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The 'Muting' of the Stability and Growth Pact

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'Because I am silent and I am holy …'
Address to the Gods of the Underworld
The Book of the Dead (Budge, 1898: 199)

Abstract
This article proposes the "muting" of the SGP, the framework of rules that the EU has implemented since the coming into being of the European Monetary Union in the fiscal domain. It is argued herein that the system is far from being credible, from the perspective of the law-as-credibility paradigm. Therefore, the legal condition of the SGP should be "muted". Three proposals to legally mute the SGP are examined in this article. The Open Method of Coordination is used as a useful model that could be followed from now on in the EU fiscal field. The gains in terms of legal credibility would argue in favour of the muting of the SGP and its correlative conversion into an OMC-like system.

Keywords: Stability and Growth Pact, EU fiscal rules, credibility, legitimacy, law as credibility, Open Method of Coordination, naming, shaming, faming, Blanchard, rules, discretion, financial markets

I. INTRODUCTION

I propose in this article the 'muting' of the Stability and Growth Pact ('SGP'). I also propose that the whole European fiscal system should be transformed into an 'Open Method of Coordination'-like structure. The article unfolds as follows. In the second part of this article, I review the state-of-the-art discussion on the reform of European economic governance, and in particular, of the EU's fiscal framework. Further, in the third part, I discuss the main proposals that have been put forward in this area, with a particular focus on that of Blanchard et al.[1] After this discussion, I revisit, in the fourth part, the issue of why the current EU fiscal framework presents problems of credibility, both from an economic and also a legal perspective. In the fifth part, I analyse the Open Method of Coordination approach to EU economic and social governance, and I explain why I use this approach as a model that, with the

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[1] O Blanchard, A Leandro, and J Zettelmeyer, 'What to Do about the European Union's Fiscal Rules', *Peterson Institute for International Economics* (February 2021).

appropriate qualifications, could be used in the EU fiscal domain. Finally, in the sixth part of this article, I propose three alternative proposals for the 'muting' of the legal side of the Stability and Growth Pact. In the final (seventh) part, I offer a number of conclusions that wrap up the main argument of this article.

II. THE REFORM OF THE SGP: THE STATE OF THE ART

It would probably be inaccurate to say that the SGP is currently under review. The truth of the matter is that is has been under constant reform since its very inception, in 1997. At the very minimum, the SGP has been formally reformed on three occasions: 2005, 2011, and 2013. Therefore, the least that can be said is that the life of the Stability and Growth Pact has been in fact quite instable. The European Commission undertook a new 'reading' of the SGP in 2015, which was oriented to give a more flexible interpretation to the Pact.[2] This new Commission's twist, together with the decision to freeze the most rigid aspects of the SGP during the COVID-19 pandemic that has been recently adopted by the EU institutions,[3] has prompted an in-depth revision of the fiscal rules of the European Union. This latest reform is being undertaken at the time of writing this article.

In particular, on 5 February 2020, the European Commission adopted its Communication on the 'economic governance review'. In this document, the European Commission identified a number of 'challenges' in the field of EU fiscal coordination and proposed a wide 'public debate' regarding these challenges. Specifically, the challenges were: debt sustainability; Member States' pro-cyclical fiscal policies; a composition of public finances not definitively oriented towards growth and investment; the lack of a strong central fiscal capacity to at least tackle eurozone crises; and the complexity and lack of transparency of the whole EU fiscal coordination framework. According to the Commission, the debate on the reform of the EU economic governance framework should be centred around the need to improve the whole EU fiscal coordination framework as to ensure the sustainability of public finances, at the same time that short-term stabilization was allowed for; the necessity to incentivize Member States to make key reforms in the economic, social, and environmental areas; the need to simplify and give more transparency to the whole framework; the demand for reviewing the sanctions' framework of the SGP; the requirement to establish and develop independent fiscal institutions in Member States; the reinforcement of the link between eurozone policies and

[2] COM(2015) 12 final, *Making the Best Use of Flexibility within the Existing Rules of the Stability and Growth Pact*.

[3] COM(2020) 123 final, *Communication from the Commission to the Council on the Activation of the General Escape Clause of the Stability and Growth Pact*. The activation of the escape clause was granted by the ECOFIN on 23 March 2020. Council of the EU Press Release, *Statement of EU Ministers of Finance on the Stability and Growth Pact in Light of the COVID-19 Crisis* (23 March 2020), https://www.consilium.europa.eu/en/press/press-releases/2020/03/23/statement-of-eu-ministers-of-finance-on-the-stability-and-growth-pact-in-light-of-the-covid-19-crisis.

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economic and monetary union in its broadest sense; and the need to deepen the European semester.

Just a month after the European Commission issued its previously noted Communication, the COVID pandemic exploded. Therefore, the European Commission issued, a year after the pandemic's outburst, its Communication on the EU's fiscal response to the 'outbreak of COVID-19'.[4] In the last part of this Communication, the Commission made a reference to the economic governance review process: 'when recovery takes hold, the Commission intends to relaunch the public debate on the economic governance framework'. According to the Commission, the 'pandemic has significantly changed the context of the public debate' with higher levels of public debt and deficit levels, lower economic growth, and, more importantly for the purposes of this article's discussion, the freezing of the SGP rules, for the first time in the EU's fiscal coordination history.

Since then, a number of EU institutions, and also experts from different intellectual quarters, have jumped into the debate of the reform of the EU economic governance system. For example, the European Fiscal Board ('EFB'), in its annual report of 2020, made a number of reflections as regards the reform of the EU's fiscal framework. In particular, the EFB proposed, among other things, to establish a (strong) central fiscal capacity in Brussels. This would imply the expansion of the EU budget. This new, larger, EU budget would be financed through EU own taxes. The creation of a central fiscal capacity in Brussels would also imply agency for the Union institutions, and in particular for the European Commission, to borrow moneys from the financial markets. Further, the European Fiscal Board also proposed to amend the fiscal framework of the EU as it stands at present. In particular, the EFB advocated for: the simplification and clarification of the SGP; the establishment of differentiated debt targets for the Member States; and alternatively (and less radically), the establishment of differentiated speeds for the reduction of the debt-to-GDP ratio depending on the economic circumstances of the Member States; and also, the enhancement of the Member States' investment capabilities oriented to boost economic growth, above all in difficult economic times.

