member States to implement and uphold the principle of equal pay for equal work for men and women.
> In the light of the foregoing, I find that there is not such an *extraordinary situation* that it can be held with the requisite certainty that the application of a general principle of EU law prohibiting discrimination on grounds of age in the employment sphere falls outside the jurisdiction conferred on the EU Court of Justice by the Law on accession [emphasis by authors].
> I accordingly find that the Law on accession confers the requisite basis for disapplying Paragraph 2a(3) of the Law on salaried employees in the case, and that Danish courts will not thereby be acting outside the limits of their jurisdiction".

Returning, to the majority ruling in the *Ajos* judgment, on the one hand, the majority's second argument signals the Court's respect of the political institutions and that the Court sees its own role as more passive.

Furthermore, we know from the Danish government's intervention in the preliminary case, that the Danish government requested that the CJEU provided the Supreme Court with the possibility not to give direct effect to the unwritten EU principle of age discrimination in respect of the principle of rule of law and the principle of legal certainty.[30] This way, the outcome of the case, which the Supreme Court reached, was in compliance with the Danish government's perception of the case even though the arguments might differ slightly from each other. Also, this way one might say that the judgment shows respect of the political institutions.

[30] Ministry of Foreign Affairs of Denmark written submission of 19 December 2014 to the Court of Justice, para. 51. Translation by the authors.

On the other hand, at the same time we see a much more active and self-confident Supreme Court than we normally see with the courage to set aside a preliminary ruling. A Supreme Court which sets limits for EU integration and stands up for the Constitution, the Act of Accession and general legal principles (though it does not directly refer to rule of law and legal certainty). The Court actively steps into the role as protector of the Constitution, general legal principles and the Danish people.[31] This way the Supreme Court gains a new identity. It is no longer the passive Court, which – in contradiction to for instance the German Constitutional Court – sets no or very few limits for how far EU integration can go without interfering with the Danish Constitution and the Act of Accession. The Court sends a signal to the political institutions that they will actively have to amend the Act on Accession to the EU – they cannot passively let EU integration go further, than what was allowed through the Act on Accession to the EU.

This seems to lead to a slight paradox since we on the one hand see a Court which through the content of its judgment shows respect of the traditional relationship between the courts and the legislator in the Danish separation of powers but on the other hand seems inspired by other more dynamic and active European Courts to stand up for the Constitution, legal principles and the people. The judgment seems to provide the Supreme Court with new legitimacy at the national level.

In other words, formally the Court respects the political institutions but at the same time it in reality becomes a much more important player in EU integration with the *Ajos* judgment sending a signal of its powers to the Danish politicians as well as the EU institutions including the Court of Justice.

The remarks made by the dissenting judge are quite interesting. They reflect that according to her, the Supreme Court does not follow the line laid out by itself in its former practise when it decides not to follow the preliminary ruling by the Court of Justice in the *Ajos* judgment. If we follow this line of thought, *Ajos* constitutes a break with existing practise, and thereby (maybe) violating the same principle of legal certainty that it initially was set out to protect.

It is however also possible to point out a link between the *Lisbon* judgment and the *Ajos* judgment by focusing on the statements by the Supreme Court in the *Lisbon* judgment on the limits of European integration and the warning to the Danish politicians as watchdogs and to the Court of Justice in relation to dynamic interpretations. One might say that *Ajos* is a "follow-up" on these statements (the missing case in the *Lisbon* judgement with adequate standing).

In conclusion, it seems that the Supreme Court has gone from being a quite passive Court to 1) broaden the access to court in the *Maastricht* case, to 2) warn the national

[31] See H. Krunke, *Courts as Protectors of the People: Constitutional Identity, Popular Legitimacy and Human Rights*, in M. Scheinin, H. Krunke, M. Aksenova (eds), *Judges as Guardians of Constitutionalism and Human Rights*, Cheltenham: Edward Elgar Publishing, 2016, p. 71 *et seq*.

political institutions and the Court of Justice of their responsibilities and of the constitutional limits of EU integration in the Lisbon case and finally to 3) become an empowered Court which has drawn a clear line in the sand as regards the limits of EU integration in the *Ajos* case. While, the Supreme Courts first broadened the access to court in cases on the constitutionality of EU treaties in the 1990's, this way indirectly strengthening court control with EU integration, the Court has in 2016 with the *Ajos* case set substantial limits for EU integration.

III.3. Possible reasons for and scope of the development

In order to understand the judgment it is useful to look at the Danish legal tradition as regards legal sources, legal reasoning in judgments and the content of the Constitution. It is probably no coincidence that it is an unwritten EU Constitutional principle, which has triggered the Supreme Court not to follow a preliminary ruling. The Danish Constitution does not directly set out general legal principles and values. While, some legal principles are regarded as legal sources primarily in private law, legal principles are not commonly used directly as legal sources. As regards constitutional principles, they are few and normally seen as some broader considerations behind the written constitutional text, which are reflected in the written text. The courts are not active in defining new constitutional principles. Written law interpreted in light of its *travaux préparatoire* ranks very high in the Danish legal system. Further, as mentioned earlier Danish courts are normally quite reluctant and do not apply a dynamic style of interpretation. Therefore, the idea that an unwritten constitutional principle created by the Court of Justice should set aside written legislation is in itself unusual for Danish judges. Furthermore, the *Ajos* case concerned a horizontal relationship since the case concerned two private parties. Third, the application of the preliminary ruling would violate legal certainty for the private parties. This way, the dynamic interpretation style by the Court of Justice in combination with its view on unwritten legal principles as a legal source, which can have constitutional status, is not in harmony with the legal tradition in Denmark.

In the Court of Justice proceedings in *Ajos*, the Danish Government submitted their observations as an intervener before the hearing. On the issue of balancing the principles, the Government made a reference to Art. 4, para. 2, TEU and national constitutional identity. Furthermore, as we shall return to, other national Supreme Courts/Constitutional Courts have referred to national constitutional identity in cases on the relationship between EU law and national law, including in cases concerning direct horizontal effect.

This way, the Danish government has found national constitutional identity relevant to the *Ajos case* and other national European Courts have found national constitutional identity relevant in similar cases. Nevertheless, the DSC did not refer to national constitutional identity in its judgment. It seems that the Court could have included constitutional identity with a reference to Art. 4, para. 2, TEU in the case already in the prelimi-

nary reference. The argument would then be that the principle of legal certainty (and/or rule of law) are part of the Danish national constitutional identity. Several possible reasons for why the Supreme Court did not refer to national constitutional identity can be provided: 1) uncertainty as to whether legal certainty can be defined as a constitutional principle, 2) the Supreme Court is reluctant as regards defining Danish constitutional identity because of the Danish model of separation of powers with strong legislators and restraint courts, and 3) uncertainty as to whether Art. 4, para. 2, TEU can be applied with sufficient certainty in a situation regarding direct effect in the relationship between two private parties, leading to the Supreme Court not having to apply the Directive in *Ajos.*[32] In the following, we will mainly focus on reason 1) and 2).

Does legal certainty constitute a constitutional principle? The principle of legal certainty is not directly mentioned in the Constitution. Nevertheless, such a principle probably does exist since a number of judgments point in that direction, and since it is an underlying value in many constitutional provisions.[33] In many cases, the High Court or the DSC has accepted legal arguments that refer to legal certainty considerations, with legal certainty often being integrated in the interpretation of legislation in a specific field. The interesting aspect is that legal certainty is sometimes referred to as a general consideration or principle, and not just through a reference to the preparatory works, which play an important role in interpretation in the Danish legal system.[34] Even more insightful are the judgments which not only indicate that a principle of legal certainty exist, but also that it might have constitutional rank. In the *Tvind* case,[35] the DSC stated that legal certainty is a core value behind the separation of powers in Art. 3 of the Constitution.[36] This judgment is the only judgment in which the DSC has ruled legislation

[32] Besides the mentioned substantial reasons a possible procedural reason could be mentioned namely that since the argument was not brought up by the parties in the case, the Supreme Court did not discuss constitutional identity.

[33] See Constitutional provisions such as Arts 3, 22, 43, 62-65, 71 and 77-79, H. KRUNKE, T. BAUMBACH, *The Role of the Danish Constitution in European and Transnational Governance*, in A. ALBI, S. BARDUTZKY (eds), *The Role and Future of National Constitutions in European and Global Governance*, The Hague: Asser Press, 2018 (forthcoming).

[34] See for instance Danish Western High Court, judgment of 26 January 2015, no. S-2482-14; Danish Supreme Court, judgment of 13 March 2014, no. 74/2013; Danish Supreme Court, judgment of 18 December 2013, no. 205/2012; Danish Eastern High Court, judgment of 25 April 2012, no. S-250-12.

[35] Danish Supreme Court, judgment of 19 February 1999, no. 295/1998.

[36] See also the following case law. In Danish Supreme Court, decision of 17 May 2000, case no. 74/2000, Art. 877, para. 3 in the Administration of Justice Act was set aside based on legal certainty considerations. In Danish Supreme Court, judgment of 2 July 2008, no. 157/2008, considerations of legal certainty trumped Art. 37 of the Danish Aliens Act. Furthermore, in Danish Supreme Court, judgment of 18 December 2013, no. 205/2012, the DSC stated that it would be a violation of legal certainty and predictability if the Danish Holidays Act was interpreted in compliance with Directive 2003/88. In Danish Special Court of Final Appeal, judgment of 2 July 2015, no. K-156-14, the dissenting judge wanted to set aside Art. 987, para. 1, of the Administration of Justice Act because of legal certainty considerations.

unconstitutional. Even though it is often not entirely clear in case law when legal certainty is applied as a source of interpretation, (maybe building on the preparatory works) and when it is applied as an independent source of law, case law leaves the impression that it is possible to argue not only for the existence of such a legal principle, but also for its constitutional rank.

In the *Ajos* case, the private employer (Ajos) had argued that it would be a violation of Art. 3 of the Danish Constitution on separation of powers and a principle of legal certainty at constitutional rank to interpret Danish legislation according to the *Mangold* principle, or not apply Danish legislation. As stated earlier, the Supreme Court in its judgment stated that if it were to set aside national law, it would be acting outside the limits of its competences as judicial power. Two observations can be made at this juncture. Firstly, the DSC does not mention legal certainty, and secondly, it does not make a direct reference to Art. 3 of the Danish Constitution. Hence, the Supreme Court does not (directly) refer to an unwritten constitutional principle of legal certainty.

However, as mentioned, in *Tvind*, the Supreme Court referred to legal certainty as an underlying value, which Art. 3 of the Constitution should be interpreted in the light of.[37] This way it could be put forward that by referring to the limits of judicial competence, the Court indirectly included the principle of legal certainty in its ruling. This argument might even be said to be strengthened by the fact that the DSC did not specifically refer to Art. 3, but to the competence of the court which is not only described in Art. 3, but also appears in other constitutional provisions. This way it underlines the general character of legal certainty as an underlying principle of the Constitution. Yet, the latter cannot be concluded for certain.

Notwithstanding this, if *Ajos* is viewed in the light of *Tvind*, legal certainty is present in the *Ajos* judgment though not directly referred to.

Whereas the DSC abstained from drawing on constitutional identity as an argument in the case, the Italian Constitutional Court refers several times to constitutional identity and Art. 4, para. 2, in *Taricco*, which is examined below. However, it has been emphasised in legal literature that the Italian court actually ends up down-playing the constitutional identity argument by underlining the importance of the constitutional traditions at both the national and European level.[38] Nonetheless, the new preliminary references made to the CJEU, re-referrals, include an argument, which could be interpreted as constitutional identity,[39] though that precise term is not used and there is no reference to Art. 4, para. 2, TEU "[...] even when setting aside such legislation would contrast with the

[37] See footnote 36.

[38] F. Fabbrini, O. Pollicino, *Constitutional Identity in Italy: European Integration as the Fulfilment of the Constitution*, in *EUI LAW Working Papers*, forthcoming, p. 14.

[39] Italian Constitutional Court, order of 23 November 2016, no. 24.

supreme principles of the constitutional order of the Member State or with inalienable human rights recognized under the Constitution of the Member State".[40]

Interestingly, as mentioned earlier in the Court of Justice proceedings in *Ajos*, the Danish Government submitted their observations as an intervener before the hearing, and on the issue of balancing the principles, the Government stated that,

> "[i]n this specific balancing [of rights] the government attach significant weight to the fact that basic conditions for the existence of a state based on the 'rule of law' and a legal system is; the principle of legal certainty, the principle of protection of legitimate expectations, as well as the possibility for citizens to know their obligations and could be adapted accordingly. This must be regarded as the very foundation of a state that bases its legal system on the principle of 'rule of law'. These principles must therefore weigh heavily and heavier than a principle which constitutes a concrete application of the principle of equality as a fundamental right based on the common constitutional traditions".[41]

Especially, if the quotation is combined with paras 56-57 in the written submission from the Danish Government, where a direct reference is made to Art. 4, para. 2, TEU, stating that the rule of law, including separation of powers, form the very core of the concept.[42]

> "56. It follows from Article 4(2) TEU, the Union respects the national identity of the Member States, as expressed in their fundamental political and constitutional structures.
> 57. Article 4(2) TEU, by its very nature, does not change the principle of primacy of EU law, but the purpose of the provision seems relevant to include in a case that affects the core of the Member States' understanding of the rule of law, including the division of responsibilities between the legislative and judicial power. The Mangold judgment's, EU: C: 2005:709, reception in the Member States, in legal theory and in the Court's own Advocates General, confirms, in the Government's view, that there is reason to compromise. In any event, the view is in support of leaving the final, concrete balance to the national court, taking into account all the elements of the case, including the foregoing considerations".

This way, whereas the DSC does not refer to constitutional identity in its judgment, the Danish government does so, this way defining part of Danish constitutional identity – something the DSC has never done. It seems to go well hand in hand with the Danish separation of powers, that whereas for instance the German Constitutional Court has been active in defining German constitutional identity, in the Danish context the political institutions play this role whereas the courts are silent on this topic (at least for the

[40] Italian Constitutional Court, order no. 24/2017, cit., p. 10 *et seq.*

[41] Ministry of Foreign Affairs of Denmark written submission of 19 December 2014 to the Court of Justice, para. 51. Translation by the authors.

[42] See also J. KRISTIANSEN, *Grænser for EU-rettens umiddelbare anvendelighed i dansk ret*, cit., p. 84.

time being).[43] In other words, if the DSC had defined Danish constitutional identity in its judgment it would have shown a much more activist approach than it does in its *Ajos* judgment stepping in the footsteps of other more activist and dynamic courts.

Furthermore, it is interesting to look at the context in which the *Ajos* judgment came out. Several European Constitutional Courts/Supreme Courts were in a critical dialogue with the Court of Justice.[44] The DSC hosted a conference on "Public trust in Courts" in the spring of 2016. The former president of the Supreme Court, Børge Dahl, had at several occasions including the FIDE congress in 2014, stated concern regarding the principles of rule of law and legal certainty in relation to interpretations by the Court of Justice.[45] Politically, the *Ajos* judgment came out in a Brexit-era with growing populism in many Member States. Finally, Denmark was to take over chairmanship for the Council of Europe the following year and high on the political agenda was an on-going reform of the European of Human Rights in light of the principle of subsidiarity including the scope of the dynamic interpretation of the European of Human Rights and understanding of special national circumstances. These aims are expressed in the programme for Denmark's chairmanship:[46]

> "A strengthened dialogue between the member States, national courts and the European Court of Human Rights on the interpretation of the Convention, including the use of the principle of subsidiarity and the margin of appreciation, will make the Court stronger in the longer term. A key objective for the Danish chairmanship is to find new ways to jointly ensure such a strengthened dialogue on developments in the Court's jurisprudence; a dialogue in which civil society should also play a key role. Our goal is a system that has both the necessary impact and understanding of local needs and conditions.
> [...]
> It will be a priority for the Danish chairmanship to shed light on how we handle the challenge resulting from the fact that the European Court of Human Rights, through its judgments, increasingly has influence on policy areas of critical importance to member States and their populations. It must be ensured that there is a sufficient ongoing dialogue, including at policy level, on the development of human rights. This includes inter alia questions such as the scope of the dynamic interpretation of the Convention and the need to take into account the principle of subsidiarity and its functional tool, the margin of appreciation".

[43] On the relationship between constitutional identity and separation of powers, see H. KRUNKE, *The Danish Lisbon Judgment*, cit., pp. 545-570, and H. KRUNKE, *Constitutional Identity – Seen through a Danish Lens*, in *Retfaerd*, 2014, p. 24 *et seq*.

[44] See for instance from Germany: German Federal Constitutional Court, judgment of 21 June 2016, 2 BvR 2728/13, paras 1-220 (OMT) and Italy: Italian Constitutional Court, order 24/2017, cit.

[45] See B. DAHL, *Keynote Address*, in U. NEERGAARD, C. JACQUESON (eds), *Proceedings: Speeches from the XXVI FIDE Congress*, Copenhagen: DJØF Publishing, 2014, p. 26 *et seq*.

[46] See Priorities of the Danish Chairmanship of the Committee of Ministers of the Council of Europe, 15 November 2017-18 May 2018.

Finally, we shall reflect on the scope of the judgment. The judgment raises several questions as regards its scope and future impact both in Danish law and in EU law keeping in mind that the parliament has amended the disputed national legislation to secure compliance with EU law, and no indications of an infringement procedure from the Commission has been seen.

The dissenting judge in the *Ajos* judgment found that if the *Maastricht* criteria was applied in the *Ajos* case there was no conflict between the Directive and Danish legislation and Union law should take precedence over national law. However, the majority of judges were under the impression that there was no legal basis in the Act of Accession to the EU to let an unwritten EU principle take precedence of national legislation in the relationship between two private parties. Does this mean that the *Maastricht* criteria is no longer in place? And that we have a new more narrow criteria? Interestingly, based on the *Maastricht* criteria the Supreme Court found both in the *Maastricht* judgment and in the *Lisbon* judgment that unwritten EU constitutional principles defined by the Court of Justice such as the principles of supremacy and direct effect did not fall outside the competence transferred to the EU and that the competence of the Court of Justice had a dynamic character. Therefore, one might wonder whether the DSC has changed its approach and left the *Maastricht* criteria. Another interpretation of the judgment could be that the *Maastricht* criteria is still in place as a starting point but what made the *Ajos* case special in the eyes of the Supreme Court was the fact, that it was a horizontal relationship between two private parties. The fact that the case concerned direct effect in relation to two private parties is emphasized by the Supreme Court throughout its judgment, which could support the latter interpretation.

Another interesting aspect regarding the scope of the judgment is that the Supreme Court discusses direct effect in relation to the Charter. This is a question, which has been discussed in a number of recent judgment at other Supreme Courts/Constitutional Courts.[47] The DSC underlines that the Charter including Art. 21 does not have direct effect in Denmark (through the Danish Act on Accession to the EU). The same applies to principles which are based on Art. 6, para. 3, TEU. This way, the Supreme Court seems to have expressed how it will treat future cases involving the Charter.

Finally, we might reflect over the impact of the judgment in relation to national Supreme Courts' and Constitutional Courts' respect of EU law and the impact of EU law in the national legal systems. Throughout this *Article*, we have presupposed that the Supreme Court did not follow the preliminary ruling. This could potentially influence other national courts not to follow preliminary rulings. However, one might ask whether the Supreme Court's judgment actually falls within the scope of the preliminary ruling from the Court of Justice? According to EU law, the age discrimination principle is a constitu-

[47] See for instance Italian Constitutional Court, order no. 24/2017, cit. and UK Supreme Court, judgment of 16 October 2013, no. UKSC 2012/0151, and judgment of 16 October 2013, no. UKSC 2012/0160.

tional principle with direct effect but EU law cannot be applied in a *contra legem* situation. Seen through this lens the DSC has followed EU law and the preliminary ruling in the sense that it has not applied EU law in a case in which it would have been *contra legem*. In favour of such an interpretation could be mentioned the fact that the EU has not initiated actions against Denmark regarding a violation of the treaties. Against such an interpretation could be mentioned, that the DSC in its judgment does not accept that the EU constitutional principle on age discrimination – or any other principles based on Art. 6, para. 3, and the Charter – have direct effect in the Danish legal system. Furthermore, it has been put forward in parts of legal literature that it was actually possible for the Supreme Court to interpret Danish legislation in accordance with EU law without the appearance of a *contra legem* situation.[48]

This way, though no definite answers can be given yet in relation to the scope of the *Ajos* judgment, as shown the *Ajos* judgment has the potential to impact the future relationship between EU law and Danish law (in a new direction) and it provides an important contribution to the European case law on the relationship between EU law and national law. The latter naturally leads us to a brief comparative visit to a few other Constitutional Court/Supreme Court cases, which are comparable to the Danish *Ajos* case.

IV. Comparative analysis of the *Ajos* case

As already touched upon above the *Ajos* case fits into a comparative European context, and hence into the judicial dialogue between national courts and the CJEU. Focus in this section will be on two comparative perspectives. First, it is considered whether other European Courts have been concerned with upholding legal certainty in relation conflict between national legal order and EU law. It is seen that by combining the jurisdiction of the national courts and the separation of powers the constitutional principles is used to potentially limit the direct effect of Union law. Second, it is considered whether other national European Courts are invoking constitutional reservations in combination with the principle of loyal cooperation and using a more EU-open dialogue compared to *Ajos*.

IV.1. Upholding legal certainty at a national level

In *Ajos* the DSC chose to highlight the discussion carried out by the AGs of the Court about the doctrinal basis of horizontal application of general EU principles in the reference to the Court of Justice.

[48] See R. Nielsen, C.D. Tvarnø, *Danish Supreme Court Infringes the EU Treaties by Its Ruling in the Ajos case*, in *Europaraettslig Tidskrift*, 2017, p. 303 *et seq*. and R. Nielsen, C.D. Tvarnø, *Ajos-sagens betydning for rækkevidden af EU-konform fortolkning i forhold til det almindelige EU-retlige princip om forbud mod aldersdiskrimination*, in *Danish National Gazette*, Section B, 2016, p. 269.

The DSC revisited the *Ole Andersen* case when considering whether the same approach could be applied in a horizontal EU law relationship between two private individuals – or if it would be a breach of legal certainty. In the said judgment AG Kokott had in her opinion questioned that the Court of Justice had relied directly on the general legal principle of the prohibition of age discrimination, stating that it was for the national court to set aside any provision of national law, which may conflict with that prohibition.[49] The AG found in para. 22 that it appeared "to be a makeshift arrangement for the purposes of resolving issues of discrimination in legal relationships between individuals, in which Directive 2000/78 is not as such directly applicable and cannot therefore replace national civil or employment law".

The AG also emphasized that the idea of an in-depth reappraisal and examination of the doctrinal basis of the controversial horizontal direct effect of general legal principles or fundamental rights between individuals were certainly appealing, but not necessary to resolve the case at hand since the main proceeding related to a vertical legal relationship. In another case, the *Dominguez* case, also AG Trstenjak had made reservations regarding legal certainty for private individuals and the risk of mixing sources of law as regard to directives as secondary law and general principles as primary EU law.[50] In regard to absence of legal certainty for private individuals she emphasized in para. 164, that:

> "[…] the principle of legal certainty requires that rules involving negative consequences for individuals should be clear and precise and their application predictable for those subject to them. However, as it will never be possible for a private individual to be certain when an unwritten general principle given specific expression by a directive will gain acceptance over written national law there would, from his point of view, be uncertainty as to the application of national law similar to that experienced where a directive is directly applied in a relationship between private individuals".

The DSC raised the same concerns and by referring the *Ajos case* to the Court of Justice they aimed to find a solution by balancing the conflicting principles. By rejecting the solution by the DSC the Court of Justice offered no easy way out for the national court, but to turn on a plate and apply EU law as told by the Court of Justice. The DSC did not act as expected; instead, the Danish judges found their own way of solving the problem and thereby securing legal certainty under Danish law as mentioned above.

In the *Taricco II* case[51] the Italian Constitutional Court made a preliminary reference to the CJEU about the extent to which the national courts are required to fulfil the obli-

[49] Opinion of AG Kokott delivered on 6 May 2010, case C-499/08, *Ingeniørforeningen i Danmark v. Region Syddanmark*.

[50] Opinion of AG Trstenjak delivered on 8 September 2011, case C-282/10, *Maribel Dominguez v. Centre informatique du Centre Ouest Atlantique and Préfet de la région Centre*.

[51] Court of Justice, judgment of 5 December 2017, case C-42/17, *M.A.S. and M.B.* [GC].

gation, identified by the Court in the judgment of 8 September 2015, *Taricco et al.* to disapply, in pending criminal proceedings, the rules in the last sub-para. of Art. 160 and the second sub-para. of Art. 161 of the *Codice penale* (the Penal Code).[52]

The *Taricco II* case concerned whether Art. 325 TFEU had primacy over national provisions in the Penal Code on a narrow limitation period for prosecuting tax offences, as the Court of Justice had suggested in the *Taricco et al.* case.[53] According to the Italian Constitutional Court, this would violate the constitutional principle of legality, which has special weight in the field of criminal law. The first preliminary reference was discussed by the Italian Constitutional Court, order no. 24, which ended up sending another preliminary reference to the Court of Justice. In the reference, the Italian Constitutional Court on a number of occasions, referred to foreseeability and level of certainty for individuals. The Italian Constitutional Court also refers to the limits set for the power of the courts in the Italian system of separation of powers.[54] The Italian Constitutional Court emphasised that it is not empowered to make choices based on discretionary assessments of criminal policy and regarding the constitutional systems of the Member States of civil law tradition. Accordingly, it said: "[...] [t]hese do not grant the courts the power to create new criminal law in place of that established by legislation approved by Parliament, and in any case reject the notion that the criminal courts may be charged with fulfilling a purpose, albeit defined by law, if the law does not specify in what manner and within what limits this may occur".

This paragraph in the decision was followed by the consideration, that "[the] conclusion would exceed the limits applicable of the exercise of judicial powers within a state governed by the rule of law, at least within the continental tradition and does not appear to comply with the principle of legality laid down by Article 49 of the Nice Charter".

As of 18 July 2017 the AG in *Taricco II* Bot delivered his opinion in the case and found that the Court of Justice should answer the questions referred for a preliminary ruling by the Italian Constitutional Court by re-stating the argumentation from the *Taricco I* case. He also found that none of the arguments put forward by the Italian Constitutional Court could alter that result. Bot suggested that Art. 325 TFEU had to be interpreted as requiring the national court to disapply the absolute limitation period in the national legal order. Thereby the facts of the case has many similarities to the *Ajos* case (but also differences being about criminal proceedings and not civil labour law).

The argumentation that had been put forward by the Italian Constitutional Court that Art. 49 of the Charter could preclude the Italian courts from disapplying national rules was disregarded by the AG. Also the suggestion that Art. 53 of the Charter could allow the courts to refuse to fulfil the obligation identified in the *Taricco I* case on the

[52] Court of Justice, judgment of 8 September 2015, case C-105/14, *Taricco et al.* [GC].
[53] Italian Constitutional Court, order no. 24/2017, cit.
[54] Italian Constitutional Court, order no. 24/2017, cit., pp. 5, 9 and 11.

ground that that obligation does not respect the higher standard of protection of fundamental rights guaranteed by the Constitution of that State was rejected.

Finally, AG Bot rejected the argument that Art. 4, para. 2, TEU could be used as a leverage in allowing the courts to refuse to fulfil the obligation identified by the Court of Justice in *Taricco I* on the ground that the instant application would affect the national identity of Italy. The argument was, that national identity would be affected, if the courts had to use a longer limitation period than that provided for by the law in force at the time when the offence was committed.[55]

The AG held that the protection of a fundamental right must not be confused with an attack on the national identity or, more specifically, the constitutional identity of a Member State. Finding that even though The *Taricco I* case concerned a fundamental right protected by the Italian Constitution, that did not mean that the application of Art. 4, para. 2, TEU could be envisaged.

It could be argued that, if a similar argument had been put forward in *Ajos* by the DSC (as the national government did) AG Bot would have dismissed it on the same grounds. In the judgment in the *Taricco II* case the Court of Justice followed the AG in regard to Art. 325 TFEU, and found that it had to be interpreted as requiring the national court, in criminal proceedings for infringements relating to value added tax, to disapply national provisions on limitation, even though they formed part of national substantive law. However, contrary to the AG the Court of Justice found that the obligation to protect the financial interests of the EU was not absolute.

The Court of Justice found the rules had to be disapplyed: "[…] unless that disapplication entails a breach of the principle that offences and penalties must be defined by law because of the lack of precision of the applicable law or because of the retroactive application of legislation imposing conditions of criminal liability stricter than those in force at the time the infringement was committed".[56]

The Court of Justice did not answer the third question from the Italian Constitutional Court about the constitutional identity, since the conclusion of the first and second question gave the referring court enough leeway to balance the principles of legal certainty in the Italian Constitution against the effectiveness of EU law. This was the same task that the DSC was unsuccessfully trying to solve under EU law in *Ajos*, instead the DSC had to combine the jurisdiction of the national courts and the separation of powers in the Constitution to limit the direct effect of Union law under Danish law.

[55] See *supra*, section III.3.
[56] *M.A.S. and M.B.*, cit., para. 62.

IV.2. Different approaches to the ongoing dialogue between national courts and the Court of Justice

When deciding to make a preliminary reference, and by choosing to revisit the discussion carried out by some of the AGs of the Court of Justice the DSC chose a path that could be interpreted as disobedient or at least sceptic towards the existing case law from the Court of Justice regarding the principle of non-discrimination on grounds of age. The critique from the AGs of the Court of Justice continues also after the *Ajos* case. And even some encouragement to *Ajos* might be found. AG Bobek held in his opinion in *Abercrombie & Fitch* that it is a "sensible practice of a number of legal systems that see the role of fundamental rights in private law relationships primarily as an interpretative one".[57]

This comparative outlook will focus on other European constitutional courts' approaches in the dialogue between the courts. When comparing the *Ajos* case with the predecessor in the *Mangold* case and the German Federal Constitutional Court's/Bundesverfassungsgericht (BVerfG) decision some major differences can be pointed out. In the *Honeywell* case the BVerfG had to decide if the *Mangold*-case from the CJEU was constitutional or not and if the Court of Justice had overstepped its competence in regard to the principle of non-discrimination on grounds of age. The Court performed a so-called *ultra vires* review.

Honeywell has already been thoroughly examined and analysed before.[58] However, in regard to the comparison with *Ajos* the case relates to the same problem: the review of if the Court of Justice is overstepping its competence in regard to the doctrinal basis of the principle and the relationship to the German Constitution. The outcome and the result of the case was very much different from *Ajos*. The BVerfG found that in regard to the interpretation it had to be remembered that the *ultra vires* review by the court could only be considered if a breach of competences was *sufficiently qualified*. The same doctrine or threshold was previously used in the Danish *Maastricht* and *Lisbon* cases:

> "Therefore, should the extraordinary situation arise in which it can be held, with the requisite certainty, that an EC legal act upheld by the EC Court of Justice is based on an application of the Treaty that falls outside the scope of the delegation of sovereignty effected by the Law on accession, Danish courts must hold that EC legal act to be inapplicable in Denmark".[59]

[57] Court of Justice, judgment of 19 July 2017, case C-143/16, *Abercrombie & Fitch Italia Srl v. Antonino Bordonaro*.

[58] M. Payandeh, *Constitutional Review of EU Law after Honeywell: Contextualizing the Relationship between the German Constitutional Court and the EU Court of Justice*, in *Common Market Law Review*, 2011, p. 9 *et seq*. and Editorial Comment, *Ultra Vires. Has the Bundesverassungsgericht Shown his Teeth?*, in *Common Market Law Review*, 2013, p. 925 *et seq*.

[59] Danish Supreme Court, judgment of 6 April 1998, no. 361/1997.

In *Ajos* on the other hand, the DSC judges, did not set a lower bar of "sufficient qualification" of the breach of competence as explained above. It would have been if the dissenting judge of the DSC had had her will. The explanations on the different outcome of the cases can of course be related to the differences in the German Constitution *vis-à-vis* the Danish. In order to understand the different approaches a very significant feature of interpretation can be underlined in the BVerfG's argumentation on the *ultra vires* review: "Die Ultra-vires-Kontrolle darf nur europarechtsfreundlich ausgeübt warden".[60]

Or as the English translation says the "[u]ltra vires review may only be exercised in a manner which is open towards European law". A similar principle of interpretation with the emphasis on the EU integration is not fully recognised under Danish law. The German position reflects in some ways the EU law principle of loyal cooperation, which implies mutual respect and assistance between the national and EU level.

Going back to the Italian re-referral in the *Taricco II* case and investigating it from the same perspective a similar positive approach in relation to EU law can be identified. Several places in the decision, such as in para. 8 on the reflection on the identity-clause: "This Court would like to stress that, [...], it does not however compromise the requirements of uniform application of EU law and is thus a solution that complies with the principle of loyal cooperation and proportionality". [61]

The tone and the language in the Italian Constitutional Court decision is somewhat respectful in regard to the Court of Justice and simply points at some difficulties for the national constitutional court to obey and comply with EU law. This style of dialogue could be interpreted as in contrast to the DSC in *Ajos*, which leads us to the next section.

After the outlook on the two different approaches from the Italian Constitutional Court and the BVerfG we look into the argumentation and the use of language in the Danish decision to refer *Ajos* to the Court of Justice. In light of the approach of its Italian and German colleagues, it may seem a bit harsh and extremely candid when the DSC suggests that the Court of Justice is not consistent in its own case law.[62]

The DSC pointed that out by referring on the one hand to the *A.M.S.* case, para. 36, in which the CJEU stressed that according to settled case law, even a clear, precise and unconditional provision of a directive seeking to confer rights or impose obligations on individuals cannot of itself apply in proceedings exclusively between private parties.[63] On the other hand the DSC argued that this would be the case if the line of argumentation in *Kücükdeveci* was applied.

Many other explanations (than legal) can be found as to why the DSC argued as it did, such as the cultural differences in the way Danish lawyers (including judges) write

[60] German Federal Constitutional Court, judgment of 6 July 2010, 2 BvR 2661/06, para. 58.

[61] Italian Constitutional Court, order no. 24/2017, cit., para. 8.

[62] Danish Supreme Court, no. 15/2014, cit.

[63] Court of Justice, judgment of 15 January 2014, case C-176/12, *Association de médiation sociale v. Union locale des syndicats* [GC].

and argue without too many detours and straight to the point, but it can also be interpreted as being confronting towards the Court of Justice. Many former DSC judges have after they resigned from the bench in the DSC expressed the view that the interpretations made by the European Courts (including the CJEU) puts the concepts of separation of powers and legal certainty on a slippery slope.[64]

Despite the general argument put forward that the DSC is reluctant towards making preliminary references to the Court of Justice the Court did so in *Ajos* despite the fact that neither of the parties had requested it. A critique could be made of the way the DSC did it by making the argument that the Court of Justice should "think again" in order to make its own case law consistent.[65] Instead, inspiration from the Italian Constitutional Court could be drawn and a lesson learnt for the DSC could be that in future referrals to the Court of Justice it must be even more thorough when drafting and explaining the difficulties posed by obeying and complying with EU law. Such an approach might prove more successful when engaging in the ongoing dialogue between the European Courts.

V. Concluding remarks

In the *Article*, we give a brief account of *Ajos* and draw a line from *Maastricht* via *Lisbon* to *Ajos* by reflecting on the development of the case law of the DSC. Here the strong emphasis that the Danish Courts puts on the parliamentary prepatory works (*travaux préparatoires*) and the will of the legislator also in regard to EU law is highlighted.

Ajos has been given many interpretations already.[66] It has been viewed as a battle between monism against dualism, as a clash between different legal cultures or as competing institutions on a national and international level. We have analysed the case

[64] See B. Dahl, *Keynote Address*, cit., pp. 26-36 and T. Melchior, *Er grundloven ændret?*, in *Festskrift til Jens Peter Christensen*, 2016, p. 239.

[65] M. Wind, *The Nordics, the EU and the Reluctance Towards Supranational Judicial Review*, in *Journal of Common Market Studies*, 2010, pp. 1039-1063 contrary to M. Broberg, N. Fenger, H. Hansen, *Den strukturelle faktors betydning for nationale domstoles præjudicielle forelæggelser for EU-Domstolen: En statistisk analyse*, in *Juristen*, 2017, pp. 182-195, who have based their analysis on statistics and suggested other explanations (when taking population, economic wealth, length of membership and other factors into account).

[66] O. Spiermann, *En højesteretsdom om EU-tiltrædelsesloven*, in *Danish National Gazette*, Section B, 2017, p. 297; J. Kristiansen, *Grænser for EU-rettens umiddelbare anvendelighed i dansk ret*, cit.; R. Nielsen, C.D. Tvarnø, *Danish Supreme Court Infringes the EU Treaties by its Ruling in the Ajos Case*, cit., pp. 303-326, and M. Rask Madsen, H. Palmer Olsen, U. Sadl, *Competing Supremacies and Clashing Institutional Rationalities*, in *iCourts Working Paper Series*, no. 85, 2017 p. 17; R. Holdgaard, D. Elkan, G. Krohn Schaldemose, *From Cooperation To Collision: The ECJ's Ajos Ruling and the Danish Supreme Court's Refusal To Comply*, in *Common Market Law Review*, 2018, p. 17 *et seq.*; U. Neergaard, K. Engsig Sørensen, *Activist Infighting among Courts and Breakdown of Mutual Trust? The Danish Supreme Court, the CJEU, and the Ajos Case*, in *Yearbook of European Law*, 2017, p. 1 *et seq*.

from a primarily constitutional perspective with emphasis on separation of powers and the temporary context in which the case was decided in.

As regards the scope of the judgment we have discussed different perspectives namely whether the judgment can be interpreted as 1) a break with the "Maastricht criteria", 2) primarily based on the fact that it was a horizontal relationship between two private parties or 3) as being in accordance with EU law and the preliminary ruling. The most clear implication of *Ajos* is that the DSC sets out a restrictive line for future cases which involve the Charter and principles developed or established on the basis of Art. 6, para. 3. Especially in relation to the prohibition of discrimination on grounds of age in Art. 21, it will be interesting to see how the DSC will respond to cases about prohibition of discrimination on other grounds than age in horizontal relationships based, for instance, on a disability (obesity)[67] or religion following the forthcoming judgement in *Cresco.*[68]

Seen through a comparative lens we have analysed *Ajos* and compared it with the latest *Taricco II* case and found that the strong focus on upholding legal certainty at a national level is a tendency that can be seen also in other Constitutional courts, but to some extent can be framed differently. Further, we concluded that the German *Honeywell* case and the Italian *Taricco* re-referral can be interpreted as more open toward Union law compared with *Ajos.*

[67] Court of Justice, judgment of 18 December 2014, case C-354/13, *Kaltoft v. Municipality of Billund*.

[68] Request for a preliminary ruling from the Oberster Gerichtshof (Austria) lodged on 13 April 2017, case C-193/17, *Cresco Investigation GmbH v. Markus Achatzi*.

ARTICLES

BREXIT: THE IMPACT ON JUDICIAL COOPERATION IN CIVIL MATTERS HAVING CROSS-BORDER IMPLICATIONS – A BRITISH PERSPECTIVE

ELIZABETH B. CRAWFORD* AND JANEEN M. CARRUTHERS**

ABSTRACT: Professors Crawford and Carruthers comment, from a British perspective, on the possible effects of Brexit upon European civil justice harmonisation measures, with particular reference to the Brussels I Recast, Brussels II *bis*, Rome I and Rome II Regulations.

KEYWORDS: Brexit – judicial cooperation in civil matters – European Union (Withdrawal) Bill – Scottish devolution – Lugano II – Hague Conference on Private International Law.

I. INTRODUCTION

The outstanding feature of the modern age of international private law has been the creation and development of a supranational body of rules, developed intra-EU by the European institutions and EU Member States, and internationally at the Hague Conference on Private International Law. Since the 1980s, international private law in the UK has undergone a European revolution in the name of judicial co-operation in civil matters, and the result is a vast body of European international private law directly applica-

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ble in the UK,[1] as well as in the other 27 Member States. As the UK prepares to withdraw from the European Union, this area of international private law must be scrutinised to ascertain what is to happen on Brexit Day and thereafter.[2]

II. The Europeanisation programme

The EU, in its Justice and Home Affairs portfolio, has delivered an ambitious and wide-ranging programme of harmonisation of laws, with the aim of creating an "Area of Freedom, Security and Justice". The central policy has been the removal of barriers to the free movement of persons, goods, services and capital. The legal basis for the development of this area is founded upon the Treaty of Lisbon. Measures in the field of judicial co-operation in civil matters having cross-border implications are authorised by Art. 81, "particularly when necessary for the proper functioning of the internal market".[3]

The Lisbon Treaty, which is shorthand for two treaties, *viz.* the TFEU[4] and TEU came into force on 1 December 2009, and as a consequence the EU's competence to propose legislation in the field of civil justice was consolidated under Title V of the TFEU, concerning the EU "Area of Freedom, Security and Justice". The TFEU provision on judicial co-operation in civil matters is contained in Art. 81, *viz.*:

> "1. The Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases. Such cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States.
> 2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures, particularly when necessary for the proper functioning of the internal market, aimed at ensuring:
> (a) the mutual recognition and enforcement between Member States of judgments and of decisions in extrajudicial cases;
> (b) the cross-border service of judicial and extrajudicial documents;
> (c) the compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction;
> (d) co-operation in the taking of evidence;

[1] Subject to the UK opt-in, discussed in section III, below.

