

EU's Schrodinger's cat: is there a democracy divide within the Economic and Monetary Union?

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Abstract: How is possible to get along with the dilemma between an asymmetric (and imperfect) economic and monetary union and the claims of direct democracy that are wide-spreading nowadays in Europe? This paper aims to discuss the main points of the ambitious reform of the Economic and Monetary Union (EMU) presented by the European Commission in December 2017, and its likely impact on EU competences. In particular, the author tries to evaluate the core of the proposals introduced by the Commission, composed by three main measures: the bringing back of the TSCG in the Treaty framework, the transformation of the ESM into a European Monetary Fund and the introduction of a European Minister for Economy and Finance. All together, these acts attempt to bring back an essential part of the economic and monetary union in the framework of constitutional guarantees, in terms of fundamental rights and judicial review, provided by the Treaties. After an overview of the Communication on the future of the EMU we will attempt to measure the importance and the impact of the proposals concerning the re-embodiment of the Treaty on Stability, Coordination and Governance (TSCG) in the Treaties, of the Minister for Economy and Finance and of the transformation of the European Stability Mechanism into a European Monetary Fund. The analysis of the initiatives of the Commission will lead us in understanding if the proposals represent a step further towards i) the rebalancing of the asymmetry of the Economic and Monetary Union, completing the integration between its two parts and ii) the challenging of the democracy deficit¹ that has, over the years, affected the solutions proposed to solve the economic crisis. Other attempts to reform the EMU within the current intergovernmentalism trends, as appears to be the Picketty and Hamon initiative,² have the potential to nourish and foster the discussion over the reform itself,³ but the price to be paid seems extremely high. Intergovernmentalism brings along the same old problems of legitimacy and lack of competences that are currently dominating the debate over crisis and that result in a lack of democratic control over it. At the same time, also the initiative of the Commission seems insufficient, since the current Treaty framework allows only a limited transfer of competences over economic policy. Eventually, day will come when a structural reform of economic governance will need to be pursued. While the situation remains as it is, it reminds of the Schrodinger's cat dilemmas: is the cat (democracy divide) in the black box (the EMU) dead or alive? A serious reform attempt perhaps will allow policy makers and the public to look inside the black box: as naïve as might be, this seems to be the only solution at hand.

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¹ See L. Daniele, P. Simone, R. Cisotta (eds.), *Democracy in the EMU in the Aftermath of the Crisis*, Springer: Berlin, 2017; D. Adamski, *Redefining European Economic Integration*, Cambridge University Press: Cambridge, 2018.

² See the Treaty on the Democratization of the Euro-Area (T-Dem). Available at <http://picketty.pse.ens.fr/files/T-DEM%20-%20Final%20english%20version%209march2017.pdf>.

³ S. Platon, *Democratizing the Euro Area without the European Parliament: Benoît Hamon's “T-Dem”*, *VerfBlog*, 13.03.2017, available at <https://verfassungsblog.de/democratizing-the-euro-area-without-the-european-parliament-benoit-hamons-t-dem/>. See also 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, pp. 59 et seq.

1. Introduction: The reform of the Economic and Monetary Union in the (aftermath of the) economic and financial crisis

The reform of the Economic and Monetary Union (EMU) has been object of debate since the rise of the economic crisis,⁴ nearly two decades after its establishment⁵ with the Maastricht Treaty.⁶ The main critique forwarded against its structure has been the necessity to complete the integration between its two fundamental elements, the monetary policy and the economic policy.⁷ The EU has exclusive competence on monetary policy⁸ but can only coordinate the economic policies⁹ of the Member States.¹⁰ The question we would like to answer in this article is if the reform of the EMU brought forward by the European Commission on 6 December 2017 can claim to be an amenable solution, or at least an important step further in the integration of economic and monetary policies.¹¹ The proposals brought forward by the Commission is composed of a number of different acts: 1) a Communication on the future of the EMU,¹² 2) a proposal for a Council Directive for strengthening fiscal responsibility (ultimately addressed into re-embodiment of the Treaty on Stability, Governance and Coordination (TSGC) into the Treaty Framework),¹³ 3) a Communication on the European Minister of Economy and Finance,¹⁴ 4) a proposal for a Council Regulation to transform the European Stability Mechanism (ESM) into an European Monetary Fund (EMF),¹⁵ 5) a proposal of amendment to Regulation n. 1303/2013 (Common Provisions Regulation) to increase the rate of efficiency in the

⁴ See the following literature: R. Bin, P. Caretti, G. Pitruzzella, *Profili costituzionali dell'Unione Europea, Processo costituente e governance economica*, Il Mulino: Bologna, 2015; D. Chalmers, M. Jachtenfuchs, C. Joerges (eds.) *The End of the Eurocrats' Dream: Adjusting to European Diversity*, Cambridge University Press: Cambridge, 2016; L. Daniele, P. Simone, R. Cisotta (eds.), *Democracy in the EMU in the Aftermath of the Crisis*, Springer: Berlin, 2017; M. Dawson, H. Enderlein, C. Joerges (eds.), *Beyond the Crisis: The Governance of Europe's Economic, Political and Legal Transformation*, Oxford University Press: Oxford, 2015; F. Fabbrini, *Economic Governance in Europe: Comparative Paradoxes and Constitutional Challenges*, Oxford University Press: Oxford, 2016; A. Hinarejos, *The Euro Area Crisis in Constitutional Perspective*, Oxford University Press: Oxford, 2015; K. Tuori, K. Tuori, *The Eurozone Crisis: A Constitutional Analysis*, Cambridge University Press: Cambridge, 2014.

