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SECTION I:  
THE IMPACT OF THE  
EURO CRISIS ON THE  
EU'S INSTITUTIONAL  
BALANCE

# 1. THE EUROZONE CRISIS AND THE LEGITIMACY OF DIFFERENTIATED INTEGRATION

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# 1. Introduction

The Eurozone crisis has led to important new forms of differentiated integration, both within the EU Treaties and outside. Existing and new instruments for differentiated integration have been used for the deepening of economic governance, for rules on increasing budgetary discipline and for the creation of emergency funds. These innovations apply to the member states of the Eurozone, but sometimes include also others. Thus, the so-called ‘Six-Pack’ of EU legislation, which entered into force in December 2011 intends to strengthen economic governance and applies partly to all member states and partly only to the Eurozone. The Fiscal Compact (FC) was concluded in March 2012 by 25 member states mainly in order to strengthen budgetary discipline.<sup>2</sup> In September 2012 the European Stability Mechanism (ESM Treaty) establishing a permanent rescue fund entered into force for the member states of the Eurozone, succeeding the earlier EFSF, which originated in May 2010. These new forms of dif-

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2. Treaty on Stability, Coordination and Governance in the Economic and Monetary Union.

ferentiated integration raise important questions of legitimacy.

This paper will examine and critically discuss the new forms of differentiated integration using a theoretical framework on the concept of legitimacy that builds on two commonly made assumptions. Firstly, that legitimacy is provided through legality. Secondly, it builds on the assumption that parliaments contribute to the legitimacy of political projects, as an important element of so-called ‘input legitimacy’.

The various legal instruments that are central to the political response to the Eurozone crisis (the ‘Six-Pack’, ESM Treaty and Fiscal Compact) will not be discussed exhaustively here. Instead a number of elements from these instruments will be discussed that best illustrate the challenges of the most recent forms of further integration in light of legitimacy. The paper will illustrate some of the opportunities, challenges and risks of the recent forms of differentiated integration.

These opportunities, challenges and risks should be seen in the broader legitimacy context of European integration and of the Eurozone crisis not only as a financial and political, but also a social crisis. There has been a shift from permissive consensus on the European project to social unrest with mass protests and general strikes in member states such as Greece, Spain, Portugal and Italy.<sup>3</sup>

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3. Compare Giandomenico Majone, ‘Rethinking European Integration after the Debt Crisis’, UCL *Working Paper*, June 2012, p. 1-32 at p. 6-7 where he explains the replacement of the permissive consensus of the past by public debate and hostile reactions through “the fact that monetary union has put an end to the primacy of process as the criterion of policy evaluation on the EU.”

## 2. The paths to strengthened cooperation or further integration

The Eurozone crisis confronts the Union with an interesting legal and political puzzle. How to operate when new powers are necessary for some – in this case for the Eurozone – but when not all member states – notably some outside the Eurozone – are willing to make this possible?

### 2.1 The obvious and less obvious paths (from a legal perspective) not chosen

The Treaties offer obvious paths for the creation of new powers for the European Union or the Eurozone. The first is Treaty amendment through article 48 EU. The ordinary amendment procedure is cumbersome though and involves several risks, most recently illustrated by the fate of the Constitutional Treaty, rejected by France and the Netherlands in 2005.<sup>4</sup> Negotiations are complicated and time consuming, they risk opening Pandora's

4. Note that the simplified amendment procedure of article 48(6) EU does not allow for the creation of new competences for the Union.

box and ratification by all member states is not at all guaranteed.

A second, less cumbersome, procedure available for the creation of new powers for the Union is the flexibility clause of article 352 TFEU. This article allows for the creation of new powers necessary for the attainment of the objectives of the European Union. Unanimity between the member states is still required (as with Treaty amendment) as well as consent of European Parliament, but no European Convention is convened or national ratification required. In the case of Germany, we know that use of this flexibility clause requires ratification by the *Bundestag* and the *Bundesrat*, but the basis for this is to be found in German constitutional law.<sup>5</sup>

It can be argued that several other and less obvious paths are available for creating new powers. A first one, proposed by Herman Van Rompuy at the eve

5. *Bundesverfassungsgericht*, BVerfG, 2 BvE 2/08, *Lisbon judgment*, 30 June 2009, para. 328.

of the December 2011 European Council, is what I call the 'protocol trick' of article 126(14) TFEU. It comes down to an amendment of the 'Protocol on the excessive deficit procedure'. This article represents an interesting abnormality in EU law, as it allows for Treaty change (protocols have the same status as the EU Treaties), but without requiring the Treaty amendment procedures of article 48 EU. Instead provisions can be adopted to replace this protocol through a much simpler procedure, namely through unanimity in the Council and consultation of the European Parliament and the European Central Bank. Some argue that much of what has been agreed in the Fiscal Compact – to be discussed below – could have also been done this way.<sup>6</sup> However, it was considered unattractive by some, including France and Germany, exactly,

6. Jacques Ziller, 'The Reform of the Political and Economic Architecture of the Eurozone's Governance. A Legal Perspective', in: Allen, Carletti & Simonelli (eds.), *Governance for the Eurozone. Integration or Disintegration* (FIC Press, 2012) p. 115-138 at p. 130; Bruno De Witte, 'Treaty Games – Law as Instrument and as Constraint in the Euro Crisis Policy', in: Allen, Carletti & Simonelli (eds.), *Governance for the Eurozone. Integration or Disintegration* (FIC Press, 2012) p. 139-160 at p. 152.

though not only, because it does not require active involvement of national parliaments.

A second less obvious path is a combination of the flexibility clause of article 352 TFEU and the procedure for enhanced cooperation of article 20 EU. This way new competences could be created to then only be applied by for example the twelve member states of the Eurozone.

An advantage of these paths is that also non-Eurozone member states can participate in the exercise of the newly created power intended to solve the current problems of the Eurozone. In other words they have an inclusive character.

None of the above procedures for creating new powers or competences for the Union has been used,<sup>7</sup> because of different reasons. They include procedural/legal reasons (the unanimity required for Treaty change and use of the flexibility clause) and purely political reasons (France has arguably

been keen to go outside the EU Treaties and create a new nucleus of the Eurozone member states). Instead the policy responses have taken a different form, which is now discussed.

## 2.2 The policy responses and the paths chosen

In the first place a number of member states – notably but not only the Eurozone member state – have gone outside the EU Treaties and concluded new intergovernmental treaties, namely the EFSF and ESM emergency fund Treaties and the Fiscal Compact. Also, there has been an extensive use of the procedure of article 136 TFEU which allows for a strengthening of Eurozone coordination and surveillance with regard to budgetary discipline and for the setting out of economic policy guidelines. Both paths will be discussed below.<sup>8</sup>

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7. A Treaty amendment has been initiated using the simplified amendment procedure of article 48(6) TFEU – namely the addition of a new article 136(3) TFEU – but this new article does not create new competence for the Union; see also European Court of Justice, Case C-370-12, *Pringle*, 27 November 2012, para. 73.

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8. The unconventional measures of the European Central Bank in the form of new legal practices, such as buying of government bonds on secondary market, although a very important element of the European response to the Eurozone crisis, are outside the scope of this paper. The focus here is on the policy responses.

### 3. Assessing the paths chosen: Legality

The first perspective from which the new instruments will be discussed is that of the principle of legality. In the European Union legal order this principle has found a specific expression in the principle of conferral or attributed powers. Thus, the Union shall act within the limits of the powers conferred by the member states (article 5(2) EU). Also, the institutions of the Union shall act within the limits of the powers conferred on them by the Treaties (article 13(2) EU). This principle puts limits to what the member states and the Union institutions can do both within and outside the EU Treaties.