As regards experts and academia, there has been no shortage of proposals for reform of the current EU system of economic governance. For example, Truger[5] proposes to increase the fiscal leeway of the Stability and Growth Pact, in order to adapt the EU fiscal rules to the growth fluctuations of the Member States. Also, he proposes to implement the so-called golden rule, so that Member States' public investment would be enhanced. A third reform would be to modify the aims of the EU's fiscal policy, towards 'social well-being' or, more generally, towards 'sustainable economic and social progress', much in the vein of the Agenda for Sustainable

[4] COM(2021) 105 final, *Communication from the Commission to the Council: One Year since the Outbreak of COVID-19: Fiscal Policy Response*.

[5] A Truger, 'Reforming EU Fiscal Rules: More Leeway, Investment Orientation and Democratic Coordination' (2020) 55(5) *Inter Economics* 277.

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Development that is being promoted by Stiglitz and others. In turn, Costantini[6] proposes to reinforce and harmonize automatic stabilizers at European Union level, together with the creation and expansion of national capital investment budgets aiming, among other social and sustainability targets, at full employment. Additionally, Dani et al[7] (2020), propose rupture—rather than reform—of the current EU economic governance rules. In particular, they propose to establish a 'fiscal centre' with a wide fiscal capacity to meet the challenge of solidaristic reconstruction and transformation of the Member States and the Union's economies, a central bank converted into a lender—and buyer—of last resort, and a system of political economic governance that would have the European Parliament and the Council at its top.

The most interesting proposal that has been put forward in the debate on European economic governance reform has been that of Blanchard et al.[8] This proposal is also directly connected with the main argument of this article. The general idea proposed by Blanchard et al would be to shift from fiscal rules to fiscal 'standards'. According to the authors, the difference between them would be that the first would be legally binding and enforceable norms, whereas the second would be discretionarily 'surveyed' by independent fiscal authorities, both national and European. In the case of a divergence between a Member State and one of these authorities, the European Court of Justice ('ECJ') would adjudicate.

This proposal merits to be analysed in depth. The crucial element that is important to understand in Blanchard's et al is what the authors understand by 'standards'. In the first paper that the authors have published on this matter.[9] Blanchard et al speak of 'enforceable standards'. The difference between a rule and a standard would be, according to the authors, in 'the degree to which legal content is defined *ex post*, at the point of application, rather than *ex ante*'. Standards would therefore be rather undefined and would provide the enforcer of the standard a wide margin of manoeuvre to define the exact legal content of the standard at the time of its application. The important point to be stressed here, above all from a pure legal perspective, is that both fiscal rules and fiscal standards would be norms, according to the authors.

The authors cite an important thread of legal literature in support of their differentiation between rules and standards. In a later paper, also published by the Peterson Institute,[10] they only refer to Kaplow's paper of 1992, entitled 'Rules Versus Standards: An Economic Analysis'. Two points are to be raised here: first, the preference between rules and standards is, according to Kaplow, a function of the frequency in which a particular behaviour occurs. Therefore, rules should be preferred when a behaviour occurs more often, and standards should be preferable

[6] O Costantini, 'The Eurozone as a Trap and a Hostage: Obstacles and Prospects of the Debate on European Fiscal Rules' (2020) 55(5) *Inter Economics* 284.

[7] M Dani, J Mendes, A Menendez, M Wilkinson, H Schepel, and E Chiti, 'At the End of the Law: A Moment of Truth for the Eurozone and the EU' (*VerfBlog*, 15 May 2020).

[8] O Blanchard, A Leandro, and J Zettelmeyer, 'Redesigning EU Fiscal Rules: From Rules to Standards', *Peterson Institute for International Economics* (February 2021).

[9] Ibid.

[10] Blanchard, Leandro, and Zettelmeyer, note 1 above.

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when a behaviour is less frequent. The second point is that the legal outcome derived from the application of a rule or a standard should always be, according to Kaplow, the same: 'it should be emphasized that the appropriate content is taken to be the same *ex ante* and *ex post*, which implies that both the law promulgator (with a rule) and the law enforcer (with a standard) are able to determine the appropriate content [of any given norm]—although the cost [of determining the appropriate content] need not be the same when incurred *ex ante* or *ex post*'.[11] This point is important. Kaplow is dealing here with the problem of inconsistency between the rule and the standard. In theory at least, the option between a rule or a standard could not determine a different legal outcome. Rather, the choice between a rule and a standard would be a matter of how to deal with the transaction costs of determining a particular legal result. In the case of the rule, the costs of determining the result would be anticipated; in the case of the standard, they would be delayed. But by definition, rules could not produce the 'best' legal results and standards sub-optimal ones (or vice-versa): they should produce the same ones, or at least, similar ones.

III. DISCUSSION

Clearly both the institutional proposals and the experts' opinions on the reform of the EU economic governance system follow a similar pattern: without calling into question both the spirit and the case for the European Union's system of fiscal coordination, they advocate for a number of reforms. In turn, the chosen reforms depend, directly, on the intellectual background laying behind each institution or expert. In general terms, their lack of novelty is rather dismal. By contrast, as has been suggested before, Blanchard et al's is a much more thought-provoking proposal since it implies a rebuttal of the whole system of EU fiscal governance as it has been conceived since the Maastricht Treaty and the establishment of the Stability and Growth Pact. This is why for reasons of time and space I shall focus on this proposal in what follows.

