

The Difficult Reform of the Economic and Monetary Union and the European Banking Union

By

Jean-Victor LOUIS

Introduction

The so-called Atlantic and the EU crises that we have known between 2007/2008 and 2015 have triggered, on the one hand, the drive for a reform of EU budgetary norms through the adoption of acts of Union law, including the regulations on the so-called six-pack and two-pack and the conclusion of international agreements, like the Treaty on Stability, Coordination and Governance and the European Stability Mechanism (ESM), and, on the other hand, for the start of a so-called Banking Union (BU), with a Single Supervisory Mechanism, operational from November 2014, a Single Resolution Mechanism, operational from January 2016 and a so-called ‘single rulebook’, including in particular a Capital Requirements Regulation and a Capital Requirements Directive as well as a Bank Recovery and Resolution Directive.¹

A substantial number of reports from the Commission and from four or five EU institutions’ presidents, have called for complements to the EMU and of the BU. The most widely known, if not the most audacious, was the one on ‘Completing the European EMU’ of June 2015, a report from a group chaired by President Juncker: the so-called ‘five presidents’ report. This suggested short or medium-term reforms of which only a few have been enacted to date. The European Parliament and the Commission as well as a number of think tanks, private groups or informal groups of officials have launched ideas, one of the most recent and most widely discussed being a CEPR report (the so-called 7/7 report) produced by an equal number of renowned French and German economists: ‘Reconciling risk sharing with market discipline: A

¹ For a synthesised but accurate description of the evolution of the EU answer to the crisis, see Nicolas Véron, ‘EU Financial Services Policy since 2007: Crisis, Responses, and Prospects’, Peterson Institute for International Economics, Washington, Working Paper 18-6.

constructive approach to euro area reform'.² At the centre of the debate, were and still are, the interpretation of the Stability and Growth Pact, the adoption of a stabilising budget either for combatting unemployment, and/or promoting investment and the creation of a so-called safe asset, in addition to some institutional reforms and a proposal for representation of the euro area in the IMF.

The BU made a rapid start after the decision taken by the European Council and the Euro Council in June 2012 which decided, on the basis of the first presidents' report, on the creation of a single supervisory mechanism (SSM), located in the ECB. The motivation for the decision to engage in a Banking Union was the long-felt need to eliminate, with an institutional creation and the development of harmonised rules, in addition with existing EU State aid discipline, the *doom-loop* ('the vicious circle') between banks and their sovereign nations: 'Sovereign nations are exposed to bank risk and banks are exposed to sovereign risk.'³ The first 2012 report recognised the need for three elements that are complementary to the SSM: a single resolution mechanism which would provide the bail-in by the banks' creditors, in lieu of a public bail-out through national budgets, a European deposit insurance scheme (EDIS) and, in conjunction with these reforms, further steps towards democratic legitimacy and accountability, the principle being⁴ that 'the general objective remains to ensure democratic legitimacy and accountability at the level at which decisions are taken and implemented'.⁵ The two first elements, centred respectively on the SSM and SRM, have been built in a few years, although the resolution mechanism is still incomplete. The (intergovernmental)⁶ resolution fund is a provisional instrument

² CEPR Policy Insight, No 91, January 2018. This important paper was the object of a considerable number of comments especially in VOX.eu and by think tanks' (including Bruegel, PIIE and CEPS) publications.

³ See Spyros Alogoskoufis and Sam Langfield, 'Regulating the doom loop', ESRB. Working Paper Series, No 74, May 2018, p.1. As the authors observe however, if reforms have served 'to mitigate the exposures of sovereigns to bank risk...recent reforms do not directly address the exposures of banks to sovereign risks'. The EU institutions are still awaiting a – compromise - solution to be adopted by the Basle Committee for Banking Supervision and which this Committee has rejected – at least for the moment- the adoption of a position considering the huge differences of views between its members.

⁴ European Council, 13-14 December 2012, Conclusions, 14 December 2012, EUCO 205/12, p. 5.

⁵ Nicolas Véron, 'Europe's fourfold union: Updating the 2012 vision', Bruegel, Policy Contribution, Issue 23, September 2017, 12 pages.

⁶ The SRM Regulation is based on article 114 TFEU, the legal basis for harmonisation in the single market although the financing of the Resolution Fund is based on an intergovernmental agreement, at the request of some member States and contrary to the opinion of the legal services of both the Commission and the Council. It is not proposed to change this legal basis for the dispositions which

that is valid for a transitional period (limited in principle to 2024) which requires a more solid foundation. It also requires a financial backstop, considering the sums called for in a major crisis. At the present stage of the negotiations, said backstop would be provided by the European Stability Mechanism (ESM). The European Deposits Insurance Scheme (EDIS) requires, for a number of States, a further improvement in risk reduction before engaging the EU in risk sharing, a central question in the present political debate. On December 6, 2017, and in the first semester of 2018, the Commission published a substantial number of proposals and communications on the reform of the EMU, which had a particular bearing on these matters and added to earlier proposals. The progress towards the accomplishment of a Capital Markets Union, which was launched in 2015, is also on the agenda. This aims at limiting the predominant role of banks in the provision of financing on the Continent and contributing to a better private risk sharing thanks to a geographical dissemination of investments.

I will first of all undertake some reflexions on the new method for approaching the reform of the EMU in parallel with the so-called Bratislava agenda, the latter centred essentially on security (PESCO) and immigration problems. I will then devote the second part on the main obstacles to an agreement on the EMU and BU: the predominant accent on risk reduction as a condition for risk sharing and the intergovernmental approach as a constitutional obstacle to further Europeanisation of the rules. I will conclude with some institutional aspects.

I. The leaders' Agenda and the new negotiation method⁷

Right from the beginning of the discussion on the EMU and the BU reform, the President of the European Council and of the Euro Summit, Donald Tusk has proposed that this Summit should meet, in a so-called inclusive composition, i.e. including not only the Member States having ratified the whole Treaty on the Stabilisation, Coordination and Governance, the so-called "Fiscal Compact", but also those which have only adhered to the budgetary objective of this Treaty, plus Croatia and the Czech Republic,⁸ i.e.

will be adopted for the end of the transitional period in 2024 or before, should this anticipation be accepted by the member States.

⁷ On this topic, see the very informative report: 'From Rome to Sibiu. The European Council and the Future of Europe debate', Study, EPRS/European Parliamentary Research Service, Suzana Anghel, Desmond Dinan and Ralph Drachenberg, European Council Oversight Unit, PE 615.667 – April 2018.

⁸ Article 12, par. 3, of the Treaty on SCG provides for the possibility for heads of State and government of Contracting Parties, other than those having adopted the euro, which have ratified the Treaty on SCG, to participate in the euro summit discussions for a very large addenda. Croatia and

all the 27 countries that are members of the euro area or have the legal prospect of adopting the euro.⁹ When explaining the new working method¹⁰ he qualified it as informal, for the European Council meeting of 20 October 2017 and set out what this method will consist of: ‘It means confronting the areas where European cooperation (sic) does not work well and being honest about the reasons why. Confrontation is healthy as long as it is respectful and helps to move forward...But what I am very pleased about today is that none of the leaders questioned the fact that we must work united, hand-in-hand, with all the member States on board...’

The new strategy of President Tusk, reflected in the Euro Agenda was endorsed by the European Council on 20 October 2017. It was described under the title ‘Building our future together’ and included the main issues that the President of the European Council intended to include in the agenda for the Leaders between October 2017 and June 2019 where a meeting would take place in Sibiu (Romania) for the adoption of a new agenda after the elections to the European Parliament. A longer document that is entitled ‘Leaders’ Agenda and Bratislava implementation report’¹¹ includes the principles and methods for this new procedure. This Agenda was published following the Bratislava European Council meeting. The October 2017 Agenda, established ‘at the request of leaders at a meeting at Tallinn’, includes a list of three principles which describe the new strategy:

‘**Firstly**, we should focus on *practical solutions*¹² to EU citizens’ real problems. This means changes – not just for the sake of change, but in order to bring back a sense of stability, security and predictability in people’s lives as well as faith in the future. Institutional innovation can in some cases be a means to an end, but we should be careful not to get bogged down in unnecessary institutional or theoretical debates.’

‘ **Secondly**, we should proceed *step by step*. Some matters are ripe for decisions now and should therefore be dealt with

the Czech Republic do not enter the categories of Member States covered by the SCG Treaty, but of course, nothing prevented their being invited. It should be mentioned that the Eurogroup will hold meetings of nineteen member States for current Euro area business and for 27 for the sessions dedicated to the reform. The same comment is valid for Council’s meetings.

⁹ Some meetings have also included the United Kingdom.

¹⁰ See Council of the EU. Documents by President Donald Tusk for the members of the European Council: Invitation letter, Leaders’ Agenda and Bratislava implementation report, Press release 593/17, 17/10/2017.

¹¹ Council of the EU, Press release 593/17, 17 October 2017.

¹² Italics are mine.

immediately, with speed, ambition and determination, so as to ensure real progress. Other matters will need to be further prepared, before we can debate them.’

‘ **Thirdly**, we should *preserve the unity* that we have managed to develop over the last year.’ [A list of matters follow of which none concerns the EMU.]¹³

If a moment is taken to analyse these three principles, the impression might be given that the justification for reform of the EMU, as included in a number of proposals on the table of the Council, could very uneasily answer to the exposed requirements.

Considering the *first principle*, it is not difficult to maintain that there are technical and legal reforms that could be justified for very good legal and political reasons, even if they don’t directly impact on citizens’ life. For example, the question of the Euro area’s representation within the IMF or the transforming into European Union acts of international law agreements, as the ESM Treaty or the TSCG – the so-called Fiscal Compact. If, as will be seen subsequently, some aspects of the reform were not held as deserving a priority it is not because they have no impact on citizens but because they challenged outdated conceptions of national sovereignty that are incompatible with the concept of integration. This attitude reflects a reluctance to admit that EU membership implies a sharing of sovereignty and a limitation of the power of international representation of the Member States. Furthermore, the question about a proposed reform: ‘do we need it?’ is a priori a reasonable question but which has often been used in favour of preserving a status quo which could be seen as favourable from a national standpoint.

The *second principle* evoked by President Tusk is the need to ‘proceed step by step. Some matters are ripe for decisions now and should therefore be dealt with immediately, with speed, ambition and determination, so as to ensure real progress. Other matters will need to be further prepared, before we can debate them.’

Here this is the format for the discussion that can matter. Is it possible to believe that if Article 136 TFEU would not have allowed for a vote by a qualified majority of the euro area Member States, the six- and two packs could have been adopted without major problems? The mere existence of the possibility of a qualified

¹³ The highlighted words and the italics are mine.

majority vote should necessarily facilitate the reaching of a compromise. When, for good reasons, you aim at unanimous decisions by all the Member States, including those not sharing the single currency, because they are legally bound by the obligation to adopt the euro, their interest may be less evident or at least, far from their immediate preoccupations. Furthermore, there is some truth in the affirmation of a former Dutch member of the European Council: ‘a superior level of decision corresponds to an inferior degree of competence.’¹⁴

The *third principle* mentioned by President Tusk aims precisely at preserving unity in a number of fields and could be applied to EMU questions. ‘To be clear, for Donald Tusk, unity cannot become an excuse for stagnation, but at the same time, ambition cannot lead to division’. It could though, surely lead to temporary exceptions and would not prevent the application of the majority vote, if available.

In the agenda attached to the Documents of the 17 October 2017, a number of present and future challenges are suggested for ‘Leaders’ meetings: i.e. European Councils meetings, Euro summits and informal meetings (these last ones without final communiqués) of heads of state and government and a brief description of the items which would be covered was elaborated. The Agenda was flexible. It was described as a ‘living document’. The actuality could lead to the addition or deletion of some items. The specificity of Leaders’ meetings, contrary to what usually takes place at European Councils or Euro summit meetings, are meant not to approve resolutions but to enable a frank discussion, a kind of brain storming among heads of State or Government without the pressure to get a specific result and as specified for example, in the Leaders’ Agenda for the meeting in March 2018: ‘There will be no written output from [the] debate.’ These have been compared with the fireside conversations dating from before the institutionalisation of the European Council although at this time, participants were less numerous.

The philosophy of the new strategy is transparent: to sum up, let us quote once again president Tusk, who has engaged himself fully in the launching of the new procedure:

¹⁴ See the quotation made by Luuk Van Middelaar, ‘*Quand l’Europe improvise. Dix ans de crises politiques*, Le débat, Gallimard, 2017, p. 271. The original Dutch title of this suggestive book is: *De nieuwe politiek van Europa*.

‘Our guiding principles are clear. First and foremost, I will do everything in my power to retain the unity of the EU. Secondly, I will concentrate on finding solutions to the real problems of our citizens, who are concerned about security, migration or unemployment. Finally, we will all make sure that Europe is making progress.’

EMU is not quoted in this paragraph although it may be felt that the search for general consensus is also applicable in this matter. This is the main justification for the participation of all 27 ‘leaders’ in most of the summit meetings¹⁵.

President Tusk retains unity as a basic concern although he doesn’t exclude that:

‘As we set out in the Rome Declaration [of 2017], this approach does not prevent Member States moving forward more rapidly in specific areas, in accordance with the Treaties, while keeping the door open for those who want to join later. To be clear, unity cannot become an excuse for stagnation but at the same time, ambition cannot lead to divisions’.

After having set out these balanced principles, President Tusk made three suggestions.

Firstly, he proposed a ‘more political approach... and - whenever necessary- more meetings’... in order to ‘overcome the sense of powerlessness, where political interests or bureaucratic inertia, stand in the way of achieving results.’ The leaders’ agenda will be organised on the basis of ‘decision notes’ reporting on the differences between members. ‘The aim will be to break any deadlock’.

‘Secondly, at each meeting, there would be a report on progress made by a representative of the six-monthly presidency. These reports should be clearer in order to provide ‘a better basis for us to draw political conclusions for our work’.

Thirdly, President Tusk alluded to the need expressed by several leaders to preserve the interaction with their parliaments and inform their public opinion. He didn’t object to those practices which depend on ‘specific constitutional traditions and political circumstances’ while meaningfully adding: ‘We could also draw inspiration from new ideas on how to debate Europe, such as those

¹⁵ There are also meetings at 28.

expressed recently'. He obviously doesn't want to be constrained by national debates and tries to deal with the effects of injunctions potentially addressed to heads of Government by their parliaments.

The first meeting of the Euro Summit in the new format on EMU reform took place on 15 December 2017. In the first session of the *inclusive* Euro Summit¹⁶, Donald Tusk sought to limit the discussion on a certain number of ideas on which there was a convergence on the basis of the work conducted by the Eurogroup.

In his summing up of the Euro meeting he explained:

'The summit participants agreed with my proposal, that in the next 6 months, the work of our finance ministers should concentrate on areas where the convergence of views is the greatest. Progressing step-by-step on issues such as the completion of the Banking Union and the transformation of the ESM into the so-called European Monetary Fund, should significantly strengthen the resilience of the EMU. Discussions will continue also on other ideas, which need more time to mature and have a longer-term perspective. I will call the next Euro Summit for next March to continue this discussion while June [2018] could be the moment for us to take the first decisions.'

The priority decided on by the European Council to focus first on the debate on Banking Union and the reform of the ESM was shared by the Commission.

Unfortunately, it was not possible to maintain the proposed schedule. The Summit in June adjourned for the December 2018 meeting the adoption of the first decisions on these matters which was dealt with concisely¹⁷. It was decided that 'Adhering to all elements of the 2016 roadmap [on which I will come back] in the appropriate sequence, work should start on a roadmap for beginning political negotiations on the EDIS'. 'Start on a road map' is an important step but final negotiation has still to begin afterwards. As I will mention, the required roadmap was once again postponed to the December meeting. The Euro Summit of June 2018 was somewhat more explicit on the ESM which 'will provide the common backstop to the Single Resolution Fund' (SRF) and be strengthened working on the basis of all of the elements of an ESM reform as set out in the letter from the Eurogroup president

¹⁶ The term 'inclusive' means including all EU (27 or 28) Member States.

¹⁷ Janis A. Emmanoulidis, 'Time to move up a gear: the results of an insufficient summit', *European Policy Centre* (EPC), Post-Summit Analysis, p. 11.

addressed on 25 June to the president of the European Council. The Eurogroup will prepare the terms of reference for the common backstop and agree on a term sheet for the further development of the ESM by December 2018'. For the rest, the Euro Summit decided that the Eurogroup would 'further discuss all the items mentioned in the letter by the Eurogroup president'.¹⁸ A special interest in this letter was due to the fact that president Macron and chancellor Merkel met at Meseberg on 19 June, some days before the Eurogroup meeting and adopted a declaration which inspired the deliberations of the Economic and Finance Ministers. It is also worth mentioning that the June Summit took place one month after the adoption by the Ecofin Council of amendments to the single banking rulebook, - as will be seen subsequently - which were considered as an important step towards risk prevention. The texts have been transmitted to the European Parliament which had to adopt a position on the proposals.

The debate, especially in relation to the BU reform but also *de facto* in discussions about the larger EMU reform, is still profoundly influenced by the conclusions of the Ecofin Council on 'Strengthening of Banking Union' of June 17, 2016, a roadmap which was based on the need for risk-reduction as a strict condition for risk-sharing, a leitmotiv insisted upon especially by Germany and the Netherlands. This is the reason that the next chapter will be on the theme 'Risk reduction as a condition for Risk sharing?' which is undoubtedly the biggest obstacle to an agreement about the delicate matters on the agenda.

II. Risk reduction and Risk sharing

The important letter sent on 25 June 2018 by the President of the Eurogroup to the President of the European Council, includes a report on the state of discussion within the Eurogroup and it 'lays down the elements for further deepening EMU'. This letter was written a few days after the so-called Meseberg Declaration which includes a 'French German roadmap for the Euro Area.' The two documents allude to the link already underlined in the June 17, 2016 conclusions between risk reduction and risk sharing in the financial sector, 'in the appropriate sequence' (Meseberg Declaration). The Letter from Mr. Centeno, after noting that substantial progress has been made in risk reduction, observes that 'different views on these developments and their link with risk sharing elements...led to

¹⁸ See *infra*.

intense discussions on the appropriate sequencing towards completing the Banking Union.’

President Tusk has recently noted that ‘a big divide exists on some subjects, not between East and West but between North and South’.¹⁹ This reality is illustrated by what has been called the ‘repositioning’ of the Netherlands from the perspective of Britain’s departure from the EU.²⁰ This latter comment refers to the adoption at the initiative of the Netherlands, of a Declaration of 5 March 2018 in which Finance Ministers from Nordic and Baltic countries ‘underline their shared views and values in the discussion on the architecture of the EMU’.²¹ These refer to their agreement for prioritising the completion of the banking union and the strengthening of the ESM. As far as BU is concerned, they are of the opinion that the *Roadmap to Complete the BU* from June 2016 ‘should remain the basis for future discussion’ and they support the view that decision-making within the future EMU ‘should remain firmly in the hands of Member States’. Those are the two most important points on which the views of the eight Nordic and Baltic countries coincide with those supported by Germany.

Before referring to the measures already adopted by the Council in the field of risk reduction, I would like to comment on the priority recognised for risk reduction as a condition for risk sharing. The emphasis on the overarching concept of risk reduction as a condition for risk sharing, corresponds to an attitude largely shared in Germany and the Nordic countries, as was made evident during the Greek crisis. In the political vocabulary this concept is translated into the refusal of the Union becoming a so-called ‘Transfer Union’.²²

¹⁹ See also Remarks by President Tusk ahead of the European Council meetings, Council of the EU, Statements and Remarks, 803/17, 14/12/2017. Referring also to the east and west divide on migrations, Donald Juncker added: ‘These divisions are accompanied by emotions which make it hard to find even a common language and rational arguments for this debate. This is why we should work on our unity even more intensively and more effectively than before.’

²⁰ See Rem Korteweg, ‘Why a New Hanseatic League will not be enough?’ *Clingendael spectator*, The Hague, 9 July 2018. This author writes that Peter Altmaier, the then German minister of economic affairs, was present during the meeting that drafted the letter. For him, this presence gives weight to the view that this coalition is meant primarily as a counterweight to Macron’s plans. Spain declined to participate in the group. The Ministry of Economy, Industry and Competitiveness published in April 2018 a ‘Spanish position on strengthening the EMU’.

²¹ The text was signed by Finance ministers from Denmark, Estonia, Finland, Ireland, Latvia, Lithuania, the Netherlands and Sweden. Of these countries, two do not participate in the EMU. It is to be noted that the first point of the Declaration approves the ‘inclusive format’ or discussions on the future of the EMU which is ‘relevant to all and therefore [should] be discussed and decided by all.’

²² This philosophy was based in particular on the interpretation of former Article 103 TEC (now Article 125 TFUE) which for a number of authors runs counter to the European Financial Support Facility (EFSF) and the bilateral aid to Greece. See Mattias Wendel, ‘Judicial Restraint and the Return

The case law of the German Constitutional Court (BVerfG) shows that the BVerfG has understood its mission of ‘safeguarding the rights of the Bundestag as first and foremost safeguarding [its] function to ensure parliamentary representation of the popular will’²³ under Article 38 of the Fundamental Law (Grundgesetz). This approach was first advanced in the decision on the constitutionality of the Maastricht Treaty of 12 October 1993 and repeated in the subsequent case law of the BVerfG²⁴.

In the so-called *Lisbon* decision, the BVerfG provided for a list of competences which substance should in principle remain with the Federal State.²⁵ It stated in particular that ‘[a] transfer of the right of the *Bundestag* to adopt the budget and control its implementation by the Government which would violate the principle of democracy and the right to elect the German *Bundestag* in its essential content would occur if the determination of the type and amount of the levies imposed on the citizen were supranationalised to a considerable extent’.²⁶

An application of this doctrine appeared in particular in the *Greece bilateral help* and *EFSF* case:

‘...the German *Bundestag* may not transfer its budgetary responsibility to other actors by means of imprecise budgetary authorisations. In particular, it may not, even by statute, deliver itself up to any mechanisms with financial effect which -...- may result in incalculable burdens with budget relevance without prior mandatory consent, whether these expenses are expenses or losses of revenue. The prohibition of the relinquishment of budgetary

to Openness: The Decision of the German Constitutional Court on the ESM and the Fiscal Treaty of 12 September 2012’, *German Law Journal*, vol. 14, No.11, p. 27 and Note 26. As it is well-known, the Court of Justice has in *Pringle* (case C-370/12, 27 November 2012, points 129 and foll.) adopted another interpretation of Article 125 TFEU. The BVerfG has also demonstrated that Article 123 TFEU (former Article 101 TEC) on the prohibition of monetary financing could not, generally, exclude the faculty for the ECB to buy from the creditors of a Member State securities previously issued by this Member State (*Pringle*, C-370/12, point 132, *Gauweiler et al.*, C-62/14, point 95 and *Weiss et al.*, C-493/17, point 103).

²³ See Mattias Wendel, ‘Judicial Restraint and the Return to Openness: the Decision of the German Federal Constitutional Court on the ESM and the fiscal Treaty of 12 September 2012’, *German Law Journal*, vol.14, No.11, p. 33.

²⁴ See for this English version of the decision of the BVerfG, 12 October 1993, II, 5, 2, Oppenheimer (ed.) *The Relationship between European Community Law and National Law: The Cases*, Cambridge UP, 1994, p. 568. See also on economic discipline, Francesco Martucci, *L’ordre économique et monétaire de l’Union économique et monétaire*, Bruxelles, Bruylant, 2016, Partie II, Titre I, Les règles de discipline, p. 593 et s.

²⁵ See on the ‘reserved powers’, Daniel Thym, ‘In the name of sovereign statehood : a critical introduction to the *Lisbon* judgment of the German Constitutional Court, *CMLRev* 46, 2009, p. 1795-1822, ad p. 1800-1802: 3.2 *Democratic constraints for European competences*.

²⁶ BVerfG, Case 2 BvE 2/08, June 30, 2009, paragraph 256, English edition.

responsibility does certainly not restrict the budgetary competence of the legislature, but is specifically aimed at preserving it.’²⁷

These references to the German constitutional case law were, in my view, necessary to understand the attitude adopted in the negotiations on the reform of the EMU and the completion of the BU by the German Government and the Member States more reluctant to accept a qualified majority vote for the exercise of competences with significant financial impact. Hence, for example, as we will see, the necessity of a unanimous vote for the decisions of the ESM related to the common backstop of the European Resolution Fund.

As eloquently observed by an author, ‘[this] discourse is based on the sovereign power of the constitutional power – an original, indivisible, and mythical power which could never be affected by the non-original, partial, and secular power which produced the law of integration. Often, it also refers to the protection of the allegedly more democratic processes established by national constitutions’.²⁸

The dichotomy between the two concepts of risk reduction and risk sharing is understandable. It is clear that rules aiming at risk reduction should make it easier for richer countries to accept risk sharing but it is also true that the existence of an effective instrument of risk sharing can have a positive effect on risk avoidance. President Draghi is not the only one to have stated that the opposition between the two apparently contradictory concepts is, to a large extent, artificial. The two objectives re-join themselves if there is a sound political framework. As the ECB President said:

‘Public risk-sharing through backstops helps reduce risks across the system by containing market panics when a crisis hits.’²⁹ A strong resolution framework also ensures that, when bank failures do the place, very little public risk-sharing is actually needed as the costs are fully borne by the private sector.’³⁰

²⁷ BVerfG, Case 2 BvR 987/10, September 7, 2011, Paragraph 125, English edition, quoted by Wendel, p. 35. This preoccupation is also reflected in the ESM and Fiscal Compact Treaty, see M. Wendel, op. cit., p.33-34.

²⁸ Julio Baquero Cruz, *What is left of the Law of Integration? Decay and Resistance in European Union Law*, Oxford UP, 2018, p. 32.

²⁹ Therefore, for example, there will be no queues at banks’ lockets, if the client is confident that some part of their account is safe. See Luis de Guindos, ‘Building a resilient EMU’, Madrid, 5 October 2018, <https://www.ecb.europa.eu/press/key/date/2018/html/ecb.sp181005.en.html> : ‘EDIS and the backstop for the SRF are thus not only risk-sharing but also confidence-building mechanisms contributing to risk-reduction.’

³⁰ ‘Risk-reducing and risk-sharing in our Monetary Union’, <https://www.ecb.europa.eu/press/key/date/2018/html/ecb.sp180511.en.html> See also ‘Risk-sharing in

President Draghi concluded by saying that the completion of both Banking Union and Capital Markets Union ‘is therefore a necessary condition for the expansion of private risk-sharing in the euro area.’ For him however, this was not sufficient because the growth potential of some states is taken hostage by a lack of equilibrium’. He also emphasised these ideas in another speech on ‘Economic and Monetary Union: past and present’³¹ where he observed that ‘the opportunities for our large financial market are not being exploited’. He pleaded for completion of the single market for the reason that ‘integrated markets and especially financial markets, help share risks within and across countries’. Integrated capital markets – the so-called Capital Markets Union (CMU) – allow people to ‘diversify their asset holdings across different regions’ and an integrated banking sector allows banks to cross-borders to ‘offset losses in a region with gains in other regions’.

In 2017, the Commission was also of the opinion that ‘Responsibility and solidarity, risk-reduction and risk-sharing go hand-on-hand.’³² The Reflexion paper also added that ‘Greater incentives for risk reduction and conditional support should go together with the design of risk-sharing measures, especially in the financial sector and the conduct of structural reforms.’ A Manifesto of personalities proposing ‘a Spanish view of EU reforms’³³ refers to ‘a virtuous circle: rules that ensure discipline would lead to a better acceptance of mutualisation of risks and an increase in solidarity would enhance capacity to comply with the rules.’ As it is clearly stated in a paper from the Spanish Ministry of Economy, Industry and Competitiveness³⁴, ‘[A common deposit insurance scheme] requires full assurances that risk sharing will not be used for material legacy exposures pre-dating the Banking Union in order to avoid adverse selection problems.’

EMU: key insights from a literature review’, by Demosthenes Ioannou and David Schäfer, SUERF Policy Note, Issue No 21, November 2017. The authors conclude their brief survey by observing that ‘More risk-sharing in the euro area through capital markets, savings, and direct transfers would increase its shock absorption capacity.’

³¹ <https://www.ecb.eu/press/key/date/2018/html/ecb.sp180919.en.html>

³² European Commission, ‘Reflection Paper on the deepening of the EMU’, May 2017, p. 18, COM(2017)291, 31 May 2017. It would also be useful that progresses in the building of Capital Markets Union would make a reality of private risk-sharing across borders through the financial system, as mentioned in EWG/Eurogroup Secretariat, *National automatic stabilisers in the euro area*, ecfm.cef.cpe(2018)5494322.

³³ Joaquín Almunia and others, ‘Quit kicking the can down the road : a Spanish view of EMU reforms’, 8 May 2018, www.realinstitutoelcano.org/wps

³⁴ ‘Spanish position on strengthening the EMU, April 2018, p. 3. See also Luis de Guindos, ‘Building a resilient Economic and Monetary Union’, 5 October 2018, <https://www.ecb.europa.eu/press/key/date/2018/html/ecb.sp181005.en.html>

Bénassy-Quéré et al.³⁵, quoted by Roel Beetsma and Martin Larch,³⁶ tend to propose a synthesis in the discussion which sets advocates of risk reduction against the apologists for risk sharing: ‘Progress requires movement on both fronts – risk sharing and risk reduction are complements, not substitutes. Hence finding the balances [between the two] will be of crucial importance.’

I would like to quote also a phrase from the departure speech from the ECB of Vitor Constâncio: ‘...a monetary union can never be just a matter of demanding and assuming that individual member countries behave appropriately. The diversity of shocks, the level of financial integration and interdependence requires collective mechanisms for discipline and risk sharing’.³⁷

Jeromin Zettelmeyer, one of the authors of the 7/7 report, describes the elements of a ‘new consensus’, with a question mark which comprises of four points: 1. ‘Euro area requires both more risk sharing and more (market) discipline; 2. ‘There is no tension between the two.’ He also added: ‘Risk sharing facilitates market discipline by making the no-bail clause credible’ (which is an interesting formula); 3. ‘More risk sharing means completing banking union (EDIS, fiscal backstop [to the Resolution Fund], capital market union [for diversifying risk], safe asset [with the same purpose], easier access to ESM liquidity as well as a fiscal risk sharing mechanism (in addition to the reform of fiscal rules); 4. Market discipline in addition requires a reduction in sovereign exposures of banks to their own sovereign, to make sovereign debt restructuring feasible as a last resort.’³⁸

Advances have been so far on some elements of the programme.

I first mention the agreements reached within the ECOFIN Council or the Committee of Permanent Representatives: the first one, called the *Banking Package*, concerns the adoption by the Ecofin

³⁵ ‘Reconciling risk sharing with market discipline: A Constructive Approach to Euro Area Reform’ CEPR Policy Insight No 91, January 2018, a document – also called the 7/7 report - due to 7 French and 7 German economists, which has been followed by an ongoing debate. See the summing up of the report and of the points addressed to it, one year after the start of the 7/7 reflexion, in a synthesis made by Jean Pisani-Ferry, ‘Euro area reform: An anatomy of the debate’, vox.eu.org, CEPR Policy Portal, 2 October 2018.

³⁶ ‘Risk reduction and risk sharing in EU fiscal policy making’, vox.eu.org, May 10, 2018.

³⁷ See Vitor Constâncio, ‘Completing the Odyssean journey of the European monetary union’, <https://www.ecb.europa.eu/press/key/date/2018/html/ecb.sp180517.en.html>

³⁸ The extensive quotation is from a slide of the speech of Jeromin Zettelmeyer on ‘Euro area governance – A new consensus? Two challenges, and an open flank’ at NBB/ECB/Solvay/TSE Conference, Brussels, 5 and 6 November 2018, on *Managing financial crises*. It is reproduced with the author’s kind permission.

Council, meeting on 25 May 2018,³⁹ of a number of amendments to the so-called ‘*Rule book*’ which, by completing norms to be followed by financial intermediaries, are deemed to contribute to risk avoidance by limiting leverage, strengthening risk-sensitive capital requirements for banks: these norms bear on MREL (Minimum Requirements for own funds and Eligible Liabilities, which is important for bail-ins) and TLAC (Total Loss Absorbing Capacity), in case of resolution for G-SIIs (Global Systemically Important Institutions). In the latter case, the act implements an FSB standard from November 2015. The acts concerned by the modifications are the Capital Requirements Regulation n° 575/2013 (CRR), and the Capital Requirements Directive 2013/36/EU (CRD), the Bank Recovery and Resolution Directive 2014/59/EU (BRRD) and the Single Resolution Mechanism Regulation SRMR 806/2014). These reforms were included in a Commission Communication of November 2015 ‘Towards the Completion of the Banking Union’ and the proposals were presented in November 2016, following the already mentioned roadmap adopted by the Council in June 2016.

The presidency of the Council was asked ‘to start the negotiations with the European Parliament as soon as the Parliament is ready to negotiate.’ On 4 December, the ECOFIN Council could endorse the result of the informal trilogue negotiation.⁴⁰

Two complementary proposals were already promptly adopted following a fast-track procedure in 2017 which relate to the bank creditor hierarchy which is applied in a winding-up procedure and to the IFRS9 and large exposures.

Another point of agreement within the Council is related to the treatment of *Non-Performing Loans* (NPLs). NPLs ‘are bank loans that are subject to late repayment or are unlikely to be repaid by the borrower’.⁴¹ Although the volume of those NPLs has substantially declined in recent years, there is still a need to address a high level of stock and to prevent its potential build-up in the future. The

³⁹ See Council of the EU. Press Releases 293/18, 25 May 2018 and 4 December 2018.

⁴⁰ More on the content of these measures may be found in Council of the European Union, PRESS, Background, Brussels, 29 November 2018. See also Council of the European Union, Permanent Representatives Committee (Part 2), Banking Package (CRR/CRD/BRRD/SRMR) –General endorsement of the trilogue, 30 November 2018, 14448/18. Council of the EU, Press release, 4 December 2018, which refers to the agreement achieved between the presidency and the Parliament on what is called: key measures of a comprehensive legislative package aiming at reducing risks in the EU banking sector.

⁴¹ Under the proposal, a bank loan is considered non-performing when more than 90 days pass without the borrower paying the agreed instalments or interest.

Committee of Permanent Representatives reached an agreement on 31 October 2018 for a first proposal for a regulation⁴² concerning the capital requirements applying to banks with NPLs on their balance sheets. This is one measure in a package of proposals put forward by the Commission on 14 March 2018.⁴³ These proposals sought to deliver on the Council's Action Plan to tackle NPLs adopted on 11 July 2017.⁴⁴ Likewise, negotiations started with the European Parliament as soon as the Parliament was ready to negotiate.

Furthermore, on 28 November 2018, the Council agreed on a stance on an EU framework for *covered bonds*, on the basis of which the presidency was able to start trilogue negotiations with the European Parliament. It is a step forward in the realisation of CMU.⁴⁵

On 3 December 2018, the ECOFIN Council agreed on a stance on the supervision *framework for clearing houses*. The Press release mentions that the COREPER endorsed the Council's negotiating mandate for future talks with the European Parliament on a revision of the European market infrastructure regulation (EMIR) as well as a decision revising an article of the Statute of the European System of Central Banks in order to give to the ECB the competence of supervising clearing houses.⁴⁶

At its meeting of 3 December 2018, the Eurogroup was able to adopt a report which included: 1. the terms of reference of the backstop to the ERF; 2. the term sheet on ESM reform; 3. The ESM-Commission cooperative agreement.⁴⁷ The principle of a common

⁴² Proposal for a regulation from the European Parliament and the Council on amending Regulation (EU) No 575/2013 concerning minimum loss coverage for non-performing exposures, 14 March 2018 COM(2018) 134 final.

⁴³ See on this package, the 'Overview of Progress in Achieving Risk Reduction Measures (RRMs). A Follow-up Note to the February 2018 discussions on EMU deepening', a document of 6 June 2018 requested by the President of the Eurogroup, and drafted by the EC and the ECB (in view of its tasks in the SSM and the SRB). Four areas as set out in the ECOFIN Action Plan on NPLs are established: (i) bank supervision and regulation, (ii) recommending further reforms for national restructuring, insolvency and debt regulatory frameworks, (iii) developing secondary markets for distressed assets, and (iv) fostering, as appropriate and necessary, the restructuring of banks. Measures and actions are also to be initiated at national level. It is observed in this paper that NPLs are 'on a significant downward trend, having fallen by a third since the peak of the crisis and being on a steady decline, especially in those MSs that hold the largest stock of NPLs'.

⁴⁴ Council of the EU. PRESS RELEASE, 459/17, 11 July 2017

⁴⁵ See Council of the European Union, Press Release, 28 November 2018. This document gives the following definition of covered bonds: '[They] are financial instruments backed by a separate pool of assets – typically mortgages or public debt – to which investors have a preferential claim in case of failure of the issuer'. The proposed framework is composed of a directive and a regulation.

⁴⁶ The reference to the ESCB Statute refers to a recommendation of the Commission for the revision of Article 22 of the Statute through the procedure provided for in Article 40 of this Statute. See Council of the EU, Press 3 December 2018.

⁴⁷ Remarks by M. Centeno of 4 December 2018.

backstop to the European Resolution Fund⁴⁸ was already ‘accepted’ when the Agreement on this Fund was approved.

The treatment of these questions was subject to the principle laid down in the Council conclusions on a roadmap for the completion of the Banking Union of 17 June 2016. As is widely known, these conclusions reaffirmed – in the context of the deepening of the EMU – the importance of the BU with a view to its completion (point 5) and recognize that, to this end, further steps will have to be taken in terms of *reducing and sharing risks in the financial sector, in the appropriate sequence*, in order to address a number of remaining challenges’ (point 6). This attitude is completed by an evident trend to prefer, when financing is at stake, international legal agreements in lieu of EU legal acts. This preference guarantees the possibility of control by national authorities, both judiciary and legislative. In the Council 2016 conclusions, a specific requirement was stated as far as EDIS was concerned: ‘the Council takes note of the intention of Member States to have recourse to an IGA (Intergovernmental Agreement) when political negotiations on EDIS start’ (point 8, a). The limits imposed on the legal arrangements on EDIS largely explain the lacklustre progress: it is difficult to distinguish in the debate between technical and political questions and on the nature of the measures.⁴⁹

Typical in this matter is the formula used by the Euro Summit concerning EDIS on 29 June 2018: ‘Adhering to all elements of the 2016 roadmap in the appropriate sequence, work should start on a roadmap for beginning political negotiations on EDIS’. The leaders announced that ‘the Euro Summit will come back to these issues [EDIS, ESM and all the items mentioned in the letter of 25 June by the Eurogroup President]’. In a further report of 17 September 2018, reporting on the Eurogroup meeting in inclusive format on 7 September 2018, on EDIS President Centeno limited himself to repeating the words used in June at the Euro Summit. He was more explicit in his remarks to the Press following the Eurogroup meeting of 5 November 2018: ‘Today we had a good exchange of

⁴⁸ Which would be transformed, following the Eurogroup meeting of 3 december 2018, into a common backstop to the Banking Union (for EDIS and the SRF).

⁴⁹ See the remark in the letter from President Centeno to President Tusk, of 25 June 2018. After having noted the progress made at national and EU levels in risk reduction in the banking system, the Eurogroup President notes that ‘different views on these developments and their link with risk-sharing elements included in the June 2016 roadmap led to intense discussions on the appropriate sequencing towards completing the BU. To advance further, an objective assessment of the progress made in the implementation of risk-reduction measures became an important part of the discussion on the implementation of the June 2016 roadmap.’

views. *No progress was made*⁵⁰ but we now have a better understanding on where we are, how we should approach this issue and work towards a roadmap. So EDIS will not go away, it will stay on our agenda for upcoming meetings.’⁵¹ At the 19 November meeting,⁵² as far as BU was concerned, the Eurogroup took stock, as usual, of the progresses in the field of ‘risk reduction, on the basis of an assessment by the institutions’. Views were exchanged ‘on possible options to improve the current setup to address possible liquidity needs of resolved banks’. It is usually called ‘liquidity in resolution’. As mentioned by President Centeno in his remarks after the meeting, ‘the current framework presents clear limitations on that topic’. Various policy remedies were discussed but it ‘is a complex issue which needs further work early in 2019’.

In its report to Leaders on EMU deepening of 4 December, the Eurogroup observes: ‘In line with the mandate from the June Euro Summit, work has started on a roadmap for beginning political negotiations on a European deposit insurance scheme (EDIS), adhering to all elements of the 2016 roadmap in the appropriate sequence. Further technical work is still needed. We will establish a High-level working group with a mandate to work on next steps. The High-level group should report back by June 2019.’ President Centeno has described the mandate of the High-level group as a collection of ‘all the technical, political and markets arguments, in favour or against, in order to lay down the whole picture in an organised way’.⁵³ It is easy to realise that the problems were not, or

⁵⁰ Italics are mine.

⁵¹ It could be helpful to reproduce some lines of a Bulgarian Presidency Progress report on the work of the Ad hoc Working Party on the strengthening of the BU (the AHWP) of 15 June 2018, 9819/1/18, Rev 1, where the difficulty of the selected method of examination is clearly described. He mentioned the compromise solution suggested by the Commission in October 2017 which consisted in providing a more gradual model to introduce EDIS, an approach which had received ‘an overall support under the condition that the participation in the discussion of the possible elements of the alternatives for the initial model of EDIS would not be interpreted as Member States’ support for any of the alternatives and related topics discussed and that the technical work should in no way pre-empt the future negotiations at political level but should rather provide the necessary basis for informal political discussion. In this respect many delegations stressed that the discussion shouldn’t lose the overarching objective of establishing a fully-fledged EDIS, while other delegations stressed that there has not yet been a political decision on the design of EDIS’. *Loc.cit.* p. 3. The formulation of the June conclusions of the Euro Council meeting on the subject confirms the instruction not to rush to a solution. It would eventually be for the European Council to make the necessary arbitration.

⁵² See Eurogroup Draft annotated agenda, 16 November 2018, ecfm.cef.cpe(2018)6539493; /2018, Main results and remarks by Mr Centeno following the Eurogroup meeting of 19 November of the Eurogroup, 19/11/2018. A document called ‘Proposal on the architecture of a Eurozone budget within the framework of the EU’ was also published on 16/11/2018.

⁵³ Interview of Mário Centeno, *El País*, 16/12/2018, p. 3.

not only, ‘technical’. As observed by ‘diplomatic sources’ quoted by the Press, ‘all the options are more than explored’.⁵⁴

EDIS was not mentioned in the conclusions of the Euro Summit of 14 December 2018 except for the general sentence: ‘We call to advance work on the Banking Union and for ambitious progress by spring 2019 on the Capital Markets Union’.

Let us conclude this part of the lecture concerning the progresses and delays in building an effective BU by referring to the list of ‘Five Actions to Strengthen the Euro Area Banking Union’ proposed by IMF authors in a Blog which is inspired by the recent visit of an IMF mission to the EU⁵⁵. The reading of this document helps to make a judgment on what has been realised and what remains to do, or at least what is to be seriously considered if it is an effective Banking Union that one wishes to build.

Things have differently evolved for the ESM reform.

The letter from President Centeno to the President of the European Council, of 25 June 2018, explained how it would proceed. The Eurogroup would prepare an ‘outline of the key features of a reinforced ESM... Thereafter, the ESM and the Commission could update the MoU on working arrangements. In a second step and following agreement at political level, we [would] prepare the necessary changes to the ESM Treaty and guidelines. In the longer term, leaders could decide to incorporate the ESM into the EU framework, retaining the key features of its governance.’

Mr Centeno observed that the ‘early introduction of the common backstop’ was, with the ESM reform, ‘the key deliverable for December’. Important progresses were realised before the end of the year towards that direction.

At its meeting of 14 December 2018, the Euro Summit endorsed ‘the terms of reference of the common backstop to the SRF, which sets out how the backstop will be operationalised, and anticipated [before 2024] provided sufficient progress has been made in risk reduction to be assessed in 2020’. The ESM reform term sheet –

⁵⁴ See Lluís Pellicer, ‘Europa se atasca en la primera marcha’, *El País*, 16/12/2018, Negocios, p. 2-3. This author mentions Community sources who attribute the deadlock to the reluctance of Italy to limit sovereign debt on banks’ balance sheets, as requested by Germany. As far as NPLs are concerned, figures are in constant diminution. The same source mentions that they have lowered to 3,4% for the whole EU in 2018 from 4,6% in 2017 but they remain problematic in some Euro area Member States, like Greece, Cyprus, Portugal, Italy or Ireland.

⁵⁵ Atilla Arda, Daniel Hardy and Maike B. Luedersen, ‘Five Actions to strengthen the Euro Area Banking Union’, December 14, 2018 <https://blogs.imf.org/2018/12/14/>

which includes the Common backstop to the SRF, the ESM toolkit, Debt sustainability issues and the cooperation between the ESM and the Commission - was also endorsed by the Euro Summit. ‘On that basis, we ask the Eurogroup to prepare the necessary amendments to the ESM Treaty (including the common backstop to the SRF) by June 2019’. A document prepared by the Eurogroup includes the ‘Terms of reference of the common backstop to the SRF’. The backstop will be in the form of a revolving credit line of the ESM to the SRF.

The first remark I will make on these terms of reference (common back stop) and term sheet (ESM and Common backstop) relates to their intergovernmental features which is not only evident in their legal form (international agreements), but also in the procedures: for the backstop, following the term sheet, the requirement to allow ‘for swift and efficient decision making to fit the timeline of resolution’ and ‘respecting national constitutional requirements’ is combined with the obligation to submit the backstop to an unanimous decision of the ESM Board of directors’. The common backstop terms of reference includes the following words which theoretically could provide for some flexibility: ‘The standard voting procedure for all decisions referred to in the Terms of reference is unanimity. We endeavour to find an agreement on an emergency voting procedure as set out in the ESM Treaty, while respecting national (constitutional) requirements’.

A number of Member States had indeed clearly manifested their intention to preserve the intervention of the Member States in the decision-making process of the ESM and the backstop. It was very clear from the start for Germany and it has been confirmed at the highest level.⁵⁶ This will was shared by the so-called Hanseatic group of countries⁵⁷ which published, on 1 November, their ‘shared views’ on the ESM reform. These supported a ‘reinforced role for the EMS, as an intergovernmental institution accountable to its shareholders’.⁵⁸ Since the Eurogroup meeting of November 2018,

⁵⁶ In the Meseberg agreement, Mrs. Merkel recognised with President Macron the need for a backstop instrument for the EMS and the importance of enhancing the effectiveness of precautionary instruments, as well as the EMS role in assessing and monitoring future programs although they both considered that ‘in a second step (sic)’, they can ‘ensure the incorporation of the ESM into EU law, preserving the key features of its governance’, which means the role of the Finance Ministers and, for the German Government, control by both the national parliament and the Constitutional Court.

⁵⁷ These countries have been joined by Slovakia (a member of the euro area) and the Czech Republic (which is not), *Euractiv*, 5 Nov. 2018.

⁵⁸ *Ibid.* In his introductory remarks, at the Eurogroup press conference, on 5 November 2018, Commissioner Moscovici mentioned with reference to the SRF: the design of the backstop and, for the ESM, the reform of its toolkit, particularly regarding its precautionary instruments. Mr Moscovici

there was a majority of Member States in favour of updating the precautionary credit line.⁵⁹ The long term perspective of integrating the EMS in EU law, as mentioned by President Centeno in his letter of 25 June 2018, is absent from the Term sheet of the EMS reform.

My second remark will relate to the extreme form of conditionality required from a State to benefit from the Precautionary Conditioned Credit Line (PCCL) of the EMS. The view has been expressed by good connoisseurs of the matter, who applied the required criteria ‘to all [19] euro area countries to see which ones would currently be eligible to the PCCL’. Their conclusion was that ‘10 countries (representing 56% of the Eurozone’s GDP) would not been able to access it at the moment they need to’.⁶⁰

My third remark will be over debt restructuring and on the intention of the Eurogroup to ‘introduce single limb collective actions clauses (CACs) by 2022 and to include this commitment in the ESM Treaty’. This idea was present in the Meseberg conclusions. The possibility to include all sovereign bonds in question in a single vote in lieu of the need to organise separate votes is surely a gain of time and money.⁶¹

The President of the Eurogroup welcomed⁶² the agreement reached on 14 November 2018 between the Commission and the ESM on their future cooperation⁶³ which ‘falls into line with the treaty provisions’, which was not an ‘acquis’ at the beginning of the discussion. Mr Centeno underlines the importance of this

evokes the necessity of a ‘swiftly deployable backstop’, as a ‘vital building block towards a stronger BU, one that can withstand future crises and can help foster the development of pan-European banks able to compete globally’. Speech/18/6308.

⁵⁹ The Eurogroup discussed this question at its meeting of 5 November. President Centeno declared that ‘the aim is to make these instruments more effective so they are a viable option for countries with sound fundamentals that need assistance. There is a difficult balancing act we have to accomplish to address the potential stigma of requesting precautionary support and, at the same time, ensure an appropriate level of conditionality. We have made progress on this issue...’

⁶⁰ Gregory Claeys and Antoine Mathieu Collin, ‘Does the Eurogroup’s reform of the ESM toolkit represent real progress?’ *Blog Post*, Bruegel, Brussels, 13 December 2018, p. 4. We refer the reader to the concise but deep analysis made by the authors of this Blog.

⁶¹ The authors of the Blog Post express the view that ‘it is not totally clear if being eligible to an ESM’s PCCL would be sufficient to be considered eligible to the ECB’s OMT programme’. I submit however that there is no ambiguity in the ECB’s communiqué in this respect. Could it not been considered that the expression used by the ECB: ‘Enhanced Conditions Credit Line’ (ECCL) really means PCCL? I cannot here refer to all contentions made by these authors which particularly concern the strictness of the conditions of recourse to the ESM.

⁶² Main results and remarks by Mr Centeno following the Eurogroup meeting of 19 November 2018 of the Eurogroup.

⁶³ Joint position on future cooperation between the European Commission and the ESM, 19/11/2018. <https://www.esm.europa.eu/press-releases>

agreement between what he called ‘the two institutions’ who will manage rescue programmes in the next crisis’.

I should also refer to the possible adoption of a new fiscal instrument for the euro area. The Meseberg Declaration included a proposal on this subject, which was accommodated in a recent Franco-German proposal on the architecture for a euro area budget, an idea already present in the Commission proposals. In its letter to to leaders, about the Eurogroup meeting of 3 December, the President of the Eurogroup mentioned that ‘we have notably discussed’ proposals from the Commission and from Germany and France, which suggest ‘the establishment of instruments for competitiveness, convergence and stabilisation in the EMU’. The report distinguished the instruments for competitiveness and convergence, which as proposed by France and Germany would be part of the EU budget, the size of the euro area budget being determined by the heads of state and government in the context of the Multiannual Financial Framework (MFF) and the ‘possible features of a stabilisation function, including the unemployment insurance scheme’. President Centeno noted in this regard: ‘We did not reach a common view on the need and design of such a function’. A discussion, particularly animated, continued within the Eurogroup on 13 December, without success. In its statement of 14 December 2018,⁶⁴ the Euro Summit mandates the Eurogroup in the context of the MFF ‘to work on the design, modalities of implementation and timing of a budgetary instrument for convergence and competitiveness for the euro area Member States’. The Euro Summit gives a number of directives and announces that ‘the features of the budgetary instrument will be agreed [by the Euro summit?] in June 2019’. The instrument itself will be adopted ‘in accordance with the legislative procedure, as foreseen by the Treaties, on the basis of the relevant Commission proposal to be amended if necessary’. There is no mention any more of a stabilisation function for the budget. But, the President of the Eurogroup assures that the debate on the stabilisation function continues.⁶⁵

III. Some final remarks

⁶⁴ European Council, Statement of the Euro Summit, EURO 503/18, Eurosummit 3, TSGC 10, Press release, 14 December 2018, point 4.

⁶⁵ ‘Europa tiene un déficit en la lucha contra la desigualdad’, interview of Mário Centeno, *El País*, 16 December 2018, p. 3.

The first point I would like to raise in these remarks will be a short but important one. I would like to put, once again, the accent on the necessary complementarity between risk reduction and risk sharing. The institutions and the Member States are under pressure especially from the so-called Nordic Member States. However, they are not alone. Let us remember that at the high point of the Greek crisis in 2010, one Member State, a developing country, member of the Visegrad 4, refused to contribute because Greece was a developed Member State richer than it was itself. The stake is important both politically but also legally: the BVerfG attitude on budgetary sovereignty is copied by other constitutional jurisdictions in the Czech Republic, in Denmark, in Poland and in the Baltic countries. Hence the fact that each Eurogroup meeting starts with a report by the institutions about ‘the progress achieved on risk reduction’. No doubt the emphasis placed by some on this topic is not exclusively inspired by legal considerations but it is a fact of life which it is important to take into account and which is taken into account. Now, time has come to conclude.

The second point will be dedicated to what is sometimes called the ‘new intergovernmentalism’. As a matter of fact it is not a new phenomenon. If a quote is permitted of what was written nine years ago about the invasive role of the European Council: ‘Ce phénomène, loin de consolider la structure communautaire en lui donnant une base de légitimité au niveau le plus élevé, constitue, au contraire, un signe de décomposition de cet ordre juridique. Il substitue le consensus et une procédure conventionnelle aux règles de vote et à l’intervention formelle des institutions dans l’élaboration des actes.’⁶⁶

Indeed I would like to stress the primacy in the negotiations of the role of the ‘leaders’ acting within the European Council, the Euro Summit or informal encounters. The difference with the recent past is that the leaders intervened normally to give encouragement or when the other levels of power required their intervention or at their initiative, if the solution of the problems appeared difficult at the legislative level.⁶⁷ The European Council was created in order to

⁶⁶ Jean-Victor Louis, ‘L’évolution du Conseil européen à la lumière de la réalisation de l’Union économique et monétaire’, *Divinire sociale e adeguamento del diritto*, Studi in onore di Francesco Capotorti, II, 2009, p.253-272, 272. See also Päivi Lino and Janne Salminen, ‘Should the Economic and Monetary Union be democratic after all? Some reflections’, *German Law Journal*, 2013, vol. 14, No 7, p.844-868, p. 864.

⁶⁷ See Luuk Van Middelaar, *Quand l’Europe improvise. Dix ans de crises politiques*, Paris, Le débat, Gallimard, 2018, p. 270.

smooth the Brussels debate, writes the same author quoted.⁶⁸ For the reform of the EMU and the conclusion of the BU, the leaders didn't succeed in giving a decisive impetus on matters where apparently an agreement was possible, after having eliminated controversial points from the Commission's package. The reason for this provisory or partial failure is due to the deep contradictory views dividing the Member States and in particular, the controversy on risk reduction as a condition for risk sharing. The leaders fixed dates for the legislative power while delimiting its mandate at an initial stage for the adoption within a deadline of the term sheet of the problem (whether it be the rules on procedure and the conditions of access to the ESM or the configuration of EDIS), leaving to the Ecofin Council or the leaders, the responsibility for giving the green light for the follow up.

Another important relatively new factor in the decision-making process is the development of political groupings between like-minded Member States. It has been observed that those groupings have always existed. The Benelux States entertained for years close relations between themselves which included joint meetings before Council meetings in Brussels or Luxembourg.⁶⁹ The Visegrad 4 (Czech Republic, Hungary, Poland and Slovak Republic-V4) is another such grouping. More recently, groups like the so-called 'Hanseatic league' (including Finance ministers from the Nordic countries, at the initiative of the Netherlands) with the recent rallying of the Czech Republic and Slovakia and in addition, the V4 manifested their will as pressure groups aiming to fight for what they see as their interest. However, if 'the new coalition is not sufficiently large to form a blocking minority under the EU system of qualified majority voting', it nevertheless constitutes a 'blocking coalition'.⁷⁰ By contrast, at the fourth Summit of Southern countries on 10 January 2018, the heads of State or government of Cyprus, Spain, France, Greece, Italy, Malta and Portugal have adopted a Declaration with the meaningful title: 'Let the EU progress in 2018'.

⁶⁸ *Op. cit.*, p. 271.

⁶⁹ The three Governments still entertain good individual relations but do not necessarily hold analogous views on Europe.

⁷⁰ Rem Korteweg, *op. cit.*, p. 4. For a similar attempt for Nordic countries to weigh on the negotiations related to the Banking Union and the powers of the ESM, see the Joint Statement of Ministers of Finance of Germany, the Netherlands and Finland, 25 September 2012, http://www.vm.fi/vmen/en/03_press_releases_and_speeches/01_press_releases/20120925.jointS/name.jsp

The Visegrad Group and the so-called ‘Hanseatic’ group both hold views that are in line with the German position. The Southern Countries expressed opinions close to the ones held by President Macron, although this was before the Italian elections which brought other political forces to power which are surely less Europhile.

A paragraph in the V4 Statement on the Future of Europe of 26 January 2018 will particularly hold our attention. Under the heading, ‘Democratic Legitimacy’ the following statements can be read: ‘As encompassed by the Treaties, the democratic control of Member States over the legislative and political processes of the EU should follow the principle of subsidiarity. It should be considered how vital national interests can be safeguarded under the present voting system, bearing in mind that the European Council is destined to be a broker where sensitive issues are on the table. On matters of strategic national interest, every Member State should be entitled to demand a unanimous decision by the European Council.’⁷¹ This vision recalls the so-called Luxembourg Compromise of 1986, which was more correctly also known as an agreement to disagree.

There is more however. A reasoning similar to the thesis adopted by the V4 Declaration was on the basis of an argument raised by the Slovak Republic and Hungary in a case before the Court against a decision by the Council which provided for the distribution among the Member States of a number of migrants with a non-EU foreign identity.⁷² For the requiring parties, the decision was contrary to a decision by the European Council which was in favour of a decision adopted by consensus. For the Court, the position adopted by the European Council didn’t prevent either the Commission proposing a non-legislative act based on article 78 (3) TFEU, nor the Council to adopt such proposal. The Court added that: ‘The principle of institutional balance prevents the European Council from altering that voting rule by imposing on the Council, by means of conclusions adopted pursuant to Article 68 TFUE, a rule requiring a unanimous vote. Indeed, as the Court has already held, as the rules regarding the manner in which the EU institutions arrive at their decisions are laid down in the Treaties and are not at the discretion of the Member States or of the institutions

⁷¹ See in this regard, *From Rome to Sibiu, op. cit.*, p. 16.

⁷² Court of Justice, judgment of 6 September 2017, joint cases C-643/15 and C-647/15, *Slovak Republic and Hungary v Council and Commission*, point 143 and foll.

themselves, the Treaties alone may, in particular cases, empower an institution to amend a decision-making procedure established by the Treaties (judgment of 19 September 2015, *Parliament v Council*, C-363/14, EU:C:2015:579, paragraph 43).’⁷³

I believe that this Court decision should lead us to remember that if unity is an important value it cannot go so far as opposing the judicious use of the qualified majority vote and neglecting the existing balance of power as well as the respect for the prerogatives of each institution. This leads us to observe the growing intergovernmentalism which impregnates the decision-making process inherent to the so-called Leaders agenda.

As a final comment, the extensive recourse to international agreements and the will to keep those existing should be referred to. The EMS will in future still be based on a Treaty for an undetermined period. The transformation of the Treaty on Stability, Coordination and Governance into an EU act, as proposed by the Commission, is not on the present agenda and if the negotiation succeeds on EDIS, it will be based on an intergovernmental agreement.

This lecture will end with a reference to a statement by President Tusk following the Tripartite Social Summit of 16 October 2018: ‘The economy is another area where the EU wants to be more resilient. Good progress in reinforcing EMU is still possible. Even if the tensions among Member States are greater today than they were in June.’ The Italian resistance against the budgetary rules added to the difficulty of the negotiation by confirming in their position those reluctant to make concessions in the discussion about risk sharing.

Let us hope that these tensions will at the end not impede the success of the negotiation...

⁷³ Points 147 to 149.