Moreover, it is useful to note at the outset that EU law has a combination of characteristics that is unique for an international organization. Based on the case law of the European Court of Justice (notably *Van Gend & Loos* and *Costa/ENEL*) EU law has primacy over and direct effect in national law. Not only do the new intergovernmental Treaties lack these characteristics of EU law, the same

characteristics also limit what member states can do through these new Treaties.<sup>9</sup>

#### 3.1 Strengthened Eurozone cooperation *WITHIN* the EU Treaties (art. 136 TFEU); or, how far can you go *within* the Treaties?

One of the instruments that have extensively been used in the political response to the Eurozone crisis is the strengthened cooperation of article 136 TFEU. This article allows for members of the Eurozone to adopt measures to “strengthen the coordination and surveillance of their budgetary discipline” and to “set out economic policy guidelines for them”, both “in order to ensure the

9. Similarly Vestert Borger & Armin Cuyvers, ‘Het Verdrag inzake Stabiliteit, Coördinatie en Bestuur in the Economische en Monetaire Unie: de juridische en constitutionele implicaties van de eurocrisis’, *SEW Tijdschrift voor Sociaal Economische Wetgeving* (2012) p. 370-390 at p. 389, who also add the EU principle of loyal cooperation.

proper functioning of economic and monetary union” (article 136(1) TFEU). How to understand this procedure? What are the limits to the action it allows for? And how has this article been applied in the Eurozone crisis?

Article 136 TFEU has been introduced by the Lisbon Treaty of 2009 and was included also in the failed Constitutional Treaty. At the time Amtenbrink and De Haan were critical about its inclusion as “this new form of closer cooperation within the already existing closer cooperation created by the provisions on EMU could open a gap between Member States with a derogation and the eurogroup.”<sup>10</sup>

How to understand this procedure? Clearly it is not intended as a *flexibility clause* in the sense of article 352 TFEU. No new powers can be created for the Union (Eurozone) in order to attain its objectives.<sup>11</sup> Even though the procedure is some-

10. Fabian Amtenbrink and Jakob De Haan, “Economic governance in the European Union: Fiscal policy discipline versus flexibility”, 46 *CML Rev.* (2003), p. 1075-1106 at p. 1101-1102.

11. Also the unanimity safeguard for member states – present in article 352 TFEU – is lacking in this procedure of article 136 TFEU as it prescribes qualified majority

times referred to as *enhanced cooperation*,<sup>12</sup> this may also not be the best term for it (and it is not the one used by the Treaty itself). The enhanced cooperation procedure under EU law (article 20 EU) is designed for the use of existing legal basis, but without the participation of all member states. Article 136 instead includes all Eurozone member states (or none) and does not allow for enhanced cooperation of only nine of them. In fact, calling it enhanced cooperation seems to imply that it is possible for member states to join or not, and that a minimum of member states of the Eurozone is required to participate, but not all.<sup>13</sup> Instead article 136 TFEU itself does not allow for a minimum of e.g. nine Eurozone member states to adopt measures, nor does it allow for non-Eurozone member states to join.

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among the member states of the Eurozone.

12. M. Ruffert, 'The European debt crisis and European Union law', *Common Market Law Review* (2011), p. 1777-1805 at p. 1801.
13. Amtenbrink and De Haan in fact use the better term *closer cooperation*, see Fabian Amtenbrink and Jakob De Haan, *supra* n. 10, p. 1101-1102.

Article 136 TFEU can probably best be understood as a Eurozone specific *enabling clause*.<sup>14</sup> In fact it is similar to the enabling clause of article 121(6) TFEU, which allows for the adoption of detailed rules for the multilateral surveillance procedure by the Union. It can also be compared to the broad legal basis of article 114 TFEU (which allows for the adoption of measures which have as their objective the establishment and functioning of the internal market) or one of the many specific legal bases included in the EU Treaties.

It could be argued though that it has to a certain extent been applied as a sort of 'Eurozone-flexibility clause', creating new powers for the Eurozone. This relates particularly to the recent use of article 136 TFEU by the member states of the Eurozone to fundamentally redesign the multilateral surveillance system of article 121 TFEU, on which more below.

As there is no case law yet on the scope of article 136 TFEU, it is useful to discuss the recent application of article 136 TFEU together with the question what the limits are to action under this proce-

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14. An interesting question is whether the combination of article 136 TFEU and article 20 EU would be possible.

dure. In general terms, Ruffert rightly argues that it does not cover deviance from Treaty rules.<sup>15</sup> But how to interpret this? Piris argues that this article does not allow for the creation of a true economic union.<sup>16</sup> Smits seems to be more generous.<sup>17</sup>

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15. "In the light of this clear wording, Article 136 TFEU does nothing but provide a means for enhanced cooperation of the Eurogroup, giving procedural indications about voting in its paragraph (2). Deviance from Treaty rules is not covered, even if this leads to strengthened budgetary control which is desirable.", Ruffert, *supra* n. 12, p. 1801.
  16. Jean-Claude Piris, 'Which institutional solutions for managing the multi-tier governance can be found in the framework of the current EU treaties?', *Challenges of Multi-tier Governance in the EU*, European Parliament AFCO Workshop, October 2012, p. 19.
  17. "The author's [Ruffert, TWB] questioning of the legality of the changes brought about in economic governance raises valid points, but his conclusions seem to go too far. If Article 136 TFEU would not allow the Council and Parliament to strengthen budgetary discipline and economic policy coordination, the provision would be rather futile. It is, after all, the absence of strong enforcement powers for the EU executive that led to the 2003 debacle with the Stability and Growth Pact. Only by strengthening the Commission, through the introduction of reversed QMV, could this fault be remedied meaningfully.", René Smits, 'Correspondence', *Common Market Law Review* (2012) p. 827-831 at p. 829.

The recent use of article 136 TFEU contains three interesting elements.<sup>18</sup> A first element is the use of article 136 TFEU for several specific steps in the final stages of the Excessive Deficit Procedure “with a view to reinforcing and deepening the fiscal surveillance” with regard to Greece since May 2010. A second element is the introduction of reversed qualified majority voting in several steps of the Macro-Economic Imbalances Procedure, the Medium-Term Budgetary Objective Procedure (in the framework of article 121 TFEU) and the Excessive Deficit Procedure (in the framework of article 126 TFEU). A third element is the introduction of new sanctions, most notably in the newly created Macro-Economic Imbalances Procedure (as part of the “Six-Pack”).

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18. The European Commission in its ‘Blueprint for a deep and economic and monetary union’ has proposed the idea of a future fourth element, namely the Convergence and Competitiveness Instrument (CCI), to be based on article 136 TFEU: “The instrument would be established by secondary legislation. It could be construed as part and parcel of the MIP reinforced by the contractual arrangements and financial support as outlined above and thus be based on Article 136 TFEU.”; Communication from the Commission. A blueprint for a deep and genuine economic and monetary union, Brussels, 30.11.2012, COM(2012) 777 final/2, p. 22.

A first most interesting element in the application of article 136 TFEU are the very detailed Commission recommendations and Council decisions under article 126(9) TFEU to give notice and to reinforce and deepen fiscal surveillance with regard to Greece. This decision was for the first time adopted in May 2010 and has been renewed many times since.<sup>19</sup>

On a procedural note, the combined use of articles 126 and 136 TFEU provides an answer to the question what is meant in article 136 TFEU with the “relevant procedure” of article 126 TFEU, as it excludes and therefore cannot relate to the procedures of article 126(14) TFEU. Instead, it relates to the procedure of adoption for the different steps in the Excessive Deficit Procedure, in this case to the procedure for the adoption of a Council decision under article 126(9) jo. (13) TFEU. This means that the European Parliament is not involved (which is different from the use of article 136 TFEU in combination with article

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19. 4 and 10 May 2010, 19 August and 7 September 2010, 9 and 20 December 2010, 24 February and 7 March 2011, 5 and 12 July 2011, 26 October and 8 November 2011, 9 and 13 March 2012.

121(6) which prescribes the ordinary legislative procedure – see for more below).

The combined use of articles 126 and 136 TFEU leads to very far-reaching decisions, including very detailed instructions to Greece. The detail is illustrated by the following examples of instructions included in the Council decisions on Greece: “a reduction of the Easter, summer and Christmas bonuses and allowances paid to civil servants with the aim of saving EUR 1500 million for a full year”, “a reduction of the highest pensions with the aim of saving EUR 500 million for a full year” and “an increase in excises for fuel, tobacco and alcohol, with a yield of at least EUR 1050 million for a full year”.<sup>20</sup>

These decisions are unprecedented and change the nature of the application of the Excessive Deficit Procedure. It can however arguably be reconciled with the scope of article 136 TFEU to the extent that it strengthens the coordination and surveil-

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20. See article 2 of Council Decision of 12 July 2012 addressed to Greece with a view to reinforcing and deepening fiscal surveillance and giving notice to Greece to take measures for the deficit reduction judged necessary to remedy the situation of excessive deficit.

lance of the budgetary discipline of the member states.

A second element is the introduction – through the “Six-Pack” measures adopted on the basis of articles 136 and 121(6) TFEU – of the reversed qualified majority voting modality for a number of steps/decisions in the Macro-Economic Imbalances Procedure (MEIP), the Medium-Term Budgetary Objective Procedure (MTO) and the Excessive Deficit Procedure (EDP).<sup>21</sup> How should we assess this in light of the scope of article 136 TFEU? According to the Council Legal Service the list of sanctions under article 126(11) TFEU

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21. Articles 4(2) and 5(2) of Regulation (EU) No 1173/2011 of the European Parliament and of the Council of 16 November 2011 on the effective enforcement of budgetary surveillance in the euro area; article 3(3) of Regulation (EU) No 1174/2011 of the European Parliament and of the Council of 16 November 2011 on enforcement measures to correct macroeconomic imbalances in the euro area; articles 6(2) and 10(2) of Council Regulation 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies as amended by Regulation (EU) No 1175/2011 of the European Parliament and of the Council of 16 November 2011; and article 10(4) of regulation (EU) No 1176/2011 of the European Parliament and of the Council of 16 November 2011 on the prevention and correction of macroeconomic imbalances.

may be enlarged for Eurozone member states to the extent that this aims at strengthening the coordination and surveillance of their budgetary discipline. The possibility is limited though in the sense that these measures must respect the essential institutional equilibrium and architecture established by the Treaties. What does this mean? It means that the introduction of reversed qualified majority voting is allowed.<sup>22</sup> Suspension of voting rights on this legal basis for example would not be possible.

Two elements seem to make reversed qualified majority voting in the “Six-Pack” possible. Firstly, the new voting modality only applies to newly created steps. This means that there is no interference with the existing voting modalities in the Treaties. This essential element, that it does not simply ap-

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22. Smits comes to a similar conclusion: “If Article 136 TFEU would not allow the Council and Parliament to strengthen budgetary discipline and economic policy coordination, the provision would be rather futile. It is, after all, the absence of strong enforcement powers for the EU executive that led to the 2003 debacle with the Stability and Growth Pact. Only by strengthening the Commission, through the introduction of reversed QMV, could this fault be remedied meaningfully.”, Smits, *supra* n. 17, p. 829.

ply to all steps of for example the Excessive Deficit Procedure, is often overseen. Secondly, the new voting modality applies to so-called implementing acts and not to so-called legislative acts. The attribution of an implementing power to the Council exercised through a procedure of reversed qualified majority voting is, according to the Council Legal Service, not problematic.

### The changing nature of the multilateral surveillance system (art. 121 TFEU)

Ruffert raises an interesting point with regard to a third element in the use of article 136 TFEU, one that has not received much attention so far.

Some of the measures to achieve convergence and budgetary control are highly doubted in EU legal terms, though in a less spectacular way than those to react to financial emergency. Few scholars would argue that Article 121(4) TFEU covers the sanctions – fines or deposits – contained in parts of the reform package, in particular, if the provi-

sion is compared with the elaborate mechanism of sanctions in Article 126 TFEU.<sup>23</sup>

The author refers to the introduction of sanctions in the Macro-Economic Imbalances Procedure (MEIP) and the Medium-Term Budgetary Objective Procedure (MTO) – respectively introduced and strengthened by the “Six-Pack” – in the framework of article 121 TFEU on multilateral surveillance of economic policy.

The objective here is not to discuss the political desirability or the economic soundness of the redesigned multilateral surveillance system of article 121 TFEU as a response to the crisis. Suffice it so say that the Macro-Economic Imbalances Procedure is a reaction to imbalances in the national economies that have been argued to contribute to the deepening of the crisis, such as the housing bubbles in Spain and Ireland.

The objective here is to illustrate how the introduction of sanctions has fundamentally changed the character of the multilateral surveillance system of article 121 TFEU and to relate this to the notion of legality. For this it is important to know

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23. Ruffert, *supra* n. 12, p. 1800, italics added TWB.

that the multilateral surveillance system of article 121 TFEU is based on recommendations. These are obviously not legally binding under EU law (article 288 TFEU). In both the Macro-Economic Imbalances Procedure (MEIP) and the Medium-Term Budgetary Objective Procedure (MTO) the adoption of recommendations and the non following-up on them can now lead to sanctions.<sup>24</sup> This, it is argued, fundamentally changes the nature of the multilateral surveillance system of article 121 TFEU. Does this application stay within the scope of article 136 TFEU? According to the Council Legal Service the establishment of new sanctions, also in this preventive arm, is allowed in so far as it has the objective of strengthening the coordination and surveillance of the budgetary discipline of member states or contribute in setting out member states’ economic policy guidelines. It can easily be argued that the sanctions

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24. See for more detail: article 3 of Regulation (EU) No 1174/2011 of the European Parliament and of the Council of 16 November 2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area; article 4 of Regulation (EU) No 1173/2011 of the European Parliament and of the Council of 16 November 2011 on the effective enforcement of budgetary surveillance in the euro area.

concerned have this aim. It can also be argued though that they go beyond mere coordination and surveillance as intended in the framework of article 121 TFEU.

In fact, a very broad reading of the scope of article 136 TFEU has to be adopted to justify the introduction of sanctions-based procedures in the framework of article 121 TFEU. If a more restrictive reading is adopted, a tension arises with the principle of attributed powers. The question seems to be: what action can be situated in between the provision becoming futile on one extreme (the fear of Smits)<sup>25</sup> and it being abused to create a true economic union with converged budgetary and economic politics on the other extreme (clearly not allowed according to Piris)?<sup>26</sup>

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25. Compare Smits, *supra* n. 17, p. 829.

26. Compare Piris, *supra* n. 16, p. 19.

### 3.2 Strengthened Eurozone cooperation OUTSIDE the EU Treaties (ESM, Fiscal Compact); or, how far can you go outside the Treaties?

In response to the Eurozone crisis member states of the EU have concluded a number of new treaties, next to the existing EU Treaties: the EFSF establishing a temporary emergency fund decided on in May 2010, the Fiscal Compact mainly increasing budgetary discipline agreed in March 2012, and the ESM Treaty establishing a permanent emergency fund which entered into force in September 2012. These new Treaties raise interesting questions: How to appreciate going outside the Treaties in general? Why was this Treaty instrument chosen in the specific cases?<sup>27</sup> And what

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27. This question is extensively discussed by De Witte, *supra* n. 6, and will not be discussed here. De Witte discusses the relevant instruments in an article on Treaty games (and takes them together with the amendment procedure of article 136(3) TFEU) concluding that law functions as an instrument as well as a constraint in the Euro crisis policy.

is their relation – both substantively and institutionally – to EU law?

How to appreciate going outside the Treaties in terms of the power of member states to do so and in terms of principle? With regard to the competence of member states to conclude so-called ‘inter se Treaties’,<sup>28</sup> it is relevant to note that monetary policy is an exclusive policy so concluding new intergovernmental Treaties on this matter by some member states outside the EU Treaty framework is not allowed. Economic policy however is a coordinating power of the EU, so it has been argued that member states are still allowed to conclude separate Treaties in this area, as long as they comply with EU law that takes primacy.<sup>29</sup> From

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28. See for this term, De Witte, *supra* n. 6.

29. Compare Bruno De Witte, ‘European Stability Mechanism and Treaty on stability, coordination and governance: role of the EU institutions and consistency with EU legal order’, *Challenges of Multi-tier Governance in the EU*, European Parliament AFCO Workshop, October 2012, p. 15 who calls economic policy a shared power: “Inter se agreements are not allowed in matters falling within the EU’s exclusive competence. Monetary policy is, in relation to euro area countries, an exclusive competence of the EU (Art 3.1 TFEU); it has been argued, also in the *Pringle* case, that the ESM Treaty deals with monetary policy and is therefore illegal under EU

that perspective neither the ESM Treaty nor the Fiscal Compact raises a problem, as has recently been confirmed with regard to the ESM Treaty by the European Court of Justice in the *Pringle* case.<sup>30</sup>

Craig in his discussion of the Fiscal Compact interestingly separates the power to conclude these Treaties from a possible principle justifying it. Is there such a principle justifying that “if the Member States fail to attain unanimity for amendment, and do not seek or fail to attain their ends through enhanced co-operation, does it mean that 12, 15, 21, etc. Member States can make a treaty to achieve the desired ends and the EU institutions can play a role therein, where the 27 Member States have not agreed to make use of the EU institutions, and where the treaty thus made deals

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law. However, in the system of the TFEU, the question of financial assistance to member states is clearly located in the Economic Policy chapter (Articles 120 to 126) rather than in the Monetary Policy chapter (Articles 127 to 133), and economic policy is a *shared* competence, in which the Member State have preserved the right to develop their own policies, alone or together with others.” [Italics in original.] See also Piris, *supra* n. 16, p. 19.

30. European Court of Justice, Case C-370-12, *Pringle*, 27 November 2012, paras. 60, 68-69.

with subject-matter covered directly by the existing Lisbon Treaty?”<sup>31</sup>

Craig argues that if the reasoning of the European Court of Justice’s case law (on which more below) can be extended, then such a principle can be accepted.<sup>32</sup> It would however have implications for “the way in which the European Union broadly conceived develops”.<sup>33</sup> Two comments are in place here. Firstly, I believe that Craig, as do others, expects too much from the possibility of enhanced co-operation as an alternative to Treaty amend-

ment.<sup>34</sup> Enhanced co-operation does not allow for changing the rules, only for applying them without the participation of all member states. The flexibility clause (possibly combined with enhanced co-operation) can function as a genuine alternative.

Secondly, it can be argued that the United Kingdom in the present case is not just ‘a certain’ member state not agreeing to Treaty amendment, but is a special case. Clearly the United Kingdom had a different interest in the proposed Treaty amendment from all other member states, even different from the so-called ‘pre-ins’ (the member states with a derogation and therefore an obligation to join the Euro in the future). Firstly, it does not take part in the monetary union and will not, based on its opt-out negotiated at Maastricht. Secondly, the rules of the economic union only partly

apply to it.<sup>35</sup> Thus, article 7 of the Fiscal Compact (which intends to make reversed qualified majority voting the practice under the Excessive Deficit Procedure for the Eurozone member states), even if it were not to apply to the Eurozone member states only, would have little impact on the United Kingdom, to which the obligation of article 126(1) TFEU to avoid excessive government deficits does not strictly apply.<sup>36</sup> Similarly, the German wish to increase the powers of the European Court of Justice under the Excessive Deficit Procedure would not impact the United Kingdom (this was eventually not achieved through the Fiscal Compact). Even the obligation to include the balanced budget rule in national law, preferably constitutional, was arguably not intended for the United Kingdom.<sup>37</sup>

It can be asked whether this has no meaning at all for the principle discussed. Clearly, there is a dif-

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31. Paul Craig, ‘The Stability, Coordination and Governance Treaty: principle, politics and pragmatism’, *ELR* (2012) p. 231-248 at p. 239. He distinguishes another principle, which would justify it “only where the issue is so important that the very survival of the European Union, or an important element thereof such as the euro, is at stake.” (p. 240).

32. Note also that the authors of the ‘Tommaso Padoa-Schioppa group’ actually suggest moving forward not on the basis of the current EU Treaties, but through a new intergovernmental Treaty as the best way forward. See Jean-Victor Louis, ‘Institutional dilemmas of the Economic and Monetary Union, *Challenges of Multi-tier Governance in the EU*, European Parliament AFCO Workshop, October 2012, p. 6.

33. Craig, *supra* n. 31, p. 240.

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34. Craig, *supra* n. 31, p. 238: “The Lisbon treaty therefore embodies requirements before change can take place, namely the ordinary and the simplified revision procedure. These provisions enshrine the proposition that the rules of the game should not be altered unless all agree. They also contain criteria as to what should happen when all do not agree, by offering the possibility for enhanced co-operation.”

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35. See Protocol 15 on certain provisions relating to the United Kingdom of Great Britain and Northern Ireland.

36. It shall only endeavor to avoid it, see article 5 of Protocol 15 on certain provisions relating to the United Kingdom of Great Britain and Northern Ireland.

37. See also article 4 of the Commission proposal of 23 November 2011, which only intended to apply to the Eurozone.

ference between going outside when dealing with a matter that relates to something the 'out' who is blocking change is not directly affected by and when not. It would have arguably been different if the Treaty amendment dealt with banking union as the United Kingdom does share the internal market rules on financial services, so there is a much clearer interest there.

### The compatibility of the new Treaties with EU law

At least three interesting legal questions are raised with regard to the compatibility with EU law of the Emergency funds and the Fiscal Compact. Two relate to the substantive conformity of the Treaties with EU law. Firstly, what is the relationship between going outside the Treaties creating a permanent ESM emergency fund and article 125 TFEU, often referred to as the 'no-bailout' clause?<sup>38</sup> Borger argues that the prohibition of ar-

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38. Extremely critical about the earlier temporary EFSF fund, which I do not discuss here, is Ruffert, *supra* n. 12, p. 1785: "To begin with, Article 125(1) TFEU is rather explicit (...) In the present legal situation, a bailout by the Union (first sentence) or by one or more Member States (second sentence) is forbidden. As a result, the

article 125 TFEU can be interpreted both narrowly and broadly.<sup>39</sup> Smits is optimistic about the possibilities to create an emergency fund.<sup>40</sup> De Gregorio Merino, a member of the Council Legal Service writing in a personal capacity (and acting as an agent for the European Council in the *Pringle* case), argues the following: article 125 TFEU prohibits member states from guaranteeing the debt

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decision of the Eurogroup of 2 May 2010 concerning Greece, the establishment of the EFSF, the extension of both in 2011 and the Eurogroup's support for Ireland and Portugal are in breach of European Union law." Much less so Smits, *supra* n. 17, p. 827: "I beg to differ from the legal analysis that leads Ruffert to the conclusion that the establishment of the EFSF and of the European Financial Stabilization Mechanism (EFSM), the granting of credit to Greece, Ireland and Portugal, and the ECB's Securities Market Program are in breach of Union law."

39. Vestert Borger, 'De eurocrisis als katalysator voor het Europese noodfonds en het toekomstig permanent stabilisatiemechanisme', [The Euro crisis as catalyst for the European emergency fund and the future permanent stabilisation mechanism] *SEW Tijdschrift voor Sociaal Economische Wetgeving* (2011) p. 207-216 at p. 212.

40. See Smits, *supra* n. 17, p. 828: "The evolved interpretation of the no-bail out clause, which bars other Member States from assuming the debt of a fellow State but does not bar them from assisting the latter in repaying its own debts, is appropriate."

of any member state and loans that defeat the purpose of this article (that is, not accompanied by conditionality), but it does not prohibit loans and credits that are conditioned and where the beneficiary is held to pay the loan back.<sup>41</sup> De Witte does see a potential conflict, but as long as the ESM is not applied in the sense that no financial support is actually given in its framework before January 1 2013 – when the ratification of article 136(3) TFEU should be completed in all member states of the EU (not only of the Eurozone!) – an actual conflict can be avoided.<sup>42</sup> The envisaged article 136(3) TFEU allows the Eurozone member states to establish a "stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole".

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41. Alberto de Gregorio Merino, 'Legal developments in the economic and monetary union during the debt crisis: the mechanisms of financial assistance', *Common Market Law Review* (2012) p. 1616-1646 at p. 1627.

42. De Witte, *supra* n. 29, p. 15. Note in this regard that: "The Spanish bank bailout is being transferred from the temporary eurozone fund (EFSF) to the permanent fund (ESM), with the first tranche expected in December, ESM chief Klaus Regling said in a press conference.", *EuObserver.com*, 13 November 2012.

The question whether the ESM Treaty is in violation of article 125 TFEU has not been answered by the *Bundesverfassungsgericht* in its judgment of September 2012. It was however recently answered in the negative by the European Court of Justice in the *Pringle* case,<sup>43</sup> a case in which the Irish Supreme Court has asked a preliminary ruling on the compatibility of the ESM Treaty with EU law and on the validity of the European Council decision of March 2011 amending article 136 TFEU (intended to introduce the abovementioned article 136(3) TFEU). The Court followed the reasoning of De Gregorio Merino, stating that “Article 125 TFEU does not prohibit the granting of financial assistance by one or more Member States to a Member State which remains responsible for its commitments to its creditors provided that the conditions attached to such assistance are such as to prompt that Member State to implement a sound budgetary polity.”<sup>44</sup>

Secondly, what is the relationship between going outside the EU Treaties through the Fiscal Com-

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43. European Court of Justice, Case C-370/12, *Pringle*, 27 November 2012.

44. European Court of Justice, Case C-370/12, *Pringle*, 27 November 2012, para. 137.

pact by prescribing a balanced budget rule and the differently defined one incorporated in secondary EU law, namely the Medium-Term Budgetary Objective (MTO) of the ‘Six-Pack’. Observers see no legal problems here, even though they sometimes fail to make the most precise comparison (comparing the Fiscal Compact with the 3% deficit norm instead of the MTO). De Witte argues: “However, it is clear that, whereas these figures are *different*, they are not *incompatible*. Just as the TFEU leaves the member states free to set a ‘golden rule’ which is stricter under their own constitutional law (as Germany and Spain have done, for example), it also allows the member states to do so *collectively*, by means of an inter se agreement.”<sup>45</sup>

A third question, which is raised by both Treaties, is of an institutional nature, namely about the legality of the use of Union institutions outside the EU Treaty framework. The Fiscal Compact bor-

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45. De Witte, *supra* n. 29, p. 16; Craig does not see problems of compatibility and argues that the “TSCG does not advance matters very much from the obligations contained in the EU Treaty and accompanying legislation”, Craig, *supra* n. 31, p. 235; Borger & Cuyvers also see no problems: “De gouden regel levert op zich geen conflicten met Europees recht op.”, Borger & Cuyvers, *supra* n. 9, p. 379.

rows the European Commission, the Council and the European Court of Justice. The ESM Treaty borrows the European Commission and the European Central Bank. This raises a question of principle about the use of EU institutions outside the Union Treaties.

The little case law of the European Court of Justice on this matter should be put in perspective in two ways. Firstly, it relates to relatively innocent use of the institutions, if we compare it with the recent Eurozone crisis related Treaties (in the *Aid for Bangladesh* case for example the Commission coordinated the aid given by member states outside the framework of the EU Treaties).<sup>46</sup> Secondly, the case law leaves a number of important questions open,<sup>47</sup> such as: Do all member states need to consent to the use of the institutions? And what kind of tasks can actually be carried out outside the framework of the European Union?

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46. European Court of Justice, C-181/91 and C-248/91, *Aid for Bangladesh*, Jur.1993, I-3685.

47. See Borger & Cuyvers, *supra* n. 9, p. 382; ‘Editorial Comments. Some thoughts concerning the Draft Treaty on a Reinforced Economic Union’, *Common Market Law Review* (2012) p.1-14 at p. 9.

The recent *Pringle* case of the European Court of Justice about the ESM Treaty has left the answer to the first question open.<sup>48</sup> This was possible, since different from the Fiscal Compact, the use of institutions was not contested among the member states here. In fact, on 20 June 2011 all 27 EU member states have authorized the seventeen member states of the Eurozone to request the European Commission and the European Central Bank to perform the tasks provided for in the ESM Treaty. A similar thing has not happened though with regard to the Fiscal Compact and the United Kingdom has on several occasions expressed its reservations to the use of the European institutions in this Treaty.

With regard to the second question, it follows from the *Pringle* case that the use of institutions as envisaged by the ESM Treaty is compatible with

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48. European Court of Justice, Case C-370-12, *Pringle*, 27 November 2012, para. 158. The Court did however speak of *the* Member States as opposed to Member States being entitled to entrust tasks to the institutions outside the framework of the Union.

EU law.<sup>49</sup> Also, with exceptions,<sup>50</sup> most observers have not been very critical about the Fiscal Compact's use of the EU institutions outside the Union Treaties.<sup>51</sup> I believe this is rightly so. Here I will discuss one element of the use of the European Court of Justice which has not to my knowledge received attention so far, but which could prove to be more problematic, namely the power to impose sanctions under the Fiscal Compact.

### ECJ power to impose sanctions under the Fiscal Compact

Most observers see no problem with the European Court of Justice's role under the Fiscal Compact.<sup>52</sup>

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49. European Court of Justice, Case C-370-12, *Pringle*, 27 November 2012, paras. 155-177.

50. Notably Craig, *supra* n. 31, p. 238-247.

51. Borger & Cuyvers, *supra* n. 9, p. 384; De Witte, *supra* n. 6, p. 155-156; 'Editorial Comments. Some thoughts concerning the Draft Treaty on a Reinforced Economic Union', *Common Market Law Review* (2012) p.1-14 at p. 6.

52. Craig, *supra* n. 31, p. 245; Borger & Cuyvers, *supra* n. 9, p. 385; De Witte, *supra* n. 6, p. 155: "the 'use' of the Court of Justice to enforce the international law obligations contained in the Fiscal Compact is justified." It can be expected therefore they also see no problem with the role of the European Court of Justice under the ESM

It can in fact be argued that this is not a case of borrowing the European Court of Justice, but of applying a power of the European Court of Justice directly conferred on it by the Treaties, namely by article 273 TFEU. The very interesting case of the power given to the European Court of Justice by the Fiscal Compact to impose sanctions on member states (article 8(2) FC) however remains undiscussed.

This is an interesting element, since it cannot be explicitly found in article 273 TFEU. A power to impose sanctions for the European Court of Justice exists under EU law in relation to the infringement procedure (article 258-259 TFEU) and an action for this can be started by the European Commission under article 260 TFEU. The power to impose sanctions under the Fiscal Compact should in fact be understood in analogy with article 260(2) TFEU. Article 260 TFEU confers a power on the European Court of Justice to impose a lump sum or penalty payment in case a member state does not comply with a judgment by the Court. Importantly, it deals with infringements by member states of "an obligation under the Trea-

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Treaty (article 37 ESM Treaty).

ties”. However, not only are we dealing with an action started by member states (article 273 TFEU) instead of the Commission (under article 260 TFEU). Also, an infringement of the Fiscal Compact as referred to in article 8 Fiscal Compact (the failure to comply with article 3(2) FC) does not qualify as an obligation under the EU Treaties.

Therefore the Fiscal Compact creates a new power for the European Court of Justice, as it is not simply exercising Treaty powers here. This is remarkable from the perspective of the attribution of powers principle. The argument that a power to impose sanctions is simply implied in article 273 TFEU is not very convincing.<sup>53</sup> It would be interesting to see if the European Court of Justice, if asked about the compatibility of article 8(2) Fiscal Compact with EU law, would be self-restraining on this point in the sense of rejecting a power given by Member States to make attainment of the objectives of the economic and monetary union

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53. Even though the Court in the *Pringle* case has shown its willingness to adopt a broad reading of article 273 TFEU to include also disputes between a member state and an international organisation; see European Court of Justice, Case C-370/12, *Pringle*, 27 November 2012, para. 175.

more effective. Peers argues that “the Court could hardly be accused of judicial activism if it simply carries out the task which member states have expressly given it here.”<sup>54</sup> One way to solve the matter is by considering the imposition of sanctions as a mere ‘task’, as opposed to a new power, which does not alter the essential character of the Court’s powers conferred by the EU Treaties.<sup>55</sup> But are we really merely dealing with a task? Another way for the Court to close the gap would be to go beyond the textual ‘notion’ of institutional balance of article 13 EU Treaty, and use the ‘principle’ of institutional balance as the source of a specific legal norm which could not be found in the text of the

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54. Steve Peers, ‘The Stability Treaty. Permanent Austerity or Gesture Politics’, *EuConst* (2012) p. 404-441 at p. 420.

55. Compare the Court’s approach to the ‘tasks’ given by the ESM Treaty to the Commission and the European Central Bank; European Court of Justice, Case C-370/12, *Pringle*, 27 November 2012, paras. 158-165.

Treaty,<sup>56</sup> as it did in the *Chernobyl* case to overcome a procedural gap.<sup>57</sup>

How should we appreciate this use? Overall, it can be argued that a very responsible use of the Treaty instruments seems to have been made. This can be illustrated by what has not been included in the Fiscal Compact, for example giving the Commission the power to directly act on behalf of the member states (under article 8 FC) – desired by some, but equally denounced by others as going against the institution’s Treaty based independence. In fact, the Fiscal Compact is to be seen as a compromise between those forces that would have liked to go further, and those who were more conservative. The choice of instrument itself, once

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56. Compare Bruno de Witte, ‘The Role of Institutional Principles in the Judicial Development of the European Union Legal Order’, in: Francis Snyder (ed.), *The Europeanisation of Law. The Legal Effects of European Integration* (Oxford, Hart Publishing 2000) p. 83-100 at p. 92

57. European Court of Justice, Case 70/88 *European Parliament v Council (Chernobyl)*, 22 May 1990. In this case, not only did the Court increase the powers of *locus standi* of the European Parliament, it thereby also increased its own powers.

it was made, put serious constraints on what could actually be regulated.

Some of the comments made on the Fiscal Compact, even though defensible from a strictly legal point of view, seem to fail to take into account these political dynamics. De Witte argues that “There was, arguably, no strict need to adopt a new treaty to implement what is contained in the text of the Fiscal Compact. Most of what it contains in terms of economic governance at the European level could have been adopted through enhanced cooperation within the EU or by means of a modification of Protocol No. 12 on the excessive deficit procedure.”<sup>58</sup> Still, it will be argued below that the intergovernmental Treaty contains important advantages over secondary EU law when it comes to imposing on member states the obligation to incorporate a balanced budget rule preferably in the formal national constitution or otherwise materially in national constitutional law.

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58. De Witte, *supra* n. 6, p. 152. Similar comments were made by Commissioner Olli Rehn on 12 December 2011 in relation to the substantive agreement reached during the December European Council.

### 3.3 The way forward: Treaty change?

So far European politicians have been able to avoid using Treaty amendment for further integration (apart from the intended creation of article 136(3) TFEU). Recent Commission proposals on a banking union as well as the report “Towards a Genuine Economic and Monetary Union” presented on 5 December 2012 by the President of the European Council – and prepared in close collaboration with the Presidents of the Commission, the Eurogroup and the European Central Bank – again raise the question to what extent a fiscal union or political union can be brought about without Treaty change.

With regard to the banking union, three elements should be distinguished: the supervision of banks (Single Supervisory Mechanism), resolution powers and a deposit guarantee fund. Already with regard to the first element, which is the only one seriously on the table at the moment, several actors have argued that a Treaty change is required and that article 127(6) TFEU is not sufficient.<sup>59</sup>

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59. Article 127(6) TFEU: “The Council, acting by means

Sweden for example argues that only through a Treaty amendment the non-Eurozone member states can be involved (as article 127(6) TFEU only covers the European Central Bank, which is not an institution with powers in relation to the non-Eurozone member states, nor do the latter have voting rights in this institution). The German *Bundesbank* argues that a Treaty amendment is needed to make a dual role of the European Central Bank possible: giving this institution both a supervisory role over national banks as well as a monetary role would otherwise endanger its independence as well as its price stability mandate. Similarly, according to the Council Legal Service a Treaty amendment would be necessary to give a separate bank supervision board within the ECB any formal decision-making powers.<sup>60</sup>

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of regulations in accordance with a special legislative procedure, may unanimously, and after consulting the European Parliament and the European Central Bank, confer specific tasks upon the European Central Bank concerning policies relating to the prudential supervision of credit institutions and other financial institutions with the exception of insurance undertakings.”

60. *Financial Times*, ‘ECB supervisory proposal illegal, says adviser’, 18 October 2012.

On the one hand a successful Treaty change that takes away any doubt about the legality of a Single Supervisory Mechanism, but also the other elements of a banking union, provides increased legitimacy. On the other hand, a procedure that takes years can arguably not be part of crisis resolution. Moreover, Treaty change has as a disadvantage that you have to get it right the first time or you risk starting another long process of fixing earlier faults. This means a Treaty change would have to lead to the introduction of broad legal bases or enabling clauses, leaving the details to be worked out under secondary law. It also means a political assessment has to be made (and agreed on!) of what is needed in the long-term to solve the Eurozone crisis as well as to prevent future ones. For now, especially since the December 2012 European Council, the prospect of a big Treaty change is receding.<sup>61</sup>

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61. See also 'Charlemagne', *The Economist*, 22 December 2012.

## 4. Assessing the paths chosen: democratic legitimacy

In the following the democratic challenges of the different types of differentiated integration discussed above will be illustrated. As said, there will be a focus on input democracy, related to rules of change (the different procedural requirements for the creation of rules) and related to the new instruments set up, in particular the role of (representative) institutions under them. I will also discuss the particular impact of the balanced budget rule of the Fiscal Compact on the powers of national parliaments.

Finally, I will touch upon the current debate about what level provides or is to provide the most important legitimating role for EU policy responses to the crisis, either the level of national parliaments and democracy or the level of European Parliament and democracy.

### 4.1 Input legitimacy and new Treaties versus extensive use of secondary legislation

From the above it is clear that the policy responses to the Eurozone crisis have led to important innovations both within and outside the framework of the EU Treaties.<sup>62</sup> Outside the framework of the EU Treaties an emergency fund has been created and an obligation to adopt at national level, preferably constitutional, a balanced budget rule. Within the framework of the EU Treaties a Macro-Economic Imbalances Procedure has been created with the possibility of imposing sanctions.

In terms of input legitimacy, there is an interesting difference between the two paths chosen for these policy outcomes. The 'outside' route of an inter-governmental Treaty leans on the legitimacy of

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62. Again, I leave aside here the unconventional measures of the ECB.

national parliaments, as the ESM Treaty and Fiscal Compact require ratification at national level. The ‘within’ route of article 136 TFEU instead leans to a great extent on legitimacy provided at the European level, as the “Six-Pack” measures adopted on the basis of article 136 and 121(6) TFEU jointly are adopted through the ordinary legislative procedure. This means qualified majority voting in the Council and co-decision for the European Parliament.

How to appreciate the ‘outside’ route from an input legitimacy perspective? The conclusion of new intergovernmental Treaties has been criticized for its lack of transparency and democracy.<sup>63</sup> While

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63. De Witte, *supra* n. 6, p. 154: “The main disadvantage of the non-EU treaty route is, of course, that the special qualities of EU law are lost, namely the relatively democratic and transparent mode of decision-making (at least if compared to purely intergovernmental decision-making), and the capacity to make the rules ‘stick’ by means of a relatively efficient judicial enforcement system.”; Ruffert, *supra* n. 12, p. 1789: “Nonetheless, the erection of a new international institution enhances the complexity of the design of European integration, and it also sidesteps some crucial features of the EU’s institutional concept, which should strive for more transparency and not for a complex plurality. The reflection behind this critical remark leads to one of the core challenges of the new ESM for EU law. Indeed, its

in terms of transparency the recent conclusion of the Fiscal Compact can surely be criticized, in terms of the involvement of parliaments one must not forget that these Treaties require ratification, so approval of national parliament and sometimes even a referendum (notably on the Fiscal Compact in Ireland). Whatever the level of popular support among those represented nationally for the specific measures adopted, national Parliaments arguably nonetheless still provide greater legitimacy than the European Parliament. And whatever the role played in the Irish referendum by the link between the ratification of the Fiscal Compact and the possibility to receive ESM funding, such a referendum nonetheless still provides greater legitimacy in Ireland than the conclusion of an EU regulation would have.

How then to appreciate the ‘within’ route of article 136 TFEU? An extensive use of article 136 TFEU is possibly problematic considering the fact that this procedure prescribes qualified majority voting in the Council and member state representa-

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construction is questionable in the light of the principle of democratic rule. The “democratic deficit” has always threatened progress in the course of European integration.”

tives can thus be outvoted. In practice, this formally does not seem to have been the case with regard to the relevant ‘Six-Pack’ measures, but still it is clear that some member states have had to accept things they strongly opposed during negotiations. The best example is the introduction of *semi-automatic* sanctioning (a decision is deemed to be adopted unless rejected), which France opposed. France initially seemed to be able to avoid the introduction of this type of sanctions through the October 2010 Deauville deal with Germany, but finally had to accept them in a showdown between the Council and the European Parliament.

This illustrates another relevant element of article 136 TFEU, namely the involvement of the European Parliament. Generally, involvement of the European Parliament is seen to compensate from a democratic perspective the possibility for member states to be outvoted by providing legitimacy at the European level. To what extent is this true also for a (too) extensive use of article 136 TFEU? Obviously the European Parliament cannot legitimate measures that overstep the boundaries of article 136 TFEU. In that case an opposing or outvoted member state can make recourse to the

European Court of Justice through the action for annulment (article 263 TFEU). To my knowledge there is no sign yet of a member state being outvoted under article 136 TFEU or contemplating recourse to the European Court of Justice.

It can be said that the European Parliament has been successful, both in its linking of the six measures of the “Six-Pack” – note that the ordinary legislative procedure was not prescribed for all these measures<sup>64</sup> – and in its impact on the final outcome (especially the mentioned *semi-automatic* sanctioning).

Interestingly, also members of European Parliament *not* from Eurozone countries voted on the measures that only apply to the Eurozone. Is this institutionally problematic? Ideally the European Parliament should not be seen to represent nationals of member states as such, but to represent the Union’s citizens (article 14 EU). Obviously though

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64. Notably, Directive 2011/85/EU on requirements for budgetary frameworks of the Member States and Regulation No 1177/2011 on speeding up and clarifying the implementation of the excessive deficit procedure (amending Regulation No 1467/97) only required consultation of the European Parliament as they were adopted on the basis of article 126(14) TFEU.

there is a tension here, as Piris rightly notes.<sup>65</sup> Interestingly, the European Parliament itself is not in favor of creating a (separate) Eurozone assembly.<sup>66</sup>

## 4.2 The (absent) role of supranational institutions under the new intergovernmental Treaties

The new intergovernmental Treaties have been criticized for the absence of accountability mechanisms involving the European Parliament.<sup>67</sup> In

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65. Piris, *supra* n. 16, p. 10: “Par ailleurs, les Etats participants pourraient avoir des difficultés politiques à accepter que les décisions les concernant exclusivement soient proposées et décidées par une Commission et un Parlement dans leur composition reflétant la totalité des Etats membres de l’Union européenne.”

66. See Benjamin Fox, ‘No eurozone-only assembly, say MEPs’, *EuObserver*, 6 October 2012.

67. **Written evidence submitted by Simon Hix to the European Scrutiny Committee of the House of Commons**, 4 January 2012: “However, the European Parliament is currently absent in the proposed intergovernmental structures for a fiscal compact for the Eurozone. If the European Parliament was given an oversight role of the Commission and the Eurozone Finance Ministers, this would at least add one democratic check in the proposed structure.”; Janis Emmanouilidis, ‘Which lessons

fact, in our discussion of the legality of borrowing the EU institutions outside the EU Treaties, no mention was made of the European Parliament. The European Parliament has no role in decision-making on providing financial assistance to member states under the ESM Treaty. The President of the European Parliament is not welcome at Euro Summits, even though he may be invited to be heard.<sup>68</sup> Also, no new accountability mechanisms are created for the Commission considering its strengthened role under the Fiscal Compact and the ESM Treaty. Arguably though, the European Parliament can use existing accountability mechanisms to scrutinize the actions of the European Commission ‘under’ these Treaties.

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to draw from past and current use of differentiated integration’, *Challenges of Multi-tier Governance in the EU*, European Parliament AFCO Workshop, October 2012, p. 11-12: “the European Parliament runs the risk of being sidelined in some of the processes aiming to lead to a “Genuine Economic and Monetary Union”.”; Ruffert, *supra* n. 12, p. 1790: “As may be shown, parliamentary control and political accountability towards the European Parliament is non-existent in the ESM, and it is substantially diminished with respect to national parliaments as in all similar institutional structures at the international level.”

68. Article 12(5) FC.

The same holds for the European Central Bank's actions under the ESM Treaty. Moreover, several commitments made in the Fiscal Compact, for example on the budgetary and economic partnership programme (article 5 FC), will be implemented through secondary EU law, involving the European Parliament on the basis of its EU Treaty powers.

Some of the criticism is not so much related specifically to the intergovernmental Treaties, but goes to the heart of the institutional set-up of the Excessive Deficit Procedure of article 126 TFEU. Thus, Hix argues with regard to the budgetary role of oversight of the Commission that "(...) the Commission does not have a sufficiently democratic mandate to pass judgement on national budgetary discipline."<sup>69</sup> With regard to key economic governance decisions of the Ecofin Council he argues that "(...) while each minister might be accountable to his or her own member state this does not make him or her either individually or collectively legitimate for the EU as a whole. Put another way, why would the public or a parliament in a Eurozone state accept a majority decision against them

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69. Hix, *supra* n. 67.

by the Eurozone Finance Ministers (such as the imposition of a fine for breaching the 3% budget deficit rule)?"<sup>70</sup> Hix is particularly concerned with democratic legitimacy since major redistributive consequences are now involved, both between Member States as a result of the funds, and within Member States as a result of austerity measures.

With regard to redistributive consequences within states, the case of Greece is pressing in its relation to the use of article 136 TFEU (see above under paragraph 3.1). It should be noted that the decisions that would arguably in the short term have the greatest redistributive consequences between Member States are taken unanimously (namely those under the EFSF and ESM Treaty). One exception is the so-called super-qualified majority under the ESM Treaty. Where the Commission and the European Central Bank both conclude that a failure to urgently adopt a decision to grant or implement financial assistance would threaten the Eurozone's economic and financial sustainability, a majority of representatives of member states representing 85% of the capital contribution key to the ESM Fund is sufficient (article 4(4)

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70. Hix, *supra* n. 67.

ESM Treaty). While all member states but Germany, France and Italy can be outvoted in this procedure, to compensate for this an emergency reserve fund is then automatically created to cover possible risks. A transfer from this emergency reserve fund back to the regular reserve fund can only be decided unanimously.

Interestingly, article 4(4) ESM has been subject of a Judgment of the Estonian Supreme Court. The Court concluded that this provision interferes with the financial competence of the *Riigikogu* (Estonian Parliament) and the financial sovereignty of the State of Estonia, but that this interference is justified by substantial constitutional values. Article 4(4) ESM Treaty provides for an appropriate, necessary and reasonable measure for the achievement of the objective of eliminating a threat to the economic and financial sustainability of the euro area.<sup>71</sup>

Where under the intergovernmental Treaties each representative of a member state has a veto, the exact role of national parliaments is left to national constitutional law (whether this is previous

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71. Estonian Supreme Court *en banc*, Constitutional Judgment 3-4-1-6-12, 12 July 2012, points 204-210.

consent, accountability ex post, etc.).<sup>72</sup> Hix again is critical: “The current plans do not specify in any detail how national approval would work. (...) Without an agreement on at least a set of minimum procedures, there is a danger that some national governments will try to side-step national parliamentary approval of their contributions to the EFSF and ESM.” Even though Hix’s fears may be justified, it can be asked whether the solution should instead be found at the level of the inter-governmental treaties. This route would easily lead to accusations of an attempt to interfere with the national constitutional identity of member states.<sup>73</sup>

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72. The German *Bundesverfassungsgericht* has recently decided that the *Bundestag* must consent to every individual disposal and that there must be sufficient parliamentary influence on the way the funds are handled by the receiving states. BverfG, 2 BvR 1390/12, 12 September 2012.

73. See for the Treaty obligation of the *European Union* to respect the national constitutional identity of the member states, article 4(2) EU.

### 4.3 The Fiscal Compact and the powers of national Parliaments

The Fiscal Compact intends to further increase budgetary discipline of member states and impacts on the powers of national Parliaments. To understand how, one should first look at the definition of the Balanced Budget Rule in the Fiscal Compact and its relation to existing EU law. Secondly, and more importantly, one should look at the character of this rule and the intention of the Fiscal Compact to have it enshrined in the national law of the contracting parties, preferably of a constitutional level.

Even though the definition of the Balanced Budget Rule is not identical under the “Six-Pack” and the Fiscal Compact, the differences are not great.<sup>74</sup> In general terms, the Fiscal Compact Balanced Bud-

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74. Moreover, the application of the rule is country specific. The Fiscal Compact starts from a more strict 0,5% limit of the structural deficit, but giving more leeway (1%) to member states with a relatively low general government debt (significantly below 60% of GDP). The “Six-Pack” starts from a less strict 1%, but can be more strict in its actual application to a specific country.

get Rule is similar to existing EU law in the sense that, as do the Treaty based 3% deficit rule and the “Six-Pack” Medium-Term Budgetary Objective rule (MTO), it provides a maximum to member states deficit, but without deciding what policy measure are to be taken to stay within these limits.<sup>75</sup> The recent combined application of articles 126(9) and 136 TFEU in the case of Greece (discussed above) goes much further in this respect!

Arguably more important is the different character of the new Balanced Budget Rule. The Fiscal Compact creates the following obligation with regard to its Balanced Budget Rule:

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75. Compare also **Brigid Laffan**, “Testing Times: Responsibility to the fore in the Euro Crisis”, Paper prepared for the conference in honour of Peter Mair: Responsible or Responsible, EUI, 26-28 November 2012, p. 1-17 at p. 12: “If national governments are increasingly drawn into budgetary and fiscal cycles within the EU and Euro area, how can national parliaments continue to exercise their traditional prerogatives in domestic public finances.” But also on same page: “Budgetary and economic policy falls within the political space of constrained choice, but choice nonetheless. (...) There are choices about the balance between spending cuts and tax increases and within both categories about where to cut and where to raise taxes.”

*The rules (...) shall take effect in the national law of the Contracting Parties at the latest one year after the entry into force of this Treaty through provisions of binding force and permanent character, preferably constitutional, or otherwise guaranteed to be fully respected and adhered to throughout the national budgetary process.*<sup>76</sup>

What does permanent mean? Or otherwise guaranteed to be fully respