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OBSERVER – POLICEMAN – PILOT?
ON LACUNAE OF LEGITIMACY AND THE CONTRADICTIONS OF
FINANCIAL CRISIS MANAGEMENT IN THE EUROPEAN UNION

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Observer – Policeman – Pilot?

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Abstract

In matters of economic policy, the institutions of the European Union exercise uncoordinated functions of observer, policeman and pilot.

Under normal circumstances the EU institutions act as observer of the economic policies of the Member States. This “soft law” approach contrasts sharply with their role to act as “policemen” and as a pilot, when excessive debts arise in the Member States. The contrast is illustrated by the "friendly advice", given to Greece in 2009 and the peremptory command addressed to this country in 2010/2011. A stable legal framework would require the elimination - or at least, attenuation - of the mismatch between the feeble powers to shape policy and the robustness of the powers to intervene in case of excessive public deficit and to impose policy sanctions. EU action needs to be targeted at an earlier stage in the process, so that ex post facto intervention with sanctions can be avoided.

Furthermore, the present rules on EMU place at risk the legitimacy of both the EU and Member States. Neither national parliaments nor the European Parliament are involved in the shaping of and the decision on Recommendations for economic policy. In the longer term, there is no alternative: the EU will have to be granted powers to take binding decisions in the area of economic policy, and, in parallel, to reconfigure the decision-making system so that economic and social policy measures have democratic legitimacy. In any event, the only reliable “pilot” is the “institutional framework” as described in Article 13 of the TEU.

Keywords

Economic governance, Economic and Monetary Union, Legitimacy, Sanctions, EU Institutions

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A. Introduction

The title of a recent book on the history of the United Nations, "No Enchanted Palace"[1] reminds the reader of a statement made by the then British Ambassador to the United States, Lord Halifax, who used the notion in 1945 to describe the newly founded United Nations. He continued: "but we have, I am convinced, forged an instrument, by which, if men are serious in wanting peace and are ready to make sacrifices for it, they may find means to win it".

This statement can be transposed to the Treaty of Maastricht of 1992, setting up, among others, Economic and Monetary Union (EMU). EMU is not just a program for the abolition of bureaux de change at internal borders. It represents an essential feature of the European Union's Internal Market.

But beyond its technical importance, it is a visionary project, aimed at peace, prosperity and stability in Europe. The Treaty did not create an enchanted palace that would spring into sight at once, by magic touch or hidden power. It was not an end in itself.

The legal and political foundations EMU are still unstable and the ideas about its future shape remain controversial. In matters of economic and monetary policy, an appropriate balance between the common interest and the autonomy of Member States, between efficiency and the legitimacy of its institutions and procedures has not yet been found. Questioning EMU as it stands and as it has been spelled out in the founding treaties, is therefore just as necessary in the post Lisbon period as it was before. And "serious men ready to make sacrifices" are equally needed.

The essence of EMU, as part of European integration, endures, however, over time. Tommaso Padoa – Schioppa summarized it in 1994: "It is a project for the solution of **common problems** by **common institutions**."[2]

The present paper does not refer to the short term economic aspects of the ongoing financial crisis. It discusses instead some structural and procedural aspects of those two fundamentals:

- what is the role of common institutions? and
- are the problems still perceived as common?

Both topics are interrelated inasmuch as the narrow democratic foundation of EU economic policy in general, and of crisis management measures in the Union in particular, adversely affect the solidarity of the citizens of the Union and their confidence in the project of EMU altogether.

The present financial crisis may have the potential to promote solutions which have long been set aside as "politically impossible". However, this unforeseen crisis generates a dynamic of its own, which not only accentuates the weaknesses, but also puts into question the achievements of common values, tools and procedures. This dynamic may prepare the ground for a substantial Treaty reform leading to more efficient decisions on economic policy and to a more democratic regime governing that policy.

The dynamic may, however, also lead to radically new solutions, which threaten the traditional legal and democratic principles of integration even beyond economic policy. Two recent examples illustrate this risk:

- In a letter written on 5 August 2011, the President of the European Central Bank asked the Government of Italy to adopt specific and far reaching economic reforms.[3]

[1] Mark Mazower, No Enchanted Palace, New York , N.Y. (N.Y. University Press) 2010.