⁵ The roots of the EMU dates back to the first decades of the European Union, as shown by the early *Report to the Council and the Commission on the realization by stages of economic and monetary union the Community*, in *Bulletin II, 1970, of the European Communities*, https://www.cvce.eu/en/unit-content/-/unit/ba6ac883-7a80-470c-9baa-8f95b8372811/bfe387f3-f0f1-4294-a1c7-1e001553bc72/Resources#fcbf62e9-40e9-46cd-bf64-3cb3f6f8fff8_en&overlay. This Report is often referred to as “Werner Report”, from the name of the Luxembourgish prime minister, Pierre Werner, who coordinated the working group leading to its completion.

⁶ The Maastricht Treaty articles establishing the foundations of the EMU are now Art. 3 para 4 TEU and Art. 119 TFEU.

⁷ See i.e. J. Snell, *The Trilemma of European Economic and Monetary Integration, and Its Consequences*, in *European Law Journal*, 2016, p. 157 *et seq.*, in part. p. 161.

⁸ Art. 127 TFEU.

⁹ Art. 120 TFEU.

¹⁰ I.e. among the most notable critics of the architecture of the EMU see F.W. Scharpf, *Monetary union, fiscal crisis and the preemption of democracy*, in *MPIfG discussion paper*, No. 11/11, 2011, http://www.mpifg.de/pu/mpifg_dp/dp11-11.pdf; Id. *The Asymmetry of European Integration, or Why the EU Cannot Be a "Social Market Economy"*, in *Socio-Economic Review*, 211 – 250, 2010.

¹¹ See European Commission, *Reflection paper on the deepening of the economic and monetary union*, 2017.

¹² Communication from the Commission to the European Parliament, the European Council, the Council and the European Central Bank on Further steps towards completing Europe's Economic and Monetary Union: a Roadmap, COM(2017) 821 final.

¹³ Proposal for a Council Directive laying down provisions for strengthening fiscal responsibility and the medium-term budgetary orientation in the Member States, COM(2017) 824 final.

¹⁴ Communication from the Commission to the European Parliament, the European Council, the Council and the European Central Bank on “*A European minister of economy and finance*”, COM(2017) 823 final.

¹⁵ Proposal for a Council Regulation establishing the European Monetary Fund, COM(2017) 827 final.

repartition of funding instruments,¹⁶ 6) a proposal for amendments to strengthen the Structural Support Programme¹⁷ and 7) a Communication on budgetary instruments for a stable Euro area.¹⁸ In this paper we will focus on the *noyau dur* of the reform: after an overview of the Communication on the future of the EMU we will attempt to measure the importance and the impact of the proposals concerning the re-embodiment of the TSCG in the Treaties, of the Communication on the Minister for Economy and Finance and of the transformation of the European Stability Mechanism into the European Monetary Fund. The analysis of the initiatives of the Commission will lead us in understanding if the proposals represent a step further towards i) the rebalancing of the asymmetry of the Economic and Monetary Union, completing the integration between its two parts and ii) the challenging of the democracy deficit¹⁹ that has, over the years, affected the solutions proposed to solve the economic crisis. As an ultimate consequence, we will try to understand if this reform package might represent a step further in the full integration of economic governance, as the macro-economic part of the EU's economic constitution, in the EU constitutional legal order.²⁰

2. The Communication on the future of the Economic and Monetary Union

The first item on the Commission reform agenda is the Communication on the Future of the EMU. Although the purpose of the Communication is to introduce the content of the initiatives of the Commission, there are at least two important elements of the package proposal that we can draw from its reading: first, the *rationale* of the reform attempt and, second, the Commission's projection about the timeline of the adoption of the proposals. According to the Commission, the three "inspiring principles" that reflect the *rationale* of the reform of the EMU are i) unity, ii) efficiency and iii) democratic accountability.²¹ Unity refers to the fact that, according to the Commission, all the non-euro Member States (with the exception of the United Kingdom and Denmark) are ultimately compelled to join the common currency. Although this legal obligation cannot be rebutted, it is known that some of the non-euro Member States are likely to postpone the deadline for joining the common currency.²² The second inspiring principle of the proposal is represented by the efficiency of the

¹⁶ Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 1303/2013 of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006 as regards support to structural reforms in Member States, COM(2017) 826 final.

¹⁷ Proposal for a Regulation of the European Parliament and the Council amending Regulation (EU) 2017/825 to increase the financial envelope of the Structural Reform Support Programme and adapt its general objective, COM(2017) 825 final.

¹⁸ Communication from the Commission to the European Parliament, the European Council, the Council and the European Central Bank on New budgetary instruments for a stable Euro area within the Union framework, COM(2017) 822 final.

¹⁹ See D. Adamski, *Redefining European Economic Integration*, Cambridge University Press: Cambridge, 2018

²⁰ See L. S. Rossi, *Economic and Monetary policies as essential elements of the EU Constitutional debate*, in L. Daniele, P. Simone, R. Cisotta (eds.), cit. p. 405 *et seq.*

²¹ On democratic accountability see M. Starita, *Democratic principles and the economic branch of the European monetary union*, in L. Daniele, P. Simone, R. Cisotta (eds.), cit., p. 3 *et seq.*; C. Kaupa, *The Pluralist Character of the European Economic Constitution*, Hart Publishing: Oxford, 2016, p. 218 *et seq.* Kaupa, in particular, makes a reconstruction of the different political ideals connected to the Economic and Monetary Union, as well as their implication democratic accountability.