[2] This *Article* is drawn from, and develops themes, treated in J.M. Carruthers, *Brexit – The Implications for Civil and Commercial Jurisdiction and Judgment Enforcement*, in *Scots Law Times (News)*, 2017, p. 105; and in J.M. Carruthers, E.B. Crawford, *Divorcing Europe: Reflections from a Scottish Perspective on the Implications of Brexit for Cross-border Divorce Proceedings*, in *Child and Family Law Quarterly*, 2017, p. 233. See also generally E.B. Crawford, J.M. Carruthers, *International Private Law: A Scots Perspective*, Edinburgh: W. Green, 2015.

[3] Note the change of wording from Treaty of Amsterdam, Art. 65, which had a stricter test, namely, "insofar as necessary for the proper functioning of the internal market".

[4] Which amends and replaces the previous Treaty (of Amsterdam) establishing the European Community (TEC).

(e) effective access to justice;
(f) the elimination of obstacles to the proper functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States;
(g) the development of alternative methods of dispute settlement;
(h) support for the training of the judiciary and judicial staff.
3. Notwithstanding paragraph 2, measures concerning family law with cross-border implications shall be established by the Council, acting in accordance with a special legislative procedure. The Council shall act unanimously after consulting the European Parliament.
The Council, on a proposal from the Commission, may adopt a decision determining those aspects of family law with cross-border implications which may be the subject of acts adopted by the ordinary legislative procedure. The Council shall act unanimously after consulting the European Parliament. The proposal referred to in the second subparagraph shall be notified to the national Parliaments. If a national Parliament makes known its opposition within six months of the date of such notification, the decision shall not be adopted. In the absence of opposition, the Council may adopt the decision".

III. The United Kingdom opt-in

Under the Lisbon Treaty, by virtue of Protocol no. 21 on the position of the UK and Ireland in respect of the area of freedom, security and justice,[5] the UK enjoys a right not to participate in EU justice and home affairs measures. The UK secured this position in order to maintain its border controls and to protect its common law system.[6]

In terms of Protocol no. 21, the default position for the UK and Ireland is one of opt-out of proposed measures pursuant to Title V of Part Three of the TFEU, but Art. 3 permits the UK or Ireland to notify the President of the Council, within three months after a proposal or initiative has been presented pursuant to Title V of Part Three, that it wishes to take part in the adoption and application of any such proposed measure, whereupon it shall be entitled to do so. The Protocol means that when the European Commission proposes legislation founded on a legal base or competence under Title V of the TFEU,[7] the UK does not participate in it unless it chooses to exercise its right to opt in.

[5] Protocol no. 21 on the position of the UK and Ireland in respect of the area of freedom, security and justice (Protocol no. 21). Prior to the Treaty of Lisbon the opt-in was provided by Protocol no. 4 on the position of the UK and Ireland. See also Protocol no. 22 on the position of Denmark (ex-Protocol no. 5 on the position of Denmark), in terms of which Denmark shall not take part in the adoption of proposed measures pursuant to Title V of the TFEU.

[6] HM Government, *Review of the Balance of Competences between the United Kingdom and the European Union*, in *Civil Judicial Cooperation*, February 2014, para. 1.17.

[7] Interpretation of the legal basis of the opt-in has been controversial, in respect of which, see House of Lords, European Union Committee, 9th Report of Session 2014-15, *The UK's Opt-in Protocol: Implications of the Government's Approach*, March 2015. The House of Lords Committee view is that a Title V legal base is required before the opt-in can be triggered. The UK Government position, however, is that the opt-in Protocol applies whenever, in its view, an EU measure contains JHA content, in addition to when a Title V legal base is formally cited (chapter 1, para. 7).

The opt-in enjoyed by the UK[8] and Ireland, coupled with the Danish opt-out,[9] means that, especially in cases where the UK and/or Ireland declines to opt in, there has emerged, in the private law subject area in question, a twin-track Europe. While British and Irish interests are thought to be protected by their default opt-out position, from the point of view of other Member States which do not enjoy the benefit of an automatic opt-out, failure by the UK and/or Ireland to opt in risks defeating the goal of a common European area of justice. Additionally, the EU rolling stock can diverge – or, as some prefer to say, proceed at different speeds – by virtue of enhanced cooperation procedure, which allows "participating Member States" to work towards a closer degree of integration and/or approximation of laws, as permitted by Title IV of the TEU.

The UK opted in to the major advances in the international private law harmonisation programme in the matters of civil and commercial jurisdiction and applicable law, but when the programme ventured into private law fields in respect of which, from the common law UK perspective, there was no perceived advantage in participating, the UK refrained from opting in. The UK exercised the right not to opt in to measures including Rome III,[10] the Wills and Succession Regulation,[11] the Regulation Establishing the Justice Programme (2014-2020),[12] the Matrimonial Property Regulation,[13] and the Registered Partnership Property Regulation.[14]

While the implications and complications of this twin-track area of freedom, security and justice have been viewed as significant in the narrative of the Europeanisation of private international law rules, they have been eclipsed by the Brexit agenda.

[8] The privilege of discretionary opt-in to proposed instruments per Protocol no. 21 is one extended not to individual legal systems of the UK, but rather to the UK as a whole, as the EU Member State.

[9] Protocol no. 22 on the position of Denmark, cit.

[10] Regulation (EU) 1259/2010 of the Council of 20 December 2010 implementing enhanced cooperation in the law applicable to divorce and legal separation.

[11] Regulation (EU) 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession.

[12] Regulation (EU) 1382/2013 of the European Parliament and of the Council of 17 December 2013 establishing a Justice Programme for the period 2014 to 2020.

[13] Regulation (EU) 2016/1103 of the Council of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes.

[14] Regulation (EU) 2016/1104 of the Council of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships.

IV. The legislative background

IV.1. The Brussels instruments

The UK, in common with other EU Member States, currently applies the Brussels I Recast regulation on jurisdiction and the enforcement of judgments in civil and commercial matters[15] ("Brussels I Recast"). The principle of mutual recognition of judgments, founded upon agreement as to acceptable grounds of jurisdiction within the EU, has been the cornerstone of judicial co-operation in civil matters since the 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters. Under the Brussels regime, common rules of jurisdiction are applied across European Member State courts and a wide range of judgments (not just money judgments) from one European Member State is enforceable in all Member States, subject to limited grounds to refuse enforcement, relatively strictly applied. The Brussels regime was created to support the single market in Europe. Although the typical situation is one concerning European parties litigating *inter se*, the regime applies regardless of where parties come from, assuming there are assets situated in one or more EU Member States out of which an EU Member State judgment may be satisfied.

Following the Brussels family, there are important procedural law instruments, such as Regulation 1206/2001 on co-operation between the courts of the Member States in the taking of evidence in civil or commercial matters,[16] and Regulation 1393/2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters.[17] Additionally, though less significantly, there are regulations the aim of which has been to accelerate the enforcement of Member State decrees, which, in their nature, are uncontroversial, namely, Regulation 861/2007 creating a European small claims procedure[18] and Regulation 805/2004 creating a European Enforcement Order for uncontested claims,[19] and Regulation 1896/2006 creating a European order for payment procedure.[20] Of importance in the commercial arena is the Insolvency Recast Regulation.[21]

[15] Regulation (EU) 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

[16] Regulation (EC) 1206/2001 of the Council of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters.

[17] Regulation (EC) 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) 1348/2000.

[18] Regulation (EC) 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure.

[19] Regulation (EC) 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims.

[20] Regulation (EC) 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure.

Echoing the commercial agenda, since 2001, there has been in place among European Member States of, by virtue of Regulation 1347/2000 on jurisdiction and recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses (colloquially known as "Brussels II"),[22] a system of allocation of jurisdiction and decree recognition in matrimonial matters. Brussels II was succeeded rapidly by Council Regulation 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility ("Brussels II *bis*"),[23] which came into force on 1st March 2005. Brussels II *bis* created a single European instrument securing the free movement of matrimonial judgments and parental responsibility judgments, directly applicable among all European Member States, except Denmark.[24] Also in family law, Council Regulation 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations ("the Maintenance Regulation"[25]) has applied in EU Member States, including the UK,[26] since 18 June 2011.

IV.2. The Rome instruments

European instruments concerning choice of law fall under the "Rome" patronymic. The most significant instrument in choice of law was the 1980 Rome Convention on the Law Applicable to Contractual Obligations ("Rome I"), now replaced by the Rome I Regulation.[27] This Regulation, in combination with the Rome II Regulation[28] (concerning non-contractual obligations arising out of tort, delict, unjust enrichment, *negotiorum gestio*,

[21] Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast).

[22] Regulation (EC) 1347/2000 of the Council of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses.

[23] Regulation (EC) 2201/2003 of the Council of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility, repealing Regulation (EC) 1347/2000 (variously known as BIIa, and BII revised, but referred to hereinafter as "Brussels II *bis*").

[24] Protocol no. 22 on the position of Denmark, cit., in terms of which Denmark shall not take part in the adoption of proposed measures pursuant to Title V of Part Three of the TFEU.

[25] Regulation (EC) 4/2009 of the Council of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations. See also Commission Implementing Regulation (EU) 2015/228 of 17 February 2015 replacing Annexes I to VII to Council Regulation 4/2009.

[26] The UK did not take part in the adoption of the Maintenance Regulation, and therefore at that point was not bound by it, or subject to its application (recital 47). However, in accordance with Art. 4 of Protocol no. 4 on the position of the UK and Ireland, cit., the UK later notified its intention to accept the Regulation.

[27] Regulation (EC) 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).

[28] Regulation (EC) 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II).

and *culpa in contrahendo*), had the effect of putting in place a harmonised set of rules applicable to the great majority of conflict disputes arising in the law of obligations before all EU Member State courts. Harmonised choice of law provisions followed for participating Member States in the area of wills and succession; and by enhanced co-operation in the areas of divorce and legal separation, wills and succession, matrimonial property and the property consequences of registered partnerships.

V. Brexit

The pressing question is whether or not the UK and UK citizens, upon Brexit, will lose the signal benefits of the harmonisation era. Can any of this complex, useful, interlocking scheme be salvaged once the UK leaves the EU and assumes the character of a Third State?[29]

V.1. Brexit: the political background

Many position papers have been published setting out the political standpoint. From the UK Government side, Prime Minister Theresa May's Lancaster House speech of 17 January 2017, set out her plan for the Brexit negotiations, swiftly followed in February 2017 by the UK Government White Paper (*The UK's Exit from and New Partnership with the EU*). In March 2017, there was published the House of Lords EU Committee, EU Justice Sub-Committee, 17th Report of Session 2016-17, *Brexit: Justice for Families, Individuals and Businesses?*,[30] and the House of Commons Justice Committee, 9th Report of Session 2016-17, *Implications of Brexit for the Justice System*.[31] Subsequently, upon the triggering of Art. 50 TEU, the Department for Exiting the European Union published a White Paper entitled, *Legislating for the UK's Withdrawal from the EU*,[32] concentrating on the content and nature of the Great Repeal Bill. Significantly, on 13 July 2017, the *European Union (Withdrawal) Bill* was published (formerly referred to as the [Great] Repeal Bill). In August 2017, the UK Government published *Providing a Cross-border Civil Judicial Cooperation Framework: A Future Partnership Paper*; and on 22 September 2017, the UK Prime Minister delivered a speech in Florence, entitled *UK Government's*

[29] See, referring to the UK as a "third country", European Commission, Directorate-General Justice and Consumers, *Notice to Stakeholders: Withdrawal of the United Kingdom and EU Rules in the field of Civil Justice and Private International Law*, 21 November 2017.

[30] House of Lords EU Committee, EU Justice Sub-Committee, 17th Report of Session 2016/17, *Brexit: Justice for Families, Individuals and Businesses?*, 20 March 2017.

[31] House of Commons Justice Committee, 9th Report of Session 2016/17, *Implications of Brexit for the Justice System*, 22 March 2017.

[32] UK Government, Department for Exiting the European Union, *Legislating for the United Kingdom's Withdrawal from the European Union*, 30 March 2017.

Plan for a New Era of Co-operation & Partnership.[33] On 1st December 2017, the Lord Chancellor and Secretary of State for Justice, The Right Honourable David Lidington MP, wrote to the Chairman of the House of Lords EU Select Committee, with the UK Government's response to that Committee's March 2017, Report on *Brexit: Justice for Families, Individuals and Businesses?*

On the European side, counterweights by which to gauge the approach of EU27 to the UK withdrawal process and wider negotiations are the European Council's Guidelines following the UK's notification under Art. 50 TEU;[34] the speeches delivered by Michel Barnier, EU Commission Chief Negotiator for the Preparation and Conduct of the Negotiations with the UK on *The Conditions for Reaching an Agreement in the Negotiations with the UK*,[35] and *The Future of the EU*,[36] and the Position Paper transmitted to EU27 on Judicial Cooperation in Civil and Commercial Matters, dated 28 June 2017. On 21 November 2017, the European Commission (Directorate-General Justice and Consumers) *Notice to Stakeholders*, regarding the withdrawal of the UK and EU rules in the field of civil justice and private international law, highlighted that from 30 March 2019 the UK will become a "third country". The Commission Notice stated starkly that as of the withdrawal date, the EU rules in the field in question no longer apply to the UK. Specifically, regarding international jurisdiction, the Commission Notice stated,

> "the rules on international jurisdiction in EU instruments in the area of civil and commercial law as well as family law no longer apply to judicial proceedings in the United Kingdom and under certain circumstances (in civil and commercial cases where the defendant is domiciled in the United Kingdom) to judicial proceedings in the EU. International jurisdiction will be governed by the national rules of the State in which a court has been seized".[37]

Likewise, with regard to recognition and enforcement, the Commission Notice stated that,

> "judgments issued in the United Kingdom are no longer recognised and enforced in EU Member States under the rules of the EU instruments in the area of civil and commercial law as well as family law, and vice versa. Recognition and enforcement of judgments between the United Kingdom and an EU Member State will be governed by the national law of the State in which recognition and enforcement is sought or by international Conven-

[33] T. May, *PM's Florence Speech: A New Era of Cooperation and Partnership between the UK and the EU*, 22 September 2017.

[34] European Council, Guidelines EUCO XT 20004/17 of 29 April 2017, *Special Meeting of the European Council (Art. 50)* and European Council, Guidelines EUCO XT 20011/17 of 15 December 2017, *European Council (Art. 50) meeting*.

[35] M. Barnier, *Speech Delivered at the Plenary Session of the European Committee of the Regions*, 22 March 2017.

[36] M. Barnier, *Speech Delivered at the Centre for European Reform,* 20 November 2017.

[37] European Commission, Directorate-General Justice and Consumers, *Notice to Stakeholders*, cit.

> tions where both the EU (or EU Member States) and the United Kingdom are contracting parties".[38]

On 8 December 2017, in a *Joint Report from the Negotiators of the EU and the UK Government on Progress during Phase 1 of Negotiations under Art. 50 on the UK's Orderly Withdrawal from the EU*,[39] the negotiators indicated that sufficient progress had been made on Phase 1 to enable moving to Phase 2 – namely, preliminary and preparatory discussions on the framework for a future relationship. Both parties recognised that,

> "On cooperation in civil and commercial matters there is a need to provide legal certainty and clarity. There is general consensus between both Parties that Union rules on conflict of laws should continue to apply to contracts before the withdrawal date and non-contractual obligations where an event causing damage occurred before the withdrawal date. There was also agreement to provide legal certainty as to the circumstances under which Union law on jurisdiction, recognition and enforcement of judgements will continue to apply, and that judicial cooperation procedures should be finalised".[40]

While the sum of these papers, UK and EU, offers a veneer of clarity, there is a vast amount of detail yet to be worked out regarding any future relationship between the UK and EU27 on the subject of judicial cooperation in civil and commercial matters.

V.2. The European Union (Withdrawal) Bill

One repercussion of the repeal of the European Communities Act 1972 would have been the denuding of legal effect in the UK of European private international law instruments. The same will be true of international agreements concluded by the EU on behalf of Member States, such as the 2007 Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, which operates among the European Community and Iceland, Norway, Switzerland and Denmark ("Lugano II Convention"), and the 2005 Hague Convention on Choice of Court Agreements.

However, the UK Government's March 2017 White Paper set out the Government's plan to convert the *acquis* – the body of existing EU law – into British law,[41] with the objective of providing "maximum certainty as we leave the EU. The same rules and laws will apply on the day after exit as on the day before. It will then be for democratically elected representatives in the UK to decide on any changes to that law, after full scruti-

[38] *Ibid.*, pp. 1-2.

[39] European Commission, *Joint Report from the Negotiators of the EU and the UK Government on Progress during Phase 1 of Negotiations under Art. 50 on the UK's Orderly Withdrawal from the EU*, 8 December 2017.

[40] *Ibid.*

[41] UK Government, Department for Exiting the European Union, *Legislating for the United Kingdom's Withdrawal from the European Union*, cit., para. 2.4.

ny and proper debate".[42] The premise is that there will be no void in British law insofar as "domesticated" rules of jurisdiction and judgment recognition, modelled on existing EU Regulations, will apply in UK courts.

Therefore, although, strictly, EU Regulations – in the form at least of EU instruments – will cease to apply in the UK upon UK withdrawal from the EU, the UK Government's express intention is that a *domesticated* version of those very same rules should continue to apply in UK law post-Brexit, in order to avoid any legal vacuum. Explicitly, the UK Government aim is that, as the European Communities Act 1972 is repealed, directly applicable EU laws will be converted into UK law, and that the Withdrawal legislation will "preserve all the laws which have been made in the UK to implement EU obligations".[43] By clause 3 of the *European Union (Withdrawal) Bill* (entitled *Incorporation of direct EU legislation*): "(1) Direct EU legislation,[44] so far as operative immediately before exit day, forms part of domestic law on and after exit day".[45]

VI. The position of Scotland within the UK in the matter of private international law

Account must be taken of the fundamental constitutional change effected by the Scotland Act 1998 (as amended), as a result of which matters of Scottish civil law fall within the legislative competence of the Scottish Parliament.[46] Section 126(4)(a) interprets the civil law of Scotland as a reference to the general principles of private law, including private international law.[47]

An Act of the Scottish Parliament is not law insofar as any provision thereof is outside the legislative competence of that Parliament; reserved matters are expressly excluded from its legislative competence. The question whether a provision of an Act of the Scottish Parliament relates to a reserved matter is to be determined by reference to the purpose of the provision, having regard, inter alia, to its effect in all the circum-

[42] *Ibid.*, p. 5.

[43] UK Parliament, *European Union (Withdrawal) Bill*, *Explanatory Notes*, 13 July 2017, para. 23.

[44] Defined in clause 3, para. 2, of UK Parliament, *European Union (Withdrawal) Bill*, cit., as meaning: "(a) any EU regulation, EU decision or EU tertiary legislation, as it has effect in EU law immediately before exit day and so far as – (i) it is not an exempt EU instrument (for which see section 14(1) and Schedule 6), (ii) it is not an EU decision addressed only to a member State other than the United Kingdom, and (iii) its effect is not reproduced in an enactment to which section 2(1) applies".

[45] For problems resulting from this strategy, see section VII, below.

[46] Scotland Act 1998 (1998, chapter 46), section 29 (legislative competence) establishes what the Scottish Parliament may not do rather than what it may do. Section 29(2)(b) provides that reserved matters (in respect of which, see section 30, Sch. 5) are outside Scottish Parliamentary competence.

[47] Family Law (Scotland) Act 2006 (2006, Act of the Scottish Parliament 2), section 38 serves as an example of Holyrood utilisation of this competence.

stances.[48] In case of dispute, final adjudication as to characterisation as devolved or reserved is for the UK Supreme Court.[49]

Although international private law generally is a devolved matter falling within the legislative competence of the Scottish Parliament, the private international law aspects of reserved matters likewise are reserved.[50]

By constitutional convention, it is possible for the UK Parliament, with consent of the Scottish Parliament, by legislative consent motion (previously a "Sewel motion") to legislate for Scotland in devolved matters.

In the context of the conflict of laws, particularly in family law, there may be perceivable benefits from having the UK Parliament legislate for the entire UK, thus lessening the likelihood of intra-UK conflict of laws problems. The resultant legislation may contain separate provision for each legal system within the UK, but, if that is the case, Parliament strives to ensure that the legislation demonstrates internal UK coherence.[51]

In terms of section 57 of the Scotland Act 1998 ("EU law and Convention rights"), despite the transfer to the Scottish Ministers of functions in relation to implementing obligations under EU law, any function of a Minister of the Crown in relation to any matter shall continue to be exercisable by him as regards Scotland for the purposes of section 2(2) of the European Communities Act 1972. In this context, therefore, there is "shared power" between Scottish and UK Ministers. Furthermore, Schedule 5, Part 1, para. 7 of the 1998 Act reserves foreign affairs, including relations with the European Union, but excepting implementation of international obligations, obligations under the Human Rights Convention and obligations under EU law.[52]

VI.1. The European Union (Withdrawal) Bill and the Scottish devolution settlement

The March 2017 White Paper indicates that, in parallel with the withdrawal negotiations, the UK Government will undertake discussions with the devolved administrations "to identify where common frameworks need to be retained in the future, what these

[48] Scotland Act 1998, section 29(3).

[49] *Ibid.*, section 33.

[50] *Ibid.*, section 29(4)(b). For example, international private law rules concerning intellectual property are reserved.

[51] By way of example, the Civil Partnership Act 2004 (2004, chapter 33), which affects reserved matters as well as devolved matters, was referred to Westminster by means of a Sewel motion. The Act, however, makes bespoke provision for the different legal systems within the UK. Compare the (pre-devolution) Matrimonial and Family Proceedings Act 1984 (1984, chapter 42), Part 3 (England) and Part 4 (Scotland).

[52] Separate secondary implementing legislation frequently is required for Scotland and England, respectively, in respect of EU Regulations.

should be, and where common frameworks covering the UK are not necessary".[53] The Government's expectation is that the outcome of the Brexit process will deliver increased decision-making power to the devolved administrations. In particular, where a matter is devolved, the repatriation of powers will deliver to the devolved administrations the power to amend the law governing such matters where, after Brexit, an unamended law no longer would operate appropriately.[54] This anticipated enlargement of powers could open up the possibility of increased divergence between the private international law of England and Wales, on the one hand, and that of Scotland, on the other. Marked divergence among the private international law rules of the legal systems of the UK – i.e. Scottish rules of private international law concerning (devolved) Scottish civil law differing from English rules – would be capable of destabilising the situation which currently obtains in conflict of laws matters *within* the UK, and the authors hope that the devolved administration in Scotland will not act so as to introduce significantly different measures than pertain under Westminster legislation.

Since, by Part 5, para. 7(1) of the Scotland Act 1998, international relations, including relations with territories outside the UK, the European Union (and their institutions) and other international organisations, regulation of international trade, and international development assistance and co-operation will continue (in the absence of amending legislation) to be reserved matters, any "international relation" or "international co-operation" will be conducted, post-Brexit or in anticipation of Brexit, by the UK Government, albeit, it is hoped, fully informed by due consultation with interested parties/stakeholders as to the positions prevailing in the legal systems of the devolved administrations. While implementation of international obligations will continue to be a devolved matter, the post-Brexit negotiation and drafting of any agreement to operate between one or more legal systems of the UK and EU27 will remain a reserved matter.

VII. The prospective regime: what should be the UK's aim?

The current European harmonised system operates to the great mutual benefit of the UK and the other EU Member States, there being not only 1.2 million UK citizens living elsewhere in the EU, but also 3 million EU citizens living in the UK. The Brussels regime offers easy access to UK courts (which is good for the British legal services market), and portability of judgments across Europe. It would be legally expedient from UK and EU27 perspectives to seek to retain a reciprocal system which ensures virtually automatic

[53] UK Government, Department for Exiting the European Union, *Legislating for the United Kingdom's Withdrawal from the European Union*, cit., para. 4.4. See, subsequently, *The Queen's Speech and Associated Background Briefing on the Occasion of the Opening of Parliament on Wednesday 21 June 2017*, *Her Majesty's Most Gracious Speech to Both Houses of Parliament*, 21 June 2017, www.gov.uk, pp. 11, 17-18.

[54] UK Government, Department for Exiting the European Union, *Legislating for the United Kingdom's Withdrawal from the European Union*, cit., para. 4.8.

recognition of judgments across the EU. Enforcing a UK judgment in an EU Member State without the benefits of the current regime inevitably would take longer and cost more than it does currently; the same is likely to be true in reverse. Whilst many disputes do not proceed to trial on the merits, and there may be no resultant judgment to have recognised and enforced abroad, the prospect and/or reality of portability is important and valuable for all litigants.

While there are long-established mechanisms in the UK, common law and statutory, enabling enforcement of non-EU judgments in the UK, the rules are more cumbersome and restrictive, and slower, than those currently in place under the EU regime.

From the UK perspective, adequate, "fit for purpose" international private law rules must be available immediately post-Brexit to deal with jurisdiction allocation and judgment recognition and enforcement in civil and commercial matters, and in family law also. It is highly questionable whether the UK Government's strategy of converting *all* existing EU regulations into "domestic" versions thereof is realistic. Two particular problems arise.

VII.1. Unilateralism

Insofar as European instruments create unilateral obligations, it is meaningful to say that the *acquis* can be converted successfully into domestic law. Reciprocity is not necessary for the operation of certain private law instruments, such as the Rome I and Rome II Regulations on choice of law concerning the law of obligations. With regard to such instruments, the UK can act unilaterally since the agreement of other Member States or European institutions is not required in order to adopt the terms of such instruments autonomously into British law, or to operate them. As matters stand, interpretation in future would become a local matter, ultimately for the UK Supreme Court, which, it seems would honour historic CJEU decisions.[55]

However, with regard to bilateral or reciprocal international private law measures, it is meaningless, indeed delusional, to say that the UK will convert the *acquis* into British law. Unilateral conversion cannot bring about the required reciprocity or mutuality, which lies at the heart of the Brussels and Lugano regimes. While courts in the UK might be prepared, through operation of Arts 36 and 39 of Brussels I Recast (or a domesticated, EU-derived version applicable per the European Union [Withdrawal] Bill), to recognise and enforce, e.g., a French judgment, there would be no obligation on, nor authority for, a French court to reciprocate *vis-à-vis* a British decree.

[55] *Ibid.*, para. 2.14: "To maximise certainty [...] the Bill will provide that any question as to the meaning of EU-derived law will be determined in the UK courts by reference to the CJEU's case law as it exists on the day we leave the EU. Everyone will have been operating on the basis that the law means what the CJEU has already determined it does, and any other starting point would be to change the law". See section VIII.1, below.

The Brussels rules, in the main, are couched in the language of "other Member State", and without express agreement between the UK and EU27, a court in an EU27 Member State in which litigation has been raised will be unable, post-Brexit, to apply, for example, the *lis pendens* provisions in Arts 29-32 of the Recast regulation to conflicting proceedings in the UK (i.e. the priority of process rule which operates where two sets of proceedings are initiated on the same or related matter in the courts of more than one Member State). EU Member State courts, faced with conflicting proceedings in a UK court, will be required to treat the UK as a Third State,[56] subject, therefore, to the provisions contained in Arts 33 and 34 of Brussels I Recast. Likewise, courts in another Member State will be unable, post-Brexit, to apply the provisions in Chapter III of the Recast regulation to the recognition and enforcement of UK judgments.

The European Union (Withdrawal) Bill *cannot* deliver reciprocity with regard to Brussels I Recast or any other regulation based upon mutuality.

VII.2. Divergence

The second problem that springs to mind from the UK Government's proposed strategy of converting directly-applicable EU law into domestic law is that EU law will continue to develop, and change from time to time, as interpreted by the CJEU and EU national courts, whereas, after Brexit, interpretation of the scope and content of the rules as translated into UK law will be a matter for the UK Supreme Court and British courts lower in the hierarchy. Over time, diverging interpretations of the "same" body of rules will emerge as between the UK and the rest of Europe, meaning that the identity of forum in any cross-border civil and commercial or family law dispute will take on a new significance.

If, for example, in family law, the UK applies a domesticated version of Brussels II *bis* and the Maintenance Regulation, how far and how quickly will the UK version of these instruments diverge from those applied and interpreted among EU27? Divergence, over time, will make a "look-a-like" BII *bis* or a "look-a-like" Maintenance Regulation less attractive and less valuable.

Brussels II *bis* is currently undergoing revisal – a process in which the UK, wisely, is participating – with the result expected in 2019. In due course, BII *bis* will be replaced by a Recast instrument. If the Recast Regulation should come into force *before* the UK's withdrawal from the EU, it *will* apply in the UK, as it will apply in the other EU Member States, up until the point of UK withdrawal. More likely, however, the Recast Regulation will come into force *after* the March 2019 withdrawal. That being so, on the "domesticated legislation" strategy, the UK will convert Brussels II *bis* into domestic law, and continue to apply it, even after the rest of Europe is transposed to the Brussels II *bis* Recast

[56] As stated in section V.1 above, the European Commission, Directorate-General Justice and Consumers, *Notice to Stakeholders*, cit., advises that as of the Withdrawal date, the EU rules in the field of civil justice and private international law will no longer apply to the United Kingdom.

regime. Choosing to apply "old" EU law is a very undesirable state of affairs, but it would be entirely against the ethos and rationale of Brexit for the UK, post-Brexit, unilaterally to incorporate Brussels II *bis* Recast into UK domestic law.

Even in the apparently more straightforward cases of the Rome I and Rome II Regulations, inevitably there will be divergence in application of the instruments.[57]

VIII. A possible compromise solution: a bespoke UK/EU27 agreement

The probable deadline for concluding the withdrawal agreement (i.e. disentangling the UK from the EU treaties) is 29 March 2019, but a longer period is likely to be necessary for finalising arrangements for the future relationship, including private international law co-operation (if any), between the UK and the EU. If the short-term solution should be different from the ultimate position, there will be a need for transitional arrangements to regulate matters until the so-called "landing zone" is reached.

It would be prudent for the UK Government to seek to negotiate with EU27 (EU competence meaning that the UK cannot do business with any individual Member State) a bespoke arrangement, namely, a tailor-made UK/EU27 agreement on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, which is a close copy of the existing Brussels regime. Seeking to secure an agreement parallel to Brussels I Recast (and sibling instruments such as Brussels II *bis*) is the solution favoured by UK parliamentary committees, and is widely supported by subject experts in the UK. There is a strong argument that the UK should seek to negotiate an agreement with EU27 to deal with the suite of EU private international law instruments as a package – albeit the scale of the negotiation task would grow exponentially. However, it must be acknowledged that EU27 may not countenance any such overture by the UK, and that the notion of the UK's seeking some parallel agreement may be optimistic.

If EU27 should prove willing, a suggested blueprint for an agreement in relation to civil and commercial jurisdiction and judgment recognition and enforcement (and, in turn, in relation to family and associated matters) is the Agreement between the European Community and Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, which extended as between the EC and Denmark the provisions of the Brussels I Regulation, with certain amendments of a fairly minor nature. Since 2012, Brussels I Recast has applied to relations between the EU and Denmark.

Negotiating a parallel agreement would require unanimity among the remaining EU Member States. Achieving unanimity in the current political climate is anything but a given. However, as noted, reciprocity is in the interests not only of the citizens of the UK,

[57] E.g. in relation to Art. 3, para. 4, Rome I Regulation, and Art. 14, para. 3, Rome II Regulation, both of which preserve in the forum operation of "provisions of Community law". Clearly there may also be divergence in the interpretation of core provisions such as Art. 3, para. 3 and Art. 9, para. 3, Rome I Regulation, and Art. 4, Rome II Regulation.

but also of all 27 continuing EU Member States. The "Brussels system", or a variant thereof, is the best vehicle by which to offer certainty and predictability to *all* European citizens. The UK could seek to retain some of the benefits of the existing EU regulations, by allowing, on a reciprocal basis, those in the 27 continuing Member States to exercise their "EU" international private law rights in a post-Brexit UK.

VIII.1. The future role and jurisdiction of the CJEU

While securing a bespoke agreement may sound attractive in principle (to the UK Government and UK citizens, at least), marked difficulty is likely to be presented by the fact that the UK Government appears resolved to rid the UK of any continuing obeisance to the jurisdiction of the CJEU. As observed, there is one interesting concession in the March 2017 White Paper, namely that "The [Great Repeal] Bill will provide that historic CJEU case law be given the same binding, or precedent, status in our [UK] courts as decisions of our own Supreme Court".[58] More contentious would be the future role of the CJEU in respect of any bilateral UK/EU27 treaty. Continuing CJEU jurisdiction in this, or any, area could be deemed to be a cheat on the British electorate, and unacceptable politically to the UK Government. From the perspective of EU27, however, the role of the CJEU may be a political red line; it will be asserted that to be party to a European agreement invariably entails that the CJEU is the court of overarching jurisdiction.

Potentially using an EC/Denmark Agreement model, the UK, under a parallel agreement on jurisdiction and judgment recognition and enforcement, could be required, when interpreting that agreement, (only) to take "due account of" the rulings contained in the case law of the CJEU. This could satisfy the UK political position if the CJEU were to have no mandatory jurisdiction in respect of cases litigated pursuant to a parallel agreement, and if CJEU jurisprudence were to have only persuasive, rather than decisive, effect as far as the UK is concerned. EU Member States and institutions, though weary of the concept of a "special UK position", have already accepted a similar, "diluted" approach in respect of Denmark.

IX. An alternative possible compromise solution: a Lugano II template

If a bespoke UK/EU27 agreement on Brussels I Recast (and related instruments) should prove impossible to achieve – either as a matter of principle, or if, for example, the CJEU jurisdiction point should prove intractable – another option to consider would be the Lugano prototype. Lugano II will cease to have effect in the UK upon Brexit.[59] The UK

[58] UK Government, Department for Exiting the European Union, *Legislating for the United Kindgom's Withdrawal from the European Union*, cit. para. 2.16.

[59] Art. 216, para. 2, TFEU, and European Communities Act 1972, section 2(1).

could seek to enter into a new treaty with EU27 and the EFTA states to adhere to Lugano II, under the mechanism for Third State accessions. This, of course, would require the consent of all existing Lugano II Contracting States. Existing EFTA states would be unlikely to object, and it is hoped that there would be no objection from the European Commission, on behalf of the 27 continuing Member States.

Undoubtedly, striking agreement in relation to Lugano II would be a second-best option because the UK would lose the improvements hard won through Brussels I Recast. Politically, from the perspective of EU27 at least, the Lugano II model might have more prospect of success than would seeking to secure a bespoke UK/EU27 agreement on jurisdiction and judgment recognition and enforcement. A Lugano II model would entail treating the UK akin to an EFTA state, i.e. as a Third State, rather than akin to an EU Member State.

IX.1. The role of the CJEU in the Lugano regime

With regard to interpretation of Lugano II, the CJEU will have a continuing role. As a result of Lugano II having become part of Community rules (the Convention having been signed and ratified by the Community, and succeeded to by the European Union), the CJEU has jurisdiction to give interpretative rulings on its provisions upon application by the courts of EU Member States.

The wording in the Lugano II regime is similar to that in the EC/Denmark Agreement, but not identical: Art. 1 of Protocol 2 (on the uniform interpretation of the Convention and on the Standing Committee) requires any court applying and interpreting Lugano II to pay due account to relevant jurisprudence on the Lugano and Brussels instruments, handed down by the CJEU and courts bound by these instruments. Use of the phrase "due account" would afford a measure of discretion to UK courts to decline to follow decisions of the CJEU, and would leave open a window of opportunity – if opportunity it be – for a British court to examine a CJEU decision, but decide to disregard it. From the EU angle, agreeing a "due account" arrangement at least would result in the continued advantage of ongoing access to UK markets.

The EU Justice Sub-Committee of the House of Lords EU Committee has urged the UK Government not to take too rigid a position in relation to CJEU jurisdiction.[60] If the UK Government adheres inflexibly to its stated policy, it will severely constrain the range of adequate, alternative arrangements in the field of civil and commercial jurisdiction and judgment recognition and enforcement.

[60] House of Lords EU Committee, EU Justice Sub-Committee, 17th Report of Session 2016/17, *Brexit: Justice for Families, Individuals and Businesses?*, cit., para. 127.

X. Failing UK/EU27 agreement…

The UK Government must face the prospect of possible (some might say probable) failure to negotiate a bespoke UK/EU27 arrangement for the post-Brexit era. Whatever may transpire by way of UK "domesticated" EU legislation, it must be appreciated that any corpus of rules which is intended by the UK Government, naively, to take effect in a reciprocal manner with EU27 will be a pipe dream, and at best having lop-sided effect. Schemes of jurisdiction (notably the problem of conflicting concurrent jurisdiction, solved in the EU schemes principally by a priority of process rule) and rules of recognition and enforcement will be particularly adversely affected.

Courts in the UK, while their inclination in relevant cases might be to draw back to pre-existing national rules of private international law (i.e. those rules currently applicable *vis-à-vis* non-EU Member States), will need to attempt to operate the "domesticated" rules on a strained basis unless and until corrective legislation is provided.[61]

XI. The Hague Conference on Private International Law

On a more positive note, the EU is not the only engine for international law reform. The Hague Conference on Private International Law is an inter-governmental body, founded in 1893, dedicated to the harmonisation of the private international law rules of different legal systems, and the development and service of multilateral legal instruments. In 1955 the Conference was put on a statutory footing. Based in the Netherlands, it has potentially global, not just regional, reach. At the time of writing, it has 82 Members from all continents and one Regional Economic Integration Organisation, namely, the European Union.[62] Its formal remit is as an international forum for the development and implementation of common rules of private international law, to promote international judicial and administrative co-operation in the fields of family law, commercial law, and civil procedure.

Although the EU's membership of the Hague Conference does not supplant the membership of individual EU Member States, shared competence in projects falling within the expanding EU remit means that participation by individual EU Member States in Hague Conference projects is correspondingly inhibited. In future, the UK, being excluded from regional European Union harmonisation measures, may be best advised to participate in international harmonisation initiatives by way of multilateral harmonisation in-

[61] One could conjecture in the distant future a legislative outcome whereby English courts will be authorised to exercise discretionary powers in jurisdiction currently available in clearly non-EU cases.

[62] On 3rd April 2007, the European Community was admitted to membership of the Hague Conference as a Regional Economic Integration Organisation. With the entry into force of the Treaty of Lisbon on 1st December 2009, and by Declaration of Succession, the European Union replaced and succeeded the EC as a member of the Conference from that date.

struments negotiated at the Hague Conference. The UK, and not the constituent legal systems thereof, is, and post-Brexit will remain,[63] the Hague Conference Contracting State.

In UK law, several fairly recent statutes relating to cross-border child and family law owe their existence, at least in part, to acceptance by the UK of Hague Conventions: principally, the Child Abduction and Custody Act 1985,[64] and Part II of the Family Law Act 1986, as well as the Wills Act 1963, and the Adults with Incapacity (Scotland) Act 2000.[65]

Greater complexity will attend those Hague instruments to which the UK is a party only by dint of being a European Member State, i.e. how may the UK extricate itself from the EU bloc and re-present as an individual Contracting State to any one or more Hague convention? By virtue of the UK's status as an EU Member State, the UK is bound by the 1996 Hague Child Protection Convention, upon which Brussels II *bis* is modelled.[66] With regard to maintenance, the UK is bound by the EU Maintenance Regulation and by the 2007 Hague Maintenance Convention. The 2007 Convention was signed by the EU on 6 April 2011 and came into force in EU Member States, including the UK, on 1 August 2014. After Brexit, the UK will require to take steps to remain a party to these conventions by signing and ratifying them.[67] In order for the UK to continue to have the benefit of such Hague instruments, it will be necessary, after agreement to that end has been struck between the UK and EU27, to ensure that there is no dissent by any other Contracting State which is party to the relevant convention, to the UK's continuing status as a party bound by the instrument. Assuming no dissent, such an agreement could be lodged with the Convention depositary (the Ministry of Foreign Affairs of the Kingdom of the Netherlands). A precedent is provided by the position of Hong Kong and Macao[68] in relation to the 1980 Hague Abduction Convention.[69]

[63] Scotland Act 1998, Part 5, para. 7(1).

[64] See N. LOWE, *What Are the Implications of the Brexit Vote for the Law on International Child Abduction*, in *Child and Family Law Quarterly*, 2017, p. 253.

[65] Exceptionally, the UK may sign a Hague Convention on behalf of one constituent legal system only, as happened in relation to the 2000 Hague Convention on International Protection of Adults, simply because there happened to be a suitable act of the Scottish Parliament on the matter in place.

[66] Constitutional complications caused by the UK's decision to deem the 1996 Hague Convention an EU Treaty as defined by the European Communities Act 1972 (so as to be able to ratify it without primary legislation) will have to be addressed: repeal of the 1972 Act will necessitate primary legislation to clarify the status of the Convention in domestic law.