The first thing that can be said about Blanchard et al's approach is that they import to the EU context a legal concept that comes from the US legal tradition and that has a different significance in Europe, and in particular, in European Union Law. Standards are different from rules because rules are legally binding, but standards are not. In other words, in the EU legal terminology, rules are 'norms', but standards are not. They are reference points that can guide the behaviour of legal and natural persons as well as adjudicators when they have to take legal or administrative decisions. But they are devoid, in principle at least, of a legally binding content. However, as Harm Schepel suggests,[12] the world of standards is not so simple:

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[11] L Kaplow, 'Rules Versus Standards: An Economic Analysis' (1992) 42(3) *Duke Law Journal*, 557, p 570.

[12] H Schepel, *The Constitution of Private Governance: Product Standards in the Regulation of Integrating Markets* (Hart, 2005), p 4.

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> standards [can be divided] into regulative and coordinative standards. The latter, in this scheme of things, are voluntary compatibility standards, set by market players and diffused through market dynamics. Regulative standards, on the other hand, are mandatory health and safety standards, set by, or under the control of, public authorities, and enforced by imposition. But … compatibility standards are sometimes set and enforced by public authorities; health and safety standards often originate in the market and are diffused by benchmarking processes. Most importantly, standards set by committees can be diffused through all three models.

In other words, the notion of standard is far from being a clearly settled one, at least legally speaking. Following Schepel's scheme, regulative standards could be closer to norms, but not even these ones have a clear normative (legal) content, at least in all cases.

Just to add to the confusion that surrounds the very notion of standard, Sunstein says that 'the contrast between rules and standards is quite useful. It identifies the fact that with some legal provisions, interpreters have to do a great deal of work in order to generate the content of the legal provision. With a standard, it is not possible to know what we have in advance'.[13] In my reconstruction of what Sunstein is arguing, standards would be, in the American administrative law tradition, opened-ended rules, and 'rules' as such would be closed-ended provisions. This is maybe not important in economics but is a key distinction in law: standards defer to the interpreter or applier of the provision, they leave a certain margin of discretion to her, whereas rules exclude both deference and discretion. We could say, in the European economic governance terminology, that the difference between rules and standards recuperates the old distinction and discussion between 'rules versus discretion'.[14] What Blanchard et al want to say with the word 'standard' is that, with their proposal in place, there would be much more leeway for discretion in favour of the EU authorities that are competent to implement the Stability and Growth Pact than what it would be the case with plain norms.

To argue, instead, that standards are just norms, as any other one, is probably misleading. As we are seeing it is not clear in American administrative law: to this one should add that in the EU legal context, the word acquires a much more complex meaning. In any case, it is not true that standards, in the European sense, are unspecific. On the contrary, they can be very detailed and specific**.** They do not always defer to the adjudicator or interpreter of the standard. And they can be *ex ante*, rather than *ex post*.[15] Also, the fact that standards can have a private source is not captured in Blanchard et al, and this is a key issue when we speak about standards, at least in the EU: when a lawyer hears this word, she has a private rule-making resonance in her ears. Finally, although, as Blanchard et al contend, standards can be and are as a

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[13] C R Sunstein, 'Problems with Rules' (1995) 83(4) *California Law Review* 953, 965.

[14] C Bianchi and M Menegatti, 'Rules Versus Discretion In Fiscal Policy' (2012) 80(5) *The Manchester School* 603.

[15] See, for example, Rule 9.2.2. f) of Norm ISO 9001:2015 (E): 'The organization shall retain documented information as evidence of the implementation of the audit programme and the audit results'. See this ISO Norm in this link: http://wqc-portal.pwa.co.th/attachment/topic/88/ISO_9001_2015.pdf.

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matter of law judicially reviewed, this does not give a specific legal condition to standards, from the moment in which the ECJ has even judged on the substance of announcements made by the European Central Bank ('ECB'), as in Gauweiler.[16] This, as it may seem obvious from a legal perspective, does not give a legal status or condition to ECB announcements. In other words, the reference to standards made by Blanchard et al is confusing in the framework of the discussion on the reform of the SGP. Just to sum up: it is not enough to be a good economist when you speak of the jumbled set of norms and rules that forms the SGP; you also have to be a good lawyer to do it.

Therefore, if we left aside the reference to standards made by Blanchard et al, the interesting point in their proposal is that they call for a de-legalization of the Stability and Growth Pact. Forget about the names (standards) and go to the substance. The substance is that, in their opinion, the EU's fiscal framework would be better served if there were much less law than what we have now. It is not only that there would be more discretion: discretionary policies can be embodied in law. The point is, rather, that there would be fewer norms in the world of the Stability and Growth Pact. This is what I intend to refer to with the expression 'de-legalisation'. In fact, what they propose is an almost complete de-legalisation of the EU's fiscal framework, with one exception: the involvement of the ECJ in the monitoring of the SGP converted into standards. This would be, as I will argue in the following, a big mistake.

It would be a mistake to make of the ECJ the final arbiter of the SGP, be it in terms of "standards", as Blanchard et al say,. The classical argument here is legitimacy. As I have argued elsewhere, it is probably wise to leave the ECJ out of difficult choices that, at the end of the day, are more political (be them political economic decisions) than technical.[17] However, this is not my favourite argument. My favourite argument is credibility.[18] Credibility is the backbone of any system of economic governance. Without credibility, the economic governance system will not work. This is more so the case in the European Union's arena. Here credibility and legitimacy interact: the EU is not a political union, a superstate with a fully recognized democracy in place. Therefore, its legitimacy is constantly at stake, and this explains why some Member States are reluctant, for example, to implement Article 7 Treaty on European Union ('TEU').[19] The low-intensity legitimacy that the EU exhibits directly affects, in a negative sense, its credibility, above all in the economic governance area. This is illustrated by the historic fact that all currency areas that have not been backed by political unions have failed in the past.[20] In this context, having the ECJ deciding on difficult choices about EU fiscal policy would not only curtail the legitimacy of

[16] A Estella, *Legal Foundations of EU Economic Governance* (Cambridge University Press, 2018), p 94.