²² See the case of Romania, which is meant to join the Eurozone in 2019, but has not yet clarified if this deadline will be postponed.

system. In this case, efficiency refers to the need to bring intergovernmental instruments created during the crisis, as the European Stability Mechanism²³ and the Treaty on Stability, Coordination and Governance (TSCG),²⁴ back into the EU legal framework. In this sense, the central issue is the legal basis chosen by the European Commission for the establishment of the European Monetary Fund and for the re-embodiment of the TSCG, as well as for the decision not to present a proposal on the Minister of Economic and Finance but rather to make recourse to an informal agreement on the model of the Eurogroup. How this will be done is a matter that will be treated in the next paragraphs. The last principle that characterizes the initiative of the Commission is the necessity to reinforce the democratic accountability of the decision making process of the EU economic governance. The Commission claims that the submission of the procedure to the EU decision making process and the involvement of the Council and the Parliament will grant that the necessary powers will be conferred over the newly established bodies. This is however a debatable and problematic point: as mentioned above, the choice of the legal basis, which is the only one available under the Treaties, allows only for a limited involvement of the Parliament under different special legislative procedures. The Commission also proposes a timeline for the completion of the reform: the executive arm of the EU²⁵ is confident that the two proposals on the EMF and the TSCG will be approved before the end of the legislature and proposes to appoint the new Minister for Economics and Finance in the context of the election of the 2019 term of the European Commission.

3. The proposal for the re-embodiment of the Treaty on Stability, Coordination and Governance in the Treaties

The first initiative of the Commission that we will consider in this analysis is a proposal for a Council directive laying down provisions for strengthening fiscal responsibility and the medium-term budgetary orientation in the Member States.²⁶ The proposal attempts to bring the Treaty on Stability, Coordination and Governance²⁷ back into the picture of the Treaties, with particular reference to its mostly debated part, the Fiscal Compact.²⁸ What it is not however clear at first glance is to what extent the proposal will repeal or rather simply complement the TSCG, and if the balanced budget rule, after having made its way through the national constitutions,²⁹ will be effectively transposed or

²³ Treaty establishing the European Stability Mechanism, signed on 2 February 2012.

²⁴ Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, signed on 2 March 2012.

²⁵ Commission Communication on New budgetary instruments..., cit. p. 13.

²⁶ Proposal for a Council Directive laying down provisions for strengthening fiscal responsibility, cit.

²⁷ On this point see, i.a. R. Baratta, *Legal Issues of the "Fiscal Compact"* in *Il Diritto dell'Unione europea*, 2012, p.647 et seq.; G. Bonvicini, F. Brugnoli (a cura di), *Il Fiscal Compact*, in *Quaderni IAI*, 2012; C. M. Cantore, G. Martinico, *Asymmetry or Dis-integration? A Few Considerations on the New 'Treaty on Stability, Coordination and Governance' in the Economic and Monetary Union*, in *European Public Law*, 2013, p.463 et seq.; P. Craig, *The Stability, Coordination and Governance Treaty: Principle, Politics and Pragmatism*, in *European Law Review*, 2012, p. 231 et seq.; J. V. Louis, *Un traité vite fait, bien fait? Le traité du 2 mars 2012 sur la stabilité, la coordination et la gouvernance au sein de l'Union économique et monétaire*, in *Revue trimestrielle de droit européen*, 2012, p.5 et seq.; L.S. Rossi, *"Fiscal Compact" e Trattato sul Meccanismo di Stabilità: aspetti istituzionali e conseguenze dell'integrazione differenziata nell'UE*, in *Il Diritto dell'Unione europea*, 2012, p. 293 et seq.

²⁸ Title III of the Treaty on Stability Coordination and Governance.

²⁹ See, in general, M. Adam, F. Fabbrini, P. Larouche (eds.), *The Constitutionalisation of European Budgetary Constraints*, Hart: Oxford, 2014.

not into EU primary legislation.³⁰ The proposal seems also to state quite clearly that its scope is limited to the “substance” of the TSCG and namely to its Art. 3.³¹ However, differently from the original text of the Treaty, in the proposal is outlined that each Member State should tend to respect the threshold and limits established by Art. 126 TFEU and Protocol 12 of the Lisbon Treaty, but is free to choose “*a framework of binding and permanent numerical fiscal rules which are specific to it*”.³² The proposal also recognises the role of the independent bodies created in the aftermath of the crisis in order to provide counsel and advice on public finances, and creates a legal obligation for the Member States to establish a link between the recommendation of the independent bodies and the budgetary authorities (the Parliaments).³³ A first problem of the proposal, however, seems to be the fact that the implementation of the fiscal rules to be followed will be left entirely to the Member States. This is inevitably connected to the nature of the legal instrument chosen, a directive, which allows for the establishment of objectives to be attained with different means by the Member States. Although this element might be interpreted as an attempt to reconcile the EU institution with the public opinion (since they leave to the EU Member States the discretion to establish their own rules, instead of imposing a European set of rules), this discretion is likely to undermine the actual enforcement of the proposal. On the other side, it must be acknowledged that a higher degree of involvement of national Parliaments, which will be in charge of establishing their own fiscal rules to comply with the EU framework, will most likely be interpreted as a step towards a greater democratic accountability, pursuant to the third inspiring principle of the EMU reform package. This approach towards a higher involvement of national legislator is also reflected by the overall spirit of the proposal, which seems to be focused on flexibility rather than on the conditionality that informed the language of the Commission in the aftermath of the economic crisis.³⁴ The TSCG should accordingly take into account the flexibility built in the Stability and Growth Package and identified by the Commission in 2015.³⁵ Similarly to the other proposals, this initiative of the Commission adopts a legal basis, Art. 126(14) TFEU, which requires the unanimity at the Council and the consultation of the European Parliament.