[67] See generally P. BEAUMONT, *Private International Law Concerning Children in the UK after Brexit: Comparing Hague Treaty Law with EU Regulations*, in *Child and Family Law Quarterly*, 2017, p. 213.

[68] See also the position of the Czech Republic and Slovakia after the "velvet revolution" in Czechoslovakia.

[69] Agreement having been reached between the UK and the People's Republic of China regarding the continuing operation of the 1980 Convention in Hong Kong and Macao following the UK's 1997 transfer of sovereignty to the People's Republic of China, a note was lodged with the Convention depositary, to the effect that the Convention would continue to apply for Hong Kong and Macao. The Hague Conference website states the date of entry into force of the Convention for Hong Kong as being 1st September 1997, and not the earlier date on which the Convention entered into force in the UK. For Macao the date of entry into force is 1st March 1999. The date of entry into force of the Convention is crucial in that, not only

In the commercial arena, in the absence of any UK/EU27 agreement on Brussels I Recast, or a UK/EFTA/EU treaty on Lugano II, the UK might be left with the option of acceding to the 2005 Hague Convention on Choice of Court Agreements. The 2005 Convention applies among the EU Member States, Mexico and Singapore. It takes effect in the UK through Art. 216 TFEU, and will cease to apply post-Brexit unless there is individual ratification by the UK. The 2005 Convention, though useful, is considerably less useful than the Brussels and Lugano regimes, for it applies only in the rather restricted circumstances of there being an exclusive jurisdiction agreement in favour of the court giving judgment. It is an attempt to solve one particular problem pertaining to exclusive choice of court clauses, and the scaled-down provisions of the Convention represent what could be salvaged after the failure of deliberations for a worldwide judgments convention.[70] In no way can the 2005 Convention be compared with the sweep of jurisdiction and judgment enforcement rules contained in the Brussels I Recast regulation, but it is a potentially useful instrument nonetheless.

While one can do a line-by-line comparison or analysis of the various Hague and Brussels instruments, and find, on the detail, particular benefits or drawbacks in either system, essentially, with regard to child abduction, child protection, maintenance, and choice of court, it is reassuring to UK citizens that other international regimes exist, which can afford a measure of protection post-Brexit.

Looking to the future, global, multilateral co-operation and agreement appears to be the best strategy for the UK.

must the circumstances of a child's alleged abduction fall within those covered by the instrument, but also the date of those circumstances must post-date the coming into effect of the instrument in the relevant country or countries: Scottish Court of Session (Outer House), judgment of 24 December 1986, *Kilgour v. Kilgour*, 1987 SLT 568; and UK House of Lords, judgment of 13 June 1991, *Re H (Minors) (Abduction: Custody Rights)* [1991] 3 All ER 230 HL.

[70] A project which, however, has been resuscitated: see www.hcch.net.

Articles

Special Section – Policy Coordination in the EU: Taking Stock of the Open Method of Coordination

Introduction

This contribution introduces the five *Articles* of this Special Section that was originally conceived at a workshop entitled "Taking Stock of the Open Method of Coordination", organised by Evangelia Psychogiopoulou and Bruno de Witte. The workshop took place in the framework of the *21st Ius Commune Congress* (24-25 November 2016) in Maastricht (the Netherlands) and focused on the open method of coordination (hereinafter, for the entire Special Section, OMC) with a view to deepening understanding of policy coordination in the EU. The workshop explored the trajectory of the OMC in the process of European integration, it examined its functioning in selected EU policy areas and compared it with other modes of EU and global governance directed at policy coordination.

The authors kindly agreed to participate in a collective project devoted to EU policy coordination, and their generous collaboration resulted in this collection of *Articles*. The aim has been to explore the application of the OMC in various EU policy areas, to study its different forms and the multiplicity of processes that it involves and to discuss its evolution. In doing so, an important consideration has been to place the OMC within the broader system of EU law and competences and also to examine its relationship with other coordination procedures and mechanisms used at the EU level.

As a result, key research questions guiding the analysis have been the following: What is the relationship of the OMC to EU law and the system of EU competences? What is the architecture of different OMC processes and how do they work? Has the OMC evolved during the past decade or so and if so, in what ways? More generally, what does EU policy coordination mean and what forms does it take? What are the key characteristics of policy coordination processes and how do they operate? Ultimately, is the OMC in decline or not? What explains its expansion in certain EU policy areas and its "replacement" in others? Against this background, the five *Articles* of this Special Section situate the OMC within the EU legal order; address well-known and lesser-known OMC processes; draw attention to novel processes of coordination at the EU level; and verify whether or not the OMC still remains a relevant conceptual framework for understanding EU policy coordination.

The first *Article* by Bruno de Witte contributes to an ongoing debate among legal scholars about the position of the OMC within the EU legal order. It addresses two

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questions in particular: *a*) Can the OMC be used in policy areas outside the competences of the EU (as is often observed)?; and *b*) Is the OMC a form of "soft law" (as is commonly argued)? The analysis shows that first, in terms of EU competence, the principle of conferral applies to the OMC and secondly, in terms of the OMC's nature and output, that the OMC is not a legal instrument but an institutional process that for the most part does not produce legal instruments.

The second *Article* by Stéphane de la Rosa also engages in legal analysis of the OMC, with the aim to identify its "legal share", as the author puts it, that is, the main elements of its relationship to EU law. To do so, the author draws on policy coordination in the health care field. Originally designed as a specific OMC process, policy coordination in health care has come to rest on a variety of processes and tools, ranging from the European Semester to EU secondary legislation. This has gone hand in hand with the introduction, by the Treaty of Lisbon, of a specific legal basis for policy coordination in the area of public health, and the dilution of the OMC within the broader coordination framework established for economic governance that covers national health policies. Seen in this light, the OMC appears to be more of a toolbox that can nurture different processes of policy coordination than a method as such for policy coordination.

The next *Article* by Åse Gornitzka focuses on the OMC as a means of organising EU governance in the field of education. The analysis explores how the education OMC developed over time, showing that it very much remains a "living" process. Contrary to other sector-specific OMC processes, established in the OMC heyday, that have faded or transformed, the education OMC has not been supplanted or abandoned. The author examines what explains this. The fact that the OMC matched domestic preferences on how cooperation in the field of education should unfold seems to have played a significant role in this regard. This is also the case for the use of the OMC as a platform to defend the profile and contribution of education to European integration. Such defence has been greatly facilitated by the European Commission, which has fed and carefully adjusted the process to increase its resilience, even if the OMC label became progressively less "fashionable".

The *Article* by Evangelia Psychogiopoulou addresses the OMC in the area of culture. Introduced in 2008 to structure Member States' cultural cooperation and foster the exchange of best practice, the cultural OMC constitutes a relatively new OMC. The process lacks key features of the OMC as a framework for policy coordination: it is a particularly "light" OMC. This ensures that Member States' autonomy in devising and implementing cultural policy is not undermined, which is in line with the EU's cultural competence as a complementary competence. Such "tailor-made" arrangements have allowed the cultural OMC to gain a solid position in EU cultural policy as a principal instrument for cultural cooperation. However, the cultural OMC should not hide from view that the Member States have accepted more rigorous forms of coordination in other policy fields that relate to culture and that in some instances, they have also agreed to experiment with cultural pol-

icy coordination, though without borrowing from the OMC toolbox. This attests to the fact that cultural policy coordination at the EU level is complex and multifaceted.

The last *Article* by Paul Dermine is about EU economic governance. In a pre-crisis context, EU economic policy, fairly based on policy coordination and new governance techniques, displayed key characteristics of the OMC. The Eurocrisis and the norms and processes that emerged as a result have fundamentally altered the nature and scope of EU action in this field. In a post-crisis setting, policy coordination has a wider focus, it is more substantive, supranationally driven, equipped with wider-reaching means and oriented towards uniformity. All this shows a new model of economic governance that departs from the OMC and its founding rationale. From this perspective, the OMC no longer constitutes an adequate framework to understand and grasp the complexities of EU economic governance. This is despite the fact that the EU still relies on the conventional OMC discourse, and the constitutional provisions on economic coordination remain unchanged.

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ARTICLES
SPECIAL SECTION – POLICY COORDINATION IN THE EU: TAKING STOCK OF THE OPEN METHOD OF COORDINATION

THE PLACE OF THE OMC IN THE SYSTEM OF EU COMPETENCES AND SOURCES OF LAW

BRUNO DE WITTE*

TABLE OF CONTENTS: I. The place of the OMC in primary EU law. – II. The OMC and the principle of conferral. – III. Does the OMC produce soft law? – IV. Conclusion: Is the OMC part of the EU legal order?

ABSTRACT: It is often said that the Open Method of Coordination (OMC) is a form of soft law and that it takes place outside the competences of the EU. This *Article* critically examines both these statements. It argues that OMC processes must, under the principle of conferral, be within the limits of the competences attributed to the EU by the Treaties, and that this is also the case in practice. It further argues that, whereas the OMC does produce soft law instruments in the field of employment, most of the other OMC processes produce neither hard nor soft law but policy documents which may or may not be taken into account by the Member States in the respective policy domains. The *Article* concludes that the OMC is a form of EU-level cooperation that operates within a legal framework defined by EU competences and the EU institutional balance, but that mostly does not use legal tools, either of the hard or soft variety, in its policy output.

KEYWORDS: competences of the EU – principle of conferral – soft law – recommendations – employment guidelines – coordination of national policies.

I. THE PLACE OF THE OMC IN PRIMARY EU LAW

When the term Open Method of Coordination (OMC) was adopted by the Lisbon European Council of 2000, it did not figure in the text of the Treaty establishing the European Community (the EC Treaty). Soon after, though, the Convention on the Future of Europe, when preparing the text of the Constitutional Treaty for Europe, discussed whether the term should be included in the EU's constitutional document. One of the Convention's

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preparatory bodies, the Working Group on Simplification, recommended in 2002 that "constitutional status should be assigned to the open method of coordination, which involves concerted action by the Member States outside the competences attributed to the Union by the treaties".[1] This sentence expresses a curious conception of the OMC (as being *outside* rather than *inside* the EU's competences) that has often been repeated and that is discussed below. In the end, and despite calls from some academics, the Convention decided not to grant constitutional status to the OMC as such.[2] Rather, by way of compromise, a description of a method of action which corresponds to the OMC – but without using the term itself – was included in the Treaty articles dealing with the policy areas of public health, industry and research. In addition, the existing references to policy coordination for the areas of economic governance and employment policy were kept as they had been previously formulated under the EC Treaty since Maastricht and Amsterdam respectively. This fragmented piecemeal approach was maintained in the Lisbon Treaty, so that the following question arises: given that the Lisbon Treaty formally recognises the use of the method in certain areas, does this mean that it may not be used in other policy areas where it is currently used (such as education and culture) or where it might have been used (such as immigration)?[3]

Today, the OMC is still situated in a constitutional no man's land. In the text of the EU Treaties, those four words do not appear anywhere together, although the word "coordination" appears in many places of the text. A glance at the website of the European Commission (Commission), one of the central actors of the OMC, does not clarify much. Some of the policy-specific webpages mention the use of the OMC in their policy domain, but not the ones one would expect: the social protection, culture and education webpages mention the OMC although the respective Treaty articles do not; conversely, the webpages on research policy, industrial policy and health do not mention the OMC although the Treaty articles dealing with those policies are the ones that allude most clearly to the OMC process! Whenever the OMC is mentioned on the Commission's website, one finds a hyperlink to the very same page of the Eur-Lex "Glossary of summaries", where a short description of the OMC is given. That quasi-official description on EUR-Lex contains two problematic legal statements, namely: (1) "the open method of coordination (OMC) in the European Union may be described as a form of 'soft law'"; and (2) "the OMC takes place in areas which fall within the competence of EU countries" (a formulation echoing the statement of the Convention working group mentioned above). Both statements are less than self-evident, and will be discussed in this *Article*. First Section II discusses the startling statement that the OMC "takes place" in areas of Member State competence;

[1] Convention on the Future of the Union, Final report of Working Group IX on Simplification of 29 November 2002, CONV 42/02, 7.

[2] See G. DE BÚRCA, J. ZEITLIN, *Constitutionalising the Open Method of Coordination: A Note for the Convention*, in *CEPS Policy Brief*, no. 31, March 2003.

[3] The three identically phrased references to the method, in relation to public health, industry and research, can be found in Art. 168, 173 and 179 TFEU.

how can this be reconciled with the principle of conferral? Then, Section III discusses the statement that the OMC is a form of soft law; this does not seem to square with most of the OMC's policy output which is neither hard nor soft law. The common theme of these two discussions is a reflection on the place of the OMC in the EU legal order. Assuming that the EU legal order is based on a rule of recognition, which determines whether a norm is part of EU law or not, is the OMC inside or outside that legal order? An answer to that question will be given in the concluding Section IV.

II. The OMC and the principle of conferral

According to Art. 5, para. 2, TEU "under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein." Note that the Treaty does not state "the Union shall make law only…" but, much more broadly, "the Union shall act only…". Within an OMC-type process, the Union is undoubtedly "acting", and funds from the EU budget are spent to sustain the process, which implies that either the OMC process in general or every single OMC should be based on a competence attributed by the Treaties. We know that there is no overall authorization for launching and conducting OMCs, so what about the existence of specific bases for each of them? With regard to employment policy, the OMC process is clearly delineated (though without using the OMC phrase) in Art. 148 TFEU, but the other OMCs seem to be based on much more generic Treaty authorizations for the EU institutions to coordinate national policies. Thus, for example, the education Article, Art. 165, para. 4, TFEU, mentions two ways in which EU institutions can "contribute to the achievement of the objectives" mentioned in that Article, namely by the adoption of incentive measures and recommendations. Both these tools are used in practice, but not in the context of OMC-education, where one apparently finds a third form of action beyond those mentioned in Art. 165, para. 4.[4] However, para. 1 of Art. 165 also states, in very general terms, that "the Union shall contribute to the development of quality education by encouraging cooperation between Member States and, if necessary, by supporting and supplementing their action"; now, if one considers that the incentive measures and recommendations mentioned in paragraph 4 are two ways for the EU to "support and supplement" member state policies, this would still leave open the alternative route of "encouraging cooperation", which is the object of the OMC-Education. Similar reasoning can be applied to the similarly structured Art. 167 TFEU, on culture. The Social OMC also seems easily justifiable in terms of EU competence since it covers areas for which

[4] The prime example of an incentive measure in this field is Regulation (EU) 1288/2013 of the European Parliament and of the Council of 11 December 2013 establishing "Erasmus+": the Union programme for education, training, youth and sport and repealing Decisions No 1719/2006/EC, No 1720/2006/EC and No 1298/2008/EC. An example of a recommendation is Council Recommendation 2012/C 398/01 of 20 December 2012 on the validation of non-formal and informal learning.

Art. 153, para. 2, TFEU allows the EU to "adopt measures designed to encourage cooperation between Member States", but there is another problem with that legal basis, namely the fact that such measures must be adopted by the European Parliament and the Council in accordance with the ordinary legislative procedure. Yet, the Social OMC was launched without using the codecision procedure.

III. Does the OMC produce soft law?

Art. 288 TFEU mentions two types of instruments that are explicitly described as non-binding: recommendations and opinions. This Article is part of a section of the TFEU entitled "The legal acts of the Union", which seems to indicate that legal acts should not necessarily be binding, thereby confirming the existence, within EU law, of the category of soft law.

Recommendations are the typical instruments of EU soft law. Although recommendations do not have binding force for the Member States to whom they are addressed, they nevertheless in certain circumstances may be an aid to the interpretation of EU and national provisions.[5] Recommendations, when addressed to the Member States, act as a kind of surrogate directive: they often lay down very detailed standards and encourage the Member States to comply with them, but any "implementing" national legislation is adopted on a voluntary basis.[6] In several places in the TFEU, EU institutions are specifically allowed, or even required, to adopt recommendations and sometimes rather elaborate decision-making rules are provided for that purpose. This is the case, for example, in the recommendations of the Council setting out the broad guidelines of economic policy[7] for the Member States, the recommendations on employment policy, and, as mentioned before, the recommendations on education policy.[8] Apart from the cases in which specific Treaty provisions allow for, or require, the adoption of recommendations, Art. 292 TFEU also seems to grant to both the Council and the Commission a general power to adopt recommendations, independently from a particular basis laid out in one of the policy chapters of the TFEU. The institutional practice confirms this, as we can observe that both institutions adopt recommendations for which the only legal basis, mentioned in their preamble, is Art. 292 TFEU.[9]

[5] Court of Justice, judgment of 13 December 1989, case C-322/88, *Salvatore Grimaldi v. Fonds des maladies professionnelles*, para. 18.

[6] See, for example, Recommendation 2006/952/EC of the European Parliament and of the Council of 20 December 2006 on the protection of minors and human dignity and on the right of reply in relation to the competitiveness of the European audiovisual and on-line information services industry.

[7] Art. 121, para. 2, TFEU.

[8] Art. 148, para. 4, TFEU.

[9] For example, Commission Recommendation (EU) 2015/914 of 8 June 2015 on a European resettlement scheme. This recommendation deals with the resettlement of asylum seekers, but its legal basis is Art. 292 TFEU rather than, as one would expect, one of the articles in the Treaty chapter on immigration and asylum.

Yet, here as well the principle of conferral applies: the EU institutions cannot make recommendations on any random subject; the content of the recommendation must, rather, relate to one of the policy competences as defined elsewhere in the Treaties.

In addition to the opinions and recommendations, there are other types of soft law in the legal practice of the Union. A well-known category consists of the *notices*, *communications and guidelines* of the Commission, in which this institution sets out the framework for dealing with individual cases, for example in the field of competition and State aid, or describes the kind of Member State measures or behaviour which it considers to be compatible with EU law in a given area (such as the internal market freedoms).[10] Although these instruments do not have any intrinsic binding force with regard to private parties, and they cannot deviate from the Treaty or secondary law,[11] they can – in combination with the principle of legitimate expectations – impose a self-limitation on the Commission with regard to its individual decision-making in the area covered by the guideline or notice;[12] and these communications and guidelines themselves can also be challenged in cases of conflict with fundamental rights or general principles.[13]

Sometimes, in the literature, the term soft law is extended to an even broader category of documents published by the various EU institutions (strategies, agendas, high level reports, green and white papers, work programmes, and so on) that all share the characteristic of being policy documents rather than normative instruments seeking to guide behaviour. Using the term soft law for those documents would be a misnomer, as they do not display any legal characteristics, whether hard or soft. They often announce or foreshadow legal developments, but are not sources of law themselves.

Now, if one examines the documentary output of the various OMC processes, it seems that very few of them can be considered as soft law. The one clear case of soft law can be found in the original domain of the OMC, namely employment policy, where the Council adopts annual guidelines addressed to the Member States and may also adopt recommendations as a follow-up measure if it considers that a Member State has not been sufficiently responsive to the guidelines.[14] The EU institutions have, right from the

[10] Examples of the former include: Commission Notice 2001/C 3/02, *Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements*; Communication 2014/C 249/01 from the Commission, *Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty*; Communication 2012/C 8/03 from the Commission, *European Union framework for State aid in the form of public service compensation (2011)*. An example of the latter type is the Communication COM(2012) 261 of 8 June 2012 from the Commission on the implementation of the services directive.

[11] Court of Justice, judgment of 14 January 1997, case C-169/95, *Spain v. Commission*.

[12] See Court of Justice, judgment of 28 June 2005, joined cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, *Dansk Rørindustri and others v. Commission*, in relation to the Commission's fining policy in competition cases.

[13] As for example in Court of Justice, judgment of 19 July 2016, case C-526/14, *Tadej Kotnik and others*.

[14] See Art. 148 TFEU, respectively paras 2 and 4. For a discussion of the legal nature of the process, see D. Ashiagbor, *The European Employment Strategy*, Oxford: OUP, 2005, chapter 5.

start, sought to enhance the normative force of these guidelines by adopting them in the form of a decision, which is an instrument of binding EU law.[15] However, this "hard law" cover is deceptive, as the only thing imposed on the Member States by those decisions is that they shall "take into account" the guidelines set out in their annex.

Economic policy is, obviously, another domain where soft law is used frequently, although it does not go under the OMC flag but under that of the European Semester. The Social OMC, and its Social Protection Committee, contribute to the elaboration and subsequent monitoring of country-specific recommendations in social matters, but this, again, is not a product of the Social OMC itself but of the European Semester. For the rest, the Social Protection Committee is very actively engaged in data collection and reporting but it does not produce soft law measures of its own. In fact, it is very rare indeed to find soft law instruments being produced by OMC processes. If one looks, for example, at ET 2020 (which is the acronym adopted for the OMC Education and Training 2020), its principal output are the reports drawn up by its thematic working groups. These reports typically contain "guiding principles" which are submitted to the Member State governments, but it would go too far to call them soft law. For that term to be appropriate, the guidelines elaborated at working group level should be taken up in a formal instrument by one of the EU institutions, but this does not happen. The Commission occasionally publishes communications in the field of education, but these are policy documents and not soft instruments emanating from the OMC process as such.[16] The Council and the Commission have summarized the state of play of the OMC process in a "Joint Report", but this document is about organizing the OMC process and setting its priorities.[17] It does not contain normative prescriptions; it is not soft law. The closest thing to a prescriptive norm are the education benchmarks which the Council adopted in 2009 when launching the ET 2020 process, but even there the Member States are merely "invited" to "consider, on the basis of national priorities" what they can do to help achieve those benchmarks.[18]

IV. Conclusion: Is the OMC part of the EU legal order?

The answer to the overall question of how, if at all, the OMC is part of the EU legal order is a complex one. First, in terms of EU competence, it seems clear that the OMC is not situated in a competence-free zone, and that the principle of conferral applies to the OMC as to any

[15] For example, Council Decision (EU) 2015/1848 of 5 October 2015 on guidelines for the employment policies of the Member States for 2015.

[16] The more recent such document is the Communication COM(2016) 941 of 7 December 2016 from the Commission, *Improving and modernising education*.

[17] 2015 Joint Report 2015/C 417/04 of the Council and the Commission on the implementation of the strategic framework for European cooperation in education and training (ET 2020), *New priorities for European cooperation in education and training.*

[18] Council conclusions of 12 May 2009 on a strategic framework for European cooperation in education and training ("ET 2020"). The benchmarks are listed in Annex I. The words quoted in the main text are on pp. 119/5 and 119/6 respectively.

other "action" of the EU. The OMC is not some kind of joker to be used by the EU institutions when the Treaty text has "forgotten" to confer competences on them. Yet, most of the actual OMCs are sufficiently embedded in the EU system of competences thanks to the fact that many TFEU articles generally state that the EU will encourage cooperation between the Member States. That generic language is broad enough to cover OMC processes.

In terms of the output of the OMC processes, the EUR-Lex webpage, cited in the introduction, is surely wrong to describe the OMC as a "form of soft law". The OMC itself is neither an independent institution nor a legal instrument. It is an institutional *process* that produces policy that may or may not take a legal form: whereas some OMCs produce soft law, others do not produce any legal measures, whether hard or soft.

The general conclusion could thus be that the OMC is a form of EU-level cooperation that operates *within a legal framework*, defined by EU competences and the EU institutional balance, but that does not often use *legal tools*, either of the hard or soft variety, in its policy output.

ARTICLES
SPECIAL SECTION – POLICY COORDINATION IN THE EU: TAKING STOCK OF THE OPEN METHOD OF COORDINATION

THE OMC PROCESSES IN THE HEALTH CARE FIELD: WHAT DOES COORDINATION REALLY MEAN?

STEPHANE DE LA ROSA*

ABSTRACT: More than fifteen years after the introduction of the Open Method of Coordination (OMC), it is necessary to assess the practical implementation of this tool. It is a subject of major interest that has inspired numerous studies in the framework of the Lisbon Strategy, but the attention focused on the OMC has diminished during the past few years, particularly with the deepening of the economic governance of the EU. This trend needs to be addressed in order to understand the actual meaning of the OMC and its relationship to the main features of EU law. The policy field of public health is an appropriate approach for a retrospective assessment of the OMC. Originally conceived as a single method, designed to promote flexible convergence on general objectives concerning the sustainability and quality of care, policy coordination in the health care field has gradually become more complex. It has now become more appropriate to consider several processes of coordination, each one with its own rationale, rather than a single method which can be qualified as an "OMC". This *Article* discusses this evolution.

KEYWORDS: open method of coordination – health policies – new modes of governance – policy coordination – economic governance – soft law.

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I. Introduction

The Open Method of Coordination (OMC) was gradually introduced in the health care field in 2004. Since then, its implementation has undergone substantial changes that reflect a more general evolution of the OMC within the EU legal system. To understand these changes, it is necessary to discuss the challenges raised by a legal analysis of the OMC (Section II), to assess the trajectory of the OMC in the field of health care within the EU legal system (Section III) and, finally, to consider the renewal of the OMC as a specific tool (or not) for the coordination of Member States' health policies (Section IV).

II. General challenges for legal analysis of the Open Method of Coordination

Among the community of European lawyers, the OMC is often seen as an enigma. At the dawn of the 2000s, the introduction of this new policy coordination tool gave rise to a substantial body of literature. The OMC's novelty, its link with the popularity of theories on new governance,[1] and its "softness" in comparison with the "traditional" community method can explain, among others, the bulk of studies on it.[2] These features can also explain the enthusiasm that characterized the first studies dealing with the OMC, which portrayed it as a "third way" between pure integration and the simple logic of cooperation[3] or as a suitable instrument for realizing "integration by cooperation".[4] The OMC was thus initially considered as an alternative tool to the formal harmonization of national laws, but its link to others features of the relationship between EU law and national law was unclear as several qualifications (coordination, cooperation, convergence) were concurrently used with regard to it. Moving beyond these initial assessments, two issues need to be raised: on the one hand, the discrepancy between the conceptualization of the OMC and the traditional features of EU law (II.1); and on the

[1] There is an obvious proximity between the conclusions of the Lisbon European Council in March 2000 and the presentation of the White Paper on Governance regarding the search for new forms of production of norms. See Commission, *European Governance – A White Paper*, COM(2001) 428 final.

[2] It would be impossible (and illusory) to list here the numerous articles on the OMC, but selected studies can be mentioned, such as: J. Scott, D.M. Trubeck, *Mind the Gap: Law and the New Approaches to Governance in the European Union*, in *European Law Journal*, 2002, p. 1 *et seq.*; C. de la Porte, Ph. Pochet (eds), *Building Social Europe through the Open Method of Co-ordination*, Brussels: PIE-Peter Lang, 2002; J. Zeitlin, D.M. Trubek, *Governing Work and Welfare in a New Economy: European and American Experiments*, Oxford: Oxford University Press, 2003.

[3] See, for instance, for the European Employment Strategy: J. Kenner, *The EC Employment Title and the Third Way: Making Soft Law Work*, in *The International Journal of Comparative Labour Law and Industrial Relations*, 1999, p. 33 *et seq*.

[4] P. Magnette, *L'intégration par la coopération. Un nouveau modèle de construction européenne?*, in P. Magnette, E. Remacle (eds), *Le nouveau modèle européen*, Bruxelles: Éditions de l'Université Libre de Bruxelles, 2000, pp. 25-29.

other hand, the significant decrease in references to the OMC in EU official documents (II.2).

II.1. The OMC and the specificities of the EU legal system

More than fifteen years after the implementation of the OMC, a retrospective look reveals a paradox, as if the significant number of studies on the OMC was inversely proportional to the degree of certainty in or knowledge of the topic. In fact, before examining the OMC in the light of EU legal considerations (such as its relationship with the principle of the distribution of competences, the relationship of hard law with soft law and the type of norms which are at stake, e.g. binding, non-binding), it is necessary to identify the relevant analytical framework. Initially, the OMC's analytical framework was deeply inspired by the methods of the sociology of law and law in context, with a specific focus on institutional discourse and the channels of influence of EU law on national policy-making. In itself, this theoretical framing can find strong justifications. Underlined by a broad conception of EU law, which contrasts with a purely normative and formal delimitation of EU law (perceived as the law of the treaties, the norms of secondary law and the case law of the Court of Justice of the European Union), such a theoretical framing allows for a dynamic understanding of European integration.

However, such an open conception of EU law raises substantial issues, related to unanswered and unavoidable questions on the boundaries of law and the delimitation of the scientific field to which the notions and concepts at stake (such as "coordination" or "convergence") belong. It is, therefore, useful to put some distance between the study of the OMC and the discourses linked to the theories on the so-called new modes of governance, at least to better identify the share of the law (*la part du droit*) that is contained in the OMC.[5] This assessment is consistent with a number of current studies dealing with the transformation of EU law in the context of the deepening of EU economic governance.[6] Paraphrasing the famous formula of the sociologist Pierre Bourdieu, such distance is also useful for understanding "what coordination means".[7]

[5] See, on the ebb and flow of theories on new governance, M. Dawson, *Three Waves of New Governance in the European Union*, in *European Law Review*, 2011, p. 208 *et seq.*; the general and retrospective study by D. Georgakaki, M. de Lasalle, *The Political Use of European Governance: Looking Back on a White Paper*, Opladen: Barbara Budrich, 2012, p. 193; F. Peraldi-Leneuf, S. de La Rosa (eds), *L'Union européenne et l'idéal de la meilleure législation*, Paris: Pedone, 2013, and especially S. de La Rosa, *Les significations évolutives du programme mieux légiférer*.

[6] See, M. Dawson, H. Enderlein, C. Joerges (eds), *Beyond the Crisis. The Governance of Europe's Economic*, in *Political and Legal Transformation*, Oxford: Oxford University Press; S. de La Rosa, F. Martucci, E. Dubout (eds), *L'Union européenne et le fédéralisme économique*, Bruxelles: Bruylant, 2015.

[7] Freely adapted from the well-known title, P. Bourdieu, *Ce que parler veut dire. L'économie des échanges linguistiques*, Paris: Fayard, 1982.

This need for clarification of the OMC and its legal share is not a superficial prerequisite, neither is it meant to establish divisions within European studies, which obviously require cross-analysis through the mobilization of different scientific fields: law, political science, economy or sociology. But, there is certainly a need to study and to assess the OMC from the perspective of the EU legal order, if only in order to understand whether this tool follows a different rationale from the general rules of EU law or whether it is consistent with them. According to settled case law, the EU legal system is conceived as an independent source of law, enjoying primacy over the law of the Member States, and the direct effect of a whole series of provisions that are applicable to the Member States and to their nationals. These elements are intrinsically linked with the preservation of fundamental rights, respect of which is a condition of the lawfulness of EU acts. They are requirements that are deeply established – from the *Costa* judgment to the most recent Opinion 2/13 on the accession of the EU to the European Convention on Human Rights – to identify the specificities of the EU legal order and to enable a common understanding of them.[8]

It follows from these classical features of the EU legal order that assessment of the OMC, including in the field of health care, must be conducted through processes such as identifying the relevant legal bases, their consistency with the principle of the distribution of competences, the articulation of the OMC with the principle of legal certainty and compliance with fundamental rights.[9] More broadly, the OMC must be examined through the requirements for a Union based on the rule of law, "inasmuch as neither its Member States nor its institutions can avoid a review of the question [of] whether the measures adopted by them are in conformity with the basic constitutional charter, the treaty".[10]

II.2. A trend toward fewer OMC references

In examining the incorporation of the OMC in to the EU legal system a gap must be acknowledged and considered. There is an obvious discrepancy between the number of studies on the OMC and the qualification and uses of the OMC in EU law, both in primary and secondary sources of law. An explanation can be found in the fact that a significant part of the literature on the OMC, consistent with the momentum of the European Commission's White Paper on Governance at the beginning of 2000, portrayed the OMC as excessively autonomous by disconnecting it from EU law and the requirements of

[8] Court of Justice, judgment of 15 July 2004, case 6/64, *Flaminio Costa v. Enel*; Court of Justice, opinion 2/13 of 18 December 2014.

[9] On this see S. de La Rosa, *La méthode ouverte de coordination dans le système juridique communautaire*, Bruxelles: Bruylant, 2007.

[10] Following the well-established formula since the landmark case *Les Verts*, Court of Justice, judgment of 23 April 1986, case C-23/83, *Parti écologiste les Verts v. European Parliament*.

the rule of law.[11] This favoured the formation and edification of an autonomous body of literature on the OMC, which is built on cross references and which is often detached from the reality of the qualification of the OMC by EU law itself.

A simple search in Eur Lex demonstrates this trend. It is widely recognized that the historical systematization of the OMC took place through the conclusions of the Lisbon European Council, which extended the legal rationale of the Treaty's provisions on employment (Art. 148 TFEU, formerly Art. 128 of the Treaty establishing the European Community (TEC))[12] to several policies with a link to the economy of knowledge (i.e. education, digital literacy, the promotion of small and medium enterprises, and so on).[13] At that time, in 2000, the OMC was broken into four phases: the definition of guidelines associated with specific timetables, the establishment of quantitative and qualitative indicators in order to analyze best practices, the translation of the guidelines into national and regional policies, and monitoring and evaluation organized through peer review.[14] Following the Lisbon Strategy, the wording "open method of coordination" can be found, through Eur Lex, in 29 references in 2000, 78 in 2001, 107 in 2002, 127 in 2003 and 112 in 2004. Of course, these results have to be qualified depending on the legal nature and function of the measures in which the selected references are made. If one excludes opinions and written questions by EU parliamentarians, the data are less regular, with, for example, 26 references to the OMC in Communications from the Commission in 2001, 33 in 2002 and 43 in 2004. What undoubtedly needs to be noted is the significant decrease in formal references to the OMC at the end of the 2000s, which become rare after the endorsement of the post-crisis legal framework, with the Six Pack

[11] White Paper on European Governance, cit.

[12] Introduced by the Treaty of Amsterdam, Art. 148 TFEU was initially the basis of the European employment strategy and provided the main features of the OMC process: endorsement of guidelines which the Member States shall take into account in their employment policies, preparation by the Member States of annual reports on the main measures taken to implement employment policy, annual examination by the Council and the Employment Committee of the implementation of the employment policies of the Member States, annual endorsement by the European Council of an annual report jointly prepared by the Council and the Commission.

[13] European Council Conclusions of 23-24 March 2000, especially paras 12 and 13 (Establishing a European area of research and innovation), paras 14 and 15 (Creating a friendly environment for starting up and developing innovative businesses), paras 25 to 27 (Education and training for living and working in the knowledge society).

[14] It is generally considered that the seminal definition of the OMC can be found in the conclusions of the Lisbon European Council, at para. 37, which states: "fixing guidelines for the Union combined with specific timetables for achieving the goals which [the Member States] set in the short, medium and long terms; establishing, where appropriate, quantitative and qualitative indicators and benchmarks against the best in the world and tailored to the needs of different Member States and sectors as a means of comparing best practice; translating these European guidelines into national and regional policies by setting specific targets and adopting measures, taking into account national and regional differences; periodic monitoring, evaluation and peer review organized as mutual learning processes".

and the Two Pack.[15] For instance, in 2016, only five documents made references to the OMC, with a single Commission Communication referring to it.[16]

This downward trend of OMC references in EU official documents can also be observed in the field of health care. In 2004, the Commission set up a specific process, designed as a kind of extension of the OMC for social inclusion, with the purpose of fostering convergence of national health policies on three main objectives: universal access to care, high quality of care and financial sustainability of care.[17] The process was essentially aimed at sharing experiences and comparing national practices to address common challenges such as the ageing of society, end of life care, the need for technology, and so on. In its Communication, the Commission insisted on the complementarity of Member States' policies and the ancillary actions of the EU, noting: "Responsibility for the organization and funding of the health care and elderly care sector rests primarily with the Member States, which are bound, when exercising this responsibility, to respect the freedoms defined and the rules laid down in the Treaty. The added value of the 'open method of coordination' is therefore in the identification of challenges com-

[15]The qualification "Six Pack" refers to a body of five EU regulations (Regulation (EU) 1173/2011 of the European Parliament and of the Council of 16 November 2011 on effective enforcement of budgetary surveillance in the euro area; Regulation (EU) 1174/2011 of the European Parliament and of the Council of 16 November 2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area; Regulation (EU) 1175/2011 of the European Parliament and of the Council of 16 November 2011 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies; Regulation (EU) 1176/2011 of the European Parliament and of the Council of 16 November 2011 on the prevention and correction of macroeconomic imbalances; Regulation (EU) 1177/2011 of the European Parliament and of the Council of 16 November 2011 on speeding up and clarifying the implementation of the excessive deficit procedure), and one directive (Directive 2011/85/UE of the European Parliament and of the Council of 8 November 2011 on requirements for euro area countries' budget). The expression "Two Pack" refers to two regulations: Regulation (EU) 472/2013 of the European Parliament and of the Council of 21 May 2013 on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability and Regulation (EU) 473/2013 of the European Parliament and of the Council of 21 May 2013 on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficits of the Member States in the euro area.

[16] See, for instance, Joint Communication JOIN(2016) 29 final of 8 June 2016 from the Commission, *Towards an EU strategy for international cultural relations*, which refers to the OMC as applied in the field of culture, "in a light but structured way", as a possible source of inspiration for implementing partnerships with third countries in the cultural industries field (e.g. a European network of creative hubs or a network between young creative and cultural entrepreneurs from the EU and third countries).

[17] Communication COM(2004) 2004 of 20 April 2004 from the Commission, *Modernizing social protection for the development of high-quality, accessible and sustainable health care and long-term care: Support for the national strategies using the Open Method of Coordination*.

mon to all and in support for the Member States' reforms".[18] The aim was thus to create a common cognitive framework, which was sometimes portrayed as "neoliberal".[19]

After this first communication, the use of the OMC in the health care field was incorporated into a more general process of coordination, following a streamlined approach of policy coordination for social inclusion.[20] Member States reported on their national health policies with specific national health policy reports only for 2005; from 2006 to 2010, reporting of health policies with regards to common objectives and indicators was incorporated into the national social inclusion plans.

A central role was (and still is) played by the Social Protection Committee (SPC), established by Art. 160 TFEU.[21] The SPC quickly assumed the role of administrative leader, by organizing a concrete process for the exchange of experiences and the comparison of national practices. This committee constitutes a forum that combines political discussion on the main objectives pursued with technical expertise, for example in the definition of indicators. This kind of hybrid approach has favoured the creation of epistemic communities, with the participation of national experts, members of non-governmental organizations (NGOs) and members of the Commission deeply involved in improving the functioning and effectiveness of the OMC.[22]

Nevertheless, despite the attention paid to the OMC in the mid-2000s, references in official documents to the OMC with respect to health care have slowly decreased. In the last five years, coordination in health care appears to be a multifaceted process which can hardly be reduced to one method. Although there are still references to the OMC in

[18] *Ibid.*, p. 11.

[19] On the application of the OMC to care, see also, F. MARK, *The Open Method of Coordination on Health Care after the Lisbon Strategy II: Towards a Neoliberal Framing?*, in S. KRÖGER (ed.), *What We Have Learnt: Advances, Pitfalls and Remaining Questions in OMC Research*, in *European Integration Online Papers (EIoP)*, 2009, p. 1 *et seq.*, eiop.or.at.

[20] Communication COM(2005) 706 of 22 December 2005 from the Commission, *Working together, working better: A new framework for the open coordination of social protection and inclusion policies in the European Union*.

[21] According to this provision "The Council, acting by a simple majority after consulting the European Parliament, shall establish a Social Protection Committee with advisory status to promote cooperation on social protection policies between Member States and with the Commission. The tasks of the Committee shall be: – to monitor the social situation and the development of social protection policies in the Member States and the Union, – to promote exchanges of information, experience and good practice between Member States and with the Commission, – without prejudice to Article 240 [TFEU], to prepare reports, formulate opinions or undertake other work within its fields of competence, at the request of either the Council or the Commission or on its own initiative. In fulfilling its mandate, the Committee shall establish appropriate contacts with management and labour. Each Member State and the Commission shall appoint two members of the Committee".

[22] On the role of the Social Protection Committee, see K. JACOBSSON, A. VIFFEL, *Towards Deliberative Supranationalism? Analysing the Role of Committees in Soft Coordination*, in O. MEYER, W. WESSELS (eds), *Economic Government of the EU, a Balance Sheet of New Modes of Policy Coordination*, London: Palgrave MacMillan, 2005.

the legal provisions concerning the mandate and the mission of the SPC, it seems that the rationale and the general orientation of the OMC as a coordination tool (soft compliance, non-binding objectives, and convergence without formal obligations) have been extended in many directions.[23]

From this perspective, on the one hand it can be argued that the OMC for health care has followed the same trajectory that other OMC processes did, falling from light in to shadow, that is, from an ancillary process, designed to be self-maintained by regular reporting, to growing institutionalization through a number of links with existing processes of coordination. On the other hand, one can observe a proliferation of practices of coordination in health care that have borrowed key features of the OMC, such as the use of indicators, the use of guidelines and more generally soft convergence. This could be considered to be a renewal of the method in the health care field. Both aspects are discussed below.

III. The evolution of OMC in the European legal system: From light to shadow

To understand the trajectory of the OMC in the health care field, two main aspects need to be examined: the recognition of a specific legal basis for the operation of the OMC in the field of interest (III.1) and the dilution of the OMC within the normative framework that has followed the substantial recast of the rules applying to economic governance (III.2). A significant consequence of the latter is a diversification of the practices related to the OMC in health care.

