



What Role for the European Commission in the New Governance of the Economic and Monetary Union?

Roberto Cisotta

“The Political Future of the Union”

Abstract

In recent years, the European Union (EU) and its Member States have tried to offer credible responses to the financial and economic crisis often outside the EU legal order and with a significant impact on the constitutional framework and on the institutional balance of the Union itself. Many of these reforms concern the Commission, which has been entrusted with new tasks mainly related to the provision of financial assistance to Member States experiencing major economic difficulties, the overview of national budgetary decisions and, to a lesser extent, actions to foster economic growth. In some areas - like the new rules on fiscal discipline - the Commission has gained strong powers *vis-à-vis* the Member States. The solutions found raise many legal concerns and may alter long-standing balances between institutions. Furthermore, they are clearly inspired by intergovernmentalism and principally conceived within intergovernmental structures like the European Council. In this context, the Commission still constitutes the last reliable driving force towards a genuine European project and it is called to play an extremely delicate role to safeguard the common interest of EU and of the Eurozone.

Keywords: *European Union / European Commission / Eurozone crisis / Economic and Monetary Union / European Stability Mechanism / Fiscal Compact / Six Pack / European Semester / Euro Plus Pact*

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by Roberto Cisotta*

Introduction

Faced with growing economic turbulence, the European Union and its Member States have, in recent years, tried to offer concrete responses and to promote appropriate *constitutional* changes, in particular within the framework of the Economic and Monetary Union (EMU).¹ There is still a long way to go,² and the current legal and political framework is far from being satisfactory. In this context, some EU institutions - in particular the European Commission³ - have been entrusted with new tasks, often outside the existing EU legal order. This paper analyses the impact of these reforms on the role of the Commission, which is the *core political driver* of the Union.

Analysis will be made, firstly, of the rescue packages provided to some Member States experiencing financial difficulty; secondly, of the new *European Semester*; thirdly, of the new instruments aimed at strengthening fiscal discipline; and finally, of the initiatives being pursued to foster economic growth.

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¹ For a general analysis, see, among others: Roberto Cisotta and Annamaria Viterbo, "La crisi della Grecia, l'attacco speculativo all'euro e le risposte dell'Unione europea", in *Il diritto dell'Unione europea*, Vol. 15, No. 4 (2010), p. 961-994; Roberto Cisotta and Annamaria Viterbo, "La crisi del debito sovrano e gli interventi dell'UE: dai primi strumenti finanziari al Fiscal compact", in *Il diritto dell'Unione europea*, Vol. 17, No. 2 (2012), p. 323-366; Jean-Victor Louis, "The No-Bailout Clause and Rescue Packages", in *Common Market Law Review*, Vol. 47, No. 4 (August 2010), p. 971-986; Frédéric Allemand and Francesco Martucci, "La nouvelle gouvernance économique européenne", (I) and (II), in *Cahiers de droit européen*, Vol. 48, No. 1 (2012), p. 17-99 and No. 2 (2012), p. 407-456; Giulio Peroni, *La crisi dell'Euro: limiti e rimedi dell'Unione economica e monetaria*, Milano, Giuffrè, 2012; Gian Luigi Tosato, "L'integrazione europea ai tempi della crisi dell'euro", in *Rivista di diritto internazionale*, Vol. 95, No. 3 (2012), p. 681-703; for a critical perspective on the compatibility of the solutions adopted with EU law, see Matthias Ruffert, "The European Debt Crisis and European Union Law", in *Common Market Law Review*, Vol. 48, No. 6 (December 2011), p. 1777-1805.

² Mandated by the European Council of June 2012, President Van Rompuy, in close collaboration with Presidents Barroso (Commission), Juncker (Eurogroup) and Draghi (ECB), presented an interim report on the steps to be taken to strengthen the EMU to the October European Council, and the final report - *Towards a genuine Economic and Monetary Union* - on 5 December 2012. The other EU institutions have also participated in the debate: see the European Parliament resolution on the report (20 November 2012) and the communication from the Commission *A blueprint for a deep and genuine economic and monetary union* (28 November 2012). For all documents see the reference section.

³ But also others, such as the Court of Justice of the European Union (CJEU).

1. Rescue packages and crisis resolution mechanisms

With the first rescue package, provided to Greece in the spring of 2010, the Commission was empowered to sign an international agreement with the Greek government and to coordinate the pool of loans.⁴ Moreover, the Commission negotiated with the Greek government, in liaison with the European Central Bank (ECB) and the International Monetary Fund (IMF), a “joint programme (including amounts and conditionality ...)”, on the basis of the acts already adopted by the ECOFIN Council regarding Greece.⁵

After the (first) Greek crisis, new instruments were established to deal with possible future crises by providing financial assistance to member states. These instruments were the European Financial Stabilization Mechanism (EFSM), designed to provide financial assistance to all Member States,⁶ and the European Financial Stability Facility (EFSF), a *special purpose vehicle* established as a limited liability company under Luxemburgish law and framed as a Eurozone crisis management system.⁷ The latter

⁴ The terms of the loan were laid down in two agreements: the Intercreditor Agreement, signed on 8 May 2010 by all Eurozone Member States (apart from Greece), and a Loan Facility Agreement concluded between the Commission, on behalf of all Eurozone Member States except Greece, and the Greek Government. The agreements are available in the Greek Ministry of Finance website: http://www.minfin.gr/content-api/f/binaryChannel/minfin/datastore/30/2d/05/302d058d2ca156bc35b0e268f9446a71c92782b9/application/pdf/sn_kyrwtikoimf_2010_06_04_A.pdf. See also the statement by the Eurogroup on the support to Greece, Brussels, 2 May 2010, http://www.consilium.europa.eu/uedocs/cmsUpload/100502-%20Eurogroup_statement-sn02492.en10.pdf.