4. The Communication on the Minister for Economy and Finance

The second item on the Commission EMU reform package is the Communication on the European Minister for Economy and Finance.³⁶ The European Commission, in its initiative, proposes the

³⁰ The proposal refers to Art. 3 as the substance of the TSCG to be incorporated in the EU legal framework. However, Art. 3 para 1, which contains the balanced budget rule, seems to have been substituted with the new Art. 3 of the proposed Directive, cit. where there is no mention to the balanced budget rule, but rather to “a framework of binding and permanent numerical fiscal rules”.

³¹ See F. Croci, *Is it worth the effort? The European Commission's proposal for integrating the substance of the 'Fiscal Compact' into the EU legal order*, in *Revue de l'euro*, <https://resume.uni.lu/story/the-integration-of-the-fiscal-compact-into-the-eu-legal-order#the-european-commissions-proposal>.

³² Art. 3 para 1 of the proposed Directive, cit.

³³ Art. 3 para 4 of the proposed Directive, cit.

³⁴ See C. Joerges, *Comments on the Draft Treaty on the Decmocratisation of the Euro-Area*, in *European Papers*, 2018, p. 75 *et seq.*; B. de Witte, A. Ott, E. Vos (eds.), *Between Flexibility and Disintegration: The Trajectory of Differentiation in EU Law*, Elgar: London, 2017; T. Beukers, B. de Witte and C. Kilpatrick (eds.), *Constitutional Change through Euro-Crisis Law*, Cambridge University Press: Cambridge, 2017; A. Mc Donnell, *Solidarity, Flexibility and the Euro Crisis*, in L.S. Rossi, F. Casolari (eds.), *The EU after Lisbon*, Springer: Berlin, 2014, p. 57 *et seq.*

³⁵ See p. 5 of the proposed Directive, cit.

³⁶ Communication on A European minister..., cit.

establishment of an informal Minister who, within the portfolio of the next European Commission, will gather all the different roles connected to the economic and monetary policy. The to-be-selected Minister will be, at the same time, the Chair of the Eurogroup, the Vice President of the Commission for Economy and Finance and will be politically responsible for the work of the future European Monetary Fund, chairing its Governing Board. The picture portrayed by the Commission reminds, accordingly, the role played within external action by the High Representative of the Union for Foreign Affairs. The main problem is, however, that this Communication seems to draw inspiration from the Eurogroup model. While simultaneously – thanks to the current package of proposals - the TSCG and the ESM are about to be brought back into the picture of the EU legal order, a configuration of the Council which plays a fundamental role in the governance of the EMU, the Eurogroup, remains an “informal forum for discussion” (see, to this respect, the Court of Justice decision in *Mallis*)³⁷ between the Minister of Economics and Finance of the Eurozone. This led, in the past, to a grey zone in between supranationalism and intergovernmentalism that has allowed the EU institutions to reduce, although in very specific circumstances, the intensity of the review of the Court of Justice.³⁸ The initiative of the Commission goes in the direction of providing a “single phone number” for EU economic-governance, resounding the statement traditionally attributed to Kissinger.³⁹ However, the essence of this proposal is simple and troublesome at the same time: what if, for instance, an agreement in the Eurogroup is not reached to appoint the Vice President of the Commission as its own President? What if the act of the Eurogroup endorsing a decision of the European Monetary Fund is not reviewable by the Court of Justice? Overall, this proposal seems to contradict the commitment to democratic accountability and efficiency made by the Commission in the Communication on the future of the EMU: perhaps this represents the best solution, on the basis of the current legal framework, but this still does not solve the problem of the accountability of such a role.⁴⁰ Where the Minister of Economics and Finance can be of help, is, however, in helping into better integrating economic and monetary policy and, enhancing economic policy coordination, contributing into rebalancing the economic and the social objectives of the EU.⁴¹ The figure proposed seems, in

³⁷ Court of Justice, joined Cases C-105/15 P to C-109/15 P, 20 September 2016, *Konstantinos Mallis and Others v European Commission and European Central Bank (ECB)*, EU:C:2016:702, paras 46-47.[GC]

³⁸ See *Mallis*, cit., where the Court of Justice repeated that the acts of the Eurogroup can not be object of the review of the same Court. Para 61.: “Finally, in so far as, by their actions, the appellants sought the annulment of a Eurogroup statement, it should be noted not only that the term ‘informally’ is used in the wording of Protocol No 14 on the Eurogroup, annexed to the FEU Treaty, but also that the Eurogroup is not among the different configurations of the Council of the European Union enumerated in Annex I to its Rules of Procedure adopted by Council Decision 2009/937/EU of 1 December 2009 (OJ 2009 L 325, p. 35), the list of which is referred to in Article 16(6) TEU. Accordingly, as the Advocate General has observed in points 55 to 65 of his Opinion, the Eurogroup cannot be equated with a configuration of the Council or be classified as a body, office or agency of the European Union within the meaning of Article 263 TFEU”.