III.1. Recognition of a legal basis for the OMC in the field of health care

While the OMC was initially portrayed as a "new mode of governance", marking "a shift" *vis-à-vis* the traditional Community method, it has been increasingly incorporated into the European legal system, with the recognition of specific legal bases in EU primary law.[24] Assessment of the OMC only through the conceptual framework of a "method" in EU law (e.g. method of coordination v. Community method, "soft method" v. "binding method") is somehow biased. In fact, the very general meaning which is attached to the qualification of "method" can lead to an overly broad perception of the decision-making process; it therefore can produce, as Jean-Paul Jacqué righty noted, a somehow "*ré-*

[23] In recent years, references to the OMC can only be found in internal documents of the Social Protection Committee, but with a link to the European Semester (see Council Decision 2015/773 of 11 May 2015 establishing the Social Protection Committee and repealing Decision 2004/689/EC).

[24] See for instance, J.S. Mosher, D.M. Trubek, *Alternative Approaches to Governance in the EU: EU Social Policy and the European Employment Strategy*, in *Journal of Common Market Studies*, 2003, p. 63 *et seq*.

ducteur" vision, in comparison with the complexity of the different forms of the policy-making processes.[25]

A debate on the legal grounds of the OMC occurred during the negotiations on the stillborn constitutional treaty. The working group on Social Europe suggested a horizontal provision to be inserted into the treaty, in order to define the OMC and its procedure and determine its scope of application *a contrario*:[26] the OMC would not apply in areas where sectoral coordination already existed (such as in economic and employment policy) and in areas where the Union had legislative powers. However, neither this provision nor any other efforts to constitutionalize the OMC have been successful, leading to its inclusion in the constitutional treaty.[27]

Despite the rejection of the constitutional treaty in 2005, the lack of agreement on the constitutionalization of the OMC had consequences for the drafting of the provisions of the Treaty of Lisbon related to health and social policies. The drafters of the Lisbon Treaty reiterated the wording of the constitutional treaty by using a general formula that establishes the main features of the OMC without qualifying them as elements of the OMC.

For health care, the relevant provision can be found in Art. 168, para. 2, TFEU, which lays down that "The Commission may, in close contact with the Member States, take any useful initiative to promote coordination, in particular initiatives aiming at the establishment of guidelines and indicators, the organization of exchange of best practice, and the preparation of the necessary elements for periodic monitoring and evaluation. The European Parliament shall be kept fully informed". This formula can also be found in the Treaty provisions on cooperation in the fields of social policy, research and education.[28] Although these provisions do not specifically refer to the OMC, their wording points to its main features, such as the use of indicators, the non-binding nature of the process, the establishment of exchanges of best practice and the main role given to the Commission for fostering coordination.

The incorporation of such provisions in the Treaty provides consistency on the use of the OMC and the nature of the EU competence at stake. For social policy, for instance, the same formula is used in Art. 156 TFEU, which, since the Single Act, has been used as a horizontal provision for promoting coordination between Member States, but

[25] J.-P. JACQUÉ, *La Commission européenne après Lisbonne: déclin ou changement de paradigme*, in *Liber Amicorum en l'honneur du professeur Vlad Constantinesco*, Bruxelles: Bruylant, 2015, p. 241 *et seq*.

[26] Final Report of Working Group XI "Social Europe", pp. 17–20.

[27] G. DE BÚRCA, J. ZEITLIN, *Constitutionalising the OMC – What Should the Convention Propose?*, in *CEPS Policy brief*, 31 March 2003, www.ceps.eu. *A contrario*, several lawyers deny the necessity of having a specific provision within primary law. See, for instance, J.-V. LOUIS, *La MOC dans la Convention*, in J. VANDAMME (ed.), *The Open Method of Coordination and Minimum Income Protection in Europe. Liber Memorialis Herman Deleeck*, Louvain: Acco, 2004, pp. 114-120.

[28] See, respectively, Art. 156, Art. 173 and Art. 181 TFEU.

without containing a legal basis for the adoption of harmonizing measures. On the contrary, there is no reference to the characteristics of the OMC in Art. 153 TFEU, which does serve as a legal basis for the adoption of the main directives in the field of social policy.[29]

The case is similar for health care. Art. 168 TFEU is the only provision in EU primary law that deals specifically with public health. It recognizes the possibility of adopting directives, in paragraph 4, but only for measures setting standards of quality and safety of organs, measures in the veterinary and phytosanitary fields and measures setting standards for medicinal products and devices. By enabling the adoption of binding measures, Art. 168, para. 4, TFEU is conceived as a derogation both to Art. 2, para. 5, TFEU (which defines the category of supporting or ancillary competences) and Art. 6 TFEU (which identifies the scope of such competences, including the "protection and improvement of human health").[30] Given this restrictive possibility of enacting binding secondary law, it follows that the reference to the features of the OMC in Art. 168, para. 2, TFEU is a concrete formalization of the types of actions and measures that shall be undertaken to substantiate the supporting EU competence in public health.

Provisions of this kind must be emphasized, as they allow for a better understanding of the relationship of the OMC with the formal distribution of competences, laid down in Arts 2 and 6 TFEU. With the Lisbon Treaty, the drafting of these provisions limits the OMC to the implementation of supporting (or ancillary) EU competences, which cannot include the harmonization of Member States' laws or regulations. At first glance, the OMC is thus disconnected from the scope of the EU's shared competences, which presuppose the co-existence of two legal bases (at Member States' and the EU level) to enact binding rules.

Besides use of the OMC in areas where the EU has supplementary competences, there is some space for using the OMC in policy areas where the EU has shared competences, especially when the treaty lays down a requirement of unanimity to enact

[29] For instance, directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 on working time; directive 98/59/EC of the Council of 20 July 1998 on the approximation of EU countries' law regarding collective redundancies and directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community.

[30] Art. 168, para. 4, TFEU reads: "By way of derogation from Article 2(5) and Article 6(a) and in accordance with Article 4(2)(k), the European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions, shall contribute to the achievement of the objectives referred to in this Article through adopting in order to meet common safety concerns: a) measures setting high standards of quality and safety of organs and substances of human origin, blood and blood derivatives; these measures shall not prevent any Member State from maintaining or introducing more stringent protective measures; b) measures in the veterinary and phytosanitary fields which have as their direct objective the protection of public health; c) measures setting high standards of quality and safety for medicinal products and devices for medical use".

norms of harmonization. For instance, this could be the case for social policy, insofar as Art. 153 TFEU requires a special legislative procedure for adopting directives on such issues as social security, protection of workers when their employment contract is terminated, representation and collective defense of the interests of workers and employers and conditions of employment for third-country nationals legally residing in Union territory. In such cases, the key to understanding the use of the OMC lies in the discrepancy between the formal categorization of the EU competence as a shared competence and the limited powers that can be effectively exercised.

III.2. Dilution of the OMC in the context of deepening European economic governance

The EU legal response to the economic crisis that occurred at the end of the 2000s substantially changed the perception and use of the OMC. The Economic and Monetary Union has gone through an important process of transformation in the last six years. It has led to EU law becoming increasingly complex, with the adoption of international treaties (e.g. the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union,[31] the Treaty establishing the European Stability Mechanism,[32] the Agreement on the Transfer and Mutualization of Contributions to the Single Resolution Fund in the Field of Banking Union), a deepening of the coordination of national policies (with the adoption of the so-called Six Pack on multilateral surveillance and Two Pack to assess Member States' draft budget plans) and a reinforcement of the monitoring of national policies.[33] Most of the tools endorsed in these frameworks raise a major difficulty concerning the discrepancy between the extent of powers given to the Union, including the intensity of economic and social policy coordination, and the nature of the legal competences of the EU as identified by the Treaty.

With respect to the coordination of national policies (including national policies in the field of health care), the creation of the European Semester diluted former processes of open coordination in the fields of employment, social inclusion and health.[34] From

[31] Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (also known as the Fiscal Compact) of 2 March 2012. To stabilise the euro area, euro area governments have concluded an intergovernmental Treaty on Stability, Coordination and Governance in the Economic and Monetary Union. It has been in force since January 2013.

[32] Treaty establishing the European Stability Mechanism of 2 February 2012.

[33] Agreement between Belgium, Bulgaria, Czech Republic, Denmark, Germany, Estonia, Ireland, Greece, Spain, France, Croatia, Italy, Cyprus, Latvia, Lithuania, Luxembourg, Hungary, Malta, Netherlands, Austria, Poland, Portugal, Romania, Slovenia and Finland of 21 May 2014 on the transfer and mutualisation of contributions to the single resolution fund.

[34] The European Semester was initially proposed by the European Commission in its Communication COM(2010) 250 of 12 May 2010 on reinforcing economic policy coordination. According to the communication, the European Semester "should encapsulate the surveillance cycle of budgetary and structural policies", relying on the common presentation by the Member States of the Stability and Convergence

a certain point of view, the European Semester can be seen as a gathering process: it brings together the implementation of several coordination procedures, such as those laid down in Art. 121 TFEU for economic policies and Art. 148 TFEU for Employment Guidelines but also procedures laid down in specific provisions introduced by the Six Pack. In this sense, the European Semester can be understood as a procedural tool which gathers measures founded on different legal bases. The machinery of the Semester relies on processes and tools which are not far from the semantic framework of the OMC: the adoption of an annual growth survey, the presentation of country reports with recommendations to the Member States, the endorsement of policy orientations by the Council, the submission by the Member States of national reform programs (and stability and convergence programs for the assessment of budgetary convergence), the evaluation by the Commission of national policies and so on.

At the same time, although the European Semester relies on similar mechanisms to those of the OMC, it has produced a shift in both the purpose and use of coordination by the Commission. Whereas coordination, within the several processes of the OMC, was initially conceived to ensure soft convergence and to exchange best practices between Member States, the implementation of the European Semester changed its purpose: coordination in this framework seeks to ensure the surveillance of national policies and their compatibility with budgetary requirements. This significant change can be observed in the sanctions that can be taken by the Council: although the content of the EU recommendations endorsed in the framework of the European Semester is not formally binding, Member States' lack of appropriation can lead to the launch of the procedure for macroeconomic imbalances, which can trigger financial sanctions.

This has produced significant changes in the coordination of national policies in the field of health care. Whereas up until 2010 the Member States reported their national health care policies through their national inclusion plans, the European Semester produced a kind of split.

On the one hand, the financial sustainability of health care has been incorporated into the national reform plans, which are part of the European Semester process. The national reform plans have thus become a tool to assess national health reform together with budgetary constraints. The French national reform plans, endorsed in 2015 and 2016, are illustrative of this tendency.[35] Their drafters insisted on reducing charges and

Programs and the National Reform Programs. Following this proposal, this process of surveillance was established by Regulation (EU) 1175/2011 of the European Parliament and of the Council of 16 November 2011 amending Council Regulation (EC) 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies.

[35] See the *Programme national de réforme* of 13 April 2016, available at www.tresor.economie.gouv.fr, p. 33, which reads (in French): "La maîtrise des dépenses de santé est articulée autour de quatre piliers: l'amélioration de l'efficience de la dépense hospitalière avec la mise en place d'un programme national décliné au niveau régional, le développement de la médecine ambula-

costs, by pointing at several changes introduced by the latest national health law, such as the extension of third party payment, the expansion of compulsory consultation with a general practitioner before having the possibility to visit and be reimbursed for a consultation with a specialist or the merger of local hospitals through the setting up of general structures (*Groupements hospitaliers territoriaux*).[36]

On the other hand, the SPC pursues a specific mission of coordination by implementing a "soft" open method of coordination, which aims at establishing an overview of national health care policies, in light of three common objectives:

– to guarantee access for all to adequate health and long-term care, to ensure that the need for care does not lead to poverty and financial dependency, and to address inequities in access to care and in health outcomes;

– to promote quality in health and long-term care and adapt care to the changing needs and preferences of society and individuals, notably by establishing quality standards reflecting best international practice and by strengthening the responsibility of health professionals and of patients and care recipients;

– to ensure that adequate and high quality health and long-term care remain affordable and sustainable by promoting healthy and active lifestyles, good human resources for the care sector and rational use of resources, notably through appropriate incentives for users and providers, good governance and coordination between care systems and institutions.

Coordination in this context essentially aims at fostering cognitive convergence between Member States. To give an example, in the field of long-term care, in a 2014 report on "adequate social protection for long-term care needs in an ageing society",[37] the SPC assessed current challenges facing long-term care systems and identified national policy responses to address the need for prevention, rehabilitation and re-enablement.[38] In line with the traditional set up of the OMC, the report stressed national strategies considered sufficiently comprehensive, such as the New Medicine Service in the UK, the French policy for the prevention of loss of autonomy or, concerning pre-

toire et l'adéquation de la prise en charge en établissement, la baisse du prix des produits de santé et la promotion des médicaments génériques, l'efficience et le bon usage des soins et des médicaments".

[36] Law no. 2016-41 of 26 January 2016 (France), *Modernisation de notre système de santé*.

[37] Social Protection Committee Report 10406/14 of 18 June 2014, *Adequate Social Protection for Long-term Care Needs in an Ageing Society*.

[38] As defined in this Social Protection Committee Report 10406/14, prevention is understood as "[s]ervices for people with poor physical or mental health to help them avoid unplanned or unnecessary admissions to hospital or residential settings" which "can include short-term emergency interventions as well as longer term low-level support"; rehabilitation as "services for people with poor physical or mental health to help them get better" and re-enablement as "services for people with poor physical or mental health to help them accommodate their illness by learning or re-learning the skills necessary for daily living".

vention, the Buurtzog model in the Netherlands, which consists of small self-managed teams aimed at providing integrated care at home.[39]

For the coming years, the SPC seeks to preserve forms of coordination that seem to be consistent with the initial rationale of the OMC. This is actually one of the targets of the current proposal for a European Pillar of Social Rights,[40] aimed at establishing a transversal framework for putting employment and social protection (including health care) at the forefront of EU and national policy-making. For the implementation of this strategy (which is still pending), the SPC is clearly willing to draw upon previous models of coordination, such as the OMC. For instance, in a key note speech in June 2017, the SPC, together with the Employment Committee, stressed:

> "implementation of the Social Pillar should aim at reinforced action at EU and Member State level and build on the existing instruments and mechanisms which have proven to be effective, notably the Europe 2020 Strategy and the European Semester, the European Employment Strategy and the Open Method of Coordination for Social Protection and Social Inclusion, including the activities related to mutual learning and exchange of best practices. Further clarity is needed as to how the implementation will be linked to these and other existing processes and procedures such as the Macroeconomic Imbalance Procedure, and how duplication of instruments and processes will be avoided".[41]

This statement is important, as it shows that both Committees wish to preserve a specific (even if circumscribed in scope) type of coordination, within their mandate, which remains qualified as an "OMC".

IV. The revival of the OMC in health care

Several features of the OMC, such as the endorsement of common indicators, the setting up of common objectives and the exchange of good practices have been incorporated within a range of tools dealing with health care, even if such tools are not referred to as an OMC. Three main points will be considered from this perspective: the systematization of a set of indicators (IV.1), the integration of OMC features within secondary law (IV.2) and the development of a set of programs and strategies that have borrowed certain OMC characteristics (IV.3).

[39] See law no. 2015-1776 of 28 December 2015 (France), *Loi relative à l'adaptation de la société au vieillissement*.

[40] Communication COM(2017) 250 of 26 April 2017 from the Commission, *Establishing a European pillar of social rights*.

[41] Employment and Social Protection Committees Opinion 9498/17 of 2 June 2017, *European Pillar of Social Rights: Endorsement of the Joint SPC and EMCO*.

IV.1. Endorsement of common indicators

The SPC has gradually developed a proper methodology to establish a comprehensive framework of social indicators, in order to propose a Joint Assessment Framework of National Policies, together with the Employment Committee. This work on indicators consists of a first-step screening of country-specific challenges based on quantitative information and as a second step in-depth qualitative analysis to contextualize findings coming from hard data.[42] The latter involves the consultation of thematic reports, national-level publications and national data sets.[43] In this context, there is obviously a link with the OMC: before entering into a process of deep, refined coordination between Member States, it is necessary to agree on a common understanding of the challenges faced in the field of health. The adoption of common indicators is a preliminary and central step in this direction. In fact, the endorsement of common indicators faces conflicting requirements: on the one hand, the indicators must be considered sufficiently objective, neutral, robust and statistically valid; on the other hand, they need to avoid the risk of manipulation that could introduce bias.

For this purpose, the SPC carries out remarkable work. A substantial part of its activities covers the identification of indicators related to the three main objectives of EU health care policy: quality (e.g. concerning colorectal cancer survival rates, breast cancer survival rates, cervical cancer survival rates, vaccination coverage for children, influenza vaccination for people aged 65+, hospital mortality and so on), sustainability of resources (e.g. current expenditure on health care per capita, practicing physicians or doctors, practicing and professionally active nurses and midwives and so on) and general improvement of health (e.g. life expectancy, obesity rate, exposure to alcohol or tobacco). The aim is to provide through a country profile chart an initial screening of areas where Member States might be facing specific challenges. The framework allows for summary assessments of overall health outcomes and provides indications on what might be the underlying factors explaining these outcomes.[44]

IV.2. Incorporation of OMC features within secondary law

Another notable development over the past several years derives from the incorporation of tools inspired by the OMC into directives adopted in health care. A very good ex-

[42] Social Protection Committee Progress Report SPC/2015.2.2/4 of 17 February 20151on the review of the Joint Assessment Framework in the area of health.

[43] See European Commission, DG Employment, Social Affairs and Inclusion & Social Protection Committee, Work in progress: 2015 update of 22 November 2015, *Towards a Joint Assessment Framework in the Area of Health*.

[44] *Ibid.*, p. 44.

ample is Directive 2011/24/EU on cross border health care.[45] This Directive has a dual legal basis: it is based both on Art. 114 TFEU (the general legal basis for harmonization measures in the internal market) and Art. 168 TFEU (on public health). Its main justification was the need to codify the substantial case law dealing with the mobility of patients on the basis of the freedom to provide services. Through seminal cases such as *Kohll and Decker*,[46] *Geraets-Smits and Peerbooms*[47] and *Watts*,[48] the Court of Justice recognized the possibly for patients to make use of the fundamental economic freedoms contained in the Treaty (such as the freedom to provide services) in order to challenge national measures (enacted in the State of affiliation) that could restrict mobility for access to health care in another Member State. In line with these rulings, the Directive distinguishes between ambulatory care and hospital care. Although access to ambulatory care cannot be denied by the State of affiliation (where the patient is insured) for obtaining reimbursement from social security funds, for hospitals, a system of prior authorization may be justified when required for certain reasons, given the specific nature of the medical services provided in a hospital setting. This specification is due to the need to preserve the discretion of the Member State of affiliation to exercise its own health care policy and avoid the risk of seriously undermining the financial balance of its social security system.

Besides the codification of the case law on the freedom to provide services, the Directive also had to clarify the nature of the rights enjoyed by patients. One of the issues dealt with was the freedom to provide services within the existing framework on the coordination of Member States' social security systems, which is set up by Regulation (EC) 883/2004.[49] This considers the patient as an insured person in the State providing the care. Although the patient is legally covered by the social security of the State of affiliation, he is considered, under the scheme of this Regulation, as a patient on the grounds of the law of the state of treatment. On the contrary, under the system of the freedom to provide services, the patient is considered a user of a provided service – as if he had obtained it in his country of residence.

This issue explains the attention paid, in the Directive, to specific mechanisms of coordination and the exchange of information between Member States. Actually, the

[45] Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients' rights in cross-border healthcare.

[46] Court of Justice, judgment of 28 April 1998, case C-158/96, *Raymond Kohll v. Union des caisses de maladie*; judgment of 28 April 1998, case C-120/95, *Nicolas Decker v. Caisse de maladie des employés privés.*

[47] Court of Justice, judgment of 12 July 2001, case C-157/99, *B.S.M. Geraets-Smits v. Stichting Ziekenfonds VGZ and H.T.M. Peerbooms v. Stichting CZ Groep Zorgverzekeringen*.

[48] Court of Justice, judgment of 16 May 2006, case C-372/04, *Yvonne Watts v. Bedford Primary Care Trust and Secretary of State for Health*.

[49] Regulation (EC) 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems.

diversity of reimbursed care in the Member States, the differences regarding the coverage rate and the disparities of the quality of care, as well as the need to preserve patients' data are, among others, factors which explain the need to coordinate national practices, in order to avoid abuses by patients of cross-border care. In this regard, the Directive requires the Commission to foster cross-border cooperation using three main tools.

First, Art. 12 of the Directive sets up for the Commission a framework to support the development of so-called European Reference Networks of health care providers and centres of expertise (in particular on rare diseases) by: adopting the criteria that such networks, and providers wishing to join them, must fulfil; developing criteria for establishing and evaluating such networks; and facilitating the exchange of information and expertise within the networks. In March 2014, the relevant legal framework, which was adopted on the grounds of the delegated competence of the Commission, was introduced.[50] According to the 2015 Commission report on the operation of the Directive, the process of establishing these networks has begun.[51] Secondly, Art. 15 of the Directive creates a Health Technology Assessment network, implemented by a specific decision of the Commission.[52] This network aims at supporting cooperation between national authorities, including on the relative efficacy and short/long term effectiveness of health technologies. This network adopted a Strategy for EU cooperation on health technology in October 2014, and a reflection paper on national activities in April 2015.[53] It meets twice a year and is supported on scientific and technical issues by a joint action under the Health Program, called EUnetHTA. Thirdly, the Directive requires the Commission to encourage Member States to cooperate on cross-border health care provision in border regions. The relevant provision, contained in Art. 15 of the Directive, still needs to be implemented, as there are a limited number of existing cross-border projects that may provide valuable experience.[54]

To understand the specific structure of the Directive, the qualification of "hybrid governance" has been proposed with the aim of describing the combination of rules

[50] Commission Delegated Decision (EU) 2014/287 of 17 May 2014 setting out criteria and conditions that European Reference Networks and healthcare providers wishing to join a European Reference Network must fulfil.

[51] Communication COM(2015) 421 of 4 September 2015 from the Commission, *Report on the operation of Directive 2011/24/EU on the application of patients rights in cross-border healthcare*.

[52] European Commission Implementing Decision (EU) 2013/329 of 26 June 2013 providing the rules for the establishment, management and transparent functioning of the network of national authorities or bodies responsible for health technology assessment.

[53] See European Commission, DG Health and Food Safety, Consultation report Ares(2017)2455149 of 15 May 2017 *Strengthening of the EU cooperation on Health Technology Assessment*.

[54] Communication COM(2015) 421, cit.

and principles that the Directive contains.[55] These stem directly from EU primary law (the implementation of the freedom to provide services as interpreted, for health care, through case law) and flexible mechanisms and tools, which are underlined by the necessity to reconcile the preservation of national competences and policies in the field of care and the existing influence of EU law. Specific features of the OMC have been integrated in the Directive, in order to facilitate its implementation into national legal systems. This explains and gives consistency to the legal foundation of the Directive: Art. 114 TFEU, for the main rules, and Art. 168 TFEU, for the coordinating tools.

IV.3. The OMC's rationale within partnership programs

In the policy field of public health, one can further observe an increasing use of tools or so-called partnership programs, which are not formally qualified as an OMC but which include similarities to it. These appear as a specific use of soft law, as it is conceived as a finality in itself, with a form of disconnection from the enactment of binding rules. Two examples demonstrate this.[56]

First, the eHealth plan could be seen as the implementation of some features of the OMC.[57] This plan creates a network aiming at supporting cooperation between national authorities. It meets twice a year and is supported operationally by a joint action (led by the EU and Member States) under the Health Programme established by Regulation (EU) 282/2014.[58] The work of the eHealth Network is supported by a number of activities carried out under the eHealth Action Plan 2012-2020. Since its inception, the eHealth Network has formulated guidelines on patient summaries data sets and ePrescriptions, and it has adopted position papers on: electronic identification, interoperability, the proposed Regulation on data protection, and eHealth investment to be supported by the Connecting Europe Facility.[59] It is currently working on guidelines on effective methods for the use of medical information for public health and research. Specific EU funding has been allocated to implement the exchange of patient summaries

[55] L. Trubek, T. Hervey, *Freedom to Provide Health Care Services within the EU: An Opportunity for "Hybrid Governance"*, in G. de Búrca, J. Scott (eds), *Narrowing the Gap? Law and New Approaches to Governance in the European Union*, in *Columbia Journal of European Law*, 2007, p. 623 *et seq*.

[56] This is already a settled tendency, see, G. Vanhercke, *The Hard Politics of Soft Law: The Case of Health*, in *Health Systems Governance in Europe. The Role of European Union Law and Policy*, 2009, p. 186 *et seq*.; also T. Hervey, *The European Union and the Governance of Health Care*, in G. de Búrca, J. Scott (eds), *Law and New Governance in the EU and the US*, Oxford: Hart Publishing, 2006.

[57] Commission Implementation Decision of 22 December 2011 providing the rules for the establishment, management and operation of the network of national responsible authorities on eHealth.

[58] Regulation (EU) 282/2014 of the European Parliament and of the Council of 11 March 2014 on the establishment of a third Program for the Union's action in the field of health (2014-2020) and repealing Decision 1350/2007/EC.

[59] EHealth Network, Guidelines on ePrescriptions Dataset for Electronic Exchange under Cross-border Directive 2011/24/EU of 18 November 2014, available at ec.europa.eu.

and ePrescriptions. In the period 2012-2014, this network established a set of common objectives to assess the added value and benefit of eHealth solutions and to promote interoperability between national practitioners' prescriptions.[60]

Secondly, the "*European Innovation Partnership on Active and Healthy Ageing*" also shares common features with the OMC. Formally launched in 2012, it can be seen as a platform for cooperation, which belongs to the general framework of European Innovation Partnerships.[61] It pursues a three-part goal: to improve the health and quality of life of Europeans with a focus on older people, to support the long-term sustainability and efficiency of health and social care systems, and to enhance the competitiveness of EU industry through business and expansion in new markets. On the whole, this partnership looks much more like an in-depth process of exchanges between experts rather than a proper process of coordination. It works through Action Groups, an assembly of partners committed to work on specific issues related to ageing, by sharing knowledge and expertise with their peers, giving added value to their national and local experience and identifying gaps that need to be filled at the European level. Six actions groups have been set up thus far on: adherence to prescription, fall prevention, functional decline and frailty, integrated care, independent living solutions, and age friendly environments.[62]

V. Conclusion

This brief and non-exhaustive presentation of the OMC in the field of health care leads to two conclusions. Given the diversity of coordination practices and the recognition of a specific legal basis for coordination in Art. 168 TFEU, it is no longer relevant to consider a single, proper "OMC" in the field of health care. It is more consistent with reality – and with actual institutional practice – to speak of several processes of coordination, which include some key features of the OMC as it was defined 15 years ago. Therefore, it is more relevant to consider the OMC as a general toolbox that can be used flexibly, in order to substantiate and to give a concrete enforcement to the EU's supporting competences, as defined in Art. 6 TFEU. This raises a more general issue, which remains un-

[60] These general objectives were identified in a Communication COM(2012) 736 final of 16 December 2012 from the Commission, *eHealth Action Plan 2012-2020. Innovative healthcare for the 21st century*. They refer to general considerations, such as improving chronic disease and multimorbidity (multiple concurrent disease) management and strengthening effective practices for prevention and promotion of good health, increasing sustainability and efficiency of health systems though innovation, enhancing patient/citizen-centric care and citizen empowerment and encouraging organizational changes, fostering cross-border healthcare, health security, solidarity, universality and equity and improving legal and market conditions for developing eHealth products and services.

[61] Communication COM(2012) 83 final of 29 February 2012 from the Commission, *Taking forward the strategic implementation plan of the European innovation partnership on active and healthy ageing*.

[62] See the general presentation on the dedicated webpage: ec.europa.eu.

solved: how can the EU formalize and substantiate its coordinating or ancillary competences that do not formally allow measures of harmonization (and therefore the enactment of binding legal norms) but which are nevertheless central to giving the EU a social dimension – a process still unfinished? There is certainly still a long and winding path before the values of social market economy – emphasized as a foundation of the EU, in Art. 3, para. 3, TEU – are translated into concrete rights for citizens.[63]

[63] Art. 3, para. 3, TEU reads: "The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance. It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child. It shall promote economic, social and territorial cohesion, and solidarity among Member States".

ARTICLES
SPECIAL SECTION – POLICY COORDINATION IN THE EU: TAKING STOCK OF THE OPEN METHOD OF COORDINATION

ORGANISING SOFT GOVERNANCE IN HARD TIMES – THE UNLIKELY SURVIVAL OF THE OPEN METHOD OF COORDINATION IN EU EDUCATION POLICY

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ABSTRACT: The introduction of the OMC brought a new template for organising EU governance and EU social and economic policy coordination. This *Article* looks into how the OMC template for organising governance became practice and developed over time in the education sector. Soft governance under the label OMC has had considerable impact on the approach to common decision-making in EU education policy. The OMC template enabled European level policy makers to enter into issues that had largely been off limits to the EU. The actors, especially the Directorate General Education and Culture (DG EAC), used the OMC format to work around the considerable national sensitivity of education. This way of organising governance was normalised as an appropriate approach to cooperation. The substantive effects on Member States' policy and policy output are, on the other hand, limited. Hence, the functional effectiveness cannot explain the survival of the OMC education. Yet, the soft coordination organised under the heading "Education and Training 2010/2020" survived because the practices incrementally gained legitimacy and became routine. The organisation of governance based on the OMC also became the platform upon which the sector could defend and profile its contribution to European integration. Despite the fact that the OMC label was no longer considered a fashionable and effective organisational template on the EU governance scene, the education sector upheld these governance arrangements.

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KEYWORDS: governance – open method of coordination – education – European Union – organisational change – institutionalisation.

I. INTRODUCTION

Political organisation impacts who has access to political decision-making, the weight given to decision-making premises, the interests and perspectives that are attended to and subsequently the very content of collective decisions and their distributional effects.[1] The same goes for the way in which collective decisions are implemented and put into effect.[2] Hence, it is key to study how the organisations of political administrative systems come about, change, survive or even die. Hence, we turn our attention to "organisation structure", i.e. the formal, normative structure containing the expectations that define who is meant to do what, how and when.[3] In addition, such formal structures can develop into institutions when organisations take on informal cultures and practices that are taken for granted and have a value in their own right.

Although political orders in established democracies tend to be upheld by a grid of formal organisations, these organisations change, be it through grand reforms or piecemeal incremental adjustments.[4] Political-administrative organisations at the European supranational level are especially interesting for the study of new organisations and emerging institutions. They are part of the unfolding experiment of organising the governance architecture of the European Union. The early "inventions", the European Commission (Commission) especially, have since their establishment proven fairly resilient. New organisations have continuously been added to the EU. This is especially the case with European agencies as newcomers in the EU regulatory space.[5] One of the episodes that brought new templates for organising EU governance took place when the EU launched a new approach to EU social and economic policy coordination and the in-

[1] M. EGEBERG, *An Organisational Approach to European Integration: Outline of a Complementary Perspective,* in *European Journal of Political Research*, 2004, p. 199 *et seq.*; J.G. MARCH, J.P. OLSEN, *The Institutional Dynamics of International Political Orders*, in *International Organization*, 1998, p. 943 *et seq.*; J.P. OLSEN, *Change and Continuity – An Institutional Approach to Institutions of Democratic Government*, in *European Political Science Review*, 2009, p. 3 *et seq.*

[2] C. KNILL, D. LIEFFERINK, *Environmental Politics in the European Union: Policy-making, Implementation and Patterns of Multi-level Governance*, Manchester: Manchester University Press, 2007.

[3] M. EGEBERG, Å. GORNITZKA, J. TRONDAL, *Organization Theory – An Organizational Approach to Governance*, in C. ANSELL, J. TORFING (eds), *Handbook on Theories of Governance*, Cheltenham: Edward Elgar, 2016, p. 32 *et seq*.

[4] J.G. MARCH, J.P. OLSEN, *Organizing Political Life: What Administrative Reorganization Tells us about Government* , in *American Political Science Review*, 1983, p. 281 *et seq*.

[5] M. EGEBERG, J. TRONDAL, *EU-level Agencies: New Executive Centre Formation or Vehicles for National Control?*, in *Journal of European Public Policy*, 2011, p. 868 *et seq.*; E. VOS, *Reforming the European Commission: What Role to Play for EU Agencies?,* in *Common Market Law Review*, 2000, p. 1113 *et seq*.

troduction of the OMC.[6] The Lisbon European Council set up the OMC as a brand with the following four elements as its main characteristics: 1) identifying and defining common goals for the Union with specific timetables for achieving them; 2) establishing indicators and benchmarks for assessing progress towards the goals; 3) translating common objectives to national and regional policies taking into account national and regional differences; and 4) engaging in periodic monitoring, evaluation and peer review organised as mutual learning processes.[7] In the case of the OMC education governance arrangements developed in a way that stayed close to the core elements of the original template coined in the Lisbon strategy.

Since the early proliferation of OMC-like governance arrangements in several different sectors these arrangements have been following different development trajectories.[8] This *Article* looks into how the OMC template for organising governance became practice and developed over time as a case of organisational change in European governance of the education sector. The analysis turns our attention to the origins of these governance arrangements and the question of what sustains them and how they evolve over time. In line with institutional perspective on organisations it seems clear that if we want to know whether organised governance arrangements will survive, we have to conceptualise and explain organisational change itself.[9] Consequently, the idea is to explore how this OMC arrangement as a way of organising governance in the field of education survived when similar constructions in other policy sectors were to a large extent abandoned, or swallowed by neighbouring governance arrangements as EU governance entered more turbulent times. The aim is to come closer to an understanding of the factors that affect organisational survival and the conditions that allow some governance arrangements to be sustainable and others not. Accordingly, this *Article* asks: to what extent did the OMC in the field of education survive and what factors have been central to shaping its development? The analysis starts out by outlining four theoretical perspectives on organisational change that can assist us in making sense of organisational change and survival of the OMC education and then extracting some general lessons from this particular case. It then identifies the context and historical roots of EU education policy and the development trajectory the OMC education as a governance architecture has undergone from the turn of the century when the structures for policy

[6] J. Zeitlin, *The Open Method of Coordination in Action: Theoretical Promise, Empirical Realities, Reform Strategy*, in J. Zeitlin, P. Pochet (eds), *The Open Method of Coordination in Action: The European Employment and Social Inclusion Strategies*, Brussels: P.I.E. Peter Lang, 2005; p. 447 *et seq*.

[7] European Council Conclusions of 23-24 March 2000.

[8] B. Laffan, C. Shaw, *Classifying and Mapping OMC in Different Policy Areas*, 29 July 2005, www.eunewgov.org.

[9] K. Thelen, *Institutional Change in Advanced Political Economies*, in *British Journal of Industrial Relations*, 2009, p. 471 *et seq*.

coordination began up to current practices that still embody the main organisational ideas launched under the label "OMC".[10]

This *Article* is based on a case study of the practice of policy coordination in EU research and education policy concluded in 2007, the findings from several studies conducted on the OMC in education as well as updated documentary evidence on how the OMC is practiced currently.[11]

II. Theories of organisational change and survival

An organisational approach to European integration focuses on individual actors' organisational context in order to account for their behaviour, interests and identities. In his third footnote to organisational change, James G. March argues that theories of organisational change are primarily different ways of describing theories of action in organisations, not different theories.[12] This implies that we can draw on theories of organisational action in order to make sense of how organisations come about, change, disappear or gain a life of their own. Below four arguments about organisational change and survival drawn from organisation theories are outlined.

II.1. Functional imperatives: organisational survival "on delivery"

A functional-instrumental perspective assumes that change occurs through functional adaptation. In the case of organising European governance the argument is that European integration needs regulation and coordination to deliver on its core integrative goals, i.e. adjustment to the main objectives of the integration project. New organisational arrangements will reflect the basic needs and functional solutions to overcome collective action problems.[13] The actors' consideration with *functional efficiency* determines the choice and design of organisations. Moreover, history is efficient in the sense that arrangements that do not "deliver" will be rearranged or replaced. Change is driven by changes in the problems that governance arrangements are designed to tackle – from the point of view of this perspective organisations are, after all, functional imperatives.[14] That organisations have functions is reasonable and fairly well documented in the study of political order. Referring to these functions as an *account* for the estab-

[10] This section builds on Å. Gornitzka, *The Lisbon Process: A Supranational Policy Perspective*, in P. Maassen, J.P. Olsen (eds), *University Dynamics and European Integration*, Dordrecht: Springer, 2007, p. 155 *et seq.*; Å. Gornitzka, *The European Governance of Education Policy: Crisis, Collisions and Sectoral Defence*, in J. Nixon (ed.), *Hlgher Education in Austerity Europe*, London: Bloomsbury, 2017, p. 47 *et seq*.

[11] Å. Gornitzka, *The Lisbon Process*, cit., p. 155 *et seq.*

[12] J.G. March, *Footnotes to Organizational Change*, in *Administrative Science Quarterly*, 1981, p. 563 *et seq*.

[13] J. Tallberg, *Explaining the Institutional Foundations of European Union Negotiations*, in *Journal of European Public Policy*, 2010, p. 633 *et seq*.

[14] *Ibid*.

lishment and change of such organisation is, however, not satisfactory. As argued by Paul Pierson, there are obvious limits to the rational design of organisations.[15]

II.2. Power perspective: survival as political battle

One of these limits concerns the question of power in design and change. Within this perspective, institutional choice reflects the power constellations in a political order. This argument can be used to explain how EU governance arrangements come about and take their form. For example, the EU has established an extensive "Eurocracy" outside of the Commission hierarchy, including over 30 European agencies and a number of networks of national regulatory authorities. Their establishment has been explained with reference to the politics of institutional choice in the EU, explaining why EU policymakers create agencies in some policy areas, while opting for looser regulatory networks in others. The design of the EU's governance arrangements is driven not by functional imperatives but by political considerations related to distributional conflict and the influence of supranational actors.[16] This perspective takes on board the fairly well established idea from organisational studies: organisations and the very structure that they consist of reflect the relative power of actors with different interests. Organisations in a political order are in this respect not "neutral" but "the mobilization of bias".[17] Power and influence are not equally distributed and stable over time. Organisations are a collection of coalitions and when the coalitions change and their power base is in flux, organisations can change. Hence, it is asymmetrical power relationships and bargaining that shape the design of governance arrangements. Powerful actors initiate new organisations or reform existing organisations to further their interests. The distributive implications of organisations are the primary concern. Organisations are structured to favour the most resourceful actors and in this respect organisations are mirrors of power.[18]

II.3. Institutionalisation and survival

According to institutional theory we can expect organisations to take on the properties of institutions. They develop action rules and practices that are embedded in a structure of meaning (that explains and justifies these rules and practices) and a structure of

[15] P. Pierson, *The Limits of Design: Explaining Institutional Change,* in *Governance*, 2000, p. 475 *et seq.*

[16] T. Idema, D.R. Kelemen, *New Modes of Governance, the Open Method of Co-ordination and other Fashionable Red Herring*, in *Perspectives on European Politics and Society*, 2006, p. 108 *et seq.;* R.D. Kelemen, A.D. Tarrant, *The Political Foundations of the Eurocracy*, in *West European Politics*, 2011, p. 922 *et seq.*

[17] E.E. Schattschneider, *The Semisovereign People. A Realist View of Democracy in America*, Hindsdale: Dryden Press, 1961, p. 71.

[18] J.G. March, *Footnotes to Organizational Change*, cit., p. 563 *et seq.*; J. Tallberg, *Explaining the Institutional Foundations*, cit., p. 633 *et seq*.

resources that makes it possible to act according to the rules.[19] Organisations will over time tend to take on a life of their own and become "living institutions".[20] Some modes of action within organisational settings become codified, standardised and "taken for granted". This reduces uncertainty and ambiguity, as well as dependence on functional efficiency or powerful coalitions that uphold organisational settings. There is less need to justify resources and patterns of conduct within these organised settings as actors follow a logic of appropriateness rather than a logic of consequentiality.[21] According to an institutional perspective, institutional arrangements will be path dependent and cannot be easily changed according to shifts in political will and power constellations, deliberate design and reorganisation, or by environmental "necessities".[22] As maturity and density of institutional structures grow over time, they gain operational autonomy and become institutionalised, infused with value "beyond the technical requirement of the task at hand",[23] becoming "a relatively enduring collection of rules and organized practices. Embedded in structures of meaning and resources that are *relatively invariant* in the face of turnover of individuals and *relatively resilient* to the idiosyncratic preferences and expectations of individuals and changing external circumstances".[24]

Such insights underline how the organisation of governance can be relatively insulated and "sticky". Yet it does not mean that governance arrangements are static. First, they are more vulnerable in the earlier stages of their life cycle when codes of conduct and meaning are less settled, that is, organisational "age" matters (the "liability of newness").[25] In the context of European integration, new governance architectures are established on top of an already established set of national political orders, based on the idea of national sovereignty and national sovereign institutions. We can expect such organisational arrangements to create stickiness, making it difficult for new ways of organising governance to develop independently.[26] In sum, new organisations are not likely to survive and develop a life of their own. In particular it has been argued that the degree of national sensitivity of a policy area is a particularly relevant framework condi-

[19] J.G. MARCH, J.P. OLSEN, *Rediscovering Institutions: The Organizational Basis of Politics*, New York: Free Press, 1989; J.G. MARCH, J.P. OLSEN, *Elaborating the "New Institutionalism"*, in R.A.W. RHODES, S. BINDER, B. ROCKMAN (eds), *The Oxford Handbook of Political Institutions*, Oxford: Oxford University Press, 2006, p. 3 *et seq*.