[17] A Estella, *The EU Principle of Subsidiarity and Its Critique* (Oxford University Press, 2002).

[18] A Estella, 'Law as Credibility: An Outline' (2015) 1 *Il Foro Napoletano* 40.

[19] J Müller, 'The EU as a Militant Democracy, or: Are There Limits to Constitutional Mutations within EU Member States' (2014) 165 *Revista de estudios políticos* 141.

[20] A Rose, 'Checking Out: Exits from Currency Unions' (2007) 19 *Journal of Financial Transformation* 121.

the Court, but it would also compromise legal credibility. This second point merits more development.

From a 'law as credibility' perspective, courts are the guardians of legal credibility. As I have argued elsewhere,[21] the law as credibility structure assumes, at the very least, a liberal democratic system in which political commitments are rendered credible because they are embodied in law. This structure assumes that the guardians of the system would be strong and active citizens and independent courts. Within this framework, courts would have to refrain and defer to the original interpretation given by political actors regarding the promises that they make. Hard choices could not be systematically deferred to courts. Courts would only substitute political actors' decisions for their own when, after a careful counterfactual analysis, their interpretations of legal commitments would yield more credibility. Therefore, if deference to the legislative bodies would be the rule at hand in the context of full democracies, this should be more so the case in a context like the EU, in which its political and democratic pedigree is less clear. To decide on whether a Member State has incurred in an excessive deficit or not would be, in other words, no job for the ECJ, at least in the majority of the cases. Furthermore: it is possible to think that the ECJ is well aware of its own legitimacy problems and, also, of the legitimacy problems of the EU as a whole.[22] Therefore, being this the case, it is also possible to think that what the Court would do would be to reject, at least in the majority of the cases, a hard scrutiny of the implementation of difficult national fiscal policy decisions. In other words, Blanchard et al's plan would be deemed to failure. To work, it would need the complicity of the ECJ, and this cannot be taken for granted.

Still, there is some interest in Blanchard et al's proposal. This is the de-legalization, as has been hinted before, of the SGP and, in general terms, of the EU's fiscal framework. Clearly, less would be more in this context. Less rules would amount, in the framework of the SGP, to more credibility. Let me turn to this in the following part of this article.

IV. WHY THE CURRENT EU FISCAL FRAMEWORK LACKS CREDIBILITY

Both from an economic and a legal perspective, the current EU fiscal framework is poisoned with serious credibility problems. In economic terms, the current framework generates a sort of self-fulfilling prophecy in markets. Markets tend to use rules, and rule defection by the Member States, as the acid test that they are right when the bet against, for example, the sustainability of Member States' debt.[23] This is probably their most common use. This means than rather than serving the purposes of disciplining the Member States respective fiscal policies, the current

[21] Estella, 'Law as Credibility', note 18 above.

[22] M Desomer and K Lenaerts, 'New Models of Constitution-Making in Europe: The Quest for Legitimacy' (2002) 39(6) *Common Market Law Review* 1217.

[23] P De Grauwe and J Yuemei, 'Mispricing of Sovereign Risk and Multiple Equilibria in the Eurozone' (2013) 34 *Journal of International Money and Finance* 15.

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EU fiscal framework hinders the perfection of the eurozone, since it places the EU closer to the wild spirits of markets. Further, from a legal perspective, it clearly undermines the credibility of the EU legal fiscal framework. Not only that: it also goes against the credibility of the whole of European Union Law, if we take into account that the SGP is central to EU law. This is the case since the EU fiscal framework is completely unstable: it has been subject to continuous sways. These sways have not been a function of technical needs but have been propelled by the conjuncture of interests of the Member States, and in particular, of *some* Member States. Another point is that sanctions have never been implemented in this context, which is all but usual, above all at a point of development of EU law in which general sanctions are now applied to the Member States.[24] Gone are the days in which the EU institutions were reluctant to sanction a Member State for failure to comply with EU law obligations. In this new context, in which sanctions are maybe not the dish of the day, but have become, at the very least, part and parcel of the menu that is currently offered by the EU, the lack of implementation of sanctions in the EU's fiscal domain is even less explainable.

The current EU fiscal framework is also incredible due to its complexity. Complexity means a number of things in the context of the SGP. First of all, there are too many rules, we could even speak of a sort of regulatory diarrhoea in this sector. Second, regulatory diarrhoea gives ample room for contradictions. Therefore, it is not only that there are too many rules, rather sometimes these rules are incoherent in relation to each other. For example, the 3% nominal deficit target cohabits with the 0.5% structural deficit target. Although the European Commission has tried to make a coherent interpretation of both targets,[25] it is clear that their common use may produce divergent results, almost by definition. Third, contradictions give way not to discretion, but to plain arbitrariness when implementing the SGP rules. This, in turn, undermines credibility. Arbitrary use of the SGP rules is the mechanism that connects complexity and lack of credibility. In other words, the SGP legal framework is so complex that it perpetuates a political use of EU fiscal rules. This is the worst possible scenario—at least if we care for credibility.

Just to sum up, the EU fiscal framework lacks legal credibility, and maybe the best proof of it lays in its almost intrinsic instability. The fact that the system is subject to constant review is the most accomplished expression of its lack of equilibrium from a legal perspective. Credible norms are norms that find its own equilibrium point between rigidity and flexibility. And they do so when there are not incentives to change. When a norm, or a set of norms, are under constant review, as is the case with the SGP, with all its swings from rigidity to flexibility and then back to rigidity, it is because there are many incentives to change in place. This means, from a law as credibility perspective, that the norm (or set of norms) does not represent an equilibrium between rigidity and flexibility. My point here is not only that this equilibrium

[24] A Gil Ibañez, 'The "Standard" Administrative Procedure for Supervising and Enforcing EC Law: EC Treaty Articles 226 and 228' (2004) 68 *Law and Contemporary problems* 135.