[2] Tommaso Padoa – Schioppa, The Road to Monetary Union, Oxford 1994.

- On 11 July 2011 the representatives of the 17 euro – area Member States signed the Treaty establishing the European Stability Mechanism (ESM).[4]

In its letter the European Central Bank requests the Italian government among others to adopt

> a thorough review of rules regulating the hiring and dismissal of employees …in conjunction with the establishment of an unemployment insurance system and a set of active labour market policies capable of easing the reallocation of resources towards the more competitive firms and sectors". The ECB regards" as crucial, that all actions …be taken as soon as possible with decree – laws, followed by Parliamentary ratification by end September 2011. A constitutional reform tightening fiscal rules would also be appropriate.

It should be remembered, that the task assigned to the ECB by the Treaty on the Functioning of the European Union (TFEU) is to "conduct the monetary policy of the Union" (Article 282 (1)). The letter issued by the ECB has no parallel in an official act, adopted by any of the Unions institutions who are responsible for EU economic and social policy.

The ESM Treaty is intended to become a key feature of Economic and Monetary Union. It is to replace the two stability instruments, which were established in 2010, one of them being a Council Regulation (No. 407/2010)[5], the other being a combination of an instrument of international law with an instrument under private law of Luxembourg.[6]

This new treaty has three potentially dangerous qualities: It will be concluded between some Member States only, it will be exclusively in the hands of national governments and it will have an entirely separate existence from the European Union. It does not lay down any statutory requirement for accountability to the European Parliament or any other EU –institution. The European Commission will be granted observer status only.

What, under such circumstances, will be the future role of the "institutional framework" of the European Union in issues of economic policy? Will the institutions become purely "observers"? Will their role be restricted to that of a "policeman"? Or can they assume a leading function as "pilots"?

Against this background, the following comments concern:

- the appropriateness of tools for the achievement of EMU (1),
- the insufficient legitimacy of activities in the area of EMU (2),
- the widening rift between Member States of the euro area and the other Member States (3).

(Contd.)

3 The letter has been published in its original English version by the Italian newspaper Corriere della Sera of 29 September 2011.

4 The Treaty is published on the website of the EU Council (http://consilium.europa.eu). Cf. also European Commission, Economic and Financial Affairs.

5 Regulation n° 407/2010 establishing a European financial stabilization mechanism, OJ 2010, L 118, p. 1.

6 European Financial Stability Facility Framework Agreement of 7 June 2010, concluded between the euro – area Member States and the European Financial Stability Facility (EFSF), a société anonyme incorporated in Luxembourg, EU Council Doc. 9614/10.

B. Structural Weaknesses of EU's Economic Policy

1. Does the Union Dispose of Adequate Tools for the Achievement of the Economic and Monetary Union?

In matters of economic policy, the tools available to the EU institutions have several shortcomings:

- they do not permit the transformation of positions, which have been agreed in common into legally binding norms,
- they offer a choice between two extremes only: they are either "soft" or "harsh",
- they are remarkably vague when it comes to "harsh" measures against one Member State, thus opening the way for interventions into national policy, which do not sit well with the functions of the common institutions.

One can see here the uncoordinated simultaneous presence of observer, policeman and pilot:

Under normal circumstances, the Union mainly acts as an observer of the economic policies of the Member States. It may only adopt "broad guidelines" (Art. 121 (2) TFEU), "monitor economic developments in each of the Member States" (Art. 121 (3) TFEU) and address "recommendations" and "warnings" to a Member State (Art. 121 (4)) TFEU). "Warnings" and "recommendations" are both not binding.

No binding legal act can be adopted in order to impose on Member States specific "constructive" policy obligations.

Hence, the achievement of the goals of (general[7]) economic policy is supposed to result from the voluntary activity of the Member States. Such drafting duly produces the predictable outcome. Member States continue to make use of their freedom to act on economic issues, while if any "common" economic policy eventuates from recommendations issued, this is solely by chance.

The "soft law" approach contrasts sharply with the role assigned to EU institutions to act as "policemen" and as a pilot, when excessive debts arise in the Member States. In this situation the EU – Council may decide two things. It may decide on financial sanctions and it may impose undefined "measures" judged necessary "in order to remedy the situation" (Art. 126 (9) TFEU).