³⁹ If he – according G. Rachman from Financial Times – actually ever pronounced the statement: “Kissinger never made the famous remark about Europe’s telephone number. According to the late Peter Rodman, who knew him well, the saying is apocryphal, and in fact Kissinger’s concern was the precise opposite – he was fed up with having to deal with a Dane whom he regarded as incompetent and ineffective, who was trying to represent the whole of the EU as President of the Council. Kissinger himself has disowned the remark, and it seems that he was actually seeking to divide and rule in Europe, rather than be restricted to a single voice on the telephone.” See G. Rachman, “Kissinger never wanted to dial Europe”, in *Financial Times*, 22 July 2009, available at www.ft.com.

⁴⁰ Although it should be acknowledged the effort of the Commission to explain its narrative over accountability, based on the relationship of trust between the Commission and Parliament and on the principle of conferred power. See the Communication on A European minister..., cit., p. 7.

⁴¹ On the relationship between the “economic” and the “social” in the EU see F. Costamagna, *The Impact of Stronger Economic Policy Coordination on the European Social Dimension: Issues of Legitimacy*, in M. Adam, F. Fabbrini, P. Larouche (eds.), *The Constitutionalisation of European Budgetary Constraints*, cit., p. 359 *et seq.*

principle, to be able to ensure an enhanced coordination of the economic policy – being President of the Eurogroup – and of the monetary policy – as Vice President of the Commission – while and to act as a connection between the Council, the Commission and the Member states. However, the possibility to succeed seems to rely more on the personal reputation and accountability of the person appointed as Minister rather than on the actual set of powers and competences conferred by the mean of an act of the institutions.

5. From the European Stability Mechanism to the European Monetary Fund

The last piece of legislation presented by the Commission is a proposal for a Council Regulation on the establishment of an European Monetary Fund.⁴² This initiative should transform the European Stability Mechanism into a body of the European Union which should be able to provide financial assistance to the EU Member States experiencing serious economic and financial imbalances, and this should be done using the legal basis provided for by Art. 352 TFEU, the open-ended power clause that allows the Commission to act when “the Treaties have not provided the necessary powers”.⁴³ As to which pertains the governance of the newly established body, according to the EMF Statute proposal⁴⁴ brought forward by the Commission, the composition of the newly established EMF Board should be the same of the Eurogroup, and, according to the position expressed by the Commission in its Communication, the Minister of Economic and Finance should be the chair of the Board of Governors. The actual initiative of the Commission is composed of two parts: a Regulation establishing the EMF and the Statute of the EMF.⁴⁵ The EMF will be founded as a fully fledged EU body with legal personality, adding to the current ESM mission, which is the provision of financial assistance to the Member States which are experiencing economic and financial imbalances, “*the new task of providing credit lines or guarantees in support of the SRB[Single Resolution Board] for backstopping the SRF [Single Resolution Fund]*”.⁴⁶ The introduction of this backstop has the effect of providing an additional guarantee to the Banking Union, in sight of the approval of the European Deposit Insurance Scheme.⁴⁷ Another advancement that the Commission plans to introduce is that the European Monetary Fund will be also allowed, under certain circumstances, to buy national bonds of the EMF Member States on the primary market, something that, at the present date, is not permitted even to the ECB.⁴⁸ The main concern is here connected to the obligations imposed by the Treaties.

⁴² Proposal for a Council Regulation establishing the European Monetary Fund, cit..

⁴³ Art. 352 TFEU: “If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures. Where the measures in question are adopted by the Council in accordance with a special legislative procedure, it shall also act unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament”.

⁴⁴ For a detailed comment on the Statute proposal see C. Gortsos, *The Proposed Legal Framework for Establishing a European Monetary Fund (EMF): A Systematic Presentation and a Preliminary Assessment*, 17 December 2017, <https://ssrn.com/abstract=3090343>.

⁴⁵ Annex to the Proposal for a Council Regulation on the establishment of the European Monetary Fund: Statute of the European Monetary Fund, COM(2017) 827 final.

⁴⁶ See p. 14 of the proposed Regulation, cit.

⁴⁷ Proposal for a Regulation of the European Parliament and the Council amending Regulation (EU) 806/2014 in order to establish a European Deposit Insurance Scheme, COM(2015) 586 final.

⁴⁸ See recital 49 of the proposed Regulation, cit and Art. 17 of the proposed Statute of the EMF.

Art. 123 TFEU⁴⁹ prohibits to the European Central Bank the direct purchase of debt instruments of the Member States, but does not say anything on other EU institutions or bodies (as the future EMF) to be established - *inter alia* - with the purpose of buying national bonds on the primary market. If this proposal will ever pass the unanimity barrier at the Council, this is a matter that will be surely discussed by the EMF The Commission, in the Communication on the Future of Europe⁵⁰ and in the EMF proposal,⁵¹ acknowledges that the current set of proposals might be held problematic in light of the *Meroni* case law on the delegation of powers from the EU institutions to other EU bodies and agencies.⁵² However, the Commission maintains that the endorsement of the Council to the politically sensitive decisions to be taken by the future EMF will be a sufficient guarantee and will ensure a correct delegation of competences.⁵³ Here it is worth to discuss briefly the conditions of the involvement of the Council. The EMF proposal distinguished between a) decisions adopted pursuant to the EMF Statute⁵⁴ from b) “circumstances [that] require the urgent provision of stability support”⁵⁵. In both cases, the Council is meant to approve, with different powers, the decisions taken by the Board of Governors or by the Board of Directors of the EMF. The question is then how this approval will be granted. Art. 3.4 of the proposed Regulation provides the answer: the right to vote and to adopt the EMF decisions will be restricted to the Member States of the Euro-zone, and they will vote according to the qualified majority procedure in Art. 236 TFEU. Hence, the real problem is if, according to the actual framework of the Treaties, such a conferral of power might actually take place, since it calls into question the (already mentioned) *Meroni* doctrine. Since, as briefly shown, the disruptive potential of the present proposal is high, is likely that the unanimity required by the legal basis in the Council will be reached at the price of a compromise on the proposal that might, or not, change the substance of the initiative of the Commission. Another solution might be that, after realising that the EMF proposal in its actual state I not viable, the Commission and the Member States will go for the enhanced cooperation procedure. This however takes time, and the end of the legislature is approaching.

