

The re-constitutionalisation of the EMU after the economic crisis

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Abstract: this paper discusses the main points of the reform of the Economic and Monetary Union presented by the European Commission in December 2017. In particular, the author tries to evaluate the core of the proposal 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 proposed introduction of an 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 constitutional framework of the Treaties. Will they succeed?

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 literature since the rise of the economic crisis, (see in general: Bin, Caretti and Pitruzzella, 2015; Chalmers, Jachtenfuchs and Joerges (eds.) 2016; Daniele, Simone and Cisotta (eds.), 2017; Dawson, Enderlein and Joerges (eds.), 2015; Fabbrini, 2016; Hinarejos, 2015; Tuori and Tuori, 2014), nearly four decades after the first plans (Werner Report, 1970) and two decades after its establishment with the Maastricht Treaty (now Art. 3.4 and Art. 119 TFEU). 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 (Snell, 2016 161). The EU has exclusive competence on monetary policy (Art. 127 TFEU) but can only coordinate the economic policies (Art. 120 TFEU) of the Member States (*contra* see Scharpf, 2011; Id., 2010). 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 (European Commission, 2017). The proposals brought forward by the Commission is composed of a number of different acts: 1) a Communication on the future of the EMU (COM(2017) 821), 2) a proposal for a Council Directive for strengthening fiscal responsibility (ultimately addressed into re-embody the Treaty on Stability, Governance and Coordination (TSGC) into the Treaty Framework)(COM(2017) 824), 3) a Communication on the European Minister of

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Economy and Finance (COM(2017) 823), 4) a proposal for a Council Regulation to transform the European Stability Mechanism (ESM) into an European Monetary Fund (EMF) (COM(2017) 827), 5) a proposal of amendment to Regulation n. 1303/2013 (Common Provisions Regulation) to increase the rate of efficiency in the repartition of funding instruments (COM(2017) 826), 6) a proposal for amendments to strengthen the Structural Support Programme (COM(2017) 825) and 7) a Communication on budgetary instruments for a stable Euro area (COM(2017) 822). 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 deficit (see recently Adamski, 2018) 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 (Rossi 2018, 405).

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 (Starita 2017, 3). 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. This is the case of Romania, meant to join the Eurozone in 2019, that has not yet clarified its intention to join. The second inspiring principle of the proposal is represented by the efficiency of the system. In this case, efficiency refers to the need to bring intergovernmental instruments created during the crisis, as the European Stability Mechanism¹ and the Treaty on Stability, Coordination and Governance (TSCG),² 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

¹ Treaty establishing the European Stability Mechanism, signed on 2 February 2012.

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

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 EU (see COM(2017) 822, 13) 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. Given that the European elections are getting closer and the likelihood of approval before the end of the legislature is diminishing over time, the destiny of this reform is uncertain. What is on the other side real is the concern that unveils, namely the need for a radical reform of the EMU.

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 (COM(2017) 824). The proposal attempts to bring the Treaty on Stability, Coordination and Governance (Baratta, 2012, 647, Bonvicini and F. Brugnoli (a cura di), 2012; Cantore and Martinico, 2013, 463; Craig, 2012, 231; Louis, 2012, 5; Rossi, 2012, 293) back into the picture of the Treaties, with particular reference to its mostly debated part, the Fiscal Compact.³ 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 (see, in general, Adam, Fabbrini and Larouche (eds.), 2014) will be effectively transposed or not into EU primary legislation. 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 (Crocì, 2018). However, differently from the original text of the Treaty, in the proposal is outlined that each Member State should tend to respect the threshold 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*”(Art. 3.1, COM(2017) 824). 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) (Art. 3.4, COM(2017) 824). 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),

³ Title III of the Treaty on Stability Coordination and Governance.

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 (see Joerges, 2018, 75; de Witte, Ott and Vos (eds.), 2017; Beukers, de Witte and Kilpatrick (eds.), 2017) Mc Donnell, 2014, 57). The TSCG should accordingly take into account the flexibility built in the Stability and Growth Package and identified by the Commission in 2015 (COM(2017) 824, 5). 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. A European 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 (COM(2017) 823). The European Commission, in its initiative, proposes the 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*, C-105/15 P to C-109/15 P, 2016, paras 46-47) 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 (*Mallis*, para 61). 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.⁴ However, the essence of this proposal is simple and troublesome at the same time: what if, for instance, an agreement in the

⁴ If he – according to 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.