[20] B. LAFFAN, *Becoming a "Living Institution": The Evolution of the European Court of Auditors*, in *Journal of Common Market Studies*, 1999, p. 251 *et seq*.

[21] J.G. MARCH, J.P. OLSEN, *Elaborating the "New Institutionalism"*, cit., p. 3 *et seq*.

[22] J.G. MARCH, J.P. OLSEN, *Rediscovering Institutions*, cit.

[23] P. SELZNICK, *Leadership in Administration: A Sociological Interpretation*, New York: Harper & Row, 1966.

[24] J.G. MARCH, J.P. OLSEN, *Elaborating the "New Institutionalism"*, cit., p. 3 (emphasis added).

[25] M.A. HAGER, J. GALASKIEWICZ, J.A. LARSON, *Structural Embeddedness and the Liability of Newness among Nonprofit Organizations*, in *Public Management Review*, 2004, p. 159 *et seq*.

[26] P. PIERSON, *The Limits of Design*, cit., p. 490.

tion.[27] Yet if new governance architectures survive the early stages, we can expect them to adapt incrementally. Radical change will only occur at "critical moments" of overt performance failure and crisis. These are occasions for questioning normative and causal beliefs, as well as the effectiveness and legitimacy of existing governance arrangements, upsetting fundamental understandings of what constitutes appropriate problems and solutions, resource distribution and legitimate actors in a policy domain. Performance crisis is thus a key determinant for de-institutionalisation.[28] Interventions and changes that are unacceptable at other times become possible in times of performance and legitimacy crises.[29] Similar arguments have been put forward to account for how the EU appears to be responding to the failures of incremental reforms by taking new steps to expand the scope and intensity of integration, e.g. in the governance of Europe's Economic and Monetary Union.[30]

II.4. Institutional perspective – Survival by riding a fashion wave

Finally, also building on institutional scholarship, a theory of organisational change as diffusion and isomorphism shifts the analytical focus to external pressures for change stemming from institutional environments and organisational fields. Changes in the organisation of governance, including establishing new governance arrangements can be explained by fashions and fads, i.e. widely held ideas and norms on how to organise modern governance arrangements.[31] Under conditions of ambiguity and uncertainty, legitimacy-seeking organisations will adhere to cultural rules and cognitive templates within the wider institutional environment. Structures and procedures associated with modernity appear as pressure waves, as short-term organisational fashions[32] or long-term, deep trends with global reach.[33]

[27] Å. Gornitzka, *Networking Administration in Areas of National Sensitivity – The Commission and European Higher Education*, in A. Amaral, P. Maassen, C. Musselin, G. Neave (eds), *European Integration and the Governance of Higher Education and Research*, Dordrecht: Springer, 2009, p. 109 *et seq.*

[28] C. Oliver, *The Antecedents of Deinstitutionalization*, in *Organization Studies*, 1992, p. 563 *et seq*.

[29] J.P. Olsen, *Democratic Government, Institutional Autonomy and the Dynamics of Change*, in *West European Politics*, 2009, p. 439 *et seq*.

[30] Å. Gornitzka, *The European Governance of Education Policy*, cit., p. 47 *et seq.*; E. Jones, R.D. Kelemen, S. Meunier, *Failing Forward? The Euro Crisis and the Incomplete Nature of European Integration*, in *Comparative Political Studies*, 2016, p. 1010 *et seq*.

[31] E. Abrahamson, *Managerial Fads and Fashions – The Diffusion and Rejection of Innovations*, in *Academy of Management Review*, 1991, p. 586 *et seq.*; J.W. Meyer, B. Rowan, *Institutionalized Organizations – Formal Structure as Myth and Ceremony*, in *American Journal of Sociology*, 1977, p. 340 *et seq.*; P.S. Tolbert, L.G. Zucker, *Institutional Sources of Change in the Formal Structure of Organizations: The Diffusion of Civil Service Reform, 1880-1935*, in *Administrative Science Quarterly*, 1983, p. 22 *et seq*.

[32] E. Abrahamson, *Managerial Fads and Fashions*, cit., p. 586 *et seq*.

[33] J.W. Meyer, B. Rowan, *Institutionalized Organizations*, cit., p. 340 *et seq*.

III. The OMC in time and context

In the early years of the history of European integration education policy was firmly based on the idea of closed national systems, founded on the basic principle that the particular character of education systems in the Member States should be fully respected, while co-ordinated interaction between education, training and employment systems should be improved.[34] While vocational training was identified as an area of Community action in the Treaty of Rome in 1957, education was formally recognised as an area of EU competence with the Treaty of Maastricht. The Treaty of Maastricht granted a complementary/supporting role to the EU – the legal instruments available for EU action in the field were limited to the so-called "incentive measures" and recommendations – in short no harmonisation of the laws and regulations of the Member States. Education policy was among the areas where Member States were unwilling to give up power and competence to the EU. The educational domain touched the heart of politics and national identity[35] and national welfare regimes.[36] From the mid-1980s, especially with the establishment of the first Erasmus programme, mobility within and between national education systems became a focus area of the Commission and Member State cooperation. Interest in educational cooperation was triggered by the work to complete the Single Market by 1992 and the idea of European citizenship. From the mid-1990s until the turn of the century, EU Member States and the Commission showed signs of broadening their ambitions, increasing the range and level of common action. When the student mobility programme Erasmus was revamped and renamed the Socrates programme in 1994, it signalled an accentuation of the involvement of the *subnational* level of European integration in the educational domain.[37] The educational institutions gained more responsibility in the activities created by the programme. This represented a certain European "crack" in national education systems. Moreover, this period saw an increase in the ambition of the EU to encourage joint learning by students from different national backgrounds and to develop European curricula – an area that had traditionally been extremely nationally sensitive. Later on, the inclusion of Central and Eastern Europe in the student mobility programme greatly expanded the geographical reach of EU education cooperation. In sum cooperation ambitions in the area of education increased over the years and this policy domain was to some extent institutionalised.[38] The European agenda for education also put greater weight on economic rationales for education policy, a development that also was

[34] J. Huisman, M. Van der Wende, *On Cooperation and Competition*, Bonn: Lemmens, 2004.

[35] Y.N. Soysal, D. Strang, *Construction of the First Mass Education Systems in Nineteenth-century Europe*, in *Sociology of Education*, 1989, p. 277 *et seq*.

[36] M.R. Busemeyer, C. Trampusch, *The Political Economy of Collective Skill Formation*, Oxford: Oxford University Press, 2012.

[37] J. Huisman, M. Van der Wende, *On Cooperation and Competition*, cit.

[38] H. Walkenhorst, *Explaining Change in EU Education Policy*, in *Journal of European Public Policy*, 2008, p. 567 *et seq*.

noticeable at the national level in several EU Member States.[39] The EU paid administrative and political attention to education policy – in the committees of the European Parliament, the relevant Council of Ministers' configuration and notably in the administrative structure of the Commission. Yet, the transfer of legal competences to EU institutions did not match these ambitions and capacities.[40] Evidently, the legal and financial means of governance nation states had at their disposal completely dwarfed the EU's capacity for action in education. As education systems remained a national prerogative in the eyes of the electorate, the legal basis and political attention of EU institutions and EU leaders placed education at the margins.[41] Nonetheless, the EU built up a tradition for dealing with the educational sector and especially vocational training (where mutual recognition of professional degrees did have a basis in EU law) and with respect to student mobility. The EU education policy arena was not entirely empty. On this basis new governance arrangements were built at the turn of the century.

This is important for understanding what happened when the EU embarked on the so-called Lisbon strategy in 2000.[42] The Lisbon process is a landmark for European education policy: when EU heads of state publicly stated the EU's ambition to become the most competitive knowledge-based economy in the world, this positioned education in the interface with the EU's economic and social policy. Education received attention in Lisbon as part of a much larger agenda and political project. The Lisbon strategy expressed greater coordination expectations, not only between territorial levels but also across sectors, i.e. an opportunity for horizontal integration of policy sectors that had operated independently of each other. The Lisbon strategy defined the whole knowledge and skills area as a necessary component of an economic and social reform strategy. The Commission's Directorate General Education and Culture (DG EAC) pushed the education sector's contribution to this strategy and the visibility of the education sector as a whole. The reference the Lisbon Spring Council in 2000 made to the OMC also opened a procedural way forward for how the education sector could organise in a different way, i.e. a new governance template to match the new ideas about the EU's transition to the knowledge economy.

The Lisbon European Council invited the education ministers of the EU Member States to formulate future goals for the education sector and work towards the modernisation of education systems across Europe. The Lisbon summit sought to address challenges of globalisation and the new knowledge-driven economy.[43] The goals for ed-

[39] Å. GORNITZKA, P. MAASSEN, *National Policies Concerning the Economic Role of Higher Education*, in *Higher Education Policy*, 2000, p. 225 *et seq*.

[40] E. BEUKEL, *Educational Policy: Institutionalization and Multi-Level Governance*, in S.S. ANDERSEN, K.A. ELIASSEN (eds), *Making Policy in Europe*, London: Sage, 2001, p. 124 *et seq.*

[41] Å. GORNITZKA, *The European Governance of Education Policy*, cit., p. 57 *et seq.*

[42] European Council Conclusions of 23-24 March 2000.

[43] *Ibid.*, paras 25-27.

ucation agreed upon as part of the Lisbon strategy were so broad that they left the entire policy domain open. In 2001 three strategic objectives were adopted that concerned quality and effectiveness of education, access to education and opening up national education and training systems to society and "the wider world".[44] This was turned into a 10-year work programme containing 13 specified objectives.[45] The Commission prepared the documents and the Education Council quickly agreed on these strategic goals. The goals that education ministers agreed on hardly touched any overtly controversial or sensitive issues. Nonetheless, the establishment of OMC education indicates a change of attitude towards European coordinating efforts among European Ministers of Education. The main elements of the inception and construction of the governance architecture are as follows.

III.1. The birth of OMC education: the European Commission's administration as facilitator

The Commission's DG EAC was central in the process of setting up the OMC. Without DG EAC's organisational capacity and attention attached to the OMC this organisational innovation would not have been included in the governance arrangements of EU education policy. DG EAC translated the template coined in the European Council's conclusions and started constructing the committee/working group structure, a framework of benchmarks, goals and indicators, as well as the format for how Member States could report on their progress. Hence, the inception of the OMC into EU education policy was from the very start marked by the active role of the Commission's DG. DG EAC acted as procedural and ideational entrepreneur for creating and maintaining OMC. The national experts that served on OMC working groups were for the most part from national ministries of education. This brought the Commission close to national political-administrative leadership in some key areas of education policy. In addition, over 30 different social partners and stakeholder organisations were invited by the DG EAC to be part of the working groups.[46] The sector's transnational and administrative networks were brought together under the umbrella of the OMC governance architecture. They gathered in Brussels and in Member States for peer learning activities in most areas of education policy, such as access to education, approaches to teaching and learning basic skills, funding and organisational issues, counselling, information and communication technology and so on. The core actors in the

[44] European Council Conclusions of 23-24 March 2001.

[45] Cf. Council and Commission, *Detailed work programme on the follow-up of the objectives of education and training systems in Europe*, 14 June 2002, publications.europa.eu. The Work Programme was endorsed by the European Council (European Council Conclusions of 15-16 March 2002).

[46] Most notably European level associations such as Union of Industrial and Employers' Confederations of Europe (UNICE), European Trade Union Committee for Education (ETUCE)/Education International, European School Heads Association, European Parents' Association, European University Association, National Union of Students in Europe.

field populated the new governance site. This enhanced and expanded the European networks of national administrations and stakeholders.

III.2. Dealing with Member States' sensitivity and the politics of education policy

From early 2004 two other parallel processes, the intergovernmental process towards establishing the European Higher Education Area ("The Bologna Process") and the EU's "Copenhagen Process" for vocational education and training, were added in order to include the whole range and forms of education. From then on the OMC process in education was referred to as "Education and Training 2010" (ET 2010).[47] Despite its non-EU status and the fact that the Commission was initially not invited to join in decision-making, the Bologna Process was an unprecedented initiative in the history of European integration and (higher) education and a surprising procedural innovation in European governance of higher education.[48] This demonstrated that cooperation around common objectives was possible even in nationally sensitive areas and this format gave the sector's own political leaders the room to control the process themselves. In this way, Ministers of Education gained experience in coordination practices that had been unthinkable only a decade earlier. The same has been observed with respect to cooperation in the area of education qualifications.[49]

The political agreement, anchored in the Education Council and legitimised by the European Council, on the content of the new cooperation was at the root of this development.[50] This agreement was somewhat unexpected, given the sensitive nature of the education domain and the historical legacies in this sector with respect to the will and interests of national education ministers in EU cooperation. Moreover, another external event that cushioned the national sensitivity of education policy came from the shock of the publication of the Programme for International Student Assessment (PISA) 2000 comparative study of school children's basic skills, which was felt especially in several

[47] Communication COM(2003) 685 final of 11 November 2003 from the Commission, *"Education & Training 2010": The success of the Lisbon Strategy hinges on urgent reforms (Draft joint interim report on the implementation of the detailed work programme on the follow-up of the objectives of education and training systems in Europe)*.

[48] P. Ravinet, *From Voluntary Participation to Monitored Coordination: Why European Countries Feel Increasingly Bound by Their Commitment to the Bologna Process*, in *European Journal of Education*, 2008, p. 353 *et seq*.

[49] M. Elken, *New EU Instruments for Education: Vertical, Horizontal and Internal Tensions in the European Qualifications Framework*, in *Journal of Contemporary European Research*, 2015, p. 69 *et seq*.

[50] 2006 Joint Interim Report 2006/C 79/01 of the Council and the Commission of 14 February 2006 on progress under the "Education & Training 2010" work programme, *Modernising Education and Training: A Vital Contribution to Prosperity and Social Cohesion in Europe*.

national Ministries of Education.[51] As argued elsewhere, the Member States' response to the ET 2010 and OMC template was also coloured by the challenge of coordinating employment policies.[52] Prior to the Lisbon European Council, the European Employment Strategy (EES) had already included lifelong learning as an area of cooperation.[53] National Ministers of Education were nudged towards defending the educational domain. Under the EES, decisions with implications for core educational issues were not decided by European ministers of education, but by national ministers running the employment portfolios, and prepared by DG Employment and not DG EAC. The skills and educational "elements" of the EES were then also followed up nationally (in the National Action Plans) primarily by the ministries of labour, not the ministries of education. The OMC process became a way of reclaiming European cooperation in the area of lifelong learning from the EES and fending off the invasion of the labour market/employment perspective of the educational policy turf. In addition, DG EAC had worked extensively on a lifelong learning agenda already from the mid-1990s.[54] This agenda had been subject to a long consultation process with Member States and stakeholders. The establishment of OMC education could then be read as defence of a sector enacted by the core European institutions in the field of education.[55]

III.3. Change and reorganisation

In 2005 the OMC structure was partly reorganised and new areas of attention were included.[56] Two new organisational elements were added that further institutionalised the OMC: a high level group (consisting of representatives of national administrations) charged with maintaining stronger links to national administrations and producing input on the reporting processes, and a large ET 2010 coordination group, that also included the social partners. A new governance site was undoubtedly being institutionalised, although not all elements were normalised equally.

[51] See e.g. Organisation for Economic Co-operation and Development (OECD) and United Nations Educational, Scientific and Cultural organization (UNESCO) Institute for Statistics, *Literacy Skills for the World of Tomorrow. Further Results from PISA 2000. Executive Summary*, 2003, www.oecd.org.

[52] Å. Gornitzka, *The Lisbon Process*, cit., p. 155 *et seq.*; Å. Gornitzka, *The European Governance of Education Policy*, cit., p. 47 *et seq.*

[53] P. Pochet, *The Open Method of Coordination and the Construction of Social Europe: a Historical Perspective*, in J. Zeitlin, P. Pochet (eds), *The Open Method of Coordination in Action*, cit., p. 37 *et seq.*

[54] Å. Gornitzka, *The Lisbon Process*, cit., p. 155 *et seq.*

[55] Å. Gornitzka, *The European Governance of Education Policy*, cit., p. 47 *et seq.*

[56] See the clusters on Modernisation of higher education, on Teachers and trainers in Vocational Education and Training, on Making best use of resources, on Maths, Science and Technology, on Access and social inclusion in lifelong learning, on Key competencies, and ICT, on Recognition of learning outcomes, Adult learning, and Lifelong guidance policy network. Most of these clusters were a continuation of the working groups that had been established in the infancy of the OMC (see Å. Gornitzka, *The European Governance of Education Policy*, cit., p. 47 *et seq.*).

In this period – half way into the Lisbon strategy – the OMC approach to European integration came under fire.[57] The OMC was no longer in fashion. Yet, unlike some of the other OMCs that had been established, the OMC education survived this "public attack". Notably, the governance approach of the OMC education – soft coordination based on peer learning and subtle "naming shaming and faming" through benchmarks and reporting – was not effective in terms of attaining the common and country specific goals. With one major exception: increasing the number of graduates in maths, sciences and engineering. There was little evidence to suggest that practicing the OMC and coordinating policies in this way had a demonstrable impact on national education policy and the national organisation of education governance.[58] In terms of progress towards common goals, the governance arrangement had failed to deliver. Nonetheless, several of the elements of the OMC arrangements increasingly showed signs of institutionalisation in this consolidation phase. The OMC education had survived "the liability of newness".

The quantified aspects of the OMC process were deeply institutionalised, such as the role of the Standing Group on Indicators and Benchmarks (consisting of Member States' experts and organised by the DG EAC). Indicator development also gained a strong position when a specific Centre for Research on Education and Lifelong Learning (CRELL) was established as part of the Commission's Joint Research Centre. The legal basis for Eurostat's education statistics was strengthened. To this day, CRELL continues to monitor the EU 2020 headline targets in education and training and conducts analysis to feed policy decisions at the EU level.[59]

Reporting from the implementation of ET 2010 became fairly well established as a routine. Since 2011, DG EAC published an annual Education and Training Monitor with in-depth country reports.[60] However, the organisation and practices for policy learning and peer review was an ongoing experiment. The adjustment of the OMC architecture implied that DG EAC set up eight "clusters" that corresponded to key priorities identified in the ET 2010 work programme. Member States could participate in each cluster according to their own priorities. Each cluster was coordinated by an official from DG EAC. The format for the clusters implied organising learning through Peer Learning Activities, the so-called PLAs.[61] Toward the end of the first decade of the 21st century this governance site had thus settled to become a fairly regularised activity at the EU level, extending its activities to the national level with the PLAs and national reporting.

[57] For a summary of this period, see L. THOLONIAT, *The Career of the Open Method of Coordination: Lessons from a "Soft" EU Instrument*, in *West European Politics*, 2010, p. 93 *et seq*.

[58] N. ALEXIADOU, B. LANGE, *Europeanizing the National Education Space? Adjusting to the Open Method of Coordination (OMC) in the UK*, in *International Journal of Public Administration*, 2015, p. 157 *et seq*.

[59] Å. GORNITZKA, *The European Governance of Education Policy*, cit., p. 54 *et seq*.

[60] See Commission, *European Training Monitor*, ec.europa.eu.

[61] B. LANGE, N. ALEXIADOU, *Policy Learning and Governance of Education Policy in the EU*, in *Journal of Education Policy*, 2010, p. 443 *et seq*.

The impact on national education policy and its goals was very difficult to document even ten years into the existence of this governance arrangement at the European level.[62] Despite this, the governance arrangement expanded its territory. In addition to the progress report on the common European objectives in education and training, the groups provided input to a string of Commission communications and recommendations on education and training. This implies that a connection was established between the regular policy making processes of the EU (production of EU official policy documents) and the processes upheld by the OMC governance architecture. We see this especially in the efforts to establish a stronger EU take on educational standards through the European Qualifications Framework (EQF),[63] adopted in 2008 and in the guidelines for European Quality in Vocational Education and Training (EQAVET).[64] The same applies to higher education policy and the work on the modernisation agenda of the European universities.[65]

Yet, the development of the OMC as governance architecture was not entirely untouched by events outside the educational policy domain. Most importantly, in June 2010, EU leaders adopted "Europe 2020" as the new strategy for creating jobs and promoting "smart, sustainable and inclusive growth".[66] This implied a major overhaul of the governance architecture. One major change is particularly relevant here: the introduction of the European Semester in 2011, which combines governance instruments in economic and social governance of the EU within one single annual policy coordination cycle.[67] The aim of the European Semester was to improve economic policy coordination in the Union and push towards implementation of the EU's economic rules.[68] The

[62] N. Alexiadou, D. Fink-Hafner, B. Lange, *Education Policy Convergence Through the Open Method of Coordination: Theoretical Reflections and Implementation in "old" and "new" National Contexts*, in *European Educational Research Journal*, 2010, p. 345 *et seq.*; B. Lange, N. Alexiadou, *Policy Learning and Governance of Education Policy in the EU*, cit., p. 443 *et seq*.

[63] European Qualifications Framework, www.cedefop.europa.eu.

[64] M. Elken, *New EU Instruments for Education: Vertical, Horizontal and Internal Tensions in the European Qualifications Framework*, in *Journal of Contemporary European Research*, 2015, p. 69 *et seq*.

[65] Å. Gornitzka, *Bologna in Context: A Horizontal Perspective on the Dynamics of Governance Sites for a Europe of Knowledge*, in *European Journal of Education*, 2010, p. 535 *et seq*.

[66] Communication COM(2010) 2020 final of 3 March 2010 from the Commission, *Europe 2020: A Strategy for Smart, Sustainable and Inclusive Growth*.

[67] J. Zeitlin, B. Vanhercke, *Socializing the European Semester? Economic Governance and Social Policy coordination in Europe 2020*, in *Economic Governance and Social Policy Coordination in Europe*, *2020*, Swedish Institute for European Policy Studies Report no. 7, 2014, www.sieps.se.

[68] The Stability and Growth Pact (SGP) and the Macroeconomic Imbalance Procedure (MIP), see Regulation (EC) 1466/97 of the Council of 7 July 1997 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies; Regulation (EC) 1467/97 of the Council of 7 July 1997 on speeding up and clarifying the implementation of the excessive deficit procedure; Regulation (EU) 1174/2011 of the European Parliament and of the Council of 16 November 2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area; Regulation (EU) 1176/2011 of the European Parliament and of the Council of 16 November 2011 on the prevention and correction of macroeconomic imbalances.

European Semester set-up gave a clearer and stronger role in policy coordination to the Commission – not only would the Commission set out the EU priorities for the coming year in the autumn of each year (Annual Growth Survey) but it would also publish its opinions on each country's draft budgetary plan. Moreover, the Commission took on a new role in issuing Country-Specific Recommendations (CSRs) for budgetary and economic policies, after each country has presented its Stability/Convergence Programme and its National Reform Programme, which set out the Member States' budgetary and economic policies respectively. The Council discusses these recommendations, amends them if deemed appropriate and adopts them.[69] The CRS was a complement to the governance structures set up on the basis of the OMC.[70]

These changes represented a fairly dramatic transformation of the whole context within which the OMC education operated. The response of the education sector, however, shows the resilience of the established approach and the continued defence of the education sector's position through the use of the OMC governance architecture. As elaborated and evidenced elsewhere, these changes in circumstances and the crises experienced in the EU at the time, did not translate into a threat to the governance arrangements erected under the umbrella of OMC education.[71] The OMC retained its shape as a major approach to education policy at the EU level, but the label as such was not used in the same way as in the first decade of cooperation. The OMC governance approach largely survived the crises that defined the EU working environment in this period. However, the reference to the "OMC" in the EU education policy documents in recent years is minimal. The label has more or less vanished from the documents as the legitimising reference but the structures set up under the OMC are still in operation, though under the label "Education and training 2020". The EU "presentation of self" on the DG EAC websites is as follows:

> "Each EU country is responsible for its own education and training systems. EU policy is designed to support national action and help address common challenges, such as ageing societies, skills deficits in the workforce, technological developments and global competition. Education and training 2020 (ET 2020) is the framework for cooperation in education and training. ET 2020 is a forum for exchanges of best practices, mutual learning, gathering and dissemination of information and evidence of what works, as well as advice and support for policy reforms".[72]

[69] Z. DARVAS, Á. LEANDRO, *The Limitations of Policy Coordination in the Euro Area Under the European Semester*, in *Bruegel Policy Contribution*, 2015, bruegel.org.

[70] L. VOLANTE, J. RITZEN, *The European Union, Education Governance and International Education Surveys*, in *Policy Futures in Education*, 2016, p. 988 *et seq*.

[71] The full argument can be found in Å. GORNITZKA, *The European Governance of Education Policy*, cit., p. 54 *et seq.*

[72] Commission, *Strategic framework – Education & Training 2020*, ec.europa.eu.

The sector specific work programme is showcased here as well as how this is compatible with the continued national sensitivity of the education policy sectors. The approach matches citizen preference for European integration in this area.[73] The Commission presents this governance architecture as a forum where mutual learning is the key mechanism for implementing the common political agenda. This underlines how implementation of the agenda (after 20 years of operation) depends on national and transnational expertise to engage in EU level joint activities and policy guidance. This is mutual learning among experts coming together through processes organised by the OMC format. Moreover, the interaction with national policy is practiced in an OECD-style peer review manner.[74] "Peer counselling brings together experienced peers from a small number of national administrations to provide advice to a Member State in designing or implementing a policy. It provides a forum for collectively brainstorming solutions to specific national challenges in a participatory workshop format".[75] At the EU level, the education sector still upholds its arrangements set up under the OMC heading. In substantive terms, the position of the education sector in the overall political project of the EU is maintained. The response of the education sector to the Europe 2020 strategy illustrates this quite succinctly. One of the seven "flagship initiatives" for growth and employment of the Europe 2020 agenda was "Youth on the Move", aiming to "improve the performance and international attractiveness of our higher education institutions and raise the quality of all levels of education and training in the EU, combining both excellence and equity".[76] Moreover, the 2020 strategy proposed five headline targets, amongst them one centred on two key issues in education policy: cutting the school dropout rate from 15 per cent to below 10 per cent and increasing the number of young people with a university degree or diploma from less than a third to at least 40 percent. In May 2010 the EU's education ministers agreed to recommend the numerical average targets that the Commission had proposed as part of the Europe 2020 strategy, although these had met with considerable resistance from several Member States.[77] Traditional territorial conflict lines between the supranational and the national approach to education policy can easily arise even after decades of cooperation through the OMC governance architecture. Yet, within the framework of the European semester, the Commission did issue country specific recommendations, which frequently encompassed recommendations on education policy. In fact, all country recommendations

[73] Å. GORNITZKA, *Executive Governance of European Science – Technocratic, Segmented, and Path Dependent?*, in L. WEDLIN, M. NEDEVA (eds), *Towards European Science: Dynamics and Change in Science Policy and Organization*, Cheltenham: Edward Elgar, 2015, p. 83 *et seq*.

[74] M. MARCUSSEN, *Multilateral Surveillance and the OECD: Playing the Idea Game*, in K. ARMINGEON, M. BEYELER (eds), *The OECD and European Welfare States*, Cheltenham: Edward Elgar 2002, p. 13 *et seq*.

[75] Commission, *Strategic framework*, cit.

[76] Communication COM(2010) 2020, cit.

[77] Å. GORNITZKA, *The European Governance of Education Policy*, cit., p. 47 *et seq*.

that the Commission issued in 2013 contained recommendations on education, with the exception of the recommendation for the Netherlands, urging the Member States in many cases to exempt education from budget cuts.[78]

The numerical target connected to education also implied that the EU has called for a continued or increasing investment in education. This is not entirely self-evident given the financial difficulties most of the Member States were faced with in the wake of the financial and economic crisis. The Commission's approach to this was not to abandon the ideational support for continued and renewed emphasis on the education and skills sector. Moreover, the Commission used the EU education governance established under the ET 2020 and the crises to further underline the need for EU concerted action and a common strategy. This echoes the approach that was used when the OMC was first introduced and the first Education and Training programme was agreed upon. The sector's input in the Europe 2020 strategy actively referred to both skills and education as the main solution to Europe's economic predicament and the need for investment in the education sector. The assertiveness of the sector seems to have been enhanced in the context of the Europe 2020 strategy, and DG EAC has continued to emphasise what education can do for the economy and the labour market. The sector-specific governance arrangements are still a modus operandi. Even in the overall atmosphere of crisis – political, economic and financial – actors inside or outside the education policy domain did not question or deinstitutionalise this governance site.

Education has over the past 15 years become more strongly embedded as an instrument for other social and economic goals, and the call for stronger horizontal coordination between sectors has intensified.[79] Whether this can be attributed to the establishment of OMC governance architecture is questionable. However, it can be argued that in the long term the content of the EU level education agenda changed and the education sector used the governance arrangements set up under the heading of the OMC to pursue an agenda that related and adjusted the education sector's contribution to a general economic growth and jobs agenda of the EU. With this governance architecture, education could make its contribution more explicit, much more so than it could have done if the EU approach had been conducted entirely under the traditional student mobility programmes. Overall the governance site established on the basis of the OMC survived the economic crisis and has been further strengthened as part of the Europe 2020 strategy. The Council of the EU in its Education, Youth, Culture and Sports (EYCS) formation defends the position of education. European education ministers stated for instance in 2014 commenting on the European Semester that the EU should aim for increasing the visibility

[78] S. Bekker, *EU Economic Governance in Action: Coordinating Employment and Social Policies in the Third European Semester*, in *Tilburg Law School Research Papers*, 2014, p. 8 *et seq*.

[79] H. Walkenhorst, *Explaining Change in EU Education Policy*, in *Journal of European Public Policy*, 2008, p. 567 *et seq*.

of education and training in the 2014 European Semester. In so doing, the Council agreed to focus on the following issue: working toward the modernisation of education and training and the development of skills through long-term investment.[80]

The extent to which European discourse results in national action remains questionable – from 2000 to 2013 the EU average spending on education dropped, as did spending in a majority of the Member States.[81] The overall country recommendations as part of the European Semester have indeed commented on and criticised this fact. The same can be seen in the comments and communications from DG EAC specifically. The sector-oriented OMC governance architecture has also spurred the call for more cross-sectoral coordination – i.e., not only coordination between EU and national action but also horizontal coordination. This is very much in line with the Post New Public Management approach to governance[82] – linking, for instance, policy for inclusiveness in the EU to education policy with calls for reforms, priorities and investment in the education sector more closely aligned with the employment sector.[83] Here we see the same pattern as when the OMC was first introduced to the education sector, that is, the tension and interaction with labour market policy as the neighbouring policy domain.[84] A similar dynamic can be detected with respect to the education sector's response to the refugee crisis as well as the fight against extremism radicalisation of youth in Europe. The Commission and the Council in the education sector responded to the crisis by offering the use of education and training strategies for integrating recently arrived immigrants.[85] This emphasis is added to the adjusted work programme of ET 2020 from 2015 and it makes this link explicit. The education ministers and DG EAC argue that the emphasis on employability, skills and innovation – long term topics under the ET 2010/2020 programmes – can not only contribute to increasing social mobility and equality, but can also be used to prevent radicalisation.[86]

[80] Council Conclusions of 24 February 2014, *Efficient and Innovative Education and Training to Invest in Skills – Supporting the 2014 European Semester*.

[81] Commission, *Education and Training Monitor 2016*, ec.europa.eu; Commission, Directorate General Education and Culture, *Education and Training Monitor 2017 – Summary*, 2017, ec.europa.eu.

[82] T. Christensen, P. Lægreid, *Democracy and Administrative Policy: Contrasting Elements of New Public Management (NPM) and post-NPM*, in *European Political Science Review*, 2011, p. 125 *et seq*.

[83] Draft Resolution of the Council and of the Representatives of the Governments of the Member States, meeting within the Council, on promoting socio-economic development and inclusiveness in the EU through education: the contribution of education and training to the European Semester 2016, data.consilium.europa.eu.

[84] Cf. Commission, *New Skills Agenda for Europe*, ec.europa.eu; Å. Gornitzka, *The European Governance of Education Policy*, cit., p. 47 *et seq*.

[85] Å. Gornitzka, *The European Governance of Education Policy*, cit., p. 59 *et seq*.

[86] See Council Conclusions of 24 November 2015 on Culture in the EU's External Relations with a Focus on Culture in Development Cooperation, p. 4.

III.4. Soft governance as practices without a label

In sum, the organisation of soft governance in the education sector has withstood the test of time for over twenty years. Progress on the EU benchmarks continues to be assessed annually in the Education and Training Monitor. Hence, the use of quantitative indicators is still prominent. The Commission and the Council have agreed on common priorities in the area of education and training for 2020. The focus is now on the effective implementation of those priorities, in particular through the set of ET 2020 Working Groups that are still in operation. Peer review is being practiced, as we have seen, along with *in situ* peer learning in the so-called PLAs that are taking place, attracting participants at the national level, and involving national administrations, experts and stakeholder groups.

Use of the concept of OMC, however, has fallen considerably in recent years in official EU documents on education. References to OMC peaked in 2014 (a search for documents in Eur-Lex with the search terms "education AND OMC" returned 57 documents for 2014 but dropped to only 5 documents for 2017).[87] The practices that were inserted into the EU education policy arena have thus been sustained but without the explicit reference to the OMC.

IV. Conclusions: why is OMC education an unlikely survivor?

As we have seen, the governance arrangement of the OMC education had a considerable impact on how cooperation in the field of education took place at the European level and it continues to do so. How can this be explained? This *Article* has pointed to possible perspectives drawn from the study of organisational change. One perspective argues that organisation of governance arrangements depends on functional performance; another power-oriented perspective argues that survival depends on power constellations that uphold or contest such arrangements. Positions drawn from institutionalist scholarship are also relevant. One argues that organisations survive because they incrementally gain legitimacy and become routinized for actors once they have passed the critical infant stage or withstood crises that challenge their existence. If organisations on the other hand are adjusting to larger organisational trends and fashions then survival depends on the ebb and flow in popularity of organisational templates.

The new governance architecture under the label OMC broke through the "glass ceiling" of national sensitivity in this policy area. In this respect, the soft approach to governance matched the need and norms of appropriate behaviour among policy makers in national administrations and EU institutions. The organisation of soft governance under the label OMC has certainly changed the approach to common decision-making in the area of education in the EU and enabled European level policy makers to enter into policy issues that had largely been off limits to the EU. This does suggest a func-

[87] The search form is available at eur-lex.europa.eu.

tional match to the needs of the sector. Yet, does this imply that a functional explanation carries weight? The obvious counter observation in this case is the overt lack of substantive impact on national policy and national policy output. Progress towards the goals set in the ET 2010 and ET 2020 has either been negligible or at best hard to attribute to the activities that take place within the OMC governance architecture. The OMC in this respect did not "deliver" and should – according to the functional perspective – have been dismantled. We need additional explanations as to why this organisational structure has survived for almost two decades despite the lack of delivery.

There are elements here that are better understood as the consequence of the power constellations in the education sector. First of all, the inception of the OMC in education was perceived as fitting the Member States preferences, i.e. Member States that guard their national prerogative but prefer low and soft levels of joint action despite "national sensitivities" in education.[88] This is not merely a relevant perspective on the power constellations along the vertical axis, i.e. between the Member States and the agenda for integration driven by the supranational Commission; there is also clear evidence of the role played by power constellations along the horizontal axis, i.e. between sectors. Members States' education policy actors defended and promoted the education sector faced with challenges especially from the employment policy and labour-market portfolios. Here they used the OMC governance architecture as the platform to defend what they saw as their education policy territory. The Commission's administration joined in this battle and facilitated this defence.[89] Yet, the politics of organisational change and survival does not entirely account for the persistence of this governance site – especially the role of the Commission's DG EAC supports an institutional argument. The organisational change as fashion and fad was an element in the inception of the OMC education and helped define it as the appropriate method. DG EAC – especially its civil servants with OMC experience from other Commission DGs – took part in spreading and interpreting the OMC concept. Yet, the subsequent dynamic of OMC education did not "follow the fashion". The practices were not abandoned even though the OMC label went out of style and in some ways fell into disrepute. DG EAC's administration continued to devote organisational capacity to the OMC and was able to build on existing organisational structures and procedures to fill the OMC template with new routines and practices that proved to be resilient even in turbulent times. The DG's civil servants carefully nurtured and adjusted the OMC arrangements and saw it through its infancy and the challenges that arose in its first and second decades. This established OMC education as the appropriate and legitimate approach to cooperation in a nationally sensitive area and these arrangements, voluntary for the Member States, were at-

[88] R. De Ruiter, *Variations on a Theme. Governing the Knowledge-based Society in the EU through Methods of Open Coordination in Education and R&D*, in *European Integration*, 2010, p.157 *et seq.*

[89] Å. Gornitzka, *The European Governance of Education Policy*, cit., p. 47 *et seq*.

tached to the existing procedures and programmes and were able also to latch onto parallel processes of coordination in the EU education policy arena. In this respect, the case of the OMC education is marked by increasing institutionalisation and normalisation of practices of coordination. The OMC-like organisational arrangements and practices proved to be relatively resilient to changes in external circumstances, even in times of considerable political turbulence in the EU.

ARTICLES
SPECIAL SECTION – POLICY COORDINATION IN THE EU: TAKING STOCK OF THE OPEN METHOD OF COORDINATION

THE CULTURAL OPEN METHOD OF COORDINATION: A NEW BUT DIFFERENT OMC?

EVANGELIA PSYCHOGIOPOULOU*

ABSTRACT: This *Article* focuses on the use of the OMC in the field of culture – a particularly sensitive policy field for the Member States. The cultural OMC was conceived as a flexible, non-binding and voluntary framework for structuring Member States' cultural cooperation and fostering the exchange of best practice. The analysis seeks to deepen the understanding of the cultural OMC as a framework for policy coordination. It examines the origins of the process and the arguments that supported it, as well as its formation, operation and development through three distinct cycles (2008-2010; 2011-2014; 2015-2018). It also places the cultural OMC within the broader framework of EU cultural policy and juxtaposes it with other coordination mechanisms pertaining directly or indirectly to culture. In doing so, the *Article* investigates the specificities of the cultural OMC and testifies to the broader set of processes that currently seek to coordinate Member States' culture policies.

KEYWORDS: open method of coordination – culture – policy coordination – cultural cooperation – European Agenda for Culture – Work Plans for Culture.

I. INTRODUCTION

Cultural policy is a policy area that has been considered outside the norm of mainstream EU law and policy for years. This is due to the fact that the main responsibility to

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design and implement cultural policies remains with the Member States. Pursuant to Art. 6 TFEU, culture belongs to the policy areas where the Union has competence only "to carry out actions to support, coordinate or supplement the actions of the Member States". More concretely, Art. 167, para. 1, TFEU declares that "[t]he Union shall contribute to the flowering of the cultures of the Member States while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore". Art. 167, para. 2, TFEU provides that EU cultural activity "shall be aimed at encouraging cooperation between Member States and, if necessary, supporting and supplementing their action" in specified areas. A limited set of instruments, laid down in Art. 167, para. 5, TFEU, can be used for that purpose, without harmonization of the laws and regulations of the Member States. Together with the Member States, the EU is also expected to foster cultural cooperation with third countries and international organizations. Moreover, through Art. 167, para. 4, TFEU, it is mandated to "take cultural aspects into account in its action under other provisions of the Treaties, in particular in order to respect and to promote the diversity of its cultures".

The EU's limited cultural mandate has mainly triggered the adoption of support measures for the promotion of transnational cultural cooperation. However, since 2008, cultural cooperation at the EU level has diversified: Member States have agreed to work together by establishing and participating in a cultural OMC. The aim of this *Article* is to deepen the understanding of the cultural OMC as a framework for policy coordination. Since its formal inception by the 2000 Lisbon European Council[1] and the advent of "new governance", the OMC has been closely associated with policy dialogue and deliberation, the exchange of experience and good practice, policy experimentation and learning from peers.[2] Does the OMC in the field of culture manifest such characteristics? How has the cultural OMC been configured and applied and what is its relationship with policy coordination? To answer these questions, the analysis is structured as follows. Section II explores the main arguments that have framed institutional discourse on the desirability of a cultural OMC. Section III discusses the origins of the cultural OMC and institutional positioning on the issue. Section IV focuses on the operation and evolution of the cultural OMC through three distinct cycles: 2008-2010; 2011-2014; 2015-2018. Section V examines the relationship of the cultural OMC to policy coordination, whereas sections VI and VII place it within the broader framework of EU cultural policy and jux-

[1] European Council Conclusions of 23-24 March 2000.