6. The EMU reform package and the asymmetry of the Economic and Monetary Union

⁴⁹ Art. 123 TFEU: “Overdraft facilities or any other type of credit facility with the European Central Bank or with the central banks of the Member States (hereinafter referred to as ‘ national central banks’) in favour of Union institutions, bodies, offices or agencies, central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of Member States shall be prohibited, as shall the purchase directly from them by the European Central Bank or national central banks of debt instruments”.

⁵⁰ See p. 6 of the Communication on Further steps..., cit.

⁵¹ See p. 7 of the proposed Regulation, cit.

⁵² Court of Justice, case 9-56, 13 June 1958, *Meroni & Co., Industrie Metallurgiche, SpA v High Authority of the European Coal and Steel Community*, EU:C:1958:7.

⁵³ Art. 3 of the proposed Regulation, cit.

⁵⁴ Art. 3 para 1 of the proposed Regulation: “Decisions taken by the Board of Governors pursuant to Article [...] of the Statute of the EMF, and decisions taken by the Board of Directors pursuant to Article [...] of the Statute of the EMF shall be transmitted to the Council immediately after their adoption, together with the reasons on which they are based. They may enter into force only if they are approved by the Council”.

⁵⁵ Art. 3 para 2 of the proposed Regulation: “Where circumstances require the urgent provision of stability support to an EMF Member in accordance with Article 16, decisions may be taken by an emergency procedure. In such an event, the decision taken by the Board of Governors or the Board of Directors shall be transmitted to the Council immediately after its adoption together with the reasons on which it is based. [...]”.

The reform proposed by the European Commission is, in principle, highly likely to have a positive impact over the asymmetry of the EMU. The asymmetry of the EMU is one of the most known and most debated issues in the field of EU law scholarship, and represents one of the main critiques that has been brought forward by those advocating not even the necessity of a reform but also the necessity to withdraw from a project that is ultimately doomed to fail. In this sense, the proposal of the Commission has the potential at least to address the issue of asymmetry between economic and monetary policy. Taking into account the *caveat* and the doubts expressed in the previous paragraphs, a task like the one of the European Minister of Economy and Finance, if it actually takes place, is seriously capable to coordinate economic policy and can reduce the divide between a fully harmonized monetary policy and economic policies where every . His role as vice president of the Commission and President of the Eurogroup and of the EMF might represent an important opportunity for harmonising economic policy. At the same time, the Commission proposal to make the decisions of the future EMF accountable to the Council is a reasonable option. However, the main weakness of the reform package lies on the informal setback of the European Minister, modelled on the Eurogroup. If the Commission succeed into supporting the proposal in front of the Council, this might lead, overall, to a weak reform that might raise issues in terms of judicial review and lack of competences of the decision taken. The reform proposed by the Commission can also undermine the effort that the very same Commission is doing to make sure that the other Member States respect and protect rule of law. We are obviously talking about different level of responsibility (undermining the independence of judiciary and the freedom of thought is not comparable with being weak on democratic accountability), but, as a matter of fact, a reform as the one proposed, is not surely reinforcing the role of the Commission.

Another, radical, objection that might be raised against the proposals of the Commission has to do with the principle of conferred powers within the Economic and Monetary Union. It is true that the Commission has not been in the forefront of the battle as it has the European Central Bank, that, since the *Pringle* judgment⁵⁶ by the Court of Justice and the *OMT* judgment by the *Bundesverfassungsgericht*⁵⁷ is under the scrutiny of *Bundestag*⁵⁸ for compliance with the principle of conferred powers. In this sense, the most relevant problem might be the provision in the EMF proposal

⁵⁶ CJEU of 16 June 2015, *Peter Gauweiler and Others v Deutscher Bundestag*. Case C-62/14, EU:C:2015:400.

⁵⁷ GCC, Judgment of 21 June 2016, 2 BvR 2728/13, 2 BvE 13/13, 2 BvR 2731/13, 2 BvR 2730/13, 2 BvR 2729/13 [OMT judgment].

⁵⁸ GCC, supra, paras 205-207 : “3. Since, against this backdrop, the OMT Programme constitutes an ultra vires act if the framework conditions defined by the Court of Justice are not met, the German Bundesbank may only participate in the programme’s implementation if any acts of implementation stay within the framework specified by the Court of Justice (a). Should these conditions not be fulfilled when implementing the OMT Programme, the Federal Government and the Bundestag would be obliged to intervene (b). a) The German Bundesbank may only participate in the programme’s implementation if and to the extent that the prerequisites defined by the Court of Justice (para. 199) are met, i.e. - purchases are not announced, - the volume of the purchases is limited from the outset, - there is a minimum period between the issue of the government bonds and their purchase by the ESCB that is defined from the outset and prevents the issuing conditions from being distorted, - the ESCB purchases only government bonds of Member States that have bond market access enabling the funding of such bonds, - purchased bonds are only in exceptional cases held until maturity and - purchases are restricted or ceased and purchased bonds are remarketed should continuing the intervention become unnecessary. Should any implementation of the policy decision of the Governing Council of the European Central Bank of 6 September 2012 fail to fulfil these conditions, it would constitute a sufficiently qualified exceeding of competences within the meaning of the ultra vires review (cf. BVerfGE 134, 366 <392 et seq. paras. 36 et seq., 398 et seq. paras. 55 et seq.>”).