[25] See European Commission 'Vade Mecum on the Stability and Growth Pact' (European Economy, 2019) Institutional Paper 101.

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point still has not been found. This would imply that *there is* an equilibrium point, that is still to be found in the future. Rather, my point is that the enterprise of trying to find an equilibrium point in this sector is doomed. From the perspective of legal credibility, we have gone as far as it was possible to go. In other words, the trip has ended, but no Ithaca has been found. Now the time has come to try a different strategy.

V. FINDING A DIFFERENT MODEL: THE OPEN METHOD OF COORDINATION

The years 2000 and 2010 marked the time in which the Open Method of Coordination ('OMC') was born and reinvigorated, respectively. In the so-called 'Lisbon Agenda' of 2000, the European Council called for the establishment of an 'Open Method of Coordination' that would entail, *inter alia*:

- fixing guidelines for the Union combined with specific timetables for achieving the goals which they set in the short, medium and long terms;
- establishing, where appropriate, quantitative and qualitative indicators and benchmarks against the best in the world and tailored to the needs of different Member States and sectors as a means of comparing best practice;
- translating these European guidelines into national and regional policies by setting specific targets and adopting measures, taking into account national and regional differences;
- periodic monitoring, evaluation and peer review organised as mutual learning processes.

As Armstrong has argued,[26] the process involved 'political commitments', rather than legal ones. This means that the European Union would set a number of targets, as regards particular areas of economic policy, whereas the Member States should attempt to achieve them. However, there were no legal consequences attached to the non-fulfilment of such targets. The process was entirely voluntary. This notwithstanding, the OMC involved a process of 'naming, shaming and faming'. Therefore, through the publication of the targets, and the respective degree of achievement of such targets by the Member States, the Member States (and the markets) could compare their respective achievements. The idea would be that those Member States less performant would be 'shamed' of their (low) degree of accomplishment, and therefore they would try to ameliorate their respective performance in the coming years. In other words, the focus of the OMC was on process, rather than on results.

I have argued elsewhere that in reality,[27] the OMC established administrative or bureaucratic commitments, rather than political ones. The nuance is important as it

[26] K A Armstrong, 'The Open Method of Co-ordination – Obstinate or Obsolete?' (University of Cambridge, 2016) Faculty of Law Research Paper No 45/2016.

[27] Estella, *Legal Foundations of EU Economic Governance*, note 16 above, p 255.

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has consequences for our discussion on the EU fiscal framework. The difference between what I call, from a law-as-credibility perspective, a 'political' commitment and a 'bureaucratic' commitment, is in terms of the costs associated to the non-fulfilment of each of these types of promises. In the first case, the cost might be framed in electoral terms: if a politician does not fulfil a political promise, she may lose an election. Instead, if an actor does not fulfil a bureaucratic commitment, the cost will be reputational. In the case of the OMC, we would be in presence of the second kind of commitments, and not of the first kind. It is implausible to think that Member States' governments would lose elections in the case in which one of the commitments included in the economic agenda of the Union would be missed, but it could well incur in reputational costs. In fact, the essence of the 'naming, shaming and faming' process is precisely that this could be the case. Reputational costs are at the very basis of the OMC.

The OMC was retained and further improved in the successor of the Lisbon Agenda, the so-called Europe 2020 Strategy. The 2020 Strategy reduced the number of targets that the Lisbon Agenda had set. In particular, it established five main targets, or 'headline targets', and gave numbers to each of these targets, which were in turn operationalized in eight indicators by Eurostat, in a document titled 'Smarter, Greener, More Inclusive? Indicators to support the Europe 2020 Strategy.'[28] Therefore the 2020 Strategy gave more transparency to the OMC; inserted a clearer quantitative twist in the whole process; and reduced the number of indicators. But it did not put in question the nature of the OMC; on the contrary, one could even argue that it streamlined the essence of the Open Method of Coordination.

The important question that needs to be addressed is whether the OMC has worked or not. In the European Commission's mid-term review of the 2020 Strategy, it was indicated that progress towards the objectives of the 2020 Strategy had been, at best, 'mixed'. Lacking an official assessment on the side of the European Commission of the 2020 Strategy's progress since then, we have to rely on academic opinion on the matter. For example, Becker et al[29] argue that 'although the EU has moved forward as whole, some regions have lagged behind or even moved backwards, and within some countries, regions are moving further away from one another. Progress has been particularly strong in education, but more work is needed in the environmental dimensions'. In turn, Fedajev et al[30] conclude that 'Sweden, Denmark and Austria are the best performers in strategy implementation. Among the EU-15, Finland and France were also positioned relatively high in the rankings. On the other hand, some new Member States achieved significant progress in the strategy implementation and

[28] Visit the 2019 edition of this document in this link: https://ec.europa.eu/eurostat/documents/3217494/10155585/KS-04-19-559-EN-N.pdf/b8528d01-4f4f-9c1e-4cd4-86c2328559d.

[29] W Becker, H Norlén, L Dijkstra, and S Athanasoglou, 'Wrapping Up the Europe 2020 Strategy: A Multidimensional Indicator Analysis' (2020) 8 *Environmental and Sustainability Indicators*, Article 100075.

[30] A Fedajev, D Stanujkic, D Karabašević, W K M Brauers, and E K Zavadskas, 'Assessment of Progress Towards "Europe 2020" Strategy Targets by Using the MULTIMOORA Method and the Shannon Entropy Index' (2020) 244 *Journal of Cleaner Production,* Article 118895.