[2] See indicatively T. *Börzel, European Governance: Negotiation and Competition in the Shadow of Hierarchy*, in Journal of Common Market Studies*, 2010, p.* 191 *et seq.*; S. Borrás, K. Jacobsson, *The Open Method of Co-ordination and New Governance Patterns in the EU*, in *Journal of European Public Policy*, 2004, p. 185 *et seq.*; D. Hodson, I. Maher, *The Open Method as a New Mode of Governance: The Case of Soft Economic Policy Co-ordination*, in *Journal of Common Market Studies*, 2001, p. 719 *et seq.*; C.F. Sabel, J. Zeitlin, *Learning from Difference: The New Architecture of Experimentalist Governance in the EU*, in *European Law Journal*, 2008, p. 271 *et seq*.

tapose it with other coordination mechanisms pertaining to culture. The analysis ends, in section VIII, with some concluding remarks on the future of the cultural OMC and policy coordination in the field of culture.

II. The "promises" of the cultural OMC

Existing literature on the OMC and new modes of governance more broadly has expounded on the normative debate that has surrounded the emergence and intensification of policy coordination processes at EU level, following the 2000 summit of the European Council in Lisbon. Institutional and academic proponents of new modes of governance have praised the OMC on various grounds.[3] First, the OMC was seen as offering a middle road between greater supranational action in particular policy areas and Member States' desire to retain control over these areas, thus striking a "constitutional compromise".[4] Secondly, it was hailed for its ability to improve policy effectiveness. EU decision-makers, it has been argued, do not always have the necessary expertise to deal with complex or sensitive issues and often lack knowledge on the implementation of rules and policies by national ministries. Resting on the activities of expert committees and working groups, the OMC could respond to knowledge deficiencies and help connect with national administrations mostly through their involvement in reporting. Moreover, the OMC could encourage participants to share information and good practice and thus foster mutual learning, in support of improved policy-making.

The "democratic potential" of new governance in general and of the OMC in particular was predicated upon the prospect of a more participatory system of EU policy-making, with substantive civil society involvement and a decentralized, open and transparent deliberative process. This has gone hand in hand with claims about the contribution of the OMC to the strengthening of the social dimension of European integration (as the new governance debate mostly focused on the use of the OMC in the social domain). This "(social) policy promise" of the OMC underlined the ability of the process to engage and commit the Member States to the pursuit of a common reform agenda, which would be implemented with appropriate respect for national differences.

The birth of the cultural OMC did not involve such a rich normative academic debate. For one thing, there has been no academic excitement about the use of the OMC in the area of culture. Instead, and with limited exceptions, the process has gone unno-

[3] On this see M. Dawson, *New Modes of Governance*, in D.M. Patterson, A. Södersten (eds), *A Companion to European Union Law and International Law*, Chichester: Willey Blackwell, 2016, p. 149.

[4] J. Zeitlin, *Social Europe and Experimentalist Governance: Towards a New Constitutional Compromise?*, in G. De Búrca (ed.), *EU Law and the Welfare State: In Search of Solidarity*, Oxford: Oxford University Press, 2005, p. 213.

ticed in academic circles.[5] On the other hand, the European institutions reflected on the application of a cultural OMC, echoing some of the earlier aspirations on the OMC and new governance. The Commission, in particular, which advanced the idea of a cultural OMC with its Communication on a European agenda for culture in a globalizing world (European Agenda for Culture), raised arguments on the desirability of a cultural OMC from the perspective of policy effectiveness and participation.[6] The Commission observed for instance that the OMC "enables Member States to learn from one another" and "strengthen[s] [...] policy making" by "creat[ing] an additional stimulus" for national policies.[7] It also took the position that the OMC allows policy actors "to have a voice at the European level that they would not otherwise have".[8] A similar stance was adopted by the European Parliament, which emphasized the significance of the involvement of local and regional authorities in the process.[9]

Such narratives were supplemented by arguments about the suitability of the OMC specifically for the field of culture in a way that was reminiscent of the "constitutional compromise". The Commission stressed that the OMC was "an appropriate framework for cooperation in the field of culture" – a policy field "where competence remains very much at Member State level" but where "the EU has a unique role to play".[10] This was associated with an understanding of the OMC as capable of "tak[ing Member States'] cooperation one step further" – the "(cultural) policy promise" of the OMC.[11] According to the Commission, such enhanced cultural cooperation of the Member States should ultimately serve as a means for "further developing their [cultural] policies".[12]

The attention paid to the "cultural policy promise" of the OMC had a dual purpose: first, to assure Member States that their autonomy in devising and implementing their domestic policies on culture would not be undermined, and secondly, to highlight the usefulness of the process for Member States' cultural policies. The emphasis on enhanced *cultural cooperation* as opposed to *policy coordination* in the field of culture

[5] See, in particular, K. MATTOCKS, *Co-ordinating Co-ordination: The European Commission and the Culture Open Method of Coordination*, in *Journal of Common Market Studies*, 2018, p. 318 *et seq.*; K. MATTOCKS, *A Few Sparks of Inspiration'?: Analysing the Outcomes of European Union Cultural Policy Coordination*, in *European Politics and Society*, 2017, p. 20 *et seq.*; E. PSYCHOGIOPOULOU, *The "Cultural" Open Method of Coordination. Is It Up to the Job?*, in *International Journal of Media and Cultural Politics*, 2017, p. 229 *et seq.*; E. PSYCHOGIOPOULOU, *The Cultural Open Method of Coordination: A New Boost for Cultural Policies in Europe?*, in *Maastricht Journal of European and Comparative Law*, 2017, p. 264 *et seq*.

[6] Communication COM(2007) 242 final of 10 May 2007 from the Commission on a European agenda for culture in a globalizing world.

[7] *Ibid.*, p. 12.

[8] *Ibid.*

[9] European Parliament Resolution P6_TA(2008)0124 of 10 April 2008 on a European agenda for culture in a globalising world, paras 71-72.

[10] Communication COM(2007) 242, cit., pp. 3 and 12.

[11] *Ibid.*, p. 12.

[12] *Ibid.*, p. 8.

sought to overcome initial hesitancy in the Council. Attempts to this end also touched on the actual label of the process, with some Member States preferring "open method of cooperation", instead of "open method of coordination".[13] Approaching the cultural OMC as a means to support policy development at the national level also sought to convince Member States of the pertinence of the process. At the same time, it downplayed its usefulness for policy development at the EU level. Besides feeding Member States cultural policies, the cultural OMC could be used to inform EU cultural action. The absence of any concrete reference in the European Agenda for Culture to its relevance for EU-level cultural action showed reticence to consider it as a process that could usefully contribute to EU cultural policy-making. Subsequent EU documents sought to correct this by raising awareness about its relevance for the EU institutions, as will be discussed below.

III. The birth of the cultural OMC

Early discussions on the design and structure of a cultural OMC were characterised by the absence of pre-existing coordination processes operating in the framework of the EU's cultural policy. Art. 167 TFEU does not elaborate on any coordination mechanism and only refers to incentive measures (adopted by the European Parliament and the Council) and (Council) recommendations on legal instruments available for the objectives that it presents.[14] Incentive measures have traditionally taken the form of funding. As indicated above, they have sought to support transnational cultural cooperation mainly by providing financial assistance to projects carried out in partnership or through cultural networks. They have also offered operating grants to organizations with a European cultural vocation and they have funded prestige initiatives such as the *European Capitals of Culture*.[15] They have not been used to engage in cultural policy coordination at EU level.

Recommendations, a characteristic instrument of EU soft law, which is used to suggest a line of action for the Member States but without binding force, could in principle be used as a means to engage in cultural policy coordination. However, Council recommendations concerning the policy domain of culture have rarely been adopted whereas some recommendations that could be viewed from a cultural policy coordination perspective have been issued in the framework of policies other than culture (on which see section VII). Other Council documents, such as the conclusions the Council commonly adopts to express its political position on specific issues, normally invite

[13] E. Psychogiopoulou, *The Cultural Open Method of Coordination*, in E. Psychogiopoulou (ed.), *Cultural Governance and the European Union: Protecting and Promoting Cultural Diversity in Europe*, Basingstoke: Palgrave Macmillan, 2015, p. 39.

[14] See Art. 167, para. 5, TFEU.

[15] See ec.europa.eu.

Member States (either with the Commission or not) to act in certain ways.[16] However, Council conclusions on culture have not sought coordination by fixing common objectives to pursue and by setting up procedures for assessing Member States' progress towards their achievement.

The fact that the cultural OMC would not build upon or adapt existing coordination processes in the domain of culture meant that by means of the European Agenda for Culture, most Member States would meet the idea of cultural policy coordination for the first time. The need to assuage domestic authorities influenced the Commission's position on the design of the process. Its proposal in the European Agenda for Culture argued for a flexible approach: "the setting of general objectives with a light regular reporting system".[17] The Council was accordingly invited to endorse the strategic objectives that the European Agenda for Culture had identified, namely promotion of cultural diversity and intercultural dialogue; promotion of culture as a catalyst for creativity in the framework of the then Lisbon Strategy for growth and jobs;[18] and promotion of culture as a vital element in the Union's international relations. It was also invited to set priorities and to agree on a biennial reporting exercise. As part of this reporting exercise, the Commission suggested drafting a joint report with high level representatives of the Member States every two years. This should present progress across Member States toward the common objectives, on the basis of national reports submitted by the Member States, which should also discuss the involvement of stakeholders, and of local and regional authorities in the activities concerned. At EU level, input from civil society would be gathered a year preceding the joint report through a dedicated meeting.

The reaction was a reluctant one, which led rather quickly to agreement on the form that the cultural OMC would take: as cultural integration was out of question, the cultural OMC would be a "light" OMC, "tailor-made" to culture, and resonant with Member States' resolve to preserve their autonomy in cultural policy-making. Indeed, the Council endorsed the use of the OMC in the field of culture, together with the strategic objectives of the European Agenda for Culture, in a 2007 resolution. This explained that the purpose of the cultural OMC would be to "provide a flexible and non-binding framework for structuring cooperation around the strategic objectives of the European Agenda for Culture and fostering exchanges of best practices".[19] The Council thus approached the cultural OMC primarily as an instrument for *organising* Member States' *cooperation* and for facilitating sharing experiences, information and good practices, in support of *mutual learning*.

[16] See for instance Council Conclusions of 21 May 2014 on Cultural Heritage as a Strategic Resource for a Sustainable Europe; Council Conclusions on Participatory Governance of Cultural Heritage.

[17] Communication COM(2007) 242, cit., p. 12.

[18] European Council Conclusions of 23-24 March 2000.

[19] Council Resolution of 16 November 2007 on a European Agenda for Culture.

In setting priority areas for action in the period 2008-2010, the Council demonstrated its eagerness to play a key role in wider questions of system design and maintaining Member States' cultural prerogatives.[20] Member States' participation in the OMC would be voluntary. The implementation of the strategic objectives and the priority areas identified would rest on triennial cultural work plans (WPs) adopted by the Council, which would also make arrangements for the operation of the cultural OMC. The Commission could contribute to the WPs with proposals for specific actions, including actions concerning the cultural OMC, but these would need to be approved and sanctioned by the Council. The Commission would be responsible for preparing a progress report after consulting the Cultural Affairs Committee (CAC) – the Council's preparatory group on cultural affairs. The progress report should draw on information voluntarily provided by the Member States and be submitted to the Council, which could then review the cultural OMC, in cooperation with the Commission. The European Parliament, the European Economic and Social Committee and the Committee of the Regions should be kept informed of the process and more generally, of the implementation of the WP. Cultural actors and the public at large should be informed about the WP's objectives and priority actions.

IV. The operation and evolution of the cultural OMC

The 2008-2010 WP for Culture linked the OMC to the priority areas for action identified by the Council by establishing dedicated working groups (WGs).[21] According to the WP, participation of Member States in the WGs would be voluntary. The WGs should be made up of experts from Member States which should "ideally have a mix of operational and policy experience in the relevant field at a national level".[22] They could decide to invite external experts to contribute and they should report to the CAC on their progress.[23] The Commission was expressly asked to facilitate the activities of the WGs through the launch of studies and logistical and secretarial support. It was also invited to report on developments mid-term and at the end of the period covered by the WP.

Four WGs, with 22 to 27 participating Member States and experts with diverse backgrounds (from national ministries, civil society and academia) operated from 2008 to 2010 – the first cycle of the cultural OMC which was rather experimental. In a 2010 report on the implementation of the European Agenda for Culture, the Commission found that the cultural OMC was "overall an effective way of cooperation in the field of culture" and "a good framework for networking and mutual learning among national

[20] *Ibid.*

[21] Conclusions of the Council and of the Representatives of the Governments of the Member States, meeting within the Council, on the Work Plan for Culture 2008-2010.

[22] *Ibid.*, Annex II.

[23] *Ibid.*

administrations".[24] However, it had proved challenging to "channel [the policy recommendations of the process] into policy making at EU and national level, and articulate the work of the groups with that of Council Presidencies and [also] the Commission".[25] On this basis, the Commission suggested focusing on "issues and outputs which [could] be taken up by Member States and the Commission in their respective fields of competence"; and "a closer articulation of the work of [the] OMC groups, the Commission and the Council".[26]

The WP for Culture for the period 2011-2014 made targeted modifications of the structure and operation of the cultural OMC.[27] Thus, the second cycle of the process involved ten WGs, linked to a revised set of policy priorities, and gathering diverse experts from 23 to 26 Member States. The WP sought to define the mandate of the WGs with more precision and listed the type of outputs envisaged for each one (e.g. analytical reports, best practice compendia, policy handbooks and so on). It also indicated that the selected topics should be addressed successively, within a period of four years, by national experts with "practical experience in the relevant field at national level" and "effective communication with competent national authorities".[28] Interestingly, the topics identified were directly connected to the strategic objectives of the European Agenda for Culture and the priorities of the Europe 2020 Strategy.[29] These links sought to specify the desired focus for the activities of the WGs and also increase the political salience of their findings.

Concerning the WGs' output, it was stressed that the WG reports should contain "concrete and useable results".[30] The Presidencies of the Council, in particular, were invited to build upon the results achieved through the organisation of meetings of senior officials from Member States' cultural ministries. The Commission and the Member States were asked to regularly consult and inform stakeholders on the implementation of the recommendations of the WGs. This marked a considerable improvement from the 2008-2010 WP which had generally invited the Commission to consult stakeholders on the implementation of the WP. In fact, the WP also made clear that in addition to external experts, the WGs could invite representatives of civil society to participate in their activities. The 2011-2014 WP thus sought to strengthen the links of the cultural OMC to civil society and also to accentuate the relevance of the WGs' findings for the Commis-

[24] Report COM(2010) 390 of 19 July 2010 from the Commission on the implementation of the European agenda for culture, p. 8.

[25] *Ibid.*

[26] *Ibid.*

[27] Conclusions of the Council and of the Representatives of the Governments of the Member States, meeting within the Council, on a Work Plan for Culture 2011-2014.

[28] *Ibid.*, Annex II.

[29] Communication COM(2010) 2020 final of 3 March 2010 from the Commission on Europe 2020, *A Strategy for Smart, Sustainable and Inclusive Growth*.

[30] Council Conclusions on a Work Plan for Culture 2011-2014, Annex II.

sion and the Member States – albeit indirectly (by inviting them to inform civil society on the implementation of the WGs' policy proposals).

In 2013, the Commission requested an external evaluation of the cultural OMC as a tool for implementing the European Agenda for Culture and the WPs.[31] This was corroborated in 2014 by a Commission survey on the implementation of the 2011-2014 WP.[32] The external evaluator found that overall there was widespread support for the way the OMC worked.[33] Participation in the process mostly led to benefits in opportunities for mutual learning, the exchange of best practice and the building of knowledge networks. Potential weaknesses included overly generalized outputs (although the changes made under the second cycle of the cultural OMC had improved focus), variations in the level of participants' expertise, limited interaction with civil society, limited research capacity and weak dissemination of the WGs' findings. Still, the external evaluation concluded that the cultural OMC was a *sustainable* process: only incremental improvements were needed; its fundamental structure should be kept intact.[34]

As a result, the WP 2015-2018 made no significant changes to the design and operation of the cultural OMC.[35] It revised priority areas for action, provided for a new list of WGs (all of which were connected to the European Agenda for Culture and the Europe 2020 Strategy) and invited the Commission to supplement the work of the WGs with studies and peer learning exercises and to support the widest possible participation of stakeholders in the process.[36] It also invited the Member States to consider the results of the WP (and thus also the results of the cultural OMC) when developing policies at the national level; the Presidencies of the Council to convene informal meetings to discuss the uptake of the OMC outputs; and the Commission to disseminate information on the OMC findings in as many languages as appropriate, including digitally.

Thus, it is clear that the 2011-2014 and 2015-2018 WPs sought to streamline the cultural OMC, but without major alterations that could undermine its flexibility. Although attention was drawn to the importance of disseminating and considering results at the national and European levels, the emphasis has been on ensuring modalities that

[31] See ECORYS, *Evaluation of the Open Method of Coordination and the Structured Dialogue, as the Agenda for Culture's Implementing Tools at European Union Level*, Final Report, July 2013, ec.europa.eu.

[32] On this see Report COM(2014) 535 final of 25 August 2014 from the Commission on the implementation and relevance of the Work Plan for Culture 2011-2014, p. 9.

[33] ECORYS, *Evaluation of the Open Method of Coordination*, cit., p. 10.

[34] *Ibid.*, p. 48.

[35] Conclusions of the Council and of the Representatives of the Governments of the Member States, meeting within the Council, on a Work Plan for Culture 2015-2018.

[36] Member States' culture ministers subsequently agreed to create a WG to explore how culture and the arts can promote migrant and refugee social integration through increased participation in cultural and societal life. See Conclusions of the Council and of the Representatives of the Governments of the Member States, meeting within the Council, *Amending the Work Plan for Culture (2015-2018) as Regards the Priority on Intercultural Dialogue*.

could facilitate the exchange of experience and mutual learning. There has been no attempt to "harden" procedures.

V. Cultural policy coordination or cultural cooperation?

According to the Commission's survey on the implementation of the 2011-2014 WP, Member States had "a [...] mixed opinion on the role played by the work plan [and thus also by the cultural OMC] on *coordinating* cultural policy at EU level, with 67% [of the Member States] considering that coordination had improved, and 25% considering that it had not [emphasis added]".[37] Relevant percentages are disclosed in the Commission's 2014 report on the implementation and relevance of the 2011-2014 WP, which employs atypical wording. "*Coordinating* cultural policy at EU level" does not usually appear in EU documents relating to the cultural OMC.

Clearly, the cultural OMC is not a demanding policy coordination process. In fact, it is characterised by arrangements that for the most part do not match conventional traits of the OMC as a framework for policy coordination, even if, as rightly noted in the literature, there is significant variation in the architecture and constitutive elements of different OMC processes.[38] The cultural OMC lacks the key features of what is usually depicted as an "ideal" OMC model, namely the OMC foreseen by the Lisbon European Council for turning the Union into "the most competitive and dynamic knowledge-based economy in the world capable of sustainable economic growth with more and better jobs and greater social cohesion".[39] According to the conclusions of the Lisbon European Council, the OMC – a means for "spreading best practice and achieving greater convergence towards main EU goals"[40] – consists of (i) setting guidelines for the EU combined with specific timetables for achieving the goals in the short, medium and long term; (ii) establishing, where appropriate, quantitative and qualitative indicators and benchmarks as a means of comparing best practice; (iii) translating the European guidelines into national and regional policies by setting specific targets and adopting measures; and (iv) periodic monitoring, evaluation and peer review organized as mutual learning processes.[41]

The cultural OMC does not involve any particular guidelines with goals to be attained within a specific timeframe, although the process is of course performed under the overarching framework of the European Agenda for Culture, which has set broad common objectives to guide cultural action at the EU level and the recursive revision of

[37] Commission Report COM(2014) 535, cit., p. 9.

[38] B. Laffan, C. Shaw, *Classifying and Mapping OMC in Different Policy Areas*, 29 July 2005, www.eunewgov.org.

[39] European Council Conclusions of 23-24 March 2000, cit., para. 5.

[40] *Ibid.*, para. 37.

[41] *Ibid.*

priority areas of action identified on that basis. There is accordingly no particular reform agenda, even if the common objectives of the European Agenda for Culture (and since 2011, the priorities of the EU 2020 Strategy) have had a marked influence on the topics dealt with by the WGs. Crucially, as there is no reformist agenda, there are also no benchmarks and indicators to compare and evaluate the performance of the Member States, no peer-review and no reporting on behalf of the Member States for monitoring progress made.

In its present form, the cultural OMC also lacks any concrete institutionalized follow-up mechanism. Efforts to raise the profile and visibility of the findings of the WGs through mechanisms such as the adoption of Council conclusions on cultural OMC topics should not be seen as undermining the flexibility of the process. To give an example, in 2017 the Council adopted conclusions on promoting access to culture via digital means with a focus on audience development – one of the topics tackled under the third cycle of the cultural OMC.[42] The Council conclusions made express reference to the final report issued by the WG concerned, built on some of its recommendations and directly took up others.[43] However, in suggesting a particular course of action, the Council conclusions did not commit the Member States to any process of assessing progress, through obligatory reporting or procedures for accounting for national performance. Member States may eventually be more inclined to follow the course of action put forward in the Council conclusions (than the policy recommendations contained in the WG's report) but this does not alter the features of the cultural OMC as a non-prescriptive process.

In describing what the cultural OMC is about, the Commission notes on its website:

> "Under the OMC, experts from ministries of culture and national cultural institutions meet [...] to exchange good practice and produce policy manuals or toolkits which are widely shared throughout Europe. [...] The OMC creates a common understanding of problems and helps to build consensus on solutions and their practical implementation. Through an exchange of good practice between EU countries, it contributes to improving the design and implementation of policies, without regulatory instruments".[44]

Apparently, for the Commission, the cultural OMC is primarily a process for the exchange of good practice and the production of policy output (by national administra-

[42] Council Conclusions on Promoting Access to Culture via Digital Means with a Focus on Audience Development.

[43] Such as the compilation of EU-wide voluntary guidelines for the collection and management of data on digital audiences. See WG on promoting access to culture via digital means, *Final Report on Promoting Access to Culture Via Digital Means: Policies and Strategies for Audience Development*, June 2017, publications.europa.eu, p. 45.

[44] Commission, *European Cooperation: The Open Method of Coordination*, ec.europa.eu.

tions and representatives of the sector) with the aim to share knowledge and pinpoint solutions to what are perceived to be common problems.

Existing literature reveals that policy coordination processes (and especially distinct elements of their architecture and methodology) can be underpinned by different co-ordination rationales: coordination as "convergence" and coordination as "cooperation".[45] While "cooperation" is generally considered to "work with the autonomy of states to define their policies [...] [and] promotes elective and selective learning across states, 'convergence' suggests that the process is not agnostic about what states can and ought to learn with a potential consequential reduction in policy diversity".[46]

The cultural OMC does not embody mechanisms or procedures for "coercive" or "constrained" learning. It is based on the premise that Member States' autonomy in devising and implementing cultural policy should be preserved. This is in line with the EU competences in the field of culture. Art. 167 TFEU attributes to the Union a complementary cultural competence, which ensures that Member States remain the principal actors that develop cultural policy. It also excludes the adoption of harmonizing measures and firmly proclaims respect for cultural diversity, rejecting any form of cultural assimilation. Its main driver actually resides in the promotion of Member States' cooperation. It should thus come as no surprise that "cooperation" is the paradigm that underlies the cultural OMC – not coordination as "convergence".

Seen in this light, the cultural OMC confirms that the OMC primarily targets, as a framework for policy coordination, policy areas that belong to the complementary competences of the EU.[47] It also reveals that policy coordination processes can take the form of genuine cooperation. The cultural OMC advances a particularly "light" understanding of coordination. Member States cooperate – in a systematic way and subject to the iterative revision of the WPs – in order to inform on their cultural policies and exchange good practices on issues of mutual interest. This can spur mutual learning and ultimately feed national policy but there is no mechanism in the process that is specifically meant to reduce Member States' cultural autonomy or limit policy diversity. This explains the Council's emphasis on the cultural OMC as a framework for *structured cultural cooperation* between Member States.[48]

[45] M. Biagi, *The Implementation of the Amsterdam Treaty with Regard to Employment: Co-ordination or Convergence?*, in *International Journal of Comparative Labour Law and Industrial Relations*, 1998, p. 325.

[46] K. Armstrong, *Europeanizing Social Inclusion – Theory, Concepts and Methods*, Oxford: Oxford University Press, 2010, p. 41.

[47] On this see the contribution in this *Special Section* of S. de la Rosa, *The OMC Processes in the Health Care Field: What Does Coordination Really Mean?*, in *European Papers*, 2018, Vol. 3, No 1, www.europeanpapers.eu, p. 215 *et seq.*

[48] Council Resolution on a European Agenda for Culture, para. 9.

VI. The cultural OMC in the context of EU cultural policy

Now undergoing its third cycle, the cultural OMC has irreversibly altered the configuration of EU cultural policy and the instruments it involves. A firm component of EU cultural action, it could be argued in fact that it has reached a period of relative "maturity": it sees high levels of participation by Member States[49] and delivers what it sets out to deliver, i.e. policy reports and manuals that present good practice and develop policy recommendations.[50] This corroborates the Council's statement that the cultural OMC constitutes "the main working method of cooperation among Member States".[51]

The fact that the cultural OMC forms a solid part of EU cultural policy has led to a reinforcement of its links to other instruments and processes of EU cultural policy-making. This is manifested in the *Creative Europe* programme – the Union's framework programme for support to the cultural and audiovisual sectors,[52] which provides, inter alia, financial assistance for transnational cultural cooperation projects. Throughout the different cycles of the cultural OMC, the wider thematic areas addressed can be summarized as follows: (i) cultural diversity, intercultural dialogue, accessible and inclusive culture and mobility of cultural works; (ii) skills and mobility of culture professionals; (iii) cultural and creative industries, the creative economy and innovation; and (iv) cultural heritage. The latest call for proposals for European cooperation projects highlights as priority themes for cooperation topics that were either the mandate of the cultural OMC WGs or received considerable attention.[53]

[49] With respect to the third cycle of the process, it is indicative that the WG on promoting reading in the digital environment gathered experts from 23 Member States; the WG on the development of the key competence "cultural awareness and expression", the WG on access to finance for the cultural and creative sectors and the WG on promoting access to culture via digital means experts from 25 Member States; and the WG on intercultural dialogue in the context of the migratory and refugee crisis experts from 26 Member States.

[50] See the reports produced in the framework of the third cycle of the cultural OMC at ec.europa.eu (listed together with Commission studies and reports).

[51] Council Conclusions on a Work Plan for Culture 2015-2018.

[52] Regulation (EU) 1295/2013 of the European Parliament and of the Council of 11 December 2013 establishing the Creative Europe Programme (2014 to 2020) and repealing Decisions No 1718/2006/EC, No 1855/2006/EC and No 1041/2009/EC.

[53] These are: "– Promote the transnational mobility of artists and professionals with a view to enabling them to cooperate internationally and to internationalize their careers. – Strengthen audience development as a means of improving access to European cultural and creative works and tangible and intangible cultural heritage and extend access to cultural works to under-represented groups. – Foster capacity building through innovative approaches to creation, develop and test new and innovative models of revenue, management and marketing for the cultural sectors, in particular as regards the digital shift, and developing new skills for cultural professionals. – Enhance intercultural dialogue, promote shared EU values and mutual understanding and respect for other cultures, thereby contributing to the social integration of migrants and refugees". See Commission, *Creative Europe (2014-2020), Culture Sub-programme, Call for Proposals EACEA 32/2017: Support for European cooperation projects 2018*, eacea.ec.europa.eu.

The themes addressed in the context of the Structured Dialogue (SD), the process the Commission maintains for policy dialogue with civil society, have also been aligned to those of the cultural OMC. Formally initiated with the European Agenda for Culture,[54] the SD consists of two strands: the European culture forums, organised biannually by the Commission, and specific channels for facilitating dialogue between civil society and the Commission. During the first and second cycles of the cultural OMC, representatives of the civil society platforms operating in the context of the SD participated as external experts in the WGs, encouraging input from civil society.[55] To ensure greater complementarity between the two processes and sharpen stakeholders' contribution to the cultural OMC, the themes tackled by Voices of Culture, the current framework for dialogue between civil society and the Commission,[56] were explicitly linked to the topics of the third cycle of the cultural OMC WGs, with stakeholders sharing their views and ideas with the WGs on a regular basis.

Concurrently, the cultural OMC has followed the strengthening of the socio-economic paradigm that has progressively underlined EU cultural policy. Following the European Agenda for Culture and the strategic objectives that it put forward, the contribution of culture to growth, job creation and social cohesion in Europe became more pronounced.[57] The ability of culture to provide answers to wider economic and social concerns in the EU was resolutely advanced by the European institutions, with culture gaining recognition as an area of broad policy relevance. Calls for a holistic approach that goes beyond cultural policy intensified, finding support in the opportunities offered by Art. 167, para. 4, TFEU for synergies between culture and other EU policies.

The renewed attention given to the socio-economic dimension of culture received consideration during the first cycle of the cultural OMC but was bolstered during the second and especially the third cycle of the process, which encouraged links with other policies. Indeed, many of the topics that have been addressed by the cultural OMC include themes that are not only relevant for culture but also for other policy sectors such as education and training, regional development, tourism, the EU's digitization and innovation policies, employment, social inclusion, migration and integration policies, to name but a few. This explains the steps increasingly taken by the various WGs to en-

[54] Communication COM(2007) 242, cit., pp. 11-12.

[55] See ECORYS, *Evaluation of the Open Method of Coordination*, cit., pp. 11, 16, 42.

[56] See www.voicesofculture.eu.

[57] On this see A. LITTOZ-MONNET, *Agenda-Setting Dynamics at the EU Level: The Case of the EU's Cultural Policy*, in *Journal of European Integration*, 2012, p. 505 *et seq.*; E. PSYCHOGIOPOULOU, *Cultural Mainstreaming: The European Union's Horizontal Cultural Diversity Agenda and its Evolution*, in *European Law Review*, 2014, p. 626 *et seq.*

gage with Commission Directorates-General (DGs) besides the DG for Education, Youth, Sport and Culture (EAC).[58]

The attention accorded to the socio-economic effects of culture and the connections drawn with an array of other policies are in line with the 2015-2018 WP: the guiding principles for its implementation were the "mainstreaming" of culture in other policy areas and encouraging "cross-sectorial cooperation".[59] They also reveal a strong instrumental approach to culture, based on its socio-economic and societal relevance. Both the topics selected and their treatment by the WGs point to the potential of culture to deliver a wide range of instrumental benefits, such as fostering intercultural dialogue, encouraging employment, supporting economic and social development and promoting social inclusion, amongst others.

VII. Cultural coordination outside the cultural OMC

Although the cultural OMC lacks key characteristics of the "ideal" OMC model put forward by the Lisbon European Council, other culture-related processes might possess such characteristics or engage in preliminary actions for the development of OMC tools. Novel forms of policy coordination might also be emerging, without directly building on the OMC and its attributes.

For example, the European Year of Cultural Heritage (2018, hereinafter EYCH) could play an important role in the development of standards, which is a prerequisite for policy coordination through benchmarking and the use of common indicators, in addition to ongoing efforts in the field of culture statistics, to produce comparable data across the EU and overcome differences in Member States' statistical approaches.[60] Launched in order to "encourage the [...] appreciation of Europe's cultural heritage as a shared resource", "raise awareness of common history and values", and "reinforce a sense of belonging to a common European space",[61] the EYCH involves activities at the Union, national, regional and local levels. One of the *European initiatives* of the EYCH, the "Cher-

[58] See Ecorys, *Evaluation of the Open Method of Coordination*, cit., pp. 10-11, 13, 16-17, 19. See also WG on access to finance for the Cultural and Creative Sectors, *Good Practice Report. Towards More Efficient Financial Ecosystems: Innovative Instruments to Facilitate Access to Finance for the Cultural and Creative Sectors (CCSs)*, November 2015, publications.europa.eu, p. 10; WG on promoting reading in the digital environment, *Report on Promoting Reading in the Digital Environment*, April 2016, publications.europa.eu, p. 9; WG on intercultural dialogue in the context of the migratory and refugee crisis, *Report on How Culture and the Arts Can Promote Intercultural Dialogue in the Context of the Migratory and Refugee Crisis*, March 2017, publications.europa.eu, p. 24; WG on promoting access to culture via digital means, *Report on Promoting Access to Culture Via Digital Means*, July 2017, publications.europa.eu, p. 51.

[59] Council Conclusions on a Work Plan for Culture 2015-2018, cit.

[60] See Council Conclusions on the Work Plan for Culture 2008-2010, cit.; on a Work Plan for Culture 2011-2014, cit.; on a Work Plan for Culture 2015-2018, cit.

[61] Art. 1, para. 2, of Decision 2017/864/EU of the European Parliament and of the Council of 17 May 2017 on a European Year of Cultural Heritage (2018).

ishing heritage" initiative, specifically targets "developing quality standards for interventions on cultural heritage".[62]

In the field of external cultural relations, developments following the adoption of the European Agenda for Culture have gradually but unquestionably led to the introduction of elements of policy coordination concerning the cultural activities of the Member States *vis-à-vis* third countries. In the wake of the European Agenda for Culture, which advocated a stronger role for culture in EU external relations,[63] the Council argued for a European strategy aimed at the consistent and systematic incorporation of culture into the EU's relations with third countries and international organizations.[64] The 2008-2010 WP for culture allowed for some preliminary work in this area.[65] The 2011-2014 WP (and its successor, the 2015-2018 WP) provided for joint informal meetings between senior officials of Member States' ministries of culture and of foreign affairs whereas in 2012, the Commission assembled an expert group (outside the framework of the cultural OMC) to work precisely in this area.[66]

Following the 2011 resolution of the European Parliament on the cultural dimensions of the EU's external actions, which suggested, amongst other issues, the establishment of an interinstitutional taskforce to "develop and widen coordination",[67] a preparatory action on culture in external relations was launched.[68] This took the form of an extensive mapping and consultation process that culminated in the formulation of operational recommendations for the development of an "EU strategy (that) would help to coordinate, amplify and consolidate the efforts of Member States".[69] Recommendations covered proposals for "cooperation between Member States, notably via their cultural institutes and attachés abroad, as well as across [...] civil society linkages and networks

[62] See Commission, *10 European Initiatives*, europa.eu; and ICOM, *European Initiative no 6. Cherishing Heritage: Developing Quality Standards for Intervention on Cultural Heritage*, network.icom.museum.

[63] Communication COM(2007) 242, cit., pp. 10-11.

[64] Conclusions of the Council and of the Representatives of the Governments of the Member States, meeting within the Council on the Promotion of Cultural Diversity and Intercultural Dialogue in the External Relations of the Union and Its Member States.

[65] The 2008-2010 WP provided for "meetings of senior government officials in the field of culture, including the meetings of Directors General of Culture in the Ministries of Foreign Affairs" with the objective of exchanging views and formulating recommendations "on the promotion of culture inside the EU and in its external relations" as well as promoting "cooperation between EU Member States' cultural institutions and with their counterparts in third countries". See Council Conclusions on the Work Plan for Culture 2008-2010.

[66] Commission Report COM(2014) 535, pp. 6-7.

[67] European Parliament Resolution P7_TA(2011) 0239 of 12 May 2011 on the cultural dimensions of the EU's external actions.

[68] For details see Commission, *Preparatory Action for Culture in External Relations*, ec.europa.eu.

[69] Y.R. Isar, R. Fischer, D. Helly, G. Wagner, M. Schneider, Y. Smits, *Preparatory Action "Culture in EU External Relations". Engaging the World: Towards Global Cultural Citizenship*, 2014, ec.europa.eu, p. 87.

that operate in parallel to governments".[70] They also included setting up a "coordination mechanism within the European External Action Service (EEAS) [the Union's diplomatic service] that could work across all the European Commission directorates concerned, communicating and liaising with governmental and non-governmental stakeholders as well as with civil society".[71] The Commission was further invited to consider attributing a coordinating role to the European Union National Institutes of Cultures (EUNIC),[72] which since 2006 had been providing a platform for cooperation between the cultural institutes of the Member States.

In response to the Council's request,[73] the Commission and the High Representative of the Union for Foreign Affairs, with a joint Communication in 2016, "Towards an EU strategy for international cultural relations", presented their position on a "strategic approach to culture in external relations".[74] The Communication identified strategic objectives for cultural cooperation with third countries (i.e. supporting culture as an engine for sustainable social and economic development; promoting culture and intercultural dialogue for peaceful inter-community relations; and reinforcing cooperation on cultural heritage) and made clear that the Union's role should be that of an "enabler".[75] Through coordinated action, the EU should allow relevant stakeholders to join forces: "government at all levels, local cultural organisations and civil society, the Commission and the High Representative (through EU Delegations in third countries [run by the EEAS]), Member States and their cultural institutes".[76] With the understanding that cultural external relations unfold with the engagement and support of state governments but also beyond them, a set of coordination mechanisms, implicating a wide range of actors, were suggested, including cultural focal points in EU delegations and enhanced cooperation between EU Member States, their national cultural institutes and EU delegations.

Focal points for culture, established within the EEAS network of EU delegations, engage with Member States to explore potential for "European" cultural actions in third countries.[77] Moreover, in May 2017, an Administrative Arrangement was signed between the EEAS, the Commission services (including DG EAC) and EUNIC for the development of "a concerted approach to international cultural relations", which should build

[70] *Ibid.*, p. 116.

[71] *Ibid.*, pp. 11 and 113.

[72] *Ibid.*, p. 14.

[73] See Council Conclusions on Culture in the EU's External Relations with a Focus on Culture in Development Cooperation.

[74] Joint Communication JOIN(2016) 29 of 8 June 2016 from the Commission and the High Representative of the Union for Foreign Affairs and Security Policy, Towards an EU Strategy for International Cultural Relations.

[75] *Ibid.*, p. 4.

[76] *Ibid.*, p. 12.

[77] D. HELLY, *Europe's Enabling Power: An EU Strategy for International Cultural Relations*, in *College of Europe Policy Brief series*, no. 2, 2017, www.coleurope.eu.

on regular coordination meetings, the development of cultural relations strategies and the undertaking of joint cultural activities to test forms of collaboration on the ground.[78]

Evidently, policy coordination in the field of international cultural relations takes subtle forms and it is not far-reaching or complex. Still, international cultural relations represent a field where Member States have agreed to engage in some form of policy coordination, on the basis of shared objectives and common working methods, even if policy coordination is ultimately performed in a multi-actor setting that extends beyond state governments. Here again, a "cooperation" rationale has been endorsed, in line with Art. 167, para. 3, TFEU, which states that the "Union and the Member States shall foster cooperation with third countries and the competent international oganisations in the sphere of culture". It is worth noting in this context that policy coordination in the area of international cultural relations lacks not only conventional OMC tools such as benchmarking, the use of indicators and peer review but also working groups and expert committees that meet to exchange information and good practice. Instead, other coordination instruments are used such as assigning staff members in EU delegations to reach out to the Member States for cultural purposes and the conclusion of administrative agreements between the Commission and representative bodies of Member States' cultural institutes. This demonstrates a proliferation of "cooperative" forms of policy coordination in the EU.

Having said this, outside the framework of the EU's cultural policy, there are processes with a strong cultural dimension that mirror the OMC as a framework for policy coordination. An example is the 2011 Commission Recommendation on the digitisation and accessibility of cultural material and digital preservation.[79] Adopted on the basis of Art. 292 TFEU, as part of the implementation of the Digital Agenda for Europe,[80] the Recommendation addresses various policy areas related to digitisation, such as the organisation and funding of Member States' digitisation activity, the digitisation and online accessibility of both public domain and copyrighted material, the development of Europeana (Europe's digital multilingual library, archive and museum) and digital preservation. The measures recommended to the Member States vary and include: planning and monitoring national digitisation activity, setting quantitative targets, diver-

[78] Administrative arrangement for activities to be developed by the European Union National Institutes for Culture (EUNIC) in partnership with the European Commission Services and the European External Action Service, eeas.europa.eu.

[79] Commission Recommendation of 27 October 2011 on the digitisation and online accessibility of cultural material and digital preservation. This Recommendation follows a 2006 Commission Recommendation on the same topic, which requested the Member States to inform on its implementation through national reports. See Commission Recommendation of 24 August 2006 on the digitisation and online accessibility of cultural material and digital preservation.

[80] Communication COM(2010) 245 final/2 of 26 August 2010 from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on A Digital Agenda for Europe.

sifying and expanding funding sources through public-private partnerships and the use of the Structural (and Investment) Funds,[81] optimizing digitisation capacity by pooling digitisation efforts and promoting cross-border collaboration, improving access to digitised public domain material and its widest possible re-use for non-commercial and commercial purposes, ensuring that Member States' public domain masterpieces become accessible through Europeana by 2015, and reinforcing strategies for long-term preservation of digital cultural material.

The Recommendation provides for a system of reporting on the measures taken by the Member States toward implementation. Reporting takes place on a bi-yearly basis through national reports, which detail the measures adopted in connection to the Recommendation (and in connection to the Council conclusions of 10 May 2012, which set an indicative roadmap for priority actions for national authorities).[82] Member States' reports feed a Commission progress report, drafted by DG for Communications Networks, Content and Technology (CONNECT). Notably, DG CONNECT is assisted in its monitoring task by the Expert Group on Digital Cultural Heritage and Europeana (DCHE).[83] This expert group, which consists of Member States' representatives, meets twice a year with the purpose, besides offering policy advice, to review Member States' digital cultural heritage policies, and provide a forum for the exchange of information and best practices concerning Member States' policies and strategies on digitization, online accessibility of cultural material and digital preservation.