of a programme to buy national bonds in the primary market: the *Primary Market Support Facility*.⁵⁹ According to Art. 17 of the proposed Statute of the European Monetary Fund, the Board of Governors of the EMF has the power to negotiate with the Member States a Memorandum of Understanding setting the policy condition for the purchase of bonds of an EMF Member. While this move is, in the perspective of the completion of the EMU though the reduction of its asymmetry, very welcome, it is also true that even the strongest supporter of the advancing of EU integration would see a competence problem in this. How it is possible to reconcile this with the spirit of Art. 123 TFEU but, even more, with the OMT judgment of the German Constitutional Court? The OMT programme,⁶⁰ which deals with secondary market purchase and has not been so far activated by the ECB, is subjected to a draconian list of conditions in order not to be retained as *ultra vires*. In a recent question for preliminary ruling raised, again, by the German Constitutional Court to the Court of Justice which is at the moment pending in front of the Court (the hearing took place in July 2018), the CJEU has been asked on the compliance of the PSPP, the ECB programme of purchase of sovereign bonds in place at the present date - again on the secondary markets.⁶¹ It seems at least unlikely that the establishment of an agency of the EU that has the power to purchase national sovereign bonds on the primary (Art. 17 of the proposed EMF Statute) and on the secondary (Art. 18 of the proposed EMF Statute) markets will be retained in compliance with the principle of conferred powers and with the prohibition of monetary financing (Art. 123 TFEU). That is why, as I will try to outline in the last paragraphs, the only solution at hand seems to be to undergo a constitutional reform.

7. Is redemption possible? the Sisyphean task of the Commission on democracy deficit and the need for a constitutional momentum

The analysis carried on on the EMU reform package and on the governance of the economic and monetary Union unveils, albeit taking also into account the many good inputs that this reform provides, the limits and the perils of the reform package proposed by the Commission. When times are hard, however, pragmatism has often proved to be, in the history of EU integration, the best solution.⁶² Problem is, at this point of EU integration, that the crisis rhetoric that has permeated the narrative over the reform of the EMU is in place since almost 10 years: when the exception becomes

⁵⁹ See the proposed Regulation on the European Monetary Fund, *supra*, Article 17: “1. The Board of Governors may decide to arrange for the purchase of bonds of an EMF Member on the primary market, in accordance with Article 12(1) and with the objective of maximising the cost efficiency of the financial assistance. 2. The policy conditions attached to the primary market support facility shall be detailed in the MoU, in accordance with Article 13(3). 3. The financial terms and conditions under which the bond purchase is conducted shall be specified in a financial assistance facility agreement, to be signed by the Managing Director. 4. The Board of Directors shall adopt detailed guidelines on the procedure for implementing the primary market support facility. 5. The Board of Directors shall decide by reinforced qualified majority, on the basis of a proposal from the Managing Director and after having received a monitoring report from the Commission in accordance with Article 13(8), the disbursement of financial assistance to a beneficiary Member State through operations on the primary market”.

⁶⁰ Defined by the ECB as “a number of technical features regarding the Eurosystem’s outright transactions in secondary sovereign bond markets that aim at safeguarding an appropriate monetary policy transmission and the singleness of the monetary policy”. See ECB, Press Release of 6 September 2012, available at https://www.ecb.europa.eu/press/pr/date/2012/html/pr120906_1.en.html

⁶¹ CJEU, *Heinrich Weiss and Others*, Case C-493/17.

⁶² I.e. see the “whatever it takes” of the president of the European Central Bank, Mario Draghi, on the commitment to save the fate of the common currency and the subsequent action taken to launch programmes alike the OMT and PSPP. [...]

the rule, then it means that the options are finished. That is why the current initiative of the Commission is commendable, since it aims, with the instruments made available by the EU legal framework, to consolidate the solutions proposed to counter the economic crisis in a way that is compatible with the guarantees established by the Lisbon Treaty. However, the task of the Commission, be that the one in power now or the one that will kick off its mandate in 2019, will become Sisyphean, without a constitutional momentum which should allow a serious reflection over the Treaties. However, it is evident that in light of the current legal and political situation (Brexit, asylum and migration crisis, the formation of at least two groups of Member States which are not favourable to further integration), it is not allowing dreams of future reform. A good sign in this sense has however been represented by the attempt launched in politics and scholarship to discuss the democratisation of the EU economic governance.⁶³ As naïve as might appear the attempt, the Picketty and Hamon initiative has the potential to nourish and foster the discussion over the reform of the Treaties, involving a discussion over their amendment. The side effect of this proposal is that, in a similar fashion to the informal setback of the role of the European Minister, but contrary to the overall re-embodiment approach of the proposal, is built on intergovernmentalism.⁶⁴ The price to be paid for an initiative like the T-Dem is, on the side of the Commission, extremely high. The risk is that, from intergovernmentalism to intergovernmentalism, the Commission task of bringing the EMU back in the constitutional framework of the Treaty will prove to be unsuccessful, and the same problems of legitimacy and lack of competences will continue to pop up in the debate over reform. In any event, day will come when a structural reform of economic governance will need to be pursued. Perhaps, a serious discussion over its opportunity and a “constitutional momentum” are needed more now than ever.

8. Conclusion: doing reforms on a shoestring?

The picture of the reform brought to bring the EMU back into the constitutional framework of the Treaties is ongoing. The Commission, after presenting a Communication on the 2021-2027 Multiannual Financial Framework at the beginning of May 2018,⁶⁵ and another on sovereign bond-backed securities,⁶⁶ presented at the end of May 2018 two proposals, on the Reform Support Programme⁶⁷ and on the establishment of a European Investment Stabilisation Function.⁶⁸ Despite the activism of the Commission, much still remains to be discussed: the informal setback of the European Minister of Economy and Finance, the broad discretion left to the Member States in the TSCG proposal, the powers of buying bonds and the mechanism of approval of the Council in the

⁶³ See the Treaty on the Democratisation of the Euro-Area (T-Dem). Available at <http://piketty.pse.ens.fr/files/T-DEM%20-%20Final%20english%20version%209march2017.pdf> [...]

⁶⁴ S. Platon, *Democratizing the Euro Area without the European Parliament: Benoît Hamon's "T-Dem"*, *VerfBlog*, 13.03.2017, available at <https://verfassungsblog.de/democratizing-the-euro-area-without-the-european-parliament-benoit-hamons-t-dem/>.

⁶⁵ Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of Regions on a Modern Budget for a Union that Protects, Empowers and Defends The Multiannual Financial Framework for 2021-2027, COM(2018) 321 final.

⁶⁶ Proposal for a Regulation of the European Parliament and the Council on sovereign bond-backed securities, COM(2018) 339 final.

⁶⁷ Proposal for a Regulation of the European Parliament and the Council on the establishment of the Reform Support Programme, COM(2018) 391 final.

⁶⁸ Proposal for a Regulation of the European Parliament and the Council on the establishment of a European Investment Stabilisation Function, COM(2018) 387 final.

EMF proposal and the choice the legal basis are only a few of the problems that are in need of a solution. [...] Even if the proposals are able to find the majority necessary for their approval in the Council, it is likely that the proposed directives and regulations will be reviewed by national supreme and constitutional Courts for their compliance, *inter alia*, with the principle of conferred powers.⁶⁹ With this – extremely ambitious – package of initiatives, the Commission appears to offer to the EU and national policy-makers an utopist vision of the future of the EMU.⁷⁰ How about this apparent utopism concealing a pragmatic vision? Since time before the end of the EU legislature is short, the Commission has launched the initiative on the EMU reform in order to make the Parliament and (in particular) the Council pay the price of their political inactivity. Similarly to what happened with the initiative⁷¹ on the Financial Transaction Tax,⁷² the Commission unveils an ambitious package of initiatives in order to launch a challenge to the Council and – ultimately – on the Member States. It will be for the Member States to decide how to cope with it, but at least the price of the inaction will not bear on the shoulders of the Commission. This challenge seems to have the ultimate purpose of increasing the political accountability of the system and to equip, within the framework of the Treaties, the EU institutions and bodies with a clearer framework of competences on economic policies, thus remedying, albeit only partially, to the asymmetry of the economic and the monetary policies. As it has been outlined before, however, in lack of a structured discussion over the opportunity to reform the Treaties, the task of the Commission to bring the EMU back into the EU constitutional framework will be Sisyphean. It is however the reality of the political situation that eventually dictates the rules to executives, and, as discouraging as might seem, it is likely that the Commission will be required to cope and work within the current legal framework for some more years. This reform package is far from being a sufficient compromise, but if it manages to bring attention about its structural reform on the agenda of EU and national policy-makers it will have reported at least a minor victory.

⁶⁹ This circumstance is similar to what happened to the OMT programme, which was scrutinized both by the *Bundesverfassungsgericht* as well as by the Court of Justice of the EU. See M. Payandeh, *The OMT Judgment of the German Federal Constitutional Court: Repositioning the Court within the European Constitutional Architecture*, in *European Constitutional Law Review*, 2017, p. 400 *et seq.*; S. Baroncelli, *The Gauweiler Judgment in View of the Case Law of the European Court of Justice on European Central Bank Independence - Between Substance and Form*, in *Maastricht Journal of European and Comparative Law*, 2017, p. 79 *et seq.*

⁷⁰ Although a Deutsche Bank paper published in the days after the presentation of the proposals maintains there is no real surprise in the package. See K. Körner, *The Commission's "Saint Nicholas" EMU package – no real surprises*, in *Deutsche Bank - EU Monitor – European Integration*, 8 December 2017, https://www.dbresearch.com/PROD/RPS_EN-PROD/PROD0000000000457921/The_Commission%27s_%E2%80%9CSaint_Nicholas%E2%80%9D_EMU_package_-_no.pdf.

⁷¹ Proposal for a Council Directive implementing enhanced cooperation in the area of financial transaction tax, COM(2013) 71 final.

⁷² See the reference in the EUI Conference on the State of the Union address of 10 May 2018 by the President of the European Commission, Jean Claude Juncker: [available only in French] “*Nous avons proposé une taxe sur les transactions financières – ce n'est pas la faute de la Commission que le Conseil tarde à se mettre d'accord, Monsieur le Président de la région; là encore, ce n'est pas la Commission, c'est les Etats membre qui avancent d'un pas hésitant vers plus de justice fiscale. Nous venons de proposer une meilleure imposition des géants du net, proposition jusqu'à ce jour non encore acceptée, même seulement partiellement examinée par le Conseil*”.