On the 10th March, the official candidate of the Socialist Party for the French presidential elections, Benoît Hamon, outlined his programme for the European Union. This programme, whilst being against austerity and in favour of more flexibility as regards EU requirements in terms of public budgets and public debts, comes with a treaty proposal, the draft treaty on the democratization of the governance of the euro area (dubbed « T-Dem »). This treaty, which was prepared by the candidate together with the superstar economist Thomas Piketty (who has joined his team) is supposed to bring more democracy to the governance of the Euro area. However noble (and necessary) this ambitious idea might seem, the way this draft treaty has been engineered raises not only political but also legal questions.

Presentation of the T-Dem

First, it has to be noted that, according to Hamon, this T-Dem would not be an amendment to the European Treaties – which, as the explanatory statement says, “appears strongly impracticable in the short term” – but an international treaty signed by the Member States of the Euro area, in parallel to the existing European treaties. Such a method is reminiscent of the Schengen Agreements and, more recently, of the other treaties concerning the Governance of the Euro Area signed in 2012, namely the Treaty on Stability, Coordination and Governance (TSCG also known as “Fiscal Compact”), the aim of which is to strengthen budgetary discipline among Member States of the European Union, and the Treaty establishing the European Stability Mechanism (ESM), which created an international organisation located in Luxembourg to act as a permanent source of financial assistance for member states in financial difficulty.

The main objective of the T-Dem is to develop the institutional framework specific to the Euro system to make it more democratic by making the existing institutions share their powers with and/or supervised by a Parliamentary Assembly.

The Economic and Monetary Union, as it stands, is an institutional system within the institutional system of the European Union. It has institutions of its own such as the European Central Bank which deals with the monetary policy. Also, the European Council (consisting of heads of States and Governments) and the Council (consisting of ministers of EU States) both have an “euro-area only” equivalent, respectively the Euro Summit and the Euro Group. The latter has been officially recognised by the Lisbon treaty, whereas the former’s existence is recognised only by the Fiscal Compact and therefore is not part of the EU institutional framework. Neither of them has any decision-making power; they are meant to allow the Member States of the Euro area to coordinate their positions between themselves, which explains why the United Kingdom was never a big fan of the Euro Group. If the “T-Dem” was to come into force, this would create a new institution specific to the Euro area, the Parliamentary Assembly.

Unlike the Summit of the Euro area and the Euro Group, the Parliamentary Assembly of the Euro area would not be an equivalent of the corresponding institution in the EU institutional framework (the European Parliament) with solely the representatives of the Member States of the Euro area (in this case, the MEPs elected as part of the contingency of the Euro States). In fact, the Parliamentary Assembly, as designed by Hamon, seems to have been built in defiance of the European Parliament. According to EurActiv, in the first version, it was supposed to be composed only of Members of National parliaments. According to the version published on the 10th March, 4/5 of the Members of the Parliamentary Assembly would be National MPs and 1/5 would be MEPs. All the members would be designated in proportion to the political groups within the assemblies that they come from and with due regard to
political pluralism. The number of designated members of the Assembly from national Parliaments shall be fixed in proportion to the population of the Euro Area Member States (Article 4).

According to the draft, the Parliamentary Assembly would have quite comprehensive powers. It would, for example:

- prepare the Euro Summits (Article 7);
- participate in and supervise the convergence and coordination of national economic and budgetary policies (Article 8);
- vote and supervise the financial assistance granted by the European Stability Mechanism (Article 9);
- adopt a resolution each year on the interpretation of the price stability objective and the inflation target adopted by the European Central Bank (Article 10);
- monitor the institutions of “governance of the Euro area”, including investigating allegations of misadministration in the “Euro area governance” (Article 11);
- exercise the legislative powers within the Euro area together with the Euro Group, in a procedure mimicking the Ordinary Legislative Procedure within the EU (this procedure makes the Council of Ministers and the European Parliament co-legislatures), including voting on the assessment and rate of corporation tax which contributes to the Euro area budget (Article 12);
- establish the budget of the Euro area together with the Euro Group (Article 15);
- appoint the candidates chosen for the Executive Board of the European Central Bank, the Presidency of the Euro Group, and the Board of Directors of the European Stability Mechanism (Article 17).

Although giving so many important powers to an assembly composed mainly of national MPs instead of the European Parliament itself raises important political issues about Hamon’s concept of European Democracy, we would like to focus, here, on the legal point of view.