As a matter of principle, sanctions are a poor instrument for the achievement of lasting results in any context. They intervene only *ex post facto*, they react to results but do not prevent causes. They are particularly inappropriate, when it comes to public deficits, which normally result from multiple causes over a longer period of time and where those, who feel the sanctions, are not necessarily identical with those who have collected the benefits.

It is worth noting, that deficit procedures under the Treaty, which may trigger sanctions, are presently applied against the vast majority of Member States.

The reality of the economic policies of the Member States shows, that the existing set of tools for the establishment of Economic and Monetary Union could not prevent economic disparities, let alone the financial crisis.

Rendering sanctions more severe, as is envisaged as part of the reform package of secondary legislation, which has been adopted at the end of September 2011, is unlikely to improve their impact on national policy decisions.

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[7] As opposed to the specific policies, e.g. the establishment of the Internal Market.

As far as the other possible reactions to excessive national deficits - the adoption of “measures” by the Council - is concerned, we now know since the outbreak of the Greek crisis, how those - hitherto mysterious - measures will look like:

The Council addressed a Decision to Greece on 8 June 2010, requiring Greece to "put an end to the present excessive deficit situation", and to "adopt the following measures" inter alia:

- reduce pensions (Article 2(1)(e));
- reduce Easter, summer and Christmas bonuses and allowances (Article 2(1)(f));
- collect revenue from the licensing of gaming (Article 2(2)(a));
- replace only 20 % of retiring public sector employees (Article 2(2)(a));
- legislate to introduce a unified statutory retirement age of 65 years (Article 2(2)(b));
- enact a law to reform the wage bargaining system (Article 2(3)(c));
- enact a minimum-wage law (Article 2(3)(d)).[8]

Greece was given staggered deadlines up to December 2011 to implement the 45 measures in question. Under Article 288 TFEU, decisions are binding on their addressees.

Article 126(9) and Article 136 TFEU constituted the legal basis for the Decision, which was adopted on the recommendation of the Commission; other Institutions, such as the European Parliament, were not involved in the process.

The full set of measures imposed on Greece (and with which Greece is required to comply) constitutes the most drastic intervention in a Member State's economic and social policy ever decided by the EU. Similar obligations have been imposed on Portugal in 2011.

A mere year before, in June 2009, the message had been very different. As part of the "economic policy recommendations" regularly addressed to the Member States under Article 121(2) TFEU (the central instrument enabling a common economic policy to be framed in the context of economic and monetary union), the Council **recommended** Greece to "pursue fiscal consolidation in the medium-term and improve the efficiency of primary expenditure, speed up on-going reforms in tax administration and the budgetary process, reduce the debt-to-GDP ratio, and further proceed with the implementation of the pension reform as rapidly as possible". [9]

The astonishing leap from friendly counsel to peremptory command at once illustrates the extremes of the EU's competence in the field of economic policy, and points up its weaknesses, in particular, the frightening lack of differentiated policy instruments. More broadly, it must increase misgivings as to whether the provisions of the Treaty really conduce to the construction of economic and monetary union. Put in more general terms: is not such drastic interference by the EU Council (and the Governments which stand behind it) in a Member State's area of competence tainted by a serious lack of legitimacy?

In any event, the Council decision with regard to Greece and the letter from the ECB to the Italian government created precedents for “economic governance”, invoking a competence on the part of the Union to set detailed and far-reaching requirements relating to conduct in areas of economic policy which hitherto have indisputably fallen within the prerogative powers of the Member States.

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[8] Decision 2010/320, OJ 2010 L 145, p.6, as amended by Decision 2010/486, OJ 2010 L 241, p. 12.

[9] Recommendation 2009/531 of 25.6.2009, OJ 2010 L 183, p. 1, Annex. See also Recommendation 2010/410 of 13.7.2010, OJ 2010 L 191, p. 28.

This brief look into the toolbox of economic governance reveals an uncoordinated and therefore inefficient presence of all three functions of the EU – institutions:

The benevolent observer of economic policy, which under normal circumstances is decided on at national level, suddenly transforms itself either into a pilot, who decides the rules according to which a country is governed, or into a policeman, who imposes financial sanctions to this end.