⁵ European Council, *Statement on the support to Greece by Euro area Member States*, Brussels, 11 April 2010.

⁶ See the Council Regulation (EU) No 407/2010 of 11 May 2010. This Regulation is based on Article 122(2) of the Treaty on the Functioning of the European Union (TFEU), and “foresees the possibility of granting Union financial assistance to a Member State in difficulties or seriously threatened with severe difficulties caused by exceptional occurrences beyond its control”, as “[s]uch difficulties may be caused by a serious deterioration in the international economic and financial environment” (recitals (1) and (2) to the Regulation). However, the resort to this legal basis was criticized, and should be considered exceptional. The EU institutions have developed a clear awareness of the exceptional character of the use of Article 122 in the context of the current economic crisis. In its judgment in case *Pringle* (not yet reported), at paras 65 and 116-118, the CJEU stated that Article 122 cannot provide a proper legal basis for a permanent mechanism such as the ESM. It has to be borne in mind that the EU Treaties provide a clear and explicit legal basis only regarding financial assistance which can be provided to non-Eurozone Member States (see Articles 143 and 144 TFEU). On all these issues, see: Roberto Cusota and Annamaria Viterbo, “La crisi della Grecia, l’attacco speculativo all’euro e le risposte dell’Unione europea”, cit., p. 981-982, and Matthias Ruffert, “The European Debt Crisis and European Union Law”, cit., p. 1787 and 1792. On the judgment in *Pringle*, see: Paul Craig, “Pringle: Legal Reasoning, Text, Purpose and Teleology”, in *Maastricht Journal of European and Comparative Law*, Vol. 20, No. 1 (2013), p. 3-11, http://www.maastrichtjournal.eu/pdf_file/ITS/MJ_20_01_0003.pdf; Bruno De Witte and Thomas Beukers, “The Court of Justice approves the creation of the European Stability Mechanism outside the EU legal order: *Pringle*”, in *Common Market Law Review*, Vol. 50, No. 3 (June 2013), p. 805-848; Daniel Thym and Matthias Wendel, “Préserver le respect du droit dans la crise; la Cour de justice, le MES et le mythe du déclin de la Communauté de droit (arrêt *Pringle*)”, in *Cahiers de droit européen*, Vol. 48, No. 3 (2012), p. 733-757.

⁷ The complexity in legal terms does not end here: according to Article 16 of the Framework agreement, “any non-contractual obligations arising out of or in connection with it shall be governed by and shall be construed in accordance with English law” (para 1), while, in the absence of an amicable settlement of disputes arising out of the agreement, such disputes are to be submitted to the jurisdiction of the CJEU when they involve Eurozone Member States only, and to that of the courts of the Grand Duchy of Luxembourg should they concern also the EFSF (para 2).

was modelled on the *ad hoc* solution adopted for Greece.⁸ It was subsequently felt necessary to establish a permanent mechanism, the European Stability Mechanism (ESM),⁹ equipped with a stronger toolkit and more reliable financial resources.

Under all these mechanisms, and despite their different legal natures, the Commission is called upon to undertake similar tasks:¹⁰ after a Member State makes an application for financial assistance, the Commission negotiates, normally in liaison with the ECB and the IMF,¹¹ a financial assistance programme, which includes the conditionality to which the Member State will be subjected. It then coordinates the pool of loans, and monitors, again in conjunction with the ECB and the IMF, compliance with the agreed terms. All these activities have raised concerns regarding the lack of democratic legitimacy of the famous “*troika*”, which exercises extensive and intrusive powers *vis-à-vis* the rescued States. From a formal standpoint, these activities are carried out within the framework of an international treaty, duly accepted by the rescued State. This said, these new tasks appear to entail a political transformation of the institutional standing of the Commission, whose role of watchdog is enhanced. One may wonder whether these new tasks, to be carried out in a clearly intergovernmental context, might undermine the independence of the Commission. We will revert to this possible concern in the final section when making an overall assessment of the new role of the Commission.

Let us first, however, consider two legal aspects. First, under the current Treaties, the Commission is entrusted with the task of representing the EU.¹² Here, however, it does not only represent the EU as a whole, but principally the Eurozone Member States. In principle, it is possible that a group of Member States can, under the enhanced

⁸ See *Terms of reference of the Eurogroup. European Financial Stability Facility*, Luxembourg, 7 June 2010, and the *EFSF Framework Agreement*. For references to the other relevant documents, see Roberto Cisotta and Annamaria Viterbo, “La crisi della Grecia, l’attacco speculativo all’euro e le risposte dell’Unione europea”, cit., p. 983-984.

⁹ The *Treaty establishing the European Stability Mechanism* was signed by the representatives of the Eurozone Member States on 11 July 2011 (first version) and then on 2 February 2012 (second version). To ensure that the new mechanism would be compatible with the EU Treaties, and particularly with the no bail-out clause (Article 125 TFEU), a new third paragraph, explicitly enabling Eurozone Member States to establish a permanent mechanism, was added to Article 136 TFEU (see the Council Decision 2011/119/EU, which was adopted under the simplified procedure provided for by Article 48(6) TEU). See Bruno De Witte, “The European Treaty Amendment for the Creation of a Financial Stability Mechanism”, in *European Policy Analysis*, No. 2011:6epa (June 2011), http://www.sieps.se/sites/default/files/2011_6epa.pdf; Jean-Victor Louis, “The Unexpected Revision of the Lisbon Treaty and the Establishment of a European Stability Mechanism”, in *Cahier Comte Boël*, No. 15 (April 2011), p. 17-39, <http://www.elec-lece.eu/documents/pub/B15.pdf>. The CJEU stated that this amendment just confirmed the competence of the Eurozone Member States to establish such a mechanism: see Pringle at para 72. In this judgment, the Court followed the view of the Commission and the ECB as expressed in their advisory opinions on the European Council decision; on this issue, see: Roberto Cisotta, “L’evoluzione dell’Unione economica e monetaria: nuovi strumenti di gestione delle crisi e coordinamento delle politiche economiche”, in Luigi Daniele (ed.), *L’Unione europea dopo due anni di applicazione del Trattato di Lisbona. Studi in memoria del prof. Francesco Caruso*, Napoli, Editoriale Scientifica, forthcoming.

¹⁰ For details of the different procedures, in particular regarding negotiations on the conditionality to be applied as part of the financial assistance granted under the various mechanisms, see Roberto Cisotta and Annamaria Viterbo, “La crisi del debito sovrano e gli interventi dell’UE: dai primi strumenti finanziari al Fiscal compact”, cit., p. 342-346.

¹¹ The IMF is not involved in financial assistance operations conducted under the EFSM.

¹² Article 17 of the Treaty on European Union (TEU).

cooperation procedure contained in Article 20 TEU and Articles 326 to 334 TFEU, establish forms of cooperation not shared by other Member States. Nevertheless, this kind of cooperation is established within the EU legal framework, while here the Commission (and the ECB¹³) is acting directly or indirectly on behalf of a group of Member States to manage their relationships with third parties, such as other Member States or the IMF, in the context of an international agreement and thus under international law.

Second, what might be striking, in strictly legal terms, is the fact that the Commission has been given additional competences by means of acts adopted outside the EU legal order.¹⁴ Nevertheless, the CJEU, when called to rule on this point - with specific reference to the ESM Treaty - recalled that, according to its case-law, it is possible to confer new tasks upon the EU institutions outside the framework of the EU Treaties, “provided that those tasks do not alter the essential character of the powers conferred on those institutions by the [TEU and TFEU]”. The CJEU did not recognise the argument that, in the earlier case law, the new tasks at issue had been conferred before the introduction of enhanced cooperation.¹⁵

2. The European Semester

Approved by the ECOFIN Council in 2010¹⁶ and launched for the first time in January 2011, the *European Semester* is aimed at coordinating the procedure for monitoring Member States' compliance with the parameters laid down in the Stability and Growth Pact (SGP) with that concerning the coordination of economic policies contained in Article 121 TFEU. The European Semester thus combines different procedures and is based on the “Integrated Guidelines for Growth and Jobs”, which result from a merger between the Broad Economic Policy Guidelines (Article 121 TFEU) and the Employment Guidelines (Article 148 TFEU).¹⁷ The Stability or Convergence

¹³ As to the ECB, there is no clear legal basis enabling it to carry out this task: see Chiara Zilioli, “La Banca Centrale Europea vent'anni dopo: nuove funzioni, nuovi poteri”, in Sergio M. Carbone (a cura di), *L'Unione europea a vent'anni da Maastricht, verso nuove regole*, Napoli, Editoriale Scientifica, forthcoming, p. 63-64.

¹⁴ This also applies, mutatis mutandis, to the tasks with which the Commission has been entrusted by the Fiscal Compact (see section 3).

¹⁵ See the judgment in *Pringle*, paras 155-169. According to the CJEU, it would not have been possible, in this case, to resort to enhanced cooperation, as the EU has no competence to establish a permanent financial assistance mechanism such as the ESM. In substance, the CJEU attached great importance to the fact that, thanks to the tasks conferred on the Commission (and the ECB), there is a stronger guarantee that the activities of the ESM will be consistent with EU law.

¹⁶ The European Semester was proposed by the Commission in May 2010. See the communication *Reinforcing Economic Policy Coordination*, 12 May 2010. See also Council Regulation (EC) No 1466/97 of 7 July 1997, as amended, in particular, by Regulation No 1175/2011.

¹⁷ These acts are typically non-binding, although failure to accomplish the objectives set in them may engage the responsibility of the member state concerned under the excessive deficit procedure (EDP) or the excessive imbalance procedure (EIP). This integrated functioning has been criticized: see Mark Hallerberg, Benedicita Marzinotto and Guntram B. Wolff, *How Effective and Legitimate is the European Semester? Increasing the Role of the European Parliament*, Briefing Paper for the European Parliament, August 2011, p. 10-11, <http://www.europarl.europa.eu/committees/en/econ/studiesdownload.html?languageDocument=EN&file=42891>.

Programmes (SCPs) and the National Reform Programmes (NRPs)¹⁸ both have to be presented by Member States by April of each year, and the Commission is then obliged to evaluate the impact of the planned measures (“integrated approach”). Policy recommendations are then to be implemented at national level on the basis of the *ex-ante* guidance provided by the EU. Moreover, the *European Semester* also provides a framework for the coordination of the new Macroeconomic Imbalance Procedure (MIP).¹⁹ Hence, some embryonic elements of what could become an integrated means of taking national budgetary decisions have been established.

Within the *European Semester*, the Commission has to prepare the “Annual Growth Survey” (AGS), the *kick-off* of the procedure, which provides the basic analysis to be taken into account and sets the priorities for Member States.²⁰ Following a debate to be held within the Council and the European Council, the Member States have to present their proposals in their budgetary and structural reform plans. In its turn, the Commission has to deliver the country-specific Recommendations to be adopted by the Council no later than July each year.

The coordination of the existing procedures and the fact that the Commission is called upon to kick off the *European Semester* by delivering the AGS have reinforced its role: actually, it is put at the heart of a creeping (and not formal) shift of EU competences from the *soft* coordination of economic policies to a more binding and intrusive agenda-setting procedure.

3. Strengthened fiscal discipline

In the area of fiscal discipline, the EU has witnessed the introduction of major legal innovations. In particular, the introduction of the new “reverse qualified majority vote”²¹ in deliberations concerning sanctions can be regarded as a Copernican revolution in EU decision-making.

In this context, the struggle between the Commission and the Council has marked the European integration process since its outset, and these innovations are a new chapter in this long story. For instance, the Luxembourg compromise reached in 1966 by Member States to overcome the “empty chair crisis” was one such instance of the

¹⁸ The NRPs also have to include the actions to be taken to achieve the objectives laid down in the Euro Plus pact (see *infra*, section 4), for those States which have signed it. This means that the European Semester should provide an overall, timely and continuous assessment of all the commitments Member States have assumed under different (legal or merely political) instruments.

¹⁹ Established by the Six Pack, see *infra*.

²⁰ The prioritization spelled out in the AGS has been subject to criticism on the grounds that it is not fully justified. See Mark Hallerberg, Benedicta Marzinotto and Guntram B. Wolff, *An Assessment of the European Semester*, Study for the European Parliament, September 2012, p. 9, <http://www.europarl.europa.eu/committees/en/econ/studiesdownload.html?languageDocument=en&file=76151>.

²¹ By “reverse qualified majority vote” is meant a system whereby the proposal of the Commission is considered adopted unless the Council votes against it by qualified majority. Other innovations include, among others, those pertaining to supervisory powers. Tobias Kunstein and Wolfgang Wessels, “The New Governance of the Economic and Monetary Union: Adapted Institutions and Innovative Instruments”, in *IAI Working Papers*, No. 1302 (January 2013), p. 8-9, <http://www.iai.it/content.asp?langid=2&contentid=823>.

dispute between the Commission and the Council and it essentially concerned the qualified majority vote in the latter. Moreover, “automaticity” in the application of sanctions within the SGP - proposed before the adoption of the single currency and intended to strengthen the rule-based discipline of the EMU²² - has always been a complex and sensitive issue, as it implies a remarkable limitation of national discretion in budgetary decisions. The introduction of the reverse qualified majority vote constitutes a clear move towards such an automaticity, attained through a new equilibrium between the Commission and the Council in the context of the SGP.

Nevertheless, in most cases in which the reverse qualified majority vote has been introduced, the powers of the Commission concern the correct application of procedures in which real decision-making power rests in the hands of the Council. This can be affirmed in particular with reference to those cases of reverse qualified majority voting introduced by the *Six Pack* (six pieces of secondary law adopted in November 2011 to enhance European economic governance²³), in particular Regulation No 1173/2011.

Such cases are worth examining. Within the preventive arm of the SGP,²⁴ reverse qualified majority voting applies to the adoption of sanctions once the Council has established “that a Member State failed to take action in response to the Council recommendation referred to in the second subparagraph of Article 6(2) of Regulation (EC) No 1466/97” (Article 4 (1) of Regulation No 1173/2011). Within the corrective arm of the SGP, reverse QMV applies once “the Council, acting under Article 126(6) TFEU, [has decided] that an excessive deficit exists in a Member State which has lodged an interest-bearing deposit with the Commission in accordance with Article 4(1) of [Regulation No 1173/2011], or where the Commission has identified particularly serious non-compliance with the budgetary policy obligations laid down in the SGP” (Article 5(1) of Regulation No 1173/2011). Reverse QMV also applies within the corrective arm once “the Council, acting under Article 126(8) TFEU, [has decided] that a Member State has not taken effective action to correct its excessive deficit” (Article 6(1) of Regulation No 1173/2011).²⁵ It is apparent that the Commission - except for the

²² In particular, this was the aim pursued by the proposal presented by German Finance Minister Theo Waigel in 1995. See Stefan Collignon, “The End of the Stability and Growth Pact?”, in *International Economics and Economic Policy*, Vol. 1, No. 1 (March 2004), p. 15-19, <http://www.stefancollignon.de/PDF/Stability%20and%20Growth%20Pact.pdf>, Jean-Victor Louis, “Managing Public Finances. Lessons and Perspectives for the EU and the Euro Area”, in *Forum Constitutionis Europae*, No. FCE 06/10 (2010), <http://www.whi-berlin.eu/documents/Rede-Louis.pdf>.

²³ See Council Directive 2011/85/EU and Regulation (EU) No 1177/2011 of 8 November 2011; and Regulations Nos 1173/2011, 1174/2011, 1175/2011 and 1176/2011 of 16 November 2011.

²⁴ The Preventive arm of the SGP is aimed at ensuring that Member States conduct a sustainable fiscal policy over the cycle, while the corrective arm establishes a framework for corrective actions to be taken by Member States with an excessive deficit.

²⁵ For another case, see Article 3(3) of Regulation No 1174/2011. For an explanation as to how decision-making rules can be affected by secondary legislation, as well as for a comprehensive legal analysis of the Fiscal Compact (see *infra*), see Roberto Baratta, “Legal Issue of the Fiscal Compact. Searching for a Mature Democratic Governance for the euro”, in *Il diritto dell'Unione europea*, No. 4 (2012), p. 647-682, available at <http://ssrn.com/abstract=2196998>. On the Fiscal Compact, see also Roberto Cusota and Annamaria Viterbo, “La crisi del debito sovrano e gli interventi dell'UE: dai primi strumenti finanziari al Fiscal compact”, cit., p. 354-362; Common Market Law Review editors, “Some thoughts concerning the Draft Treaty on a Reinforced Economic Union”, in *Common Market Law Review*, Vol. 49, No. 1 (February 2012), p. 1-14; Paul Craig, “The Stability, Coordination and Governance Treaty: Principle, Politics and

second case under Article 5(1)²⁶ - simply has to *force* the Council to draw the relevant conclusion from what it has already decided.

The introduction of the reverse voting rule can be considered an attempt to counterbalance two drawbacks of the procedures regarding the preventive and corrective arms of the SGP: first, the *solidarity* shown by Member States, that has always obstructed the imposition of sanctions under these procedures; second, the rather timid attitude adopted by the Commission in that context.²⁷ Already in the first years of the SGP's implementation, the political meaning and interpretation of the underlying economic assumptions of its rules were controversial among Member States. In November 2003, the most generous (towards the larger Eurozone States) of the different interpretations of the SGP prevailed together with the mentioned *solidarity* among Member States: the Council did not vote in favour of proceedings with the Excessive Deficit Procedure concerning Germany and France.²⁸ Although putting the two biggest economies of the Eurozone under pressure might have constituted a (small) political earthquake, the choice of the Council ended up undermining the credibility of the SGP. Today, thanks to the reverse qualified majority rule, *solidarity* among Member States should at least become stronger - up to the QMV threshold - to block proceedings in this context.

The *Fiscal Compact*²⁹ - the contracting parties to which have committed to incorporate within their national legal orders, preferably at the constitutional level, the *golden rule* of the balanced budget - actually increases the number of cases in which the reverse voting rule applies. The signatories to the *Fiscal Compact* - and in particular the Eurozone Member States - have agreed to support a proposal or recommendation made by the Commission that the deficit criterion within the framework of the excessive deficit procedure has been breached by one of them, unless a qualified majority is opposed to the decision so proposed or recommended (Article 7). There is no need for a previous ascertainment by the Council concerning the breach in question.³⁰ However, this commitment cannot have exactly the same legal means of functioning as that laid down in the *Six pack* (although the practical effects should be the same), given that, in the case of the Fiscal Compact, the existence of a qualified majority of Eurozone Member States opposing the adoption of a proposed decision is left to the ascertainment of the contracting parties.

Pragmatism", in *European Law Review*, No. 3 (2012), p. 231-248, available at <http://ssrn.com/abstract=2115538>; Gianni Bonvicini and Flavio Brugnoli (eds.), "Il Fiscal Compact", in *Quaderni IAI*, No. 5 (September 2012), <http://www.iai.it/content.asp?langid=2&contentid=798>.

²⁶ According to the wording of Article 5(1) of Regulation No 1173/2011 (second case) - just cited in the text - it is for the Commission to identify "particularly serious non-compliance with the budgetary policy obligations laid down in the SGP", therefore here the Council does not have to simply confirm what it has already ascertained in a preceeding deliberation.

²⁷ Jörg Asmussen, *Building deeper economic union: what to do and what to avoid*, Policy Briefing at the European Policy Centre, Brussels, 17 July 2012, <http://www.ecb.int/press/key/date/2012/html/sp120717.en.html>.