**Legal analysis**

When Member States make international treaties with one another outside of the EU legal framework, they must be extremely cautious, because these treaties must comply with EU law. In the *Pringle case*, for example, the compatibility of the ESM Treaty with EU Law has been challenged before the European Court of Justice.

Are there grounds for challenging the compatibility of the “T-Dem” with EU Law? It is of course difficult to give a fully comprehensively assessment to this hypothesis, especially in a blog post. However, we would like to focus here on one point, which is how the T-Dem "hijacks" the existing bodies of the European Union, along with Hamon and his team’s blatant defiance of the European Parliament, could in fact lead to the legal downfall of this treaty.

According to the case-law of the European Court of Justice, as summed up in the Pringle ruling (§158):

> The Member States are entitled, in areas which do not fall under the exclusive competence of the Union, to entrust tasks to the institutions, outside the framework of the Union, such as the task of coordinating a collective action undertaken by the Member States or managing financial assistance (see Parliament v Council and Commission, paragraphs 16, 20 and 22, and Parliament v Council, paragraphs 26, 34 and 41), provided that those tasks do not alter the essential character of the powers conferred on those institutions by the EU and FEU Treaties (see, inter alia, Opinion 1/92 [1992] ECR I-2821, paragraphs 32 and 41; Opinion 1/00 [2002] ECR I-3493, paragraph 20; and Opinion 1/09 [2011] ECR I-1137, paragraph 75).
The Court went on to assess whether these conditions were respected by the ESM treaty and noticed (§161) that: 

_the duties conferred on the Commission and [the European Central Bank] within the ESM Treaty, important as they are, do not entail any power to make decisions of their own. Further, the activities pursued by those two institutions within the ESM Treaty solely commit the ESM._

One could wonder whether the T-Dem complies with these requirements. According to Article 136 TFEU, the Euro Group only adopts “measures specific to those Member States whose currency is the euro: (a) to strengthen the coordination and surveillance of their budgetary discipline; (b) to set out economic policy guidelines for them, while ensuring that they are compatible with those adopted for the whole of the Union and are kept under surveillance”. It does not exercise any legislative power. Yet, Article 13 of the T-Dem gives the Euro group legislative powers (together with the Assembly) within the Governance of the Euro Area. One could argue that this provision entails a power for the Euro Group, that it does not have in the normal framework of the European Union, to make decisions – even though not of its own. As for the European Parliament, who normally exercises legislative, budgetary and political control functions (Article 14 TEU), it is deprived of such functions within the T-Dem, and only gets to designate MEPs to sit, with an important minority, in a broader assembly that shall exercise them. One could wonder whether it alters the essential character of the powers conferred on the European Parliament by the EU and FEU Treaties. Furthermore, even though the new structure is officially disconnected from the EU institutional system, it is obviously linked to it. Can we say then that the activities pursued by the Euro Group and the European parliament within the T-Dem solely commit a separate international organization, as was the case for the ESM? As a matter of fact, there is no indication that the T-Dem intends to create a separate international organisation – and as a matter of fact, such a secession would be probably hard to accept politically.

It is true that, as the issue is extremely political, the Court could abstain from addressing it. However, given constitutional significance of the matter, it could also choose to step in – as with the opinion 2/13 on the accession of the European Union to the European Convention of Human Rights.

Another issue raised by this T-Dem would be the nature of the decisions and legislation adopted by this “Governance”. Clearly, even though the decision-making process put forward in the project is intended to mimic the decision-making process in the EU (especially the legislative process), it is clear that the decisions taken by these bodies would not become EU Law. Therefore, they would have no direct effect, they would not benefit from the primacy of EU Law and nor would they be protected or interpreted by the European Court of Justice. This legislation would exist in parallel with EU Law.

The legislation adopted based on the decision-making process laid down in the T-Dem would either be non-binding or benefit from the binding effect of the treaty itself. In the second instance, just like the T-Dem itself, any legislation issued on the basis of the T-Dem would be attributable to its contracting parties (the Member States of the Euro Area). If this “Euro Area legislation” therefore happens to be incompatible with EU Law, the “T-Dem” contracting parties would be liable and could be found by the European Court of Justice to be in breach of EU Law. In the absence of any _ex ante_ procedure designed to ensure that the “Euro-area” legislation is compatible with EU legislation, the former is doomed to be precarious and at risk of _ex post_ uncomfortable legal challenges.

There is no doubt that something must be done to increase the democratic accountability of the Governance of the Euro Area. However, any serious suggestion in that direction must duly take into account the specific constraints arising from the EU legal framework.