A similar coordination process was launched on the back of the 2005 European Parliament and Council Recommendation on film heritage and the competitiveness of related industrial activities.[84] Adopted on the basis of Art. 173 TFEU (industry), this Recommendation has sought to improve the conditions of conservation, restoration and exploitation of film heritage and at the same time remove obstacles to the development and competitiveness of the European film industry. Recommended measures included, amongst others, the systematic collection of cinematographic works, their cataloguing and indexing, preservation and restoration measures, making deposited works accessible for educational, cultural, research or other non-commercial uses of a similar nature in compliance with copyright and related rights, the promotion of professional training in fields of film heritage, the designation of bodies for carrying out relevant tasks, and their support for the purposes of exchanging information and coordinating their activities at national and European levels.

[81] For details see Commission, *European Structural and Investment Funds*, ec.europa.eu.

[82] Council Conclusions of 10-11 May 2012 on the Digitisation and Online Accessibility of Cultural Material and Digital Preservation.

[83] Commission Decision C(2017) 1444 of 7 March 2017 setting up the Expert Group on Digital Cultural Heritage and Europeana, ec.europa.eu.

[84] Recommendation of the European Parliament and of the Council of 16 November 2005 on film heritage and the competitiveness of related industrial activities.

The Recommendation urged Member States to inform the Commission every two years of the measures taken in response to its provisions. DG CONNECT monitors progress and considers the need for further action through "implementation reports". It also facilitates the exchange of good practices in the context of the Cinema Expert Group (and particularly its sub-group on film heritage), which brings together national ministries responsible for film heritage issues, film archives and museums as well as other relevant institutions.[85]

The coordination processes discussed do not formally appear as "OMC" processes in EU related documents and they are more demanding than the cultural OMC. For one thing, they involve reporting on national measures, and monitoring and evaluation through dedicated Commission reports and in cooperation with expert groups established for policy advice and review. The configuration of the coordination process on digital heritage has to be seen in the light of the TFEU Article that provides the legal basis for its founding act. Art. 173 TFEU contains a provision that specifically refers to coordination and also describes the main features of the OMC but without qualifying them as such. Art. 173, para. 2, TFEU states: "The Member States shall consult each other in liaison with the Commission and where necessary, shall coordinate their action. The Commission may take any useful initiative to promote such coordination, in particular initiatives aiming at the establishment of guidelines and indicators, the organisation of exchange of best practice, and the preparation of the necessary elements for periodic monitoring and evaluation […]".

The Recommendation on the digitisation and accessibility of cultural material and digital preservation, which is based on Art. 292 TFEU, was adopted under the framework of the Digital Agenda for Europe. This brought together a range of EU policies in order to "maximize the social and economic potential of [Information and Communication Technologies] ICT",[86] but those most relevant for the Recommendation appear to be the EU's industrial policy (Art. 173 TFEU) and the internal market (Art. 114 TFEU). Whereas Art. 173 TFEU refers to key elements of the OMC, as already mentioned, nothing precludes the European institutions from creating coordination processes which are similar to the OMC and which are not called "OMC" in areas of shared competence (such as the internal market). Such "OMC-like processes" have in fact been used as a complement to EU legislative standards in areas of shared competence or as a possible route forward where political agreement on binding rules proved impossible.[87] Relevant coordination processes can touch upon culture, given its transversal policy relevance

[85] Established pursuant to Communication COM(2001) 534 of 26 September 2001 from the Commission on certain legal aspects relating to cinematographic and other audiovisual works. For details see ec.europa.eu.

[86] Communication COM(2010) 245 final/2, cit., p. 3.

[87] On this see, G. De Búrca, J. Zeitlin, *Constitutionalising the Open Method of Coordination: What Should the Convention Propose?*, *CEPS Policy Brief*, no. 31, 2003, www.ceps.eu, p. 1.

and the duty of the Union, laid down in Art. 167, para. 4, TFEU, to "take cultural aspects into account in its action under other provisions of the Treaties, in particular in order to respect and to promote the diversity of its cultures". "Action" is a substantially broad term that can encompass coordinating action.

VIII. Conclusion

The cultural OMC is a "light", flexible OMC, based on Member States' cooperation, which forms part of the larger governance architecture of the EU in the field of culture. Through the cultural OMC, Member States cooperate to exchange knowledge and experience on topics of mutual interest. The process does not commit the Member States to a shared cultural project and it does not exert pressure on domestic authorities for policy convergence. In fact, it is not defined by any tool or procedure, which could be viewed as reducing Member States' autonomy in formulating and implementing cultural policy. Rather the cultural OMC seeks to make the most of the diversity of ways the Member States devise and conduct cultural policy by identifying good practice and by formulating related policy suggestions. This does not exclude impact on Member States' policies but any such impact originates in selective and elective learning enabled by the process.[88]

Despite initial reticence in the Council and following an experimental and a streamlining phase, the cultural OMC should currently be seen as an entrenched, well-established process. The solid position it has gained in EU cultural policy-making has favoured the creation of links to other cultural policy instruments and processes – an element which arguably strengthens the coherence and consistency of EU cultural action. The process currently unfolds with an instrumental vision, which is mainly attributed to the socio-economic gains that cultural activity can yield. EU cultural policy has gradually endorsed an instrumental approach to culture, in view of the latter's potential to make a major contribution to the Union's economic and social agenda. Such an instrumental approach has permeated the cultural OMC and could become even stronger in the future.

Indeed, one should not underestimate the impact that the current debate on the future of Europe may have on culture as a policy area in general and on the cultural OMC as a cultural policy process in particular.[89] Culture stands side by side with education among the work strands of the seminal *Leaders' Agenda*, which was endorsed by the European Council on 20 October 2017 to guide discussions on ongoing challenges

[88] On this see E. Psychogiopoulou, *The Cultural Open Method of Coordination: A New Boost for Cultural Policies in Europe?*, cit., p. 264 *et seq.*

[89] See Commission, *White Paper on the Future of Europe, Reflections and Scenarios for the EU27 by 2025*, COM(2017) 2025 final.

facing the EU.[90] In underlining the importance of both education and culture for competitiveness, and the inclusiveness and cohesion of European societies, the education and culture note of the Leaders' Agenda pointed to the "important supporting and coordinating role" that the EU can play in these areas.[91]

The Commission's recent Communication, "Strengthening European identity through education and culture", has taken the position that "the reflection about the future of Europe also entails a reflection on the strength of [Europeans'] common identity".[92] Adopted in order to foster and stimulate debate in the European Council, the communication presented the Commission's vision of Europe for 2025 as a continent in which people should have "a strong sense of their identity as Europeans, of Europe's cultural heritage and its diversity".[93] Proposals for measures in this direction included "revamping and strengthening the European Agenda for Culture", the backbone of the cultural OMC.[94] The Commission's Communication sent a strong political message that education and culture could be bundled together for addressing and coping with key challenges affecting Europe, from digitization and technological progress, to the need to fight unemployment, combat poverty and social exclusion, promote a resilient economy, integrate a culturally diverse migrant population and prevent populism, xenophobia and violent radicalization.

The European Council Conclusions of 14 December 2017 do not expressly refer to the European Agenda for Culture and its "revamping".[95] However, they do note the importance of culture for "bringing Europeans together and building [a] common future".[96] There is accordingly strong political will to enhance EU cultural action, in support of European integration, especially through measures that harness the potential of culture as a driver for jobs, social justice, active citizenship and cultural belonging. The renewed attention on the significance of culture for the European edifice may significantly affect the policy focus of the cultural OMC, consolidating topics that underscore an instrumental understanding of culture, in light of its economic, social, societal and ultimately political relevance.

Of course, it is one thing to strengthen the instrumental mindset of the cultural OMC. It is quite another to introduce strict elements into its architecture. At the mo-

[90] European Council, *Leaders' Agenda, Building our Future Together*, October 2017, www.consilium.europa.eu.

[91] European Council, *Leaders' Agenda, Education and Culture*, November 2017, www.consilium.europa.eu.

[92] Communication COM(2017) 673 final of 14 November 2011 from the Commission, *Strengthening European identity through education and culture. The European Commission's contribution to the Leaders' meeting in Gothenburg, 17 November 2017*, p. 2.

[93] *Ibid.*, p. 11.

[94] *Ibid.*, p. 10.

[95] European Council Conclusions of 14 December 2017.

[96] *Ibid.*

ment, there are no grounds to assert that any changes in the design and operation of the cultural OMC would result in more exacting procedures, undermining the "cooperation" rationale of the process. The adoption of cultural benchmarks and indicators remains a highly contentious issue for the Member States where the introduction of peer-review and Member States' monitoring and evaluation continue to be barred from discussions on possible modifications to the process. This is despite the fact that the Member States have accepted more rigorous forms of coordination in other culture-related fields (as shown by the processes established in the fields of film heritage, digitisation, accessibility of cultural material and digital preservation) and they have even agreed to experiment with novel forms of coordination, as exemplified by the processes launched in the domain of international cultural relations.

The preceding analysis actually shows that there are a variety of coordination processes in the field of culture: a cultural OMC, which has become a key instrument for Member States' cultural cooperation, a coordination process in the field of international cultural relations which does not borrow from the conventional OMC mechanisms, and coordination processes in policies other than culture that relate to culture and employ certain OMC features but without being labelled "OMC". None of these processes include working methods and procedures that go as far as to demand policy convergence, constraining national cultural policy-making. Despite variation in their constitutive features and the degree of the policy guidance they generate, processes generally remain of a "soft" nature. This is in accordance with the nature of the EU's cultural competence as a complementary competence, the EU's duty to respect its rich cultural diversity, laid down in Art. 3, para. 3 TEU, and the fact that the EU needs to integrate a cultural diversity rationale in its action overall, as required by Art. 167, para. 4, TFEU.

ARTICLES
SPECIAL SECTION – POLICY COORDINATION IN THE EU: TAKING STOCK OF THE OPEN METHOD OF COORDINATION

EUROPEAN ECONOMIC GOVERNANCE IN A POST-CRISIS ERA – A CONCEPTUAL APPRAISAL

PAUL DERMINE*

ABSTRACT: EU economic governance, as organized in the Treaties and implemented during the first years of the Economic and Monetary Union (EMU), strongly echoed the philosophy of "new governance" theories, and closely resembled the general patterns of the Open Method of Coordination (OMC). This Article seeks to determine whether this still holds true after the Eurozone crisis, and the subsequent fundamental revamping of the EMU's economic pillar. It is argued that the Eurocrisis set in motion a dual process of expansion and intensification of EU intervention in economic policy, and brought about a new economic governance model. This new model relies on a certain understanding of policy coordination – supranationally driven, increasingly substantive and designed to harmonize – which sharply contrasts with that at the heart of new governance and the OMC. On that basis, the Article further argues that in the post-crisis era, EU economic governance radically departs from the OMC pattern and its main constitutive features (horizontality, experimentation, diversity accommodation), so much so that it has lost most of its relevance as a conceptual framework to characterize EU economic policy. Finally, the *Article* highlights the fundamentally paradoxical nature of the post-crisis EU economic governance framework, and the disparities that exist, on the one hand between the reality of post-crisis economic coordination and the relevant institutional discourse, and on the other hand, between the extensive powers the EU now enjoys under that governance framework, and the weak constitutional settlement that supports it.

KEYWORDS: EU economic policy – eurocrisis – transformation – governance – open method of coordination – harmonizing coordination.

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I. Introduction – EU economic policy from a governance perspective

The Eurozone crisis has triggered a dramatic upheaval in the legal and political architecture of the Economic and Monetary Union (EMU). The crisis brought into the open the many structural flaws of the EMU construct as it had been designed in Maastricht. The constitutional asymmetry of the EMU was especially at stake, along with the weakness of its economic pillar. The crisis showed that the currency union was not sustainable if economic and fiscal policies remained primarily national, and if the inevitable interdependencies entailed in the sharing of the Euro were not more forcefully dealt with at the supranational level. Consequently, the correction of this systemic imbalance was placed high on the political agenda, and many reforms were passed to make up for the mistakes made in the original design of the EMU such as the Six-Pack, Two-Pack, Fiscal Compact, EuroPlus Pact and so on.

Much has been written on this unprecedented reconfiguration of the EMU architecture. EU law scholars have mostly favoured the institutional and constitutional perspective to describe and analyse the ongoing transformations. This *Article* does not follow this trend. Instead, it considers the dramatic upheaval in the economic pillar of the EMU through a more underexploited approach, that of governance modes. Through this governance perspective, this *Article* seeks to show how the Eurozone crisis, and the body of new rules and arrangements it gave rise to, changed the nature and the ambition of EU action in economic policy. It also endeavours to determine whether those changes mark a significant departure from the system that prevailed in the pre-crisis era. As Section II will show, the economic policy the EU followed until the crisis could be fairly described as a process of policy coordination, deeply inspired by the 'new governance' theories, which displayed the key characteristics of their main embodiment in the EU institutional framework, the Open Method of Coordination (OMC). The fundamental question this *Article* seeks to answer is whether it is still legitimate, after the Eurocrisis, to approach EU economic governance in those terms. Does the OMC, and its emphasis on multi-level power-sharing, soft coordination through deliberation, and experimentation, still constitute an adequate framework to understand EU economic policy?

The issue is controversial, and the few commentators that have sought to address it have yet to reach common ground.[1] This *Article* adds to that debate by offering a new perspective on economic governance in a post-crisis era. The approach is both conceptual and comparative. The *Article* identifies the core features of the post-crisis economic governance model and contrasts it with the model of the pre-crisis era. It does so in order to examine whether new governance and the OMC remain adequate theoretical tools to conceptualize economic governance today and in order to highlight some of the paradoxes and shortcomings of the current system.

[1] See for example J. Zeitlin, *EU Experimentalist Governance in Times of Crisis*, in *West European Politics*, 2016, p. 1073 *et seq.*; M. Dawson, *The Legal and Political Accountability Structure of Post-Crisis EU Economic Governance*, in *Journal of Common Market Studies*, 2015, p. 976 *et seq*.

The *Article* is structured as follows. Section II offers a comprehensive account of economic governance in the pre-crisis era. It elaborates on the institutional system set up by the Maastricht Treaty for economic policy, and highlights the proximity between EU economic governance, as it was actually conducted during the first two decades of the EMU, and the OMC and "new governance" conceptual frameworks. Section III focuses on the post-crisis situation. It describes the main substantive and institutional transformations brought about by the crisis, and identifies the main characteristics of the new governance model that resulted. On that basis, it highlights the metamorphosis economic governance has undergone since 2010, and the associated paradoxes that this structural shift has involved.

II. Characterizing economic coordination in the pre-crisis era

II.1. The Treaty framework on economic policy

Much has been written on the structural asymmetry of the EMU.[2] The negotiation of the Maastricht Treaty revealed two conflicting macroeconomic logics: the economist logic, according to which the supranationalization of money required, especially in a sub-optimal currency area such as the one under construction,[3] an integrated macroeconomic policy and ultimately, political union, and the monetarist logic, following which the adoption of a common currency, combined with market mechanisms, would trigger the convergence of European economies, thus making an integrated economic policy superfluous.[4] The outcome was, as it often is, a political compromise. Monetary policy would be fully transferred to the supranational level, whereas macroeconomic management would mainly remain in the hands of the European nation-States, with the *caveat* that their economic policies shall be regarded as "a matter of common concern" (Art. 121, para. 1, TFEU). At the heart of the Maastricht construct, there is thus a core unresolved political tension between a strong claim for containment, which seeks to prevent the EU from interfering in highly sensitive political choices of an intrinsically redistributive nature, and the recognition of a *de facto* necessity to act somehow collectively in the sphere of economic policy, due to the high degree of interdependence brought about by the shared currency.

[2] For an extensive account, see R. Lastra, J.-V. Louis, *European Economic and Monetary Union: History, Trends and Prospects*, in *Yearbook of European Law*, 2013, p. 60 *et seq.*; A. Hinarejos, *The Euro Area Crisis in Constitutional Perspective*, Oxford: Oxford University Press, 2015, p. 3 *et seq*.

[3] It was from very early on admitted that the EMU did not meet all the criteria of an "optimum currency area". This model, developed by Robert Mundell, emphasizes the importance of factor (capital and labour) mobility, wage flexibility, automatic fiscal transfers and macroeconomic convergence.

[4] See K. Dyson, F. Featherstone, *The Road to Maastricht. Negotiating Economic and Monetary Union*, Oxford: Oxford University Press, 1999, p. 291.

It is this founding tension that explains the conceptual ambiguity around economic policy as an EU competence. Indeed, economic policy stands out as a particularly fragmented and indeterminate field of competence, which does not fit squarely within the categorization of EU competences set up by the Lisbon Treaty.[5]

What do the constitutional texts tell us?[6] The general principle is stated in Art. 2, para. 3, and Art. 5, para. 1, TFEU: Member States shall coordinate their economic policies (together with their employment and social policies) within the arrangements determined by the Treaties and further provided for by the Union institutions. National economic policies ought to be implemented in coordination, to contribute to the general objectives of the Union, and in accordance with "the principle of an open market economy with free competition, favouring an efficient allocation of resources" (Art. 120 TFEU). The coordination of national economic policies is mainly carried out under a process established by Art. 121, paras 2-6, TFEU, colloquially known as the Multilateral Surveillance Procedure (MSP).[7] The MSP is a soft law process that works through monitoring national policies in light of common supranational standards, the Broad Economic Policy Guidelines (BEPG). Inconsistencies may lead to the European Commission (Commission) issuing warnings and, ultimately, to policy recommendations (eventually made public) by the Council of Ministers (Council).[8] More specific to national budgetary policies, the prohibitions of monetary financing (Art. 123 TFEU) and privileged access to financial institutions (Art. 124 TFEU) and the no-bailout clause (Art. 125 TFEU) aim at guaranteeing the Member States' commitment to sound public finances (Art. 119, para. 3, TFEU). Finally, Art. 126 TFEU establishes the so-called Excessive Deficit Procedure (EDP).[9] The EDP is an EU law process which aims to preserve the soundness and stability of the Member States' public finances.[10] In summary, under the EDP, the Commission monitors "the development of the budgetary situation and of the stock of government debt in the Member States" (Art. 126, para. 2, TFEU). Acting upon proposals from the Commission, the Council decides to open of a procedure against a Member State with an excessive deficit (Art. 126, para. 6,

[5] Especially so when contrasted to monetary policy.

[6] For a general overview, see R. SMITS, *Some Reflections on Economic Policy*, in *Legal Issues of Economic Integration*, 2007, p. 5 *et seq*.

[7] The MSP has been further organized, and integrated into the Stability and Growth Pact (of which it constitutes the preventive arm), by Regulation (EC) 1466/97 of the Council of 7 July 1997 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies.

[8] For a more detailed analysis, see J.-V. LOUIS, *L'Europe et sa monnaie*, Bruxelles: Editions de l'ULB, 2009, p. 85 *et seq*.

[9] Together with Protocol No. 12 on the excessive deficit procedure. Regulation (EC) 1467/97 of the Council of 7 July 1997 on speeding up and clarifying the implementation of the excessive deficit procedure has further specified the timing and modalities of the EDP, which since then constitutes the corrective arm of the Stability and Growth Pact.

[10] For further information, see J.-V. LOUIS, *L'Europe et sa monnaie*, cit., p. 97 *et seq.*; R. LASTRA, J.-V. LOUIS, *European Economic and Monetary Union*, cit., p. 107 *et seq*.

TFEU), and after doing so, issues recommendations on how to correct the situation (Art. 126, paras 7-8, TFEU). The Commission is not entitled to bring infringement procedures against a Member State that failed to take measures to bring its deficit under control (Art. 126, para. 10, TFEU) but persistent non-compliance may ultimately lead to the imposition of financial sanctions by the Council (Art. 126, para. 11, TFEU).[11]

Against this background, it is clear that economic policy is difficult to characterize within the competence constellation of the Lisbon Treaty. It did not go unnoticed that the competence basis for economic policy had been included in separate provisions, namely Art. 2, para. 3, and Art. 5 TFEU, between those devoted to shared competences and complementary competences, thus suggesting that this policy field falls outside the three-tier competence structure of the Lisbon Treaty for exclusive, shared and complementary competences. In addition, the Court of Justice has so far failed to provide any conclusive guidance as to the exact nature of the EU competence for economic policy.[12] This has led to confusion in the literature, and commentators are still divided as to whether economic policy ought to be treated as a shared,[13] complementary[14] or *sui generis*[15] competence.

[11] It was posited that Arts 123 to 126 TFEU would suffice to prevent moral hazard and negative externalities across the EMU, and that budgetary and macroeconomic discipline would thus be guaranteed. There is no need to explain how this assumption was fundamentally questioned by the Eurocrisis.

[12] In both *Pringle* and *Gauweiler*, the Court managed to evade the question. See Court of Justice, judgement of 27 November 2012, case C-370/12, *Pringle v. Government of Ireland et al.*, paras 108-114; judgement of 16 June 2015, case C-62/14, *Gauweiler et al. v. Deutscher Bundestag*, paras 46-65.

[13] Some argue that following the clear language of Art. 4, para. 1, TFEU, this is the default category for competences not otherwise classified by the Treaties. For that argument, see C. TIMMERMANS, *ECJ Doctrines on Competences*, in L. AZOULAI (ed.), *The Question of Competence in the European Union*, Oxford: Oxford University Press, 2014, p. 163; K. LENAERTS, P. VAN NUFFEL, *European Union Law*, London: Sweet & Maxwell, 2011, p. 128; J.-C. PIRIS, *The Lisbon Treaty – A Legal and Political Analysis*, Cambridge: Cambridge University Press, 2010, p. 77. *Contra*, see Opinion of AG Kokott delivered on 26 October 2012, case C-370/12, *Pringle v. Government of Ireland et al.*, para. 93.

[14] For another group of commentators, the "soft" nature of the intervention powers of the Union in the field of economic policy, as well as their alleged lack of pre-emptive effect, suggest economic policy should be regarded as a complementary competence. As an example, see M. DOUGAN, *The Convention's Draft Constitutional Treaty: Bringing Europe Closer to its Lawyers?*, in *European Law Review*, 2003, p. 771.

[15] For this last group, the fact that economic policy was inserted in separate Treaty provisions would indicate the Drafters' clear intent to refuse its qualification either as a shared or a complementary competence. Economic policy, together with employment and social policy, should thus be considered as a distinct, *sui generis* category of competence, falling outside the conceptual trilogy consecrated by the Lisbon Treaty. See R. BIEBER, *The Allocation of Economic Policy*, in L. AZOULAI (ed.), *The Question of Competence in the European Union*, cit., p. 89 *et seq.*; P. CRAIG, *The Lisbon Treaty – Law, Politics and Treaty Reform*, Oxford: Oxford University Press, 2010, p. 178 *et seq.*; J. DUTHEIL DE LA ROCHÈRE, *Fédéralisation de l'Europe – Le problème de la clarification des compétences entre l'Union et les Etats*, in O. BEAUD, A. LECHEVALIER, I. PERNICE, S. STRUDEL (eds), *L'Europe en voie de Constitution*, Bruxelles: Bruylant, 2004, p. 329; J.-P. JACQUÉ, *Droit institutionnel de l'Union européenne*, Paris: Dalloz, 2015, p. 180; R. SCHÜTZE, *European Constitutional Law*, Cambridge: Cambridge University Press, 2016, p. 241 *et seq.*; F. MARTUCCI, *L'ordre économique et monétaire de l'Union européenne*, Bruxelles: Bruylant, 2015, p. 263.

Such conceptual uncertainty makes determining the legal regime economic policy should be subject to particularly challenging. From the combined wording of Art. 2, para. 3, and Art. 5 TFEU, one may only infer that the Union can provide arrangements and take measures to allow the Member States to coordinate their economic policies, on top of those already put in place by the Treaties. It should be emphasized that following Art. 2, para. 3, TFEU, it is not the Union that coordinates Member States' economic policies, but the Member States that carry out such coordination. The role of the Union thus appears as that of a facilitator, rather than of a policy-maker *per se*. However, the peculiar position of economic policy in the competence constellation suggests that the Union competence in that field must be normatively stronger than its complementary competences under Art. 6 TFEU, and that it would therefore allow some degree of harmonization.[16] After all, Art. 2, para. 3, TFEU does not, as Art. 2, para. 5, TFEU does, specify that legal acts adopted by the Union in the field of economic policy shall not entail harmonization. The question of whether some kind of pre-emptive effect could be attributed to measures adopted by the Union under its competence for economic policy remains unanswered.

Under the Treaty framework, economic policy very much looks like an unidentified object. Although the EU's powers under the specific chapter devoted to economic policy (and most notably under Arts 121 and 126 TFEU) are more neatly framed, the room for general action under Art. 5 TFEU remains largely undefined. These powers must entail more than mere complementary prerogatives, but not as much as what the Union enjoys under the competences it shares with Member States. One may therefore be tempted to claim that the very specificity of this field of competence, which the Masters of the Treaties left undefined and unconstrained, was its constant state of flux, its flexibility, and its adaptability to the context and the needs of the time.

II.2. Pre-crisis economic governance and the OMC

Despite the fundamental ambiguity of the nature of economic policy as an EU competence, it remains possible, on the basis of both the relevant Treaty provisions and the subsequent practice of the EU institutions and the Member States, to identify the main features of EMU economic governance as it was *de facto* carried out in the pre-crisis era.[17] This section claims it was mainly designed as a kind of soft governance, very much along the lines of the theories of new governance.[18] Starting from the letter of the EU Treaties,

[16] See R. Schütze, *European Constitutional Law*, cit., p. 242. *Contra*, see Tridimas which speaks of an "EU presence", rather than competence, in the field of economic policy, which would only allow for convergence, rather than harmonisation (T. Tridimas, *Competence after Lisbon: The Elusive Search for Bright Lines*, in D. Ashiagbor, N. Countouris, I. Lianos (eds), *The European Union After the Treaty of Lisbon*, Cambridge: Cambridge University Press, 2012, p. 56).

[17] This generally refers to a time period spanning from the entry into force of the Maastricht Treaty in 1993 to the outbreak of the Eurozone crisis in 2009-2010.

[18] On soft law and soft governance in the EU, see F. Terpan, *Soft Law in the European Union – The Changing Nature of EU Law*, in *European Law Journal*, 2015, p. 86 *et seq*.

and the emphasis on coordination as the driving principle of this governance framework, the analysis shows that the kind of economic coordination carried out until the eve of the Eurocrisis was very much aligned with the main precepts of new governance and experimentalism, and strongly reflected their main embodiment in the EU institutional framework, i.e. the OMC.

The EU Treaties identify coordination as the guiding principle for EU economic governance. As already pointed out, it is not for the Union to coordinate its Member States' economic policies, but for the Member States to carry out such coordination *inter se*, following the methodology provided for in the Treaties. The role of the EU as an arranger consists of providing and managing the procedural frameworks necessary for economic coordination to take place, rather than in dictating the terms and orientations of the policies to coordinate.[19] There seems to be no room for EU action of a more substantive, harmonizing nature.

In the pre-crisis era, EU action in the field of economic policy has been in line with that model. Under the general rule consecrated by ex-Art. 98 of the Treaty establishing the European Community (TEC), Member States were to regard their economic policies as a matter of common concern, and were therefore mandated to enact policies consistent with the general objectives of the EU and the economic guidelines defined collectively. Economic coordination was itself primarily carried out under the MSP set up by ex-Art. 99 TEC, as complemented by Regulation 1466/97.[20] The MSP consisted of an early warning system, a soft and non-binding process combining reporting, discussion, advice and peer-review to achieve compliance on the one hand with the BEPG,[21] and on the other, with the medium-term budgetary objective (MTBO) set by each country.[22] Under this framework, economic coordination was very much nationally driven. Be it the details on important economic reforms taken by the Member States (ex-Art. 99, para. 3, TEC) or the stability and convergence programmes mandated by Regulation 1466/97, the information economic coordination relied on emanated from the Member States themselves, and its availability was dependent on their good will and eagerness to cooperate.[23] Economic coordination itself, i.e. adoption of the general benchmarks steering the process (the BEPG), review and assessment of national economic policies, and the issuance of

[19] In that regard, see Art. 121, para. 6, and Art. 126, para. 14, TFEU. Since Lisbon, specific arrangements may also be foreseen for Eurozone countries, following Art. 136 TFEU.

[20] Regulation 1466/97 established the preventive arm of the Stability and Growth Pact.

[21] Adopted following the procedure detailed in ex-Art. 99 TEC.

[22] Following Art. 3, para. 2, let. a), and Art. 7, para. 2, let. a) of Regulation 1466/97, each Member State is ascribed a medium-term budgetary objective (and an adjustment path towards it) that will secure compliance with the debt and deficit criteria of the Maastricht Treaty.

[23] Amtenbrink and De Haan have shown the limited means the EU and the other Member States did enjoy *vis-à-vis* a State reluctant to faithfully fulfil its reporting obligations. F. Amtenbrink, J. De Haan, *Economic Governance in the European Union: Fiscal Policy Discipline Versus Flexibility*, in *Common Market Law Review*, 2003, p. 1081 *et seq*.

warnings and policy recommendations, was primarily conducted by those EU institutions mostly dominated by the national logic: the European Council, the EuroGroup and, first and foremost, the Council of Ministers.[24] The European Parliament remained very much sidelined in the entire process, thus confirming the horizontal, state-centred nature of economic coordination in its early stages.[25]

These elements tend to highlight the strong intergovernmental character of EU economic governance in the pre-crisis era.[26] In this policy arrangement, the functions of the Commission, the institution that embodies the supranational interest of the EU as a whole, were mainly procedural, of a facilitative nature.[27] The Commission acted as the link between the individual Member States and the various decision-making bodies at the supranational level, starting with the Council. Its primary responsibility was to secure full adherence to the coordination process as it was framed in the Treaties and in the Stability and Growth Pact (SGP).[28] If the Commission enjoyed significant prerogatives of suggestion and recommendation, it could never act autonomously. The ultimate authority always lay somewhere else, most often with the Council.

Moreover, the policy coordination carried out could be best characterized as very open, soft and loose, in the sense that its ultimate aim was limited to the attainment of common economic objectives (starting with sound public finances and efficient allocation of resources) through a preserved diversity of national policy structures and solutions. Economic coordination in the pre-crisis era did not equate to the joint implementation of a certain type of economic policy. The emphasis was thus certainly not on substantive convergence (and even less so on harmonization) and the reduction of structural economic differences among Member States. Quite the contrary, it solely supported the collective pursuit of shared policy goals (constituting a common economic project) through a perpetuated plurality of approaches, structures and tools. Hence, one might best describe economic coordination in its early phase as "project-coordination".

In short, the governance model behind EU economic policy in the pre-crisis era was nationally driven, it confined the Commission (and the EU) to a mere procedural, facilitative role, and it relied on a soft understanding of policy coordination, solely focused on

[24] See U. Puetter, *The Eurogroup: How a Secretive Circle of Finance Ministers Shape European Economic Governance*, Manchester: Manchester University Press, 2006.

[25] C. Lord, *The European Parliament in the Economic Governance of the European Union*, in *Journal of Common Market Studies*, 2003, p. 249 *et seq*.

[26] For similar findings, see F. Amtenbrink, J. De Haan, *Economic Governance in the European Union*, cit., p. 1080; I. Maher, *Economic Governance: Hybridity, Accountability and Control*, in *Columbia Journal of European Law*, 2007, p. 693 *et seq*.

[27] I. Maher, *Economic Governance*, cit., p. 694. More generally, on the procedural nature of the EU competences in the field of economic policy, see F. Martucci, *L'ordre économique et monétaire de l'Union européenne*, cit., p. 264 *et seq*.

[28] This responsibility was clearly emphasized by the Court of Justice in 2004. See Court of Justice, judgement of 13 July 2004, case C-27/04, *Commission v. Council*, paras 78-81.

the implementation of shared goals via a diversity of national approaches. This model strongly echoes both the philosophy and the main precepts of "new governance" theories.[29]

New governance is here understood as a departure from the traditional methods and forms of regulation[30] and, in the specific context of the EU, from the Community method and the "integration through law" narrative.[31] It is characterized by the rejection of normative hierarchy, and it encourages multi-level power-sharing, leaves final policy-making to the lower-level policy actors, and seeks to foster iterative deliberation and experimentation[32] by relying on flexible and revisable guidelines and benchmarks rather than binding standards or norms.[33] The central manifestation of new governance in the EU is undoubtedly the OMC, which took shape in the field of social and employment policy,[34] and was later codified by the Lisbon European Council in 2000.[35] The emergence and expansion of the OMC in EU institutional practice can be explained by subsidiarity (and the limited competences of the EU), flexibility and legitimacy.[36] In brief, the OMC could be best described as a procedural strategy "which leaves a considerable amount of policy autonomy to the Member States, and which normally blends the setting of guidelines or objectives at EU level with the elaboration of Member States action plans or strat-

[29] Within the theory of new governance, which has produced a vast array of literature, it is possible to distinguish various trends and schools, with their own conceptualization and characterization of the phenomenon: democratic experimentalism, proceduralisation and reflexive law. This *Article* will not enter these theoretical debates, but will rely on a basic and consensual understanding of new governance. For an extensive and comparative account of these trends, see M. DAWSON, *New Governance and the Transformation of EU Law*, Cambridge: Cambridge University Press, 2011, p. 105 *et seq*.

[30] M. DAWSON, *New Governance in the EU after the Euro Crisis: Retired or Reborn?*, in *EUI AEL Paper Series*, no. 1, 2015, p. 2.

[31] J. SCOTT, L. TRUBEK, *Mind the Gap: Law and New Approaches to Governance in the European Union*, in *European Law Journal*, 2002, p. 1.

[32] C. SABEL, J. ZEITLIN, *Learning from Difference: The New Architecture of Experimentalist Governance in the EU*, in *European Law Journal*, 2008, p. 271 *et seq*.

[33] S. SMISMANS, *From Harmonization to Co-ordination? EU law in the Lisbon Governance Architecture*, in *Journal European Public Policy*, 2011, p. 505.

[34] S. DEAKIN, O. DE SCHUTTER, *Social Rights and Market Forces: Is the Open Coordination of Employment and Social Policies the Future of Social Europe?*, Bruxelles: Bruylant, 2005.

[35] European Council, Presidency Conclusions of 23-24 March 2000, paras 37-40. The Conclusions identify the four key elements of the Method: the definition of common goals and guidelines at EU level; the setting of benchmarks and indicators to compare State policies and performances; the translation of EU guidelines into national policies and programmes; periodic monitoring, evaluation and peer-review.

[36] D. HODSON, I. MAHER, *The Open Method as a New Mode of Governance: The Case of Soft Economic Policy Co-ordination*, in *Journal of Common Market Studies*, 2001, p. 727 *et seq*.

egy reports in an iterative process intending to bring about greater coordination and mutual learning in these policy fields".[37] It is generally considered to display the following key features:[38] revisability,[39] diversity,[40] proceduralization[41] and national ownership.[42]

It is self-evident that the pre-crisis economic governance model of the EMU described above meets both the overall philosophy of new governance and the general pattern of the OMC.[43] This model emerged in response to a dual concern: on the one hand, securing a minimal level of interstate concertation in the conduct of Member States' economic policies, in view of the many interdependencies that the sharing of a common currency entails, and on the other hand, the preservation of national sovereignty (and diversity) with regard to economic and redistributive policies. The structure of the pre-crisis economic governance model revolved around a common process (the MSP, as complemented by the SGP) bringing together all relevant policy actors to coordinate their action in the economic field through discussion and monitoring (*proceduralization*). Together at the EU level, they set the overarching guidelines and objectives (BEPG and MTBO) that would guide their future budgetary and economic policies for the year to come (*revisability*). Those guidelines were then translated into national action plans (stability and convergence programmes), which the States devised in absolute autonomy (*diversity* and *differentiation*). The process was strongly dominated, both at the deliberative and implementation stages, by the Member States (either taken individually, or gathered in the Council), with the Commission confined to a supportive role (*national ownership*).[44] The

[37] G. De Búrca, *The Constitutional Challenge of New Governance in the European Union*, in *European Law Review*, 2003, p. 824.

[38] This characterization builds upon that established by Dawson, and Scott and Trubek. See M. Dawson, *New Governance in the EU after the Euro Crisis*, cit., p. 4 *et seq.*; J. Scott, L. Trubek, *Mind the Gap*, cit., p. 5 *et seq*.

[39] I.e. the flexibility and adaptability of the policy guidelines, benchmarks and objectives, which are constantly reviewed, adjusted and renewed following an iterative process, with no clear demarcation between rule-making and rule-implementation.

[40] I.e. the tailoring of policy-making, the rejection of a *one-size-fits-all* approach and the emphasis on differentiation.

[41] I.e. the OMC is less about substantive output than about tying all policy actors into a collective decision-making process, structured around deliberation, participation and power sharing, with the aim of fostering mutual learning and experimentation.

[42] I.e. the idea that Member States, the lower-level units, are both the key players of the OMC process itself, and the ultimate decision-makers on the realization and implementation of the OMC guidelines.

[43] For a similar view, see F. Amtenbrink, J. De Haan, *Economic Governance in the European Union*, cit., p. 1079; D. Hodson, I. Maher, *The Open Method as a New Mode of Governance*, cit.; D. Hodson, *Macroeconomic Co-ordination in the Euro Area: The Scope and Limits of the Open Method*, in *Journal of European Public Policy*, 2004, p. 231; E. Szyszczak, *Experimental Governance: The Open Method of Coordination*, in *European Law Journal*, 2006, p. 494; F. Terpan, *Soft Law in the European Union*, cit., p. 81 *et seq*.

[44] One can easily argue that both diversity and national ownership have been further strengthened as the 2005 reform of the SGP increased the possibilities for country-specificity and differentiation.

process may well have allowed for peer pressure but it retained an overly soft, open and non-constraining nature.

The co-existence, next to this economic coordination framework, of prescriptive budgetary rules on deficit and debt, and a surveillance mechanism, the EDP, which may ultimately lead to the imposition of sanctions, seems to sit uneasily with the characterization of economic governance in the pre-crisis era as new governance. This *Article* claims that such hybridity does not contradict this broad depiction of pre-crisis EU economic governance as an OMC-like process.[45] The existence of substantive treaty rules on national budgets certainly contributed to constraining the flexibility and discretion Member States enjoy in economic coordination, but did not fundamentally question the open, soft and coordinate nature of the policy process.[46] Moreover, the EDP, which can be reasonably characterized as a hard law mechanism in view of its hierarchical, binding and punitive nature, has proven a non-credible threat, which in the pre-crisis period failed to discipline Member States running excessive deficits.[47] The reasons for this low credibility pertained to the procedure's lack of teeth in its first stages and, more importantly, to its non-automaticity and deep politicization, due to the dominance of the Council on each crucial step of the EDP.[48] Despite its many flaws, the EDP, and the substantive budgetary rules to which it secured compliance, did interplay with the softer framework for economic coordination, and continued casting "a shadow" of hard law.[49] But this shadow was not threatening enough to call into question the intrinsic flexibility, openness and coordination of the overall governance process.

[45] D. TRUBEK, P. COTTRELL, M. NANCE, *Soft Law, Hard Law and European Integration: Towards a Theory of Hybridity*, in G. DE BÚRCA, J. SCOTT (eds), *Law and New Governance in the EU and the US*, Oxford: Hart, 2006, p. 65 *et seq*.

[46] On the notion of constrained discretion, see J. PISANI-FERRY, *Only One Bed for Two Dreams: A Critical Retrospective on the Debate over the Economic Governance of the Euro Area*, in *Journal of Common Market Studies*, 2006, p. 839.

[47] The famous case of France and Germany in 2004-2005 is quite telling in that regard. See *European Commission v. Council of the European Union*, cit. See also D. HODSON, I. MAHER, *Soft Law and Sanctions: Economic Policy Co-ordination and Reform of the Stability and Growth Pact*, in *Journal of European Public Policy*, 2004, p. 798 *et seq*.

[48] For Maher, the absence of political ownership of the EDP called its very existence into question (I. MAHER, *Economic Governance: Hybridity, Accountability and Control*, cit., p. 807).

[49] On this interplay, see W. SCHELKE, *EU Fiscal Governance: Hard Law in the Shadow of Soft Law?*, in *Columbia Journal of European Law*, 2007, p. 706 *et seq*.; K. ARMSTRONG, *The Character of EU Law and Governance: From "Community Method" to New Modes of Governance*, in *Current Legal Problems*, 2011, p. 199 *et seq*.; A. HÉRITIER, M. RHODES (eds), *New Modes of Governance in Europe – Governing in the Shadow of Hierarchy*, Basingstoke: Palgrave Macmillan, 2011.

III. Economic governance in the post-crisis era – Entering a new world?

III.1. Whither the OMC? The new face of economic coordination

The Eurocrisis has changed the face of EU action in the field of economic policy. Whether under the existing provisions of the Treaties, in the framework of new mechanisms and processes set up under EU law, or under *ad hoc* arrangements hastily put together outside the EU legal framework, the Union's activism in the field since 2010 has truly been unprecedented. In this new governance context, which has been widely discussed in the literature,[50] two main trends can be identified.

On the one hand, the scope of EU economic governance has dramatically expanded to an unprecedented magnitude. In the pre-crisis era, EU economic policy was very much focused on budgetary policies. After the storm, this emphasis of course remains, and has been accentuated through substantial strengthening of the budgetary surveillance mechanisms. This is seen in the consolidation of the SGP by the Six-Pack reform,[51] the harmonization of national budgetary frameworks carried out under Directive 2011/85,[52] the es-

[50] Among others, see K. Tuori, K. Tuori, *The Eurozone Crisis – A Constitutional Analysis*, Cambridge: Cambridge University Press, 2014, p. 105 *et seq.*; A. Hinarejos, *The Euro Area Crisis in Constitutional Perspective*, cit., p. 29 *et seq.*; D. Adamski, *Economic Policy Coordination as a Game Involving Economic Stability and National Sovereignty*, in *European Law Journal*, 2016, p. 180 *et seq.*; F. Allemand, F. Martucci, *La nouvelle gouvernance économique européenne*, in *Cahiers de Droit Européen*, 2012, p. 17 *et seq.*; K. Armstrong, *The New Governance of EU Fiscal Discipline*, in *European Law Review*, 2013, p. 601 *et seq.*; M. Dawson, *The Legal and Political Accountability Structure of Post-crisis EU Economic Governance*, cit.; N. De Sadeleer, *The New Architecture of the European Economic Governance: A Leviathan or a Flat-Footed Colossus?*, in *Maastricht Journal of European and Comparative Law*, 2012, p. 354 *et seq.*; M. Ioannidis, *Europe's New Transformation: How the EU Economic Constitution Changed During the Eurozone Crisis*, in *Common Market Law Review*, 2016, p. 1237 *et seq.*; R. Smits, *The Crisis Response in Europe's Economic and Monetary Union: Overview of Legal Developments*, in *Fordham International Law Journal*, 2015, p. 1137 *et seq.*; P. Craig, *Economic Governance and the Euro Crisis: Constitutional Architecture and Constitutional Implications*, in M. Adams, F. Fabbrini, P. Larouche (eds), *The Constitutionalization of European Budgetary Constraints*, Oxford: Hart, 2016, p. 72 *et seq*.

[51] See especially, Regulation (EU) 1173/2011 of the European Parliament and of the Council of 16 November 2011 on the effective enforcement of budgetary surveillance in the Euro area; Regulation (EU) 1175/2011 of the European Parliament and of the Council of 16 November 2011 amending Council Regulation (EC) 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies; and Regulation (EU) 1177/2011 of the Council of 8 November 2011 amending Regulation (EC) 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure.

[52] Directive 2011/85/EU of the Council of 8 November 2011 on requirements for budgetary frameworks of the Member States.

tablishment of a Eurozone-specific budgetary monitoring procedure by Two-Pack Regulation 473/2013[53] and the internalization of a shared fiscal discipline regime mandated by the Fiscal Compact.[54] The focus has however been broadened to macroeconomic policies *sensu lato*, via the Macroeconomic Imbalance Procedure (MIP), which in many regards, reflects the logic of the SGP in the macroeconomic field.[55] This dual evolution, combined with the impetus given by the Europe 2020 strategy and the EuroPlus Pact, and the merger of various coordination cycles under the European Semester framework,[56] has been taken advantage of by the EU to make inroads (actual or potential) in any national policy sector with a budgetary or macroeconomic aspect or impact (in short, potentially every single area of national public action), thus triggering a general blurring of the classic dividing lines between the Union's and its Member States' respective spheres

[53] Regulation (EU) 473/2013 of the European Parliament and of the Council of 21 May 2013 on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficits of the euro area Member States.

[54] The Fiscal Compact constitutes the core of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (TSCG). Its key provision, Art. 3, para. 2, requires that its signatories internalize the balanced-budget rule and an automatic budgetary correction mechanism into their domestic legal order through rules of a (quasi-) constitutional rank. Compliance with that obligation is to be supervised by the Commission together with the Court of Justice (Art. 8).

[55] In summary, the MIP, as organized by its founding Regulation (EU) 1176/2011 of the European Parliament and of the Council of 16 November 2011 on the prevention and correction of macroeconomic imbalances, aims at identifying, preventing and addressing the emergence of macroeconomic imbalances which have the potential to adversely affect the economic stability of a Member State and of the Union. The notion of macroeconomic imbalance is largely conceived, and can relate to a multiplicity of sources: current account imbalance, problematic real exchange rates, excessive levels of private debt, worrying trends on the real estate market, unsustainable levels of unemployment and so on. Following a template quite similar to that of the SGP in the field of public finances, the MIP is structured around two arms: a preventive arm and a corrective arm, which can be triggered by the Council on the basis of the macroeconomic assessment carried out by the Commission. The MIP, just like the SGP, heavily rests on a dense net of monitoring, surveillance and reporting processes, the intensity of which depends on the nature of the macroeconomic imbalance at stake, and the status of Member States under the MIP. Regulation (EU) 1174/2011 of the European Parliament and of the Council of 16 November 2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area, adds an extra "hard" layer to the MIP, by setting up a Eurozone-specific regime of sanctions that can be applied to reluctant Member States under an excessive imbalance procedure.

[56] The European Semester has been established by Six-Pack Regulation 1175/2011. It brings all existing coordination mechanisms (the SGP, the MIP, budgetary monitoring under Regulation 473/2013, Europe 2020 and the EuroPlus Pact) under one common procedural "umbrella framework", and can therefore be best described as a meta-coordination process. It seeks to strengthen and extend the coordination capacities of the EU, and foster maximal synergy and transversality. The Semester is run following a synchronized timeline, which provides for both *ex ante* orientation and *ex post* correction and assessment. It opens in January with the publication of the Annual Growth Survey and the Council recommendations on the economic policy of the euro area. But, the apex of the process is certainly in May, when the Commission releases its country-specific recommendations, which are subsequently endorsed by the Council. For more, see the official detailed timeline provided by the Commission on ec.europa.eu.

of competences.[57] More specifically from a conceptual point of view, since 2010 an expansion of the EU understanding of the very notion of economic policy is observed, leading to a *de facto* extension of its material scope.[58] Significant pieces of social, employment and other redistributive policies are absorbed into EU economic governance, without specific regard being paid to their distinctive features. This willful emphasis on the sole budgetary and macroeconomic aspects of policy areas, and their subsequent incorporation into the realm of EU economic governance, has brought about a phenomenon of "economization" of redistributive (and not strictly economic) policy areas.[59]

On the other hand, the crisis has also triggered a substantial intensification of the means and methods of EU action in the economic field. As shown *supra*, before the crisis broke out, economic policy was from a governance perspective mainly characterized by its softness, and by policy processes resorting to new governance techniques, with the already notable but non-paradoxical exception of the EDP. The post-crisis situation looks much different. The clearest example of such intensification is certainly to be found in countries under financial assistance such as Greece, Portugal, Ireland or Romania, which following their bail-out, saw large parts of their economic and social policies radically constrained[60] by the prescriptive conditionality programs the EU had them enter into in the name of fiscal consolidation and macroeconomic stability.[61] Other structural transformations of the general architecture of EU economic governance also support the escalation of EU economic action, across the board this time. The EDP has been further hardened, and seriously depoliticized (and automatized) via the introduction of reverse qualified majority voting (RQMV), thus enhancing the overall credibility of the threat.[62] The

[57] See M. Dawson, F. De Witte, *Constitutional Balance in the EU after the Euro-crisis*, in *Modern Law Review*, 2013, p. 824 *et seq*.

[58] See N. Martinez-Yanez, *Rethinking the Role of Employment and Social Policy Coordination Competences in a Deeper Economic Union*, in *European Labour Law Journal*, 2016, p. 533 *et seq*.

[59] One may also speak of economic mainstreaming or, in view of Art. 9 TFEU's objective, of "reverse" mainstreaming. In that regard, see F. Costamagna, *The Impact of Stronger Economic Policy Co-ordination on the European Social Dimension: Issues of Legitimacy*, in M. Adams, F. Fabbrini, P. Larouche (eds), *The Constitutionalization of European Budgetary Constraints*, cit., p. 359 *et seq*.

[60] Since the entry into force of the Two-Pack, those countries are subject to the so-called "enhanced surveillance" procedure set up by Regulation (EU) 472/2013 of the European Parliament and of the Council of 21 May 2013 on the strengthening of economic and budgetary surveillance of Member States in the Euro area experiencing or threatened with serious difficulties with respect to their financial stability. See M. Ioannidis, *EU Financial Assistance Conditionality after "Two Pack"*, in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 2014, p. 61 *et seq*.

[61] See the narrative of "bonded government" developed by Damian Chalmers in D. Chalmers, *Crisis Reconfiguration of the European Constitutional State*, in D. Chalmers, M. Jachtenfuchs, C. Joerges (eds), *The End of Eurocrats' Dream – Adjusting to European Diversity*, Cambridge: Cambridge University Press, 2016, p. 269 *et seq*.

[62] See R. Palmstorfer, *The Reverse Majority Voting under the Six-Pack: A Bad Turn for the Union?*, in *European Law Journal*, 2014, p. 186 *et seq*. Following a similar rationale as the RQMV, Art. 7 TSCG instructs

punitive logic of the EDP has been further extended to the preventive arm of the SGP, making sanctions possible at a much earlier stage. Under the combined effect of Regulation 473/2013, Directive 2011/85 and the Fiscal Compact, substantial inroads have been made in both the procedural and substantive budgetary autonomy of the Member States. The spirit and architecture of the SGP, with a dual preventive/corrective structure, a fully-fledged sanction regime, and clear supranational steering, have been duplicated in the field of macroeconomic policy via the MIP. Even under the European Semester, the new umbrella framework for economic policy coordination within the EMU and a process that remains formally of a soft and open nature, EU action has proven significantly more incisive. This has to do with the central role the Commission has been endowed with, and the dominance it exercises in the whole process, especially *vis-à-vis* the Council of Ministers, which is bound by the "comply or explain" rule.[63] This also relates to the level of detail and prescription of the policy guidance addressed to Member States, which overall has increased, despite clear variations depending on the state's economic and budgetary health. Moreover, in the Semester context, the interplay between soft economic policy coordination strictly speaking and the more constraining arrangements of the SGP and MIP is strengthened, and the shadow of hard law cast by the latter is more immediate than in the pre-crisis era. This suggests that the Semester's output, starting with the country-specific recommendations it produces yearly, may be more binding and enforceable than it *prima facie* seems.[64] The use of financial incentives under the European Semester only further confirms this phenomenon of intensification. The 2014-2020 Structural Funding Regulation indeed favours the alignment of funding priorities with policy priorities expressed by the EU in the framework of the Semester. A certain form of conditionality is thus established between the granting of structural funds by the EU, and Member States' compliance with the recommendations addressed to them under the Semester process.[65]

What is one to make of this dual evolution undergone by EU economic policy in the aftermath of the Eurocrisis, especially if analysed against the economic governance model that prevailed in the pre-crisis era? It is claimed that this model, as derived from

Eurozone Member States to support the proposals made by the Commission with regard to a State under an EDP.

[63] According to this rule, which applies to most instruments adopted under the Semester process (starting with the country-specific recommendations), the Council may only amend the Commission's proposals if it justifies the changes brought. The rule has the practical effect of deterring the Council from suggesting amendments. See Art. 2-ab, para. 2, of Regulation 1466/97, as amended by Six-Pack Regulation 1175/2011.

[64] For more, see C. WUTSCHER, *Coordination by Coercion? On the Legal Status of European Semester Instruments*, on file with author; E. KORKEA-AHO, *Adjudicating New Govenance – Deliberative Democracy in the European Union*, Abingdon: Routledge, 2015, p. 86 *et seq*.

[65] On this question, see also A. STEINBACH, *Structural Reforms in EU Member States: Exploring Sanction-based and Reward-based Mechanisms*, in *European Journal of Legal Studies*, 2016, p. 173 *et seq*.

the EU Treaties[66] and its functioning during the first decade post-Maastricht, has been radically reconfigured, as the EMU moved from one coordination pattern to another. As has been shown, economic policy was granted a status of its own under the Treaties, neither shared nor complementary, but somewhere in between. Coordination was coined as the guiding principle for this area of EU competence. This economic coordination was to remain primarily in the hands of the Member States, with the Union acting as a facilitator and arranger. Strongly echoing the philosophy of new governance theories, and the founding rationale of their main manifestation in the EU framework, the OMC, coordination was designed as procedural and open-ended, and primarily focused on the implementation of shared goals via a preserved diversity of national approaches. The Eurocrisis caused the EU and its Member States to largely transcend this pattern, leading to its evolution towards a new form of coordination, and a new type of EU intervention in the field of economic policy. It displays the following features.

First, the role and prerogatives of the actors of economic coordination have changed. A reversal of the relationship (and power dynamics) between the EU and its Member States has taken place. If the Member States blatantly dominated the political process that produced the main crisis-induced reforms discussed above,[67] now their implementation and day-to-day operation is firmly in the hands of the Commission.[68] As a result, Member States are more subjects than drivers in the post-Eurocrisis economic coordination galaxy. The introduction of RQMV at critical junctures of the SGP and MIP, which in most cases will leave Member States with no other choice than to rubberstamp the decisions reached by the Commission, paradigmatically embodies this trend. One could also refer to the dominant part played by the Commission under the European Semester framework. If certain aspects of the process, such as the budgetary monitoring carried out under Regulation 473/2013, are fully administered by the Commission, others still require the formal intervention of the Council. But even there, under the effect of the

[66] Notwithstanding the addition of a third paragraph to Art. 136 TFEU to allow the establishment of a stability mechanism by the Eurozone Member States, the EU Treaties have been left untouched during the Eurocrisis.

[67] It is against that background that claims about the emergence of a new intergovernmentalism have been made. See for example, C. BICKERTON, D. HODSON, U. PUETTER, *The New Intergovernmentalism: European Integration in the Post-Maastricht Era*, in *Journal of Common Market Studies*, 2015, p. 703 *et seq*. The strong part played by the European Council, the Eurogroup and the Council of Ministers, the strong reliance on pure international law to get new initiatives through, do support such claims, but only at the reform level. The actual implementation of those reforms is, as this *Article* argues, dominated by supranational logic.

[68] For an interesting analysis of the Commission's role under the new architecture of EU economic governance, and the centrality of expertise and scientific truth, see L. DE LUCIA, *The Rationale of Economics and Law in the Aftermath of the Crisis: A Lesson from Michel Foucault*, in *European Constitutional Law Review*, 2016, p. 455 *et seq*.

"comply or explain" rule, the Commission retains the upper hand. In short, the Commission no longer is a mere facilitator that secures full adherence with an economic coordination process managed by the States and the intergovernmental fora in Brussels. It now runs it, and heavily weighs on its outcomes. The "re-credibilization" of the corrective and sanction-based mechanisms of that process, together with the strengthening of the link between these harder arrangements and the softer coordination cycle, further support the claim of an increasingly supranational hold on the entire economic governance of the EMU.[69] Of course, this in no way means that national actors have become insignificant. They retain an important role within the EU arrangements for economic coordination. However constrained its discretion may be in that regard, the Council keeps the final say in the framework of the EDP, the MIP or on the outputs of the European Semester (the Annual Growth Survey, country-specific recommendations and so on). Moreover, although the pressure faced by national authorities in that context may well have increased, the success of EU economic governance still depends on Member States' compliance, and their willingness to translate its main outputs into national measures and reforms. Yet, despite the important prerogatives it retains under the post-crisis economic governance framework, the national level no longer has the prominence it used to enjoy, in line with the Treaties, during the first decade of EMU. More than ever today, the drive and the impulse in the field of economic coordination is supranational. It is interesting to note that this strengthening of the supranational institutions of the EU at the expense of the Member States and their intergovernmental fora only concerns, at least to a certain extent, the Commission. From a comparative perspective, the institutional position of the European Parliament, or that of the EU social partners, has not been similarly enhanced.[70] The evolution of EU economic governance into an increasingly centralized and vertical system should not distract us from a parallel phenomenon, directly correlated to the emergence of the Commission as a powerful actor endowed with wide supervisory functions and several prerogatives of a (quasi-)decisional nature in the field of economic policy. This institutional context, and the complex and flexible regulatory frameworks the Commission is to rely its decisions on, have opened wide discretionary spaces that it has had no other choices than to exploit. In the post-crisis era, the Commission is repeatedly placed in situations where it has to exercise judgement and make use of its interpretative

[69] For a similar view, see K. ARMSTRONG, *Differentiated Economic Governance and the Reshaping of Dominium Law*, in M. ADAMS, F. FABBRINI, P. LAROUCHE (eds), *The Constitutionalization of European Budgetary Constraints*, cit., p. 72 *et seq*.

[70] See C. FASONE, *European Economic Governance and Parliamentary Representation: What Place for the European Parliament*, in *European Law Journal*, 2014, p. 174; M. DAWSON, *The Legal and Political Accountability Structure of Post-crisis EU Economic Governance*, cit., p. 988 *et seq*.

authority. This has in turn contributed to its politicization,[71] a phenomenon acknowledged by the Commission itself.[72] Because the Commission has emerged as the central actor of post-crisis economic governance, it has thus gone through a parallel politicizing trajectory. As a consequence, the Commission has become heavily exposed to external pressures, as other EU institutions and, most notably, Member States may seek to regain clout by weighing on the decision-making process within the Commission itself.[73] The clearest example of this is probably that of the Commission's decision in July 2016 not to request the imposition of fines on Spain and Portugal for not taking sufficient action to reduce their excessive deficit, which seems to have been heavily influenced by pressures exercised by Wolfgang Schäuble on several EU commissioners. Similar national pressures may explain the lenient approach of the Commission towards France in the framework of the EDP it is still subject to.

The second feature of this new coordination pattern directly connects to the progressive supranationalization of economic coordination within the EU, and the evolution of the Commission's role from a facilitator to a stimulator and policy-initiator. This institutional evolution deeply impacted the nature and content of supranational action, which is not only procedural anymore (an arrangements provider), but has gained an increasingly substantive and material nature.[74] Far from merely framing and monitoring an economic coordination process in the hands of the Member States, the EU supranational institutions, with the Commission at the fore, have taken advantage of the stronger institutional position they occupy under the post-Eurocrisis governance framework, to directly influence the terms and orientations of the many (national) policies to coordinate, seeking to advance, through increasingly prescriptive means, a certain reform agenda and set of policy preferences, based on a specific socio-economic model (an ideational

[71] On this phenomenon, see also P. LEINO, T. SAARENHEIMO, *Discretion, Economic Governance and the (New) Political Commission*, in J. MENDES (ed.), *EU Executive Discretion and the Limits of Law*, Oxford: Oxford University Press, 2018 (forthcoming).

[72] Commission President Juncker made it clear in a speech delivered in December 2015 before the European Parliament: "Economic governance is not about legal rules or numerical percentages: it is about people and it is about political decisions that affect them".

[73] More broadly on the permeability of the European Commission to external political tendencies in the field of economic governance, see A. DE STREEL, *The Confusion of Tasks in the Decision-making Process of the European Economic Governance*, in F. FABBRINI, E. HIRSCH BALLIN, H. SOMSEN (eds), *What Form of Government for the European Union and the Eurozone?*, Oxford: Hart, 2015, p. 88 *et seq*.

[74] See R. BIEBER, *The Allocation of Economic Policy*, cit., p. 92, who rightly speaks of the EU economic policy competence as "a 'dormant' substantive competence", that has thus been abundantly activated in the context of the Eurocrisis. In a similar vein, Chalmers argues that in the aftermath of the Eurocrisis, economic and fiscal governance is subject to a regime of co-government (D. CHALMERS, *The European Redistributive State and a European Law of Struggle*, in *European Law Journal*, 2012, p. 679 *et seq*.).

repertoire)[75] they hope will permeate the entire process.[76] The degree of uniformity displayed on specific policy issues (such as pension reforms, social security or fiscal policy) by the European Semester's country-specific recommendations or the Memoranda of Understanding entered into by bailed-out countries for example, suggests this is the intended effect. Providing a comprehensive analysis of this embedded agenda, and underlying model, goes beyond the scope of this *Article*. One can however identify the following founding features: strong emphasis on fiscal stability through budgetary consolidation and the restoration of growth, macroeconomic sustainability and competitiveness through structural reforms; almost exclusive recourse to "supply-side" structural reforms (privatization, deregulation and reduction of barriers to entry in protected sectors, flexibilization of labour laws and social dialogue mechanisms, activation of social security schemes, income tax reforms, administrative simplification, and so on); economization of social policies.[77]

Directly flowing from this dual trend – the supranationalization and substantivization of EU economic coordination – comes the third feature of the post-crisis coordination pattern, probably the most crucial and the most groundbreaking. It is argued that the economic coordination model has evolved from one of "project-coordination", mainly derived from the "new governance" and experimentalist narrative, and thus based on OMC techniques, to one of "harmonizing coordination", which has ultimately not much more to do with the original model, although it is still largely decked out in its formal and institutional finery.[78] The claim here is that the post-crisis economic governance of the EMU took advantage of the Treaties' indeterminacy to dramatically expand and thicken the very concept of coordination.[79] If the new economic coordination model still borrows and builds on the conventional language and methods of the OMC, it has however stopped

[75] The expression is used by Smismans in S. SMISMANS, *From Harmonization to Co-ordination?*, cit., p. 506.

[76] See the characterization of post-crisis economic governance as a regime of knowledge-truth governed by the Foucauldian principles of discipline and pastorship, in L. DE LUCIA, *The Rationale of Economics and Law in the Aftermath of the Crisis*, cit., p. 466 *et seq*. For a similar account, in the light of authoritarian liberalism, see A. SOMEK, *Delegation and Authority: Authoritarian Liberalism Today*, in *European Law Journal*, 2015, p. 340 *et seq*.

[77] For more on this issue, see P. HALL, *Varieties of Capitalism and the Euro Crisis*, in *West European Politics*, 2014, p. 1223 *et seq.*; J.-P. FITOUSSI, F. SARACENO, *European Economic Governance: The Berlin-Washington Consensus*, in *Cambridge Journal of Economics*, 2013, p. 479 *et seq*.

[78] In 2001 already, Hodson and Maher argued that the OMC could just be a transitional mechanism on the basis of which coordination could evolve into a "form of positive integration with agreement on a specific policy approach at", and policy transfers to the supranational level (D. HODSON, I. MAHER, *The Open Method as a New Mode of Governance*, cit., p. 740 *et seq.*). This Article argues that, even if it occurred by stealth and without any adaptation of the EU constitutional framework, this is exactly the kind of transformation that the Eurocrisis precipitated.

[79] See N. MARTINEZ-YANEZ, *Rethinking the Role of Employment and Social Policy Coordination Competences in a Deeper Economic Union*, cit., p. 540 *et seq*.

living up to its spirit and founding rationale. The process no longer aims at the collective pursuit of a shared economic project and the attainment of common policy objectives through a diversity of structures, tools and approaches. It is to contribute to the joint implementation of a certain type of economic policy, and hence pursues far-reaching substantive convergence by seeking to erase, or at least reduce the structural economic and social differences between the Member States.[80] This diverted utilization of OMC techniques, and the coordination narrative in general, amounts to a hidden attempt at harmonization. Under the guise of classic policy coordination, the EU is indeed striving to *order* national policies in the economic and social field along the lines of the uniform model described above.

This attempted harmonization is not the "reflexive" harmonization often associated with the OMC and "new governance" techniques, which mainly implies the diffusion of a common discourse and set of beliefs to collectively approach shared problems. It is a much harder kind of harmonization, which goes beyond mere convergence: harmonization as "a conscious process that has the aim of leading to the insertion of a concept into the national legal orders, which triggers a process of adaptation to form a European concept [the socio-economic agenda advocated for by the EU] as uniform as required to serve the objectives of the European Union [the stability and viability of the EMU]".[81] Such harmonization leaves little room for experimentation and mutual-learning as it attempts to reduce, rather than accommodate, structural differences between Member States. This form of legal, political and economic integration, as we have seen it unfolding since the Eurocrisis broke out, however contrasts with the traditional form of harmonization the EU classically relies on.[82] At least four differences can be identified. First, the harmonization purpose is most often covert and not explicitly assumed by the EU as is traditionally the case.[83] As a consequence, harmonization is carried out "by stealth", through a vast and complex array of instruments and mechanisms that considered in isolation may not be deemed of a harmonizing nature, but when placed end to end, tend to exert

[80] On this point, see M. DAWSON, *The Legal and Political Accountability Structure of Post-crisis EU Economic Governance*, cit., p. 984 *et seq.*, who argues that "post-crisis economic governance seems to adopt the form of coordination but not its substance". See also, M. DAWSON, *New Governance in the EU After the Euro Crisis*, cit., p. 14 *et seq*.

[81] E. LOHSE, *The Meaning of Harmonisation in the Context of European Union Law – A Process in Need of Definition*, in M. ANDENAS, C. BAASCH ANDERSEN (eds), *Theory and Practice of Harmonisation*, Cheltenham: Edward Elgar, 2011, p. 313.

[82] That is harmonization as approximation, as it is traditionally relied on in the field of internal market law. In this regard, see I. MALETIC, *Theory and Practice of Harmonisation in the European Internal Market*, in M. ANDENAS, C. BAASCH ANDERSEN (eds), *Theory and Practice of Harmonisation*, cit., p. 314 *et seq*.

[83] It is contended that as a general rule, this harmonizing ambition is openly acknowledged when pursued in the traditional areas of integration. If the question of the actual policy goal striven for through a harmonization initiative (market integration, public health, social policy, ...) can of course be highly debatable, as the *Tobacco Advertising* saga has amply shown, that of the underlying harmonizing endeavour rarely is.

undeniable pressure towards harmonization. Second, the harmonization at stake here is a non-universal, variable-geometry one, in the sense that the pressure exerted on Member States is not uniform, but greatly varies according to their fiscal and macroeconomic health.[84] Under the classic harmonization model, the push towards harmonization is homogeneously and symmetrically applied to all Member States, as they face (at least from a legal perspective) comparable substantive and procedural duties. As a general rule, this is not the case under the "harmonizing coordination" model that prevails post-crisis in the field of economic governance. Asymmetry has to a large extent become the overarching rule, in the sense that the pressure towards harmonization, and the number and intensity of legal, political and financial obligations flowing from it, highly vary from one country to the other, depending on the State of its public finances and its macroeconomic track record, and the procedures it is subjected to. Third, the enforcement tools available to the harmonizer widely differ from those traditionally attached to classic harmonization, namely the initiation of judicial proceedings with the Court of Justice of the European Union as ultimate authority. Enforcement under the post-crisis economic "harmonizing coordination" model does not rely on judicial procedures and institutions,[85] or any other kind of external review mechanism, and is directly assumed by the harmonizer itself, i.e. the Commission, acting sometimes on its own, sometimes with other political bodies, and being able to mobilize a vast array of financial sanctions. In that regard, the enlarged and strengthened sanction regimes under the SGP and MIP have been discussed. Member States under the enhanced surveillance procedure face the constant threat of seeing their financial assistance cut if they fail to satisfactorily comply with their reform commitments. Financial incentives are also used under the Semester process. Finally, if the scope for EU action under the classic harmonization model is already quite broad, that under the economic "harmonizing coordination" model is even wider, in view of the all-encompassing understanding of economic policy that prevails in the post-crisis era. One may even provocatively claim that its scope is potentially unlimited, as it is difficult to think of any public policy sector that could not be deemed harmonizable under the overarching

[84] M. DAWSON, *The Legal and Political Accountability Structure of Post-crisis EU Economic Governance*, cit., p. 981 *et seq*. See also, D. CHALMERS, *The European Redistributive State and a European Law of Struggle*, cit., p. 687 *et seq*.

[85] In the framework of the EDP for example, see Art. 126, para. 10, TFEU and *European Commission v. Council of the European Union*, cit. See also the Court of Justice's refusal to intervene with regard to conditionalities imposed on bailed-out States: Court of Justice, order of 14 December 2011, case C-434/11, *Corpul National al Politistilor*; order of 10 May 2012, case C-134/12, *MAI et al* order of 15 November 2012, case C-369/12, *Corpul National al Politistilor*; order of 14 December 2011, case C-462/11, *Cozman*; order of 7 March 2013, case C-128/12, *Sindicato dos Bancarios do Norte et al.*; order of 26 June 2014, case C-264/12, *Sindicato Nacional dos Profissionais de Seguros e Afins*; order of 21 October 2014, case C-665/13, *Sindicato Nacional dos Profissionais de Seguros e Afins*. As a more general rule, the lack of judicial involvement may also be explained by the new economic governance framework's continued reliance on OMC formal language (see *infra*).

objectives of budgetary discipline and macroeconomic stability. Under the new economic governance framework, the EU comes closer to the status of a total political actor, potentially active in each and every area of national policy.[86]

III.2. The paradoxes of economic governance in the post-crisis era

The Eurocrisis led the EU and its Member States to largely transcend the original model of economic governance, and precipitated its evolution towards a new type of EU intervention in the field of economic and budgetary policy. In the post-crisis era, economic coordination is supranationally driven, combines both procedural and substantive aspects and displays evident harmonizing features. More fundamentally, EU economic governance has ceased to live up to the spirit of new governance, experimentalism and the OMC altogether, as its ultimate aim no longer seems to be the collective pursuance of shared objectives through an accommodated diversity of policy approaches, but the diffusion of a certain reform agenda and its underlying socio-economic project, through the reduction of national divergences.

The post-crisis economic governance model, and the genre of economic policy coordination it is grounded on, if analysed in the light of the political and legal context of their emergence, reveal two founding paradoxes. They are briefly introduced in the following sections, with the hope that they will prompt further research and ultimately be addressed by the legal and political authorities in the EU.

The first paradox lies in the fact that if post-crisis economic governance has abandoned the foundational philosophy and rationale of the OMC, it still borrows, and builds on, the traditional language, methods and instruments of the OMC, though in a much diverted way. On the surface, and following the narrative presented by the EU, it is as if the fundamental overhaul described above had not occurred. This view is further supported by the constancy of the Treaty framework for economic policy. The TFEU provisions on economic coordination have indeed been left untouched, thus suggesting that the pre-crisis system, and its OMC-likeness, have continued and not been significantly departed from. As things currently stand, the constitutional charter of the EU fails to account for what economic coordination is really all about.[87]

[86] M. Dawson, *Opening Pandora's Box? The Crisis and the EU Institutions*, in M. Dawson, H. Enderlein, C. Joerges (eds), *Beyond The Crisis – The Governance of Europe's Economic, Political and Legal Transformation*, Oxford: Oxford University Press, 2015, p. 85. See further P. Genschel, M. Jachtenfuchs (eds), *Beyond the Regulatory Polity? The European Integration of Core State Powers*, Oxford: Oxford University Press, 2013.

[87] The question of whether the evolution of economic coordination in the aftermath of the Eurocrisis complies with the Treaty provisions (and its competence allocation system) on economic policy lies beyond the scope of this *Article*. For an interesting analysis, see C. Kaupa, *The Pluralist Character of the European Economic Constitution*, Oxford: Hart, 2016, p. 277 *et seq*.

The second paradox relates to the constitutional settlement on which the post-crisis economic governance of the EMU rests. The claim here is that the Eurocrisis has produced a fundamental, and worrying, misalignment between economic governance and its constitutional credentials. As amply shown in the literature, new governance and OMC processes such as pre-crisis economic coordination, rely on a flexible constitutional compromise characterized by a rather loose understanding of the rule of law, which is to be considered as the natural prolongation of the reversible, experimental and open-ended nature of these governance processes.[88] Briefly, this compromise displays the following traits. OMC normative outputs feature a low level of generality, publicity, clarity, foreseeability and congruence. Because of its intrinsic reversibility and differentiation, the OMC is not conducive to much legal certainty and equality. When it comes to the availability of external review, judicial or quasi-judicial actors only have a very peripheral role to play under the OMC, for the very reason that the notion of justiciability seems particularly ill-suited to the process in view of the softness and non-binding character of its main outputs.[89] Similarly, parliamentary actors are kept at the margin of the process, which is mainly considered to be an executive one.[90] Following a similar logic, and in view again of the programmatic, flexible and soft nature of the OMC, fundamental rights do not act as credible guidelines likely to frame, and potentially constrain, these governance processes. It is both striking and paradoxical that these traits, and the constitutional settlement that sustains them, are still very much present in the post-crisis economic governance framework. Indeed, whereas economic coordination decidedly moved away from the pre-crisis pattern of coordination to become increasingly supranational, substantive, harmonizing and, in the end, 'harder', the constitutional settlement on which that pre-crisis model relied has been perpetuated without any parallel redefinition nor upgrade of its "rule of law" credentials, thus bringing about significant constitutional discrepancies. Despite the thicker legal environment in which Member States evolve in the post-crisis era, with more numerous and far-reaching legal obligations, subject to substantially stricter enforcement mechanisms, the economic and budgetary rules they are to abide by still present problems of clarity, consistency and foreseeability.[91] This is certainly not

[88] See for example M. DAWSON, *Soft Law and the Rule of Law in the European Union: Revision or Redundancy?*, in B. DE WITTE, A. VAUCHEZ (eds), *Lawyering Europe: European law as a Trans-National Social Field*, Oxford: Hart, 2013, p. 221 *et seq.*; G. DE BÚRCA, *The Constitutional Challenge of New Governance in the European Union*, cit.

[89] See J. SCOTT, S. STURM, *Courts as Catalysts: Re-thinking the Judicial in New Governance*, in *Columbia Journal of European Law*, 2007, p. 565 *et seq*.

[90] See C. LORD, *The European Parliament in the Economic Governance of the European Union*, cit.; F. DUINA, T. RAUNIO, *The Open Method of Coordination and National Parliaments: Further Marginalization or New Opportunities?*, in *Journal of European Public Policy*, 2007, p. 489 *et seq*.

[91] This is particularly the case in the field of fiscal surveillance, where rules still lack precision and consistency. The multiplicity of the sources used (primary law, secondary law, international law, the Commission's administrative guidance) does not serve clarity. Some key notions of the legal regimes at stake

conducive to much legal certainty and, combined with an almost absolute lack of external review, raises legitimate concerns as to the equality and objectivity of the various processes of the new economic governance framework. When it comes to legal accountability, practice indeed reveals that the EU judicature has broadly continued to stay away from economic governance, whereas the very features of the pre-crisis governance model that justified such a stance were progressively abandoned.[92] This raises important issues of access to justice, and means that the significant powers the EU has gained in the field of economic policy are not matched with an appropriate level of judicial control. In the same vein, there is a vast array of literature showing how the transformation of EU economic governance, and the substantial strengthening of the EU prerogatives in the field, especially those of the Commission, have not been accompanied by a parallel consolidation of the democratic credentials of EU economic decision-making.[93] In the words of Dawson, this dual evolution has contributed to opening "accountability gaps", both in the legal and political realm.[94] Finally, while economic governance has become more intrusive and constraining for Member States' policies, and potentially more disruptive for citizens' benefits and entitlements, the institutional position of fundamental rights in that policy area has not been redefined, and rights considerations have so far failed to conclusively guide and frame the action of EU actors in the field of economic policy.[95]

(such as that MTBO or structural deficit) are vaguely defined, thus harming foreseeability. The MIP could also be mentioned, as its central concept, the macroeconomic imbalance, is only broadly defined in the texts, and very much left to the appreciation of the Commission.

[92] On the closure displayed by the Court, see the developments *supra*. See also L. FROMONT, *L'application problématique de la Charte des droits fondamentaux aux mesures d'austérité: vers une immunité juridictionnelle*, in *Journal européen des droits de l'homme*, 2016, p. 469 *et seq*. It should however be noted that the Court has recently started showing greater awareness of the role it may have to play under the post-crisis economic governance framework. In that regard, see Court of Justice, judgement of 20 September 2016, case C-8/15 to C-10/15, *Ledra Advertising et al. v. European Commission and ECB*. For an extended analysis, see P. DERMINE, *The End of Impunity? Legal Duties of "Borrowed" EU Institutions under the ESM Framework*, in *European Constitutional Law Review*, 2017, p. 369 *et seq*.

[93] See for example M. MADURO, M. KUMM, B. DE WITTE, *The Democratic Governance of the Euro*, in *RSCAS Policy Paper*, no. 18, 2012; K. TUORI, K. TUORI, *The Eurozone Crisis – A Constitutional Analysis*, cit., p. 205 *et seq.*; C. GLINSKI, C. JOERGES (eds), *The European Crisis and the Transformation of Transnational Governance – Authoritarian Managerialism Versus Democratic Governance*, Oxford: Hart, 2014; D. CURTIN, *Challenging Executive Dominance in European Democracy*, in *Common Market Law Review*, 2014, p. 1 *et seq.*; J. HABERMAS, *Democracy in Europe: Why the Development of the EU into a Transnational Democracy Is Necessary and How It Is Possible*, in *European Law Journal*, 2015, p. 546 *et seq.*; F. SCHARPF, *After the Crash: A Perspective on Multilevel European Democracy*, in *European Law Journal*, 2015, p. 384 *et seq.*; L. DANIELE, P. SIMONE, R. CISOTTA (eds), *Democracy in the EMU in the Aftermath of the Crisis*, Cham: Springer, 2017.

[94] M. DAWSON, *The Legal and Political Accountability Structure of Post-crisis EU Economic Governance*, cit., p. 986 *et seq*. See also S. GARBEN, *The Constitutional (Im)balance between "the Market" and "the Social" in the European Union*, in *European Constitutional Law Review*, 2017, p. 47 *et seq*.

[95] For an in-depth analysis of that very issue, see O. DE SCHUTTER, P. DERMINE, *The Two Constitutions of Europe: Integrating Social Rights in the New Economic Architecture of the Union*, in *European Journal of Human Rights*, 2017, p. 108 *et seq*. See also, M. DAWSON, *The Governance of EU Fundamental Rights*, Cambridge: CUP, 2017, p. 185 *et seq*.

IV. Conclusion

This *Article* began with a return to the roots of EU economic policy. Section II explained how economic governance quickly evolved, in spite of the cryptic nature of the relevant Treaty provisions, into a soft, procedural and State-centred kind of policy coordination, very much in line with the overall philosophy of the "new governance" theories, and the characteristics of their main embodiment in the EU institutional framework, the OMC. Section III showed how the Eurocrisis opened a new chapter for EU economic governance. The dual trend of expansion and intensification of EU economic action it initiated indeed contributed to bringing about a new model of governance, based on a more intense understanding of policy coordination, in sharp contrast with that which prevailed in the pre-crisis era: an economic coordination increasingly driven and propelled by the EU itself and the Commission; an economic coordination where EU action is no longer solely procedural, but has become strongly substantive and material; an economic coordination which ultimately strives for convergence and harmonization of policy approaches and policy tools. Against this background, this *Article*'s central claim has been that the OMC, and its emphasis on horizontality, differentiation and experimentation, are no longer relevant to approach EU economic governance. In the post-crisis era, EU economic governance has obviously ceased to live up to its founding rationale.

This *Article* has striven to describe a politico-legal phenomenon, i.e. the transition from one governance model to another, and the abandonment of the OMC as a policy framework for EU economic coordination. But it has not sought to take sides as to the soundness and justification of such evolution in view of the wider trajectory of the EMU project. It has however considered it crucial to draw attention to two constitutive, yet highly disturbing, paradoxes of EU economic governance in the post-crisis era. The metamorphosis of economic governance within the Union has been precipitated by covert, underground and interstitial institutional dynamics that the EU and its Member States have so far failed to explicitly embrace. The relevant provisions of the EU constitutional charter have not been amended, and the Union's narrative on economic coordination suggests it is just business as usual. As a result, one can only grasp the full meaning and extent of the transformations at play through a complex holistic analysis of the new legal framework for EU economic policy and the practice of relevant actors within it. Here lies the first paradox of post-crisis economic governance in the EU. Even if economic coordination no longer plays by the rules of the OMC, the EU still very much relies on the conventional language of the OMC, as if that framework were still relevant today. There is thus a strong mismatch between the discourse and the facts, the form and the substance of EU post-crisis economic governance, obviously harming transparency, intelligibility and in the end, accountability. This mismatch leads to a second paradoxical development: the pre-crisis constitutional foundations of EU economic policy have broadly stayed in place, although the governance model they supported underwent an unprecedented up-

heaval. This perpetuation, and lack of parallel redefinition of the constitutional settlement of EU economic governance, is even more problematic, as it suggests that the post-crisis model is at odds with some of the most fundamental values of the EU.

From a normative and practical perspective, both paradoxes must be resolved soon. For obvious reasons of political readability and legal consistency, the transition to a new form of economic coordination, away from soft law and the OMC, must be unequivocally accounted for. In agreement with the constitutional charter of the EU, the "rule of law" and democratic credentials of EU post-crisis economic governance are to be aligned with the powers and prerogatives the EU currently enjoys in that framework. As the dust of the Eurocrisis starts to settle, it is high time to start addressing the foundational shortcomings of a governance model that emerged in a context of emergency. Its long-term sustainability, efficiency and legitimacy are in the balance.

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