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 (COM(2017) 824, 7). 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 (Costamagna 2016, 359). The figure proposed seems, in 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 (COM(2017) 827). 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*”. As to the governance of the newly established body, according to the EMF Statute proposal (Annex, COM (2017) 827) 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. 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]*” (COM(2017) 827, 14). 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 (COM (2015) 856). 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 (COM(2017) 827, recital 49). The main concern is here connected to the obligations imposed by the Treaties. Art. 123 TFEU 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, it is likely that the act will be challenged on this ground in front of the Court of Justice, either according to the action for annulment pursuant to Art. 263 TFEU, or within a procedure for preliminary ruling under Art. 267 TFEU. The Commission, in the Communication on the Future of Europe (COM(2017) 821, 6) and in the EMF proposal, (COM(2017) 827, 7) 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 (case 9-56, *Meroni*). 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 (Art. 3, COM(2017) 827). 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 Statute (Art. 3.1 COM(2017) 827) from b) “circumstances [that] require the urgent provision of stability support” (Art. 3.2 COM(2017) 827). 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 (COM(2017) 827) 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, it 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 is not viable, the Commission and the Member States will open an enhanced cooperation procedure (Art. 329 TFEU). This procedure, however, requires a considerable amount of time and the coordination between the different EU institutional actors: a minimum number of Member States should ask to the Commission to deliver a proposal to the Council, and the Member States representatives participating into the procedure should approve unanimously the initiative. How this will be done before the end of the Juncker legislature is an open question.

6. The projected reform and the asymmetry of the Economic and Monetary Union

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 (Scharpf, 2011), the exclusive competence in monetary policy *vis à vis* the coordination of economic policy, is one of the most known and most debated issues in the field of EMU scholarship, and represents one of the main critiques that has been brought forward by those advocating the necessity to withdraw from a project that is ultimately doomed to fail. In this sense the proposal of the Commission has the potential to at least 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 bring into the picture an increased democratic accountability. His role as vice president of the Commission and President of the Eurogroup and of the EMF might represent an

important opportunity for strengthening the coordination of economic policy. At the same time, the Commission proposal to make the decisions of the EMF accountable to the Council is a reasonable option, which enhance the democratic accountability of the institution. 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.

7. The need for a comprehensive reform of the EMU?

The analysis carried 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, and we have no doubt that the EU institutions will do “*whatever it takes*” (© Mario Draghi) to save the euro and the EMU. Problem is, at this point of EU integration, that the crisis rhetoric that has imbibed the narrative over EMU reform is in place since almost 10 years: when the exception becomes the rule, then it means that the other options are short-handed. That is why the current initiative of the Commission is problematic, since it aims, with the instruments available within the EU legal framework, to consolidate the solutions proposed to counter the economic crisis in a way that is not compatible with the competences established by the Lisbon Treaty. The task of the Commission, the one in power or the one kicking off mandate in 2019, will become Sisyphean, without a serious reflection over the reform of the Treaties. However, it is evident that the current legal and political framework (e. g. Brexit, asylum and migration crisis, the formation of at least two groups of Member States which are not favourable to further integration), is not leaving room for future constitutional reforms. An interesting proposal has however been brought forward by the attempt launched in politics and scholarship to discuss the democratisation of the EU economic governance.⁵ As naïve as might appear the attempt, the T-Dem initiative has the potential to nourish and foster the debate 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 spirit of reconstitutionalisation of the proposal, it is built on intergovernmentalism (Platon, 2017). The price to be paid for initiatives alike the T-Dem, on the side of the Commission, might be too high. The risk is that the Commission task of bringing democratic accountability in the EMU will prove to be unsuccessful, and the intergovernmentalism 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

⁵ 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>

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 (COM(2018) 321), and another on sovereign bond-backed securities (COM(2018) 339), presented at the end of May 2018 two proposals, on the Reform Support Programme (COM(2018) 391) and on the establishment of a European Investment Stabilisation Function (COM(2018) 387). 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 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 (Payandeh 2017, 400; Baroncelli 2017, 79). 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 (Körner, 2017). 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 initiative (COM(2013) 71) on the Financial Transaction Tax,⁶ the Commission unveils an ambitious package of initiatives in order to challenge to the Council and – ultimately – 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 above, 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 become impossible. It is however the reality of the political situation that eventually dictates rules to executives, and it is likely that the Commission will be required to cope and work within the current Treaties legal framework for some more years, perhaps exploring the possibility of an enhanced cooperation procedure. 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 small victory.

⁶ See the reference in the EUI 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*”.

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