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**GUEST EDITORIAL**

## *Living with the Eurozone*

The "Report of the Five Presidents" of March 2015,[1] as it is known colloquially, is the latest in a series of texts emanating from EU institutions, which are designed to give shape and an impetus to the programme for the completion of the EU's economic and monetary union (EMU).[2] The Report seems generally well conceived for that purpose; however, like its predecessors it fails completely (whether from ideological distaste or for some other reason) to consider the appropriate ordering of the relationship between EMU and the other core EU policies, and hence between members and non-members of the Eurozone. It is not good enough simply to declare, as the Report does (doubtless with perfect sincerity), that progress towards a deeper EMU must "preserve the integrity of the single market in all its aspects". Concrete constitutional arrangements are needed, that will enable the Eurozone to develop any new structures perceived as necessary to secure its successful functioning, without jeopardizing the attainment of the full range of objectives that Article 3 TEU identifies for the Union as a whole, including for Member States that are unwilling or unable to participate in the single currency.[3]

For the fact that this issue is to be addressed at last, we have to thank Mr Cameron, who has placed it (under the heading "Economic Governance") at the top of the agenda proposed in his letter of 10 November 2015 to the President of the European Council, Mr Tusk, for negotiating what is described in the letter as "a new settlement for the United Kingdom in a reformed European Union". However, it is important to be clear that, in spite of the context in which it has been raised, the issue is very far from being of

1. Officially entitled "Completing Europe's Economic and Monetary Union". The five Presidents in whose names the Report is published are those of the Commission (Jean-Claude Juncker), the Euro Summit (Donald Tusk), the Euro Group (Jeroen Dijsselbloem), the ECB (Mario Draghi) and the European Parliament (Martin Schulz). The report is at <ec.europa.eu/priorities/economic-monetary-union/docs/5-presidents-report_en.pdf>.

2. See, in particular, the Report "Towards a Genuine Economic and Monetary Union", prepared for the European Council by its then President, Herman Van Rompuy, in collaboration with the Presidents of the Commission, the Euro Group and the ECB ("the Four Presidents' Report") and the Commission's "Blueprint for a deep and genuine economic and monetary union", both of 2012.

3. Hereinafter, where convenient, "non-participating Member States".

exclusive concern to the United Kingdom. It represents a lacuna in the constitutional structure of the EU, affecting not only the other Member States not participating in the single currency but the Union as a whole.

There are presently 19 Member States belonging to the Eurozone and nine outside it. The non-participating Member States, constituting almost a third of the total, fall into three categories. Denmark and the United Kingdom each have an indefinite opt-out from the single currency (though on somewhat different terms), which would be abrogated if they wished to join in and were found to meet the convergence criteria laid down by Article 140(1) TFEU and Protocol No 13. Six Member States fall into the category of "Member States with a derogation", as defined by Article 139(1) TFEU; this means that, for the time being, they are excused from adopting the euro as their currency, because the Council has not yet decided that they fulfil the necessary conditions for doing so. Sweden is a case apart. In strict law, it remains a Member State with a derogation; whereas, in reality, it is manifestly capable of qualifying for membership of the Eurozone but has chosen not to join, and that choice has never been legally challenged.

It might be argued that euro non-participants require no constitutional recognition as a class, because their situation is liable to be a temporary one. The general rule underlying Article 139 TFEU (though not spelled out there) is that adoption of the single currency is compulsory for Member States which meet the convergence criteria; once they do so, they will be not merely entitled but bound to enter the Eurozone. As for the three Member States that have chosen to remain outside, even they may come in time to appreciate the error of their ways.

That argument is unsustainable, on both legal and factual grounds. Legally, all Member States enjoy equality before the Treaties pursuant to Article 4(2) TEU; it cannot seriously be contended that non-participation in the single currency compromises that equality. Moreover, in the case of Denmark and the United Kingdom, the right to hold aloof is guaranteed by the primary law of the Union; while Member States with a derogation in the sense of Article 139(1) TFEU are prevented from participating, again by primary EU law, even if they wanted to. Factually, it has been obvious since the enlargements of 2004 and 2007 that a substantial minority of euro non-participants was likely to be a semi-permanent feature of the Union's constitutional order. Even if the present Member States with a derogation are mostly hopeful of entering the Eurozone at some point in the future, there are countries at the head of the queue for accession to the Union whose prospects of fulfilling the convergence criteria sooner than the Greek Kalends appear slim. Also, although the history of the Eurozone may have been one of political hope triumphing over economic experience, recent crises must surely have brought

home the lesson that countries must not be allowed in, unless they unequivocally and sustainably fulfil the prescribed conditions. The case of Sweden, added to those of Denmark and the United Kingdom, demonstrates, moreover, that no Member State of the Union can be compelled to join in the single currency if its people do not wish this; in Denmark, it may be remembered, a proposal by the then Danish Government to adopt the euro, which had the support of the largest political parties in the country, was defeated in a referendum held in September 2000.

The moment has surely come (indeed, it is overdue) to acknowledge that membership of the Union but not of the Eurozone is a normal constitutional status, deserving of formal recognition and protection. There is an established variable geometry, according to which some Member States adopt the single currency, while others do not, and the primary law of the Union ought to accommodate this reality.

A step towards "normalizing" the position of euro non-participants would be to make membership of the Eurozone no longer compulsory, in principle, but optional for all Member States not already belonging to it.[4] (Whether existing Eurozone members should have the option of leaving, is a different matter, owing to the risks to financial stability; all that can be said is that, were a country to be blasted out of the Eurozone by overwhelming economic and political forces, that should not put its membership of the Union in doubt.) Abolishing the compulsory membership rule would also relieve the ideological pressure on Member States to become Eurozone members, which increases the risk of premature adherence. If new Member States had a free choice in the matter, they would perhaps think longer and harder before making a commitment which they and their partners may come to regret.

There are two dangers, in particular, that need to be addressed in the ordering of the relationship between the Eurozone and the EU as a whole. The first is the undue prioritization of EMU over other core EU policies with which it is liable to interact, notably but not exclusively the single internal market. The second danger is that of the domination of the ordinary legislative process within the Council by Eurozone members acting as a caucus.

As to the first danger, the Union is about a great deal more than EMU – though you would not think so from reading the Report of the Five Presidents. The establishment of "an economic and monetary union whose currency is the euro" is referred to in Article 3(4) TEU as just one of five principal objectives the EU is called upon to pursue. Article 3(3) identifies the whole range of the Union's socio-economic objectives other than EMU, placing the establishment of "an internal market" before all of them. According to

4. This is not an issue in the United Kingdom's negotiations with the EU, since that country already has an indefinite opt-out.

Article 3(6), the Union is to "pursue its objectives by appropriate means commensurate with the competences which are conferred upon it in the Treaties". The structure of Article 3 is clearly intended to emphasize the equal priority of the stated objectives. It provides no warrant for the mind-set that would subordinate other Union activities to the drive towards a "deep and genuine" EMU, simply because this is perceived as the main vehicle of European integration.

The unfortunate results of such a mind-set were graphically illustrated by the attempt made in 2011 by the ECB to impose the legal requirement that clearing houses handling euro-denominated trades be located in Member States belonging to the Eurozone. Such a requirement, it may be noted, would have affected not only United Kingdom-based clearing houses but also businesses in Eurozone countries that might wish to deal with them. It is shocking that the United Kingdom was left to contest before the General Court, with the sole support of Sweden, a blatantly discriminatory measure that contravened fundamental principles of the single internal market. Where, one is entitled to ask, was the Commission, with its role as guardian of the Treaties, in all of this? The United Kingdom won its case in the General Court, though on the narrow ground that the ECB lacked competence to regulate the activity of securities clearing systems; the Court found it was unnecessary to examine the pleas relating to the infringement of internal market freedoms and the principle of non-discrimination.[5] From a wider perspective, the main interest of the case lies in its aftermath. Rather than continue the litigation, the ECB and the Bank of England reached agreement on a set of measures to enhance stability in relation to centrally cleared markets. This involved the Banks' extending their standing swap arrangements, to facilitate the provision of multi-currency liquidity support to clearing houses established, respectively, in the UK and in the Eurozone; in simple terms, if a United Kingdom clearing house needs euros and the Bank of England does not have enough, the ECB will provide them, and *vice versa*, when a clearing house in the Eurozone is short of sterling.[6] In an ideal world, that arrangement, substituting cooperation for prescription, might stand as a model for organizing cohabitation between the Eurozone and the non-participating Member States. However, in the usual cut and thrust of EU decision-making, a more legally robust solution is called for.

5. Case T-496/11, *United Kingdom* v. *ECB ("Clearing Houses")*, judgment of 4 March 2015, EU:T:2015:133. See generally Marjosola, "Missing pieces in the patchwork of EU financial stability regime? The case of central counterparties", 52 CML Rev., 1491 et seq.

6. See accounts in *Reuters Business News*, 27 March 2015, and *Bloomberg Business*, 29 March 2015. For the text of the joint statement issued by the Bank of England and the ECB, see *The City A.M.*, 29 March 2015.

The second danger, that of caucusing, would entail the Member States of the Eurozone, which are now able to muster between them a qualified majority within the Council,[7] voting as a block on proposals for legislation applicable to all of the Member States. If most or all Eurozone members were regularly to adopt the same position, whether as a result of prior concertation or from commonality of interests, the normal process of consensus-building within Council bodies would be liable to be subverted. Opportunities for concerting positions are provided by the existence of informal parallel fora, the Euro Group of Finance Ministers[8] and the Euro Summit comprising Heads of State or Government,[9] which meet in the presence of representatives of EU institutions, but away from the eyes and ears of non-participating Member States. While there is no convincing evidence to date of systematic caucusing by members of the Eurozone, it cannot be excluded that this may develop over time, especially if their political economies converge progressively, as the Report of the Five President envisages. The risk, therefore, exists that non-participating Member States may be marginalized in the decision-making process, with no realistic prospect of influencing the content of legislation in core policy areas like the internal market.

A remedy for both dangers would consist of devising principles of "good neighbourliness", to ensure that EMU does not encroach upon other policy areas (or *vice versa*) and that members and non-members of the Eurozone respect each other's interests (insofar as these may be divergent). Some of these principles should be legally binding and sufficiently clear and circumstantial to serve as grounds for mounting a challenge in the EU courts, while others might constitute a code of good practice. To minimize recourse to litigation regarding the former, and to reinforce the latter, an appropriate safeguard mechanism should also be provided.

Among the legally binding principles, protection of the integrity of the internal market should be in the forefront. The situation that led to the *Clearing Houses* litigation demonstrates the need for it to be spelled out in unequivocal terms that no measure, even though it may be deemed useful for furthering certain aspects of EMU, must be allowed to encroach upon the fundamental Treaty freedoms or distort competition in the single market. This, it must be stressed, would not be to elevate the internal market above EMU but simply to ensure that an *acquis* built up over the whole history of the Union is not eroded. A further group of binding principles should be devised to protect Member States not participating in the Eurozone, and their

7. Under the new rules on qualified majority voting, which came into force on 1 Nov. 2014.
8. See Art. 137 TFEU and Protocol No. 14.
9. The Euro Summit was established by Title V of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union.

nationals, against any form of direct or indirect discrimination connected with the retention of national currencies. There should also be a general requirement (more in the nature of good practice) that, prior to the adoption of a measure exclusively applicable to the Eurozone (e.g. pursuant to Art. 136 TFEU), any possibly negative implications for other EU policy areas be identified and eliminated; and that formal acts include a recital confirming this.

The safeguard mechanism could be modelled on the double-majority voting system that was introduced by Regulation1022/2013 for certain decisions by the Board of Supervisors of the European Banking Authority (EBA).[10] The purpose of that system is explained by recital (14) to the Regulation as being "to ensure that the interests of all Member States are adequately taken into account and to allow for the proper functioning of the EBA with a view to maintaining and deepening the internal market for financial services". The model could be adapted for present purposes as follows. Prior to the adoption of a proposal for an internal market measure, any member of the Council would have the right, by making a reasoned declaration that one or more of the "good neighbourliness" principles referred to above was not being complied with, to call for verification that the prospective qualified majority comprises the votes of a simple majority of, respectively, members and non-members of the Eurozone. In case of failure to pass the double-majority test, voting on the proposed measure must be deferred unless and until the test is satisfied. As in the case of the EBA, provision would have to be made for the continuing suitability of the mechanism to be reviewed, in case the number of euro non-participants should fall below a specified threshold (four, say).

An alternative would be to draw inspiration from the "emergency brake" procedures included in some Treaty provisions.[11] By making a reasoned declaration regarding non-compliance with the "good neighbourliness" principles, a Council member could insist on having the proposed measure referred to the European Council. After discussion, and in the case of a consensus, the proposal would be referred back to the Council for adoption. If there is no consensus, the only option for adopting the proposal would be under the enhanced cooperation procedure. A mechanism of this kind might be thought preferable to double majority voting, since it would be more flexible and available, under the same conditions, to both members and non-members of the Eurozone.

10. Regulation (EU) 1022/2013 of the European Parliament and of the Council of 22 Oct. 2013 amending Regulation (EU) 1093/2010 establishing a Supervisory Authority (European Banking Authority) as regards the conferral of specific tasks upon the European Central Bank pursuant to Council Regulation (EU) 1024/2013, O.J. 2013, L 287/5. The double-majority voting system is provided for by Art. 44 of the amended Regulation 1093/2010.

11. See e.g. Art. 82(3) and Art. 83(3) TFEU.

Both the principles and the safeguard mechanism would need, in due course, to be incorporated into the primary law of the Union, whether through their insertion into the texts of the Treaties, at appropriate points, or by way of a separate Protocol. Pending an opportunity for the formal amendment of the Treaties, the principles could be given binding force by a decision of the European Council adopted by consensus. The safeguard mechanism could be implemented by way of a political arrangement – a benign version of the old Luxembourg or Ioannina Compromises.

In the long term, the non-participating Member States may find that they have to live with a Eurozone, which has been transformed into a fully-fledged fiscal union governed by democratically accountable institutions. If that were to happen (and it is a very large "if" indeed), it may be that the only viable way of holding the Union structure together would be to create separate institutions, with far-reaching but narrowly defined powers, to run the fiscal union, leaving the existing institutions free to focus on all the other important things the EU should be doing.

But that is futurology. For the time being, it can be said that there are strong reasons for placing the relationship between the Eurozone and the EU as a whole on a sounder legal footing; and that, by including this on his negotiating agenda, Mr Cameron has provided his partners and the EU institutions with an opportunity for doing so, which it is hoped they will grasp willingly.

Alan Dashwood*

* Member of the Advisory Board of the *Review*; Professor of Law, City University, London; Henderson Chambers, London.