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over performed some old Member States, like Lithuania, Slovenia, Croatia, and the Czech Republic, so they joined a group of core countries. In contrast to them, Belgium, Bulgaria, Spain, Italy, Cyprus, Luxembourg, Malta, the Netherlands, and Romania have an unfavourable position in the final ranking, for which reason they are classified into the group of the Peripheral countries. Further, Rogge[31] claims that 'all Member States are in general making progress towards their national targets. Member States generally moved forward in the areas of R&D, environmental and educational policy and moved backwards in terms of employment and poverty and social inclusion. As to the realization of the national targets, the majority of the Member States are still mostly lagging on R&D and social inclusion and poverty reduction'.

In turn, Papageorgiou et al[32] indicate that ' the distance to the employment target of 75% of people aged 20–64 years has narrowed; the expenditure for R&D as a percentage of GDP are still below the target of 3%; the reduction of greenhouse gas emissions in ESD sectors by 20% compared to 1990 levels are still below the target; the increase of the share of renewable energy in final consumption to 20% remains just below the target; the move towards a 20% increase in energy efficiency shows a good prospect; the reduction of school drop-out rates to less than 10% is steadily approaching its target; the share of population aged 30–34 having completed tertiary education to at least 40% is steadily approaching its target; and the lifting at least 20 million people out of risk of poverty was not achieved'. As we see, the conclusions are mixed, and they heavily depend on the methodology that is used to assess progress. But in general terms, we can say that all the previous authors coincide that notable progress has been achieved, although the success of the 2020 strategy around the year 2020 (the previously cited papers' dates are from 2019 to 2021) is not complete.

Important as the previous literature on the matter is, what they do not include is a counterfactual analysis. This is the crux of the matter to assess whether, and the extent to what, the 2020 strategy has been successful or not. It is important not to get lost at this point: to assess counterfactually the success of the 2020 Strategy is, as well, to assess the goodness of the Open Method of Coordination. If the objectives of the 2020 Strategy had been met, this would be proof that the OMC worked, and vice-versa. In this vein, Borrás and Radelli[33] observe that 'the counterfactual of what could have happened without the OMC is virtually impossible to determine'. I do not really think that it is impossible to make counterfactuals in the area of the 2020 Agenda or as regards, more in particular, the OMC. However, it is true that, to my knowledge, this has never been tried.

Pending this matter, it is difficult to arrive to bold conclusions as regards the OMC. However, it is clear that the whole Lisbon *cum* 2020 Agenda exercise has not been

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[31] N Rogge, 'EU Countries' Progress Towards "Europe 2020 Strategy Targets"' (2019) 41 *Journal of Policy Modelling* 255.

[32] Ch Papageorgiou, A Anastasiou, and P Liargovas, 'Trends in the "Europe 2020" Strategy: An Overview' (2021) 23(1) *The Journal of Applied Business and Economics*.

[33] S Borrás and C Radaelli, 'Recalibrating the Open Method of Coordination: Towards Diverse and More Effective Usages' (Svenska institutet för europapolitiska studier, 2010) *SIEPS* Report No 7.

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fruitless, as the previous literature contends. Some results have been achieved, and what is more important, these results have been achieved without creating clear losers in the process, and also, without generating serious cleavages among the Member States and between these and the Union. Furthermore, the OMC seems to be an equilibrium from a law as credibility perspective. No-one seriously questions the essence of the approach, and it has not been profoundly reformed (only streamlined) since its inception. There are, therefore, no incentives for its change.

This clearly contrasts with the implementation of the fiscal framework of the EU. The results of the SGP are questioned by all, and what is more important than that, everyone is pleading for its reform. The constant sways that we find as regards the SGP are inexistent in the life of the OMC. Further, the counterfactual exercise as regards the SGP has been made by authors such as Koehler and Köning.[34] The analysis of these authors comes to the paradoxical conclusion that the 'donor' countries are better served by the SGP than the 'recipient' countries. This is a conundrum, if one starts from the assumption that the original idea behind the SGP was to discipline the Member States of the south when they acceded the euro. Or if one prefers a different formulation, the SGP is rooted in a clear lack of trust from the northern countries as regards the southern countries, once the euro started operating. In this context, the SGP was the price that the peripheral Member States had to pay to be able to accede the euro. If Koehler and Köning's findings were confirmed by future research on the matter, this would imply a total rebuttal of the SGP.

VI. THE 'MUTING' OF THE SGP

The previous reflections serve to justify my proposal of 'muting' the SGP. If I use the metaphor of 'muting', it is because there would be a number of options that would all go in the direction of providing for a certain degree of de-legalization of the SGP. The result would be always one and the same: all of them would 'mute' the legal side of the SGP. This is where I think we find the problem in this field: the problem is not that there are a set of rules that serve to orientate the Member States' conduct in the domain of fiscal policy. The problem rests in the nature of such rules. In other words, the problem is that they are *legal* rules. This means that it would be conceivable to establish a certain framework of rules in this field; the part that would have to be eliminated from the current picture would be the juridical condition of this framework. This sounds a little bit like a laboratory experiment. It is as if we were at the CERN trying to de-compose subatomic particles in search of the elemental particle. The question is obviously if this can be the case. Is it possible to maintain a set of fiscal rules that would be decoupled of their legal nature without curtailing their effectiveness? Or would this be another futile exercise in which we would be throwing the baby together with the bathwater?

[34] S Koehler and T König, 'Fiscal Governance in the Eurozone: How Effectively Does the Stability and Growth Pact Limit Governmental Debt in the Euro Countries?' (2014) 3(2) *Political Science Research and Methods* 329.

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The conceivable options that we have at hand in order to mute the legal aspects of the SGP are, at the very least, the following ones.

1. Not to establish a deadline to the current freezing of the SGP
2. Reform the current SGP legislation in order to go for discretion
3. Abrogate the current SGP legislation and adopt a recommendation on the matter.

Let us discuss each of these options in the following.