2. Insufficient Legitimacy of Economic Policy Decision

What makes the contrast between 2009's "friendly advice" and the peremptory command under the authority of Article 126(9) TFEU in 2010 more critical is a further structural design fault in the TFEU's economic policy provisions - the fact that neither national parliaments nor the European Parliament are involved in the shaping of and the decision on Recommendations for economic policy. The European Parliament is only informed **ex post facto** of the recommendations and decisions adopted by the Council under Articles 121(2) and (4), 122 and 126(9) and (11). It is quite simply incomprehensible how the Member States' ministerial officials who framed those Treaty provisions could ever imagine it possible to impose major decisions of economic and social policy on the peoples of Europe simply by decisions of the executive, without any parliamentary legitimacy at EU level. Such arrangements blatantly flout the principle of democracy - postulated in Article 2 of the Treaty on European Union (TEU) as one of the values on which the Union is founded. The urgency of any need for EU action cannot justify dispensing with parliamentary consideration. When a situation arises which is sufficiently important to individual nations, the European Parliament is perfectly capable of convening at short notice in extraordinary part-session (see Article 229 TFEU).

We note here the most serious paradox of the present instruments for the achievement of EMU: The heaviest intervention into hitherto national responsibilities which the Treaty authorizes enjoys the least legitimacy.

Similarly, the initiative by the ECB concerning economic and social policy measures to be adopted by the constitutional organs of Italy may be useful and even necessary in its substance. It contributes, however, to the growing disorientation of the public about political responsibilities and legitimacy of action in the Union[10].

Precluding any involvement by the body charged with the direct representation of citizens at European level (Article 10(2) TEU) considerably diminishes the legitimacy of any such measures. Circumventing the European Parliament (adumbrated in - though not absolutely mandated by - the TFEU[11]) may well prove exceptionally dangerous to the EU's legitimacy if the populations of the Member States concerned were to engage in large-scale resistance to European Union interventions, causing internal political crises with unforeseeable consequences, precisely because no politically responsible institution is visible. On the other hand, one can see from the reactions in northern EU Member States, that European solidarity can only be invoked credibly if it is founded on a large public debate, leading to a parliamentary vote to sustain it. This problem is increasingly felt at national level, as is revealed by the recent decision of the German Constitutional Court on the compatibility of the "European Financial Stability Mechanism" and the "European Financial Stability Facility" with the German Constitution[12].

In sum, a fundamental prerequisite for the legitimacy of measures for the establishment of Economic and Monetary Union is lacking. This is not only true of the exceptional, albeit far - reaching measures

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10 Cf. Fritz W. Scharpf, Monetary Union, Fiscal Crisis and the Preemption of Democracy, Discussion Paper, www.mpifg.de/pu/mpifg_dp/dp 11-11.pdf (2011).

11 This is because it can at least be compensated for to some extent by voluntary consultation of the EP.

12 Federal Constitutional Court, 2 BvR 987/10 and others, Judgment of 7 September 2011.

in case of excessive deficit. As has been mentioned above, the creation and implementation of the European Stability Mechanism does not envisage any role for the European Parliament either. Whether and to what extent national parliaments are involved remains an open question and depends on the respective constitutional settings.

A stronger participation of the European Parliament in decisions concerning economic and social policy does not offer any miracle solution to lacking legitimacy. It constitutes, however, a minimum requirement, which is not existent at present.

3. Is There Still a Common Aim?

Beginning with the Lisbon Treaty, but accelerating since the outbreak of the financial crisis, there has been an attempt to even out the well-known asymmetry between the rules on economic policy on the one hand, and on monetary policy on the other, at the cost of a widening rift with regard to common institutions between Member States whose currency is the euro and Member States “with a derogation”.

Besides the aforementioned appearance of new legal instruments for economic policy, applicable outside the legal order of the Union to some Member States only, we have also seen in recent months a proliferation of new actors in economic policy. Their common denominator is the fact, that they are not inclusive with regard to all Member States. To give two examples: On 25 March 2011 a “Euro plus Pact” was agreed by the euro area Heads of State or Government[13], joined by six Member States, which do not belong to the euro area.[14] Its purpose is “to achieve a new quality of economic policy coordination”.

Another group of actors, this time the Heads of State or Government of the euro area and EU institutions (the text does not say which ones) on 21 July 2011 “agreed” on certain measures of economic policy[15].

According to the founding Treaties, EMU is a common project, to which all institutions of all Member States and of the Union are committed even though the United Kingdom and Denmark were granted a special status from the beginning. All Member States are bound by Article 3, paragraph 4 of the Treaty on European Union, which reads: “The Union shall establish an economic and monetary union whose currency is the euro”. Legally and conceptually EMU is not a case of enhanced cooperation, namely because the introduction of the common currency depends on objective criteria and is subject to specific procedures.

Furthermore, by contrast to Acts of enhanced cooperation (cf. Art. 20 (4) TEU), the acts adopted in the context of EMU form part of the “acquis” which has to be accepted by all new Member States. One may, however, have serious doubts as to whether there still is (if there ever was) an equal commitment of all Member States to the project: In fact, the non – euro area States differ in their attitude to the monetary area.

Not all such States participate in the European Exchange Rate Mechanism (ERM 2), a prerequisite for the introduction of the euro.[16] And some States, which for economic reasons are not yet in a position to introduce the euro, are nevertheless working to achieve euro area membership, while others (the UK, Denmark and Sweden) are not at all pursuing membership. The transitional provisions of Articles

[13] European Council of 24/25 March 2011, Conclusions, EUCO/10/11 Rev. 1, Annex 1.

[14] Bulgaria, Denmark, Latvia, Lithuania, Poland, Romania.

[15] Council of the European Union, Press Release of 21 July 2011, www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/123978.

[16] Art. 140 (1), third indent, TFEU and Agreement of 16.3.2006, OJ 2006 C 73, p. 1, as last amended 8.12. 2008, OJ 2009 C 16, p. 10.

139 and 140 TFEU were designed solely for the former group (numbering seven States since 2011) and were meant to last for few years only.

The default position contemplated by the Treaties (whereby economic policy decisions take effect across the Union) is further qualified by the fact that, since the Treaty of Lisbon, there are not only derogations for non-euro area States, but also special powers conferred on the EU by Article 136 TFEU, the effect of which is limited to euro area States.

This contrast is amplified by a difference in the application of Treaty provisions to Member States within and outside the euro area. For example, the main instrument for the coordination of economic policy, the "broad guidelines of economic policy" distinguishes between the two groups. Furthermore, the coercive measures for the reduction of an excessive deficit are applicable only within the euro area. (Protocol No 15 to the TEU lays down further special arrangements for the United Kingdom.)

Whether such arrangements facilitate the achievement of the Treaty's stated objective of monetary union for all Member States is an open question[17].

This is even more doubtful as regards the amendment to Article 136 TFEU, which has recently been decided by the European Council and which is at present in the process of ratification, aimed at establishing a legal basis for a "stability mechanism" among the euro area Member States. Paradoxically, this amendment requires the approval of, among others, the United Kingdom, Sweden and Denmark, although it will not apply to those states.

The transformation of Economic and Monetary Union into a form of enhanced cooperation among Member States, who seriously adhere to the project, would add realism and transparency to the project and would render its operation between the participants easier.

Enhanced cooperation and even international agreements between Member States outside the framework of the Union are not per se detrimental to the common project. Both previous examples, the "Schengen" and the "Prüm" – agreements (the latter on police cooperation) have subsequently been absorbed by the Union.

Transforming EMU into a project of some Member States only would, however, shift away from a hitherto common political undertaking, would delete a symbol of unity and would as a consequence reduce the substance of the European Union.

4. Interim Conclusion

The present system of economic governance in the European Union suffers from severe weaknesses. It could not prevent the present crisis nor has it yet been able to bring about workable crisis management, founded on solidarity and on popular support among the peoples of Europe. In the perception of the public, in this area the European Union does not act as a "pilot" but only, if at all, as a "policeman".

The recent efforts to improve economic governance within the European Union do not fundamentally change this situation. They are again marked by contradictions and an insufficient degree of legitimacy, both of which risk jeopardizing their effect and threatening the entire project of European Integration.

At the same time they have the potential to prepare the path for the fundamental reforms which are necessary to ensure a workable economic and monetary union

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[17] For an extensive treatment see J.–V. Louis, EMU and enhanced cooperation, in: Diederichs/Faber/Tekin/Umbach (eds.), Europe Reloaded, Baden – Baden (NOMOS) 2011, p. 303 - 330.

In fact, an entity composed of multiple institutions, a construct with so many contradictions, is not necessarily ineffective or doomed to fail. An ambiguous concept within a constitutional framework may even have a greater capacity to learn than a seemingly homogenous rigid system. It is easier for it to generate a dynamic among the actors and to incite them to strive for renovation and adjustment. Such a positive effect of constitutional ambiguity presupposes, however, a minimum of consistency and a willingness of all actors to pursue a common aim and to perform their part on the same playing field.

C. Which Reforms are Necessary in Order to Enhance Efficiency and Legitimacy of EMU ?

Any reform which does not address the reasons for the lack of efficiency and legitimacy of the Unions economic policy but which perpetuates the “carrot and stick” approach, as does, for example, the “economic governance reform package”, which had been proposed last year by the Commission and which has been adopted on 28 September 2011 by the European Parliament and approved by the Council on 4 October 2011 (the famous “sixpack”), will not bring about the necessary change in the quality of the economic policy of the Union.

If one wished to maintain the traditional concept of unity and solidarity within the Union and at the same time to increase the efficiency and legitimacy of economic governance, some consideration should be given to the idea of “constructive” tools for the coordination of economic policies.

Only an amendment of the Treaty, that authorizes the adoption of measures of “positive“ policy, to be decided according to the ordinary decision - making procedure on the level of the Union, such as, for example, the adoption of regulations or directives imposing minimum standards on economic issues (e.g. pension systems or harmonization of taxes) is likely to resolve the question of the appropriate form of European economic governance.

The focus of Union action should be brought forward so as to obviate ex post facto intervention in the form of sanctions. One way of achieving this would be to enable the “broad guidelines” referred to in Article 121(2) TFEU, instead of being adopted in the form of non-binding recommendations, to be adopted as binding directives. Member States, while remaining free to select the means to be used, would then nonetheless be committed to the achievement of the stated aims. It would, in addition, be possible to lay down time-limits.

It would also serve the same aim of constructive policy-formulation if, following the example of EU social policy rules (Article 153(2)(b) TFEU), a number of areas of economic policy were designated in which the EU was empowered to lay down mandatory minimum requirements by means of directives.

Because the “broad guidelines” touch upon fundamental economic and social choices, their transformation into binding measures requires the broadest political legitimacy. This implies in any event a serious public debate and decisions by elected institutions. In the present economic and social situation, which demands major and difficult reforms in all Member States, no measure can simply be justified by reference to a request “from Brussels” (or “from Frankfurt”), despite its technocratic merits.

Even without this transformation of guidelines into binding acts, the decision-making procedures provided for in Articles 121, 122 and 126(9) and (11) TFEU should in any case be replaced by the ordinary legislative procedure, adding in particular a right of co-decision on the part of the European Parliament.

Furthermore, any decision on exceptional measures in favor of a Member State (Art. 122 TFEU) and on acts of closer cooperation among the euro area Member States (Art. 136 TFEU) would have to be adopted according to the ordinary legislative procedure, so the European Parliament would have a right of co-decision. In any case, such co-decision is entirely appropriate, since, generally speaking, exceptional measures under Article 122 TFEU entail considerable expenditure from the EU budget, and hence require EP assent in the budgetary procedure.

One might even ask in the context of such a fundamental reform, whether the possibilities of excluding a Member State from the Union and of Treaty amendments entering into force even without the approval of all Member States should not be introduced.

The euro area Member States have until now tried to avoid a substantial Treaty amendment, which would improve the quality of the available instruments within the structure of the Union. As has been mentioned above, they opted instead for the establishment of a new international instrument, which should operate outside the existing Treaties and for the adoption of an informal agreement among some Member States (the "Euro – plus Pact"). Aside from the problems of legitimacy, it is doubtful whether this approach will be more efficient than mechanisms which rely on the institutions of the Union.

The discussions in Finland and Slovakia concerning the recent amendment to the "European Financial Stability Facility" (EFSF) of 2010 which involves 17 governments and – perhaps, and in any event to varying degrees, - 17 national parliaments gives an idea of the difficulties, the operation of this instrument will face. – And this is just the prelude to the forthcoming "European Stability Mechanism".

The European Council assented to Germany's call for an amendment to the TFEU. The Council's original plan was to amplify Article 122 TFEU to the effect that financial crises within a Member State would also qualify for EU assistance. What was surprising about that original intention was that the May 2010 assistance for Greece had already been founded on Article 122 TFEU. If Article122 TFEU constituted a sufficient legal basis for that assistance, then a Treaty amendment was neither necessary nor justified. In December 2010 the European Council decided to abandon that course and instead add the following new paragraph 3 to Article 136 TFEU:

> 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."

Whereas the stability mechanism introduced in 2010 was – at least in part - adopted in the form of a Council regulation,[18] the new mechanism is to remain entirely outside of the EU legal framework. The effect of the planned Treaty amendment will therefore be a considerable shift of competences from the Union back to Member States.

Until now, this is the only project for an amendment to the Treaty provision. Chances are, however, increasing, that a more thorough reform of EMU will take place in the near future.

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[18] Regulation No 407/2010, OJ 2010 L 118, p. 1.

D. Concluding Remarks

It is apparent, that the corpus of rules in the Treaties relating to the framing of economic and monetary union contains a latent fissure leading to inconsistency and legal uncertainties, and placing at risk the legitimacy of both the EU and Member States. This state of affairs may be hidden by cosmetic tinkering, but only at the cost of tremendous conflicts. A stable solution would surely require the elimination - or at least, attenuation - of the mismatch between the feeble powers to shape policy and the robustness of the powers to intervene in case of excessive public deficit and to impose policy sanctions. In other words, EU action needs to be targeted at an earlier stage in the process, so that ex post facto intervention with sanctions can be avoided.

In the longer term, there is no alternative: the EU will have to be granted powers to take binding decisions on the broad guidelines for a common economic policy, and, in parallel, to reconfigure the decision-making system so that economic and social policy measures have democratic legitimacy.

Such reconfiguring would have to reach beyond the bi-polar system which has prevailed hitherto, whereby responsibility for economic policy rests either with the EU or with Member States. The most recent instances of intervention in the economic policy of Greece, Ireland and Portugal, despite their character as instruments resolving a financial crisis and despite their weak democratic legitimacy, constitute precedents exemplifying the need for and feasibility of economic governance within the European Union.

The EU, at bottom, is not bound together with the Member States in a system of command, hierarchy and sanctions. The means by which its continued existence is secured and its objectives achieved require first and foremost a never-ending pursuit of consensus and balance. Yet, consensus must ultimately be translated into norms binding all Member States. Only then will the Union enjoy the authority and internal consistency which in turn will contribute to the legitimacy of its actions.

European Integration in general, and Economic and Monetary Union in particular, is, as Andrew Shonfield called it in his BBC lectures in 1972, "*A journey to an unknown destination*".

European Integration is a process of continued learning and adjustment, open to errors and willing to run certain risks, just like the Phoenician princess "Europa", when she undertook her maritime adventure. A policeman's help is of little use on a journey of this kind. European integration in economic and other areas is too complex a matter to be achieved by sanctions and with the help of policemen.

As on a difficult waterway, in such a situation a reliable pilot is needed.

With regard to Economic and Monetary Union the only pilot on duty is the "institutional framework" as described in Article 13 of the Treaty on European Union and consisting of:

- the European Parliament, the European Council, the Commission and others. They**,** together, are entrusted with the task of
- "promoting its values, advancing its objectives, serving its interests, those of its citizens and those of the Member States".

This unique institutional setup is too valuable to be confined to the role of a mere observer. It is the task of the institutional framework to articulate and to promote the general interest of the Union, to lead in the interest of the European citizens. No alternatives to this framework are available.

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