²⁸ On this episode and on its economic and political interpretation, see Stefan Collignon, "The End of the Stability and Growth Pact?", cit., p. 2 ff.

²⁹ Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, signed on 2 March 2012 by all Member States except the UK and the Czech Republic (often referred to as the Fiscal Compact).

³⁰ So that the Commission's proposal or recommendation would entail the subsequent imposition of a sanction, as in most of the cases envisaged under Regulation No 1173/2011 (see *supra*, in this section).

Moreover, this obligation is not covered by the jurisdiction conferred on the CJEU by Article 8 of the *Fiscal Compact*, which is specifically limited to scrutiny of the incorporation into national law of the *golden rule*.³¹ In Article 8 we find a procedure very similar to that for infringement proceedings as laid down in Articles 258-260 TFEU, with the difference that under the *Fiscal Compact* the Commission is not entitled to bring the action, as this is for contracting parties only. However, at the insistence of some Member States - Germany and the Netherlands - that wanted an independent evaluation and automatic triggering of such a procedure, the Commission is obliged to present a report on the incorporation of the *golden rule* into national legal orders.³²

4. Action to foster economic growth

Providing stimulus to economic growth and promoting competitiveness have become the main concerns of the EU institutions and the Member States, but really effective action is yet to come. Two acts - both purely political commitments - are worth mentioning: the *Euro Plus* pact and the *Compact for Growth and Jobs*.

First agreed by the Heads of State or Government of the Eurozone Member States on 11 March 2011, the *Euro Plus* pact was included in an annex to the conclusions of the European Council of 20 April 2011,³³ and also signed by the Heads of State or Government of Bulgaria, Denmark, Latvia, Lithuania, Poland and Romania.³⁴ The *Compact for Growth and Jobs* was adopted by the European Council of 28-29 June 2012.³⁵

³¹ However, for a wider interpretation of Article 8, see Roberto Cisotta and Annamaria Viterbo, "La crisi del debito sovrano e gli interventi dell'UE: dai primi strumenti finanziari al Fiscal compact", cit., p. 359; Jacques Ziller, "The Reform of the Political and Economic Architecture of the Eurozone's Governance. A Legal Perspective", in Franklin Allen, Elena Carletti and Saverio Simonelli (eds.), *Governance for the Eurozone: Integration or Disintegration*, Philadelphia, FIC Press, 2012, p. 131-132, <http://fic.wharton.upenn.edu/fic/goveuro.pdf>.

³² See Common Market Law Review editors, "A revival of the Commission's role as guardian of the treaties?", in *Common Market Law Review*, Vol. 49, No. 5 (October 2012), p. 1557. The Commission must also propose timeframes for convergence of the contracting parties towards their medium-term objectives and common principles for correction mechanisms - to be put in place by the contracting parties "in the event of significant observed deviations from the medium-term objective or the adjustment path towards it" (Articles 3 of the Fiscal Compact). In addition, other new supervisory tasks of the European Commission are laid down in Articles 5 and 6 of the Fiscal Compact. These tasks confirm that monitoring roles involving the establishment of technical parameters (against which the behaviour of the Member States will be evaluated) are considered as particularly suitable for the Commission. The Commission is entrusted with somewhat similar tasks in the Six Pack, where it has to establish a series of economic indexes useful to detect arising imbalances and to evaluate the measures adopted by the Member States (when implementing decisions adopted by the Council). See Maria Luisa Tufano, "Il ruolo della Commissione nella governance europea: quali prospettive?", in *Il diritto dell'Unione europea*, Vol. 17, No. 1 (2012), p. 152-153.

³³ Annex I to the conclusions of the European Council of 24-25 March 2011.

³⁴ The multiplication of instruments of differing natures, some, like the Euro Plus pact, being political, and others, like the Fiscal Compact, legally binding, which have been subscribed to by different groups of Member States increases the complexity of both the legal relationships between Member States and groups thereof, and the overall legal framework of the EMU. See Lucia Serena Rossi, "'Fiscal compact' e Trattato sul meccanismo di stabilità: aspetti istituzionali e conseguenze dell'integrazione differenziata nell'UE", in *Il diritto dell'Unione europea*, Vol. 17, No. 2 (2012), p. 293-307.

³⁵ It is included in an annex to the conclusions of the European Council of 28-29 June 2012.

In the *Euro Plus* pact, although it is up to Heads of State or Government to monitor the implementation of the commitments made, the Commission is fully involved, and in particular has to prepare the reports on the basis of which the evaluation has to be carried out.³⁶ As for the *Compact for Growth and Jobs*, the Commission carries out monitoring tasks in respect of the commitments made regarding policies to be implemented at the national level, while it is directly involved in the monitoring of those policies which pertain to the EU level, exercising in this case the powers conferred on it by the EU Treaties. In some cases, the *Compact for Growth and Jobs* provides relatively specific guidance with regard to the actions to be implemented; in other cases, simple and quite vague objectives are laid down.

Concluding remarks

The analysis above shows how complicated the legal framework of the governance of the Economic and Monetary Union has become. In this last section, a few new elements will be added, and some general remarks made as concerns the role of the Commission.

In the first place, one has to bear in mind that, within the College of Commissioners, decision-making procedures in the area of the Economic and Monetary Union have been made more effective, and the role of the Commissioner for Economic and Monetary Affairs has been strengthened. In particular, this Commissioner, who is also Vice-President of the Commission, can adopt, in agreement with the President, decisions on behalf of the Commission in a number of areas related to the *Six Pack* and to the adjustment programmes adopted within the framework of the EFSM, EFSF and ESM.³⁷

This new operational procedure can firstly be regarded as a response to the need to react quickly and effectively when the EU finds itself faced with severe and urgent economic (and/or political) crises. To this extent, this might be simply interpreted as one of the practical solutions introduced to adapt the EU institutions to the current challenging conditions, in which the ability to react clearly and quickly is fundamental for institutional structures that are built to withstand bad weather. However, such innovations were not just conceived as operational adjustments, but, more broadly, as a way of adapting the institutions to the substantive changes the EU is undergoing. As for the operational aspects, the Commission seems ready to react more rapidly and interact with governments and the other institutions in an *increasingly intergovernmental* legal framework. As for the substance, it cannot be denied that the greater responsibilities of the Commissioner for Economic and Monetary Affairs mean that he has power and *prestige* which is seemingly separate from the Commission, to which he ultimately belongs. The Commission is aware of these developments, and

³⁶ The monitoring activity constitutes an integral part of the process of governance which the Euro Plus pact aims at strengthening: see *supra*, footnote 18.

³⁷ See European Commission, *A blueprint for a deep and genuine economic and monetary union*, cit., p. 38. Furthermore, the Vice-President's services have to be consulted on all Commission initiatives with "a potential impact on growth, competitiveness or economic stability".

has even been working on “a special relationship of confidence and scrutiny between the Vice President for Economic and Monetary Affairs and a “euro committee” of the European Parliament”.³⁸ After several exercises of *constitutional engineering* in the context of the crisis, the EU institutions thus still feel the need to re-adjust the institutional balance, and in particular to deal with the *democratic deficit*.³⁹ Nonetheless, as the Commission itself recognizes, such innovations should be introduced by means of Treaty change, as they clearly touch upon the principle of collegiality,⁴⁰ and, of course, the current institutional framework of the EU.

Second, the Commission is seen as the institution able to ensure appropriate coordination with the EU legal order and to hedge against intergovernmentalism. This observation appears to be in line with the position expressed by the CJEU when, ruling on the legality of the conferral of new competences on the Commission and the ECB, it stated that those institutions are in a position to *protect the integrity* of the EU legal order through the power they have to control the consistency of the new legal instruments with that legal order.⁴¹ Thus, the Commission finds itself in a very delicate position, as the new governance of the Economic and Monetary Union builds largely upon instruments working outside the EU legal framework.

The role of the Commission might be conceived as that of guardian against the risks of what might be called *cloud constitutionalism*: i.e. powers, procedures and obligations are dispersed - and, one might say, *stored* - in several instruments with different legal values. It is highly debatable whether the whole system could function if each of these *elements* could be picked out and used on the sole basis of concern for formal rules. Under this fragmented legal and political framework, the Commission still constitutes the last reliable driving force towards a genuine European project. On the one hand, the ECB should be concerned only with monetary aspects. On the other hand, even when establishing new forms of cooperation - clearly inspired by intergovernmentalism and principally conceived and planned within intergovernmental structures like the European Council,⁴² - governments have resorted to some of the classical “Community

³⁸ Ibidem, p. 38-39.

³⁹ The problems of democratic control and of the role of the European Parliament are not analyzed in this paper. On these issues see Miguel Poiarés Maduro, Bruno De Witte and Mattias Kumm, “The Euro Crisis and the Democratic Governance of the Euro: Legal and Political Issues of a Fiscal Crisis”, in Miguel Poiarés Maduro, Bruno De Witte and Mattias Kumm (eds.), “The Democratic Governance of the Euro”, in *EUI RSCAS Policy Reports*, No. 2012/08 (2012), p. 3-11, <http://hdl.handle.net/1814/23981>; Tobias Kunstein and Wolfgang Wessels, “The New Governance of the Economic and Monetary Union: Adapted Institutions and Innovative Instruments”, cit., p. 2 and 8; Andreas Maurer, “From EMU to DEMU: The Democratic Legitimacy of the EU and the European Parliament”, in *IAI Working Papers*, No. 1311 (April 2013), <http://www.iai.it/content.asp?langid=2&contentid=892>. On the role of national Parliaments, see Claudia Hefftlér and Wolfgang Wessels, “The Democratic Legitimacy of the EU's Economic Governance and National Parliaments”, in *IAI Working Papers*, No. 1313 (April 2013), <http://www.iai.it/content.asp?langid=2&contentid=900>.

⁴⁰ European Commission, *A blueprint for a deep and genuine economic and monetary union*, cit.

⁴¹ The judgment of the CJEU in Pringle, paras 155-169, should be recalled (see supra).

⁴² See Frédéric Allemand and Francesco Martucci, “La nouvelle gouvernance économique européenne” (I), cit., p. 85.

structures”, in the first place the Commission and the CJEU.⁴³ Member States need a counterpart, acting strongly on behalf of the Union, with which to negotiate.

The independence of the Commission is of course at stake.⁴⁴ For instance, when acting on behalf of (a group of) Member States, the Commission’s independence is of crucial importance to maintain a balance between the interests of the EU, the Member States and the third parties involved. The guarantees of its independence still applies when it is acting outside the EU legal order, as the international law instruments adopted include clauses ensuring consistency with EU law. It would have been difficult - and legally impossible - to question the position of the institutions under the EU Treaties and governments actually look for an independent counterpart in the European integration process. In this context, it is nevertheless remarkable that EU institutions like the Commission (and the ECB) have been entrusted with crucial tasks related to the preservation of the “financial stability of the Euro area as a whole” - which, as explained by the CJEU, must be protected by Eurozone members, given the weak competences of the EU in the area of economic policy.⁴⁵ Therefore, the Commission (and the ECB) must be guided by the pursuit of the *public interest of the Eurozone* (the “financial stability of the Euro area as a whole”) and preserve its independence from individual Member States also when acting under the non-EU instruments adopted during the crisis.⁴⁶

Finally, not only must the Commission try to preserve the advantages of the “Community method”, but it must also create the conditions for the political coherence of the decisions adopted. A very recent example might be helpful to illustrate this point. When dealing with the Cypriot crisis, the EU institutions failed to take a common stance towards the Cypriot Government concerning the measures to be taken to cope with the difficult financial situation. When the Cypriot Parliament rejected the package initially

⁴³ In addition, it has been highlighted that the new enforcement powers related to the SGP concern “types of infringements that are qualitatively very important”. See Common Market Law Review editors, “A revival of the Commission’s role as guardian of the treaties?”, cit., p. 1562.

⁴⁴ According to some authors, the Commission should obtain greater democratic legitimacy to perform the new duties introduced by the reforms of the EMU and in particular it “must be able to rely on the kind of legitimacy that comes with direct link to the outcome of European elections”. Miguel Poiarés Maduro, Bruno De Witte and Mattias Kumm, “The Euro Crisis and the Democratic Governance of the Euro: Legal and Political Issues of a Fiscal Crisis”, cit., p. 4.

⁴⁵ See judgment of the CJEU in Pringle, paras 135 ff. On this point see Bruno De Witte and Thomas Beukers, “The Court of Justice approves the creation of the European Stability Mechanism outside the EU legal order: Pringle”, cit., p. 822-823, 832-833, 838 and 840-843. Therefore, here the role of the Member States is crucial. More generally, it has been argued that in this phase it is fundamental to resort to the national level (broadly intended as “political structure and decisional process of the Member States”, including “national parliaments, national judiciaries, national media and, yes, national governments”) to seek legitimacy for the European integration process: Joseph H.H. Weiler, “In the Face of Crisis: Input Legitimacy, Output Legitimacy and the Political Messianism of European Integration”, in *Journal of European Integration*, Vol. 34, No. 7 (November 2012), p. 838.

⁴⁶ Acting independently in such a context is not easy (and maybe not completely possible), as the Commission (and the ECB) has to take decisions concerning money directly coming from the Member States (and not from the EU budget). For an illustration of the influence exerted by Member States into the technical negotiations for the provision of rescue packages - regarding the German point of view on the Cypriot bailout - see Tyson Barker, “Bailout Insights: What Cyprus Tell Us about Germany’s Character”, in *Spiegel Online International*, 26 March 2013, <http://www.spiegel.de/international/europe/the-cyprus-bailout-reveals-german-fears-of-tax-havens-a-891063.html>.

proposed, the Commission openly recalled it had disagreed with that solution,⁴⁷ thus marking its different approach. The new governance of the Economic and Monetary Union cannot ensure *per se* political coherence and coordination among the EU institutions.

In this phase, the Commission is thus playing an extremely important role in *managing the equilibrium* between the evolving branches of the governance of the Economic and Monetary Union.⁴⁸ It is interacting with Member States to drive that change, while setting the economic agenda for them in the future.

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⁴⁷ Seemingly, the Cypriot Government had supported the measures the Parliament rejected and had also pursued second and unorthodox objectives (like the protection of Russian depositors to the detriment of national and European interests). See Tyson Barker, "Bailout Insights: What Cyprus Tell Us about Germany's Character", cit. On the management of the Cypriot crisis see also Roberto Cisotta, "The Cypriot Crisis: the Last Act of the 'Greek Tragedy'?", in *SIDIBlog*, 9 April 2013, <http://www.sidi-isil.org/sidiblog/?p=282>.

⁴⁸ On the need for the EU institutions to coordinate their actions and functions within the EMU, as well as on the need for the EU to acquire, in the long term, stronger powers in the area of economic policy, see Roland Bieber, "Observer - Policeman - Pilot? On Lacunae of Legitimacy and the Contradictions of Financial Crisis Management in the European Union", in *EUI LAW Working Papers*, No. 2011/16 (2011), p. 11, <http://hdl.handle.net/1814/19696>.

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