A. The Sine Die *Freezing of the SGP*

As is known, the Commission proposed the activation of the escape clause of the SGP on 20 March 2020. In turn, the ECOFIN backed this petition some days later on 23 March 2020.[35] Since then, the main aspects of the SGP, above all those that refer to the reactive side of the Pact, have been deactivated. As a consequence of the pandemic, all the Member States are now under an Excessive Deficit Procedure, but the European Commission will not sanction the Member States for their respective failures to comply with the SGP.

The interesting thing about the escape clause of the SGP is that the norms that regulate this issue, that were established through the six-pack reform in the EU fiscal framework, did not establish a sunset clause that would put an automatic end to the activation of the SGP escape clause. Some authors have been commissioned to advise the EU institutions on this issue from an economic perspective, and they have concluded that, for reasons of credibility, the sooner that a deadline is set, the better.[36]

Instead, I think that the non-establishment of a deadline as regards the activation of the SGP's general escape clause has to be celebrated not only as a very wise move on the side of the drafters of the six-pack reform, but also as a very good opportunity to leave things as they stand at present. This is not the first time in legal history that a temporary measure becomes permanent. In fact, a good strategy for perdurance is to start by temporality. Of all the available options, this would be the alternative that would bear less transaction costs. Maybe it could be rounded up with a Commission Communication in which this institution would certify that the deactivation of the SGP rules would become permanent, unless, for example, the EU would be armed with a strong central fiscal capacity. This seems to be the approach taken by the European Fiscal Board in a report recently published on this issue.[37]

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[35] Council of the EU Press Release, note 3 above.

[36] See E Jones, 'When and How to Deactivate the SGP General Escape Clause?' (Economic Governance Support Unit, Directorate General for Internal Policies, European Parliament, 2020) PE 651.378; K Gern, S Kooths, and U Stolzenburg, 'When and How to Deactivate the SGP General Escape Clause? Fiscal Surveillance after the Break' (Economic Governance Support Unit, Directorate General for Internal Policies, European Parliament, 2020) PE 651.376.

[37] European Fiscal Board, 'Annual Report 2020'.

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If low transaction costs would be the main benefit derived from this alternative, the main cost would be its relative incertitude. It would be like giving a face wash to a house that in reality has problems with its own foundations. The temporary *cum* permanent solution would be criticized by its lack of solidity. What is more important, it would probably be criticized from the perspective of credibility. Would a temporary solution made permanent by the force of facts be all that the Member States and the EU institutions could offer in this field in terms of credibility? The answer to this question is probably negative. But, on the other hand, it is important to note and remember the incapability of the Member States to make good arrangements (good commitments) in the field of EU fiscal governance. This is why this alternative should not just be thrown to the rubbish bin. In a world like the SGP in which taking good decisions has proved to be if not an impossible mission, at least a challenging one, this option should be retained as a realistic possibility to mute the main and most worrying legal aspects of the SGP.

B. The Reform of the Legal Side of the SGP and the Quest for Discretion

The second option would be to reform the legal side of the SGP, above all, the so-called 'preventive' and 'corrective' prongs of the SGP, as they have been amended by the successive and interminable modifications of these two pieces of EU law until present times. As is known, the core of both regulations remains, on the one hand, the 3% and 60% deficit and debt government limits, plus, on the other hand, a sanction system for eurozone Member States incurring excessive deficits. In turn, the preventive and corrective arms of the SGP have been supplemented by the so-called 'Fiscal Compact',[38] that has introduced yet another quantitative limit that the Member States should not trespass: the 0.5% of structural deficit. To be sure, the EU fiscal framework is duped with many more normative details, but the previous one is the basic legal scheme of the SGP.

If this second alternative were to be followed, the idea would be to eliminate the previous quantitative limits. Therefore, no mention of any limit whatsoever would be made in Regulations 1466/97 and 1467/97. Ideas such as debt sustainability, fiscal consolidation, or fiscal adjustment path would be retained: only the numerical references previously noted would disappear. Even the reference that the original SGP makes to the expression 'close to balance or in surplus' in the medium term, could be maintained, since this expression, de-coupled from any numerical target, could be adapted and interpreted according to the particular situation of each Member State. Further, the Commission, or an independent fiscal agency, could be granted ample powers to supervise if the Member States are in fact consolidating their respective fiscal positions and getting to a situation in which debt is sustainable,

[38] Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (aka 'Fiscal Compact') of 2 March 2012, https://www.fdfa.be/sites/default/files/atoms/files/981_Ondertekende%20akte%20in%20het%20Engels.pdf.

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on the basis of *ad hoc* analyses that would very much depend on the particular economic and social context that the Member States would be going through. Finally, sanctions would be eliminated.

The main problem that this proposal has is that it would entail the reform of the Treaties. First of all, the Protocol on the Excessive Deficit Procedure should be abrogated. And secondly, the reference to sanctions that is made in the framework of Article 126 of the Treaty on the Functioning of the European Union ('TFEU') should also be abrogated. The rest of Article 126 TFEU could be taken, in fact, as a very good model to regulate this area. As is known, Article 126 only says that the Member States shall avoid 'excessive deficits' and it speaks of 'gross errors' and 'budgetary discipline' as regards the debt side of the SGP equation. This would be the sort of expressions and concepts that should be integrated in the new preventive and corrective arms of the SGP.

Under this normative context, the European Commission, or the independent fiscal agency that I referred to above, would be the friends of the Member States, and not their foes. They would 'help' the Member States in their consolidations plans; they would 'assist' the Member States with problems of debt sustainability; and they would 'accompany' the Member States in their respective search for a better fiscal profile. They would also publish reports, in the framework of the European Semester, regarding the fiscal performance of the Member States in the fiscal area. The publication of these reports would ignite a process of naming and shaming, through which the Member States would learn from their peers and would try to temper their bad fiscal impulses out of shame. Finally, the markets would supervise the whole process, and at the same time the whole process would serve to discipline markets. As markets would see that the process is serious, and adapted to each Member State specific situation, they would attack bad students but would reward students that would invest efforts in trying to change the situation, even irrespective of their actual performance. At the same time, markets would be disciplined through this process since it would fly away from the pernicious 'one size fits all' philosophy that has so much allowed for the animal spirits to flow in the EU fiscal area. This case-by-case analysis, tailormade to the real economic performance and situation of each Member State, would introduce a certain degree of rationality in the markets. In other words, we would depart from coarse salt and would go to fine grain, much to the benefit of both the Member States and the markets. A final point regards credibility: the system would be much more credible, once again, because it would abandon the 'one size fits all' old philosophy and would also give ample margin to discretion. However, it would be a sort of discretion that would successfully avoid political pressure from the Member States' governments (above all from the most powerful of them) since this discretionary process would never end in sanctions. As has been said before, sanctions would disappear from the EU fiscal framework thus reformed. This would induce more credibility, because the problem of having sanctions that have never been implemented would be eliminated once for all.

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C. Death in Venice

It is not a hyperbole to say that the life of the SGP has been a radical failure. If the best analyses that have been referred to in this article are right, it has only served the interests of the Member States that had a lesser need for a framework of this kind. In many ways, its death was a story foretold. The SGP is Thomas Mann's Aschenbach:[39] it has died out of the idealistic passion that rules could be effective enough to discipline Member States in a world that lacks a strong fiscal capacity at the centre. Maybe the time has arrived to come to terms with the SGP.

Of all the alternatives, this one would be the most radical one. It would imply the abrogation of the legal side of the SGP. To start with, this would affect Regulations 1466/97 and 1467/97, but also all the legislation that has been adopted in this area through the six- and two-pack reforms. The Fiscal Compact would also be abrogated. As happens with the alternative that I have exposed in Section B, it would imply the reform of the Treaties. This reform would be coupled with the adoption of a Commission Recommendation on Fiscal Policy in which some of the points that have been mentioned in the previous section would be included. The Member States would be instructed to avoid 'excessive deficits' and orientate their respective fiscal policy towards debt sustainability, in a coordinated effort with the Union and the rest of the Member States. In this recommendation, no reference to quantitative targets would be made. However, the European Commission, or the independent fiscal agency that I mentioned above, would deliver particularized reports to each Member State in which a recommended (I insist once again: a recommended) fiscal path towards a certain quantitative target could be made. Therefore, Member States would have targets according to their respective macro-economic and fiscal position. This would imply that the targets would be different depending on the Member State. The European Commission (or the independent fiscal agency) would follow up these reports on a yearly basis. Also, a general report on the progress made towards the targets would be published every year. Therefore, the Member States, and the markets, would count on a clear and common publication where the respective performance of each Member State in the fiscal domain could be compared. It is important to stress once again the voluntary side of this process: there would be no sanctions associated to poor performances, but only a naming, shaming and faming process.

The main advantage of this option would be its clarity. It would also be clear to all that the EU would be entering in a new phase of fiscal governance, in which the recommendation that I mentioned before would be the focal point. The main cost that would be associated to this alternative would be that it would put in question the past fiscal governance system of the EU. It would be the acknowledgment of a failure. However, it is also possible to think that global markets would welcome this profession of faith. Only the recognition of failures is penalized by markets when it is not accompanied by responses to the previous situation. In this case, the acknowledgement of a mistake would be accompanied by a new framework of fiscal governance

[39] T Mann, *Death in Venice* (English translation, 1912; Harper Perennial, 2005).

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that would clearly depart from the previous one. It would be a way to signal that the message (the current fiscal framework is inefficient) had been heard.

VI. CONCLUSIONS

I have proposed in this article to mute the legal side of the SGP. The muting of the legal dimension of the SGP is proposed, fundamentally, for reasons that have to do with the low credibility of the current system of fiscal governance of the Union. The system has a low credibility both for economic and legal reasons, reasons that have been reviewed in this article. Form an economic perspective, the markets use the legal side of the SGP as a way to self-fulfil their own prophecies about the Member States' fiscal performance. Legally speaking, the current system is not an equilibrium from a law as credibility perspective. It is too complex and has been subject to almost incessant reform. The fact that sanctions have been never implemented in this area only serves to further curtail the credibility of the EU's fiscal framework.

In this context, what is proposed is to profoundly modify the legal nature of the EU's fiscal framework. To do this, I take inspiration from the Open Method of Coordination. It is possible to think that the OMC has been relatively successful since it has put the Member States in a path towards achieving a number of social and economic objectives when the Union had no budget to fund economic transformation. This trade-off was realistic: the Union would not support economic reforms in the Member States, but at the same time it would only recommend them to undertake a certain path. No funding at the expense of a voluntary process of change. If one takes a careful look at the fiscal structure of the Union, the point of departure was rather similar: there was (and it remains to be seen what will happen once the COVID crisis is over) no strong fiscal capacity at the centre that would support Member States fiscal consolidation plans, above all in times of crisis. However, the difference with the economic compact of the Union was that, in the fiscal domain, the Member States were to be disciplined through rules. This would be like being in the worst of both worlds: fiscal stimulus would have to come from each of the national capitals, but the Union would impose an iron corset of rules and regulations upon Member States which enforcement would mark their own fiscal fate.

Obviously, this state of affairs is untenable in the coming future. The prospects of having a strong fiscal central capacity at the Union level could fly with the wind once the economic crisis that has been prompted by the COVID pandemic fades away. If this last opportunity that the Union has for a real Hamiltonian moment is lost,[40] then the only option would be to release the Member States from the straight jacket of rules that has been imposed upon them by the EU and adopt a much more flexible compact in the fiscal domain.

[40] R Henning and M Kessler, 'Fiscal Federalism: US history for Architects of Europe's Fiscal union' (2012) *Bruegel Essay and Lecture Series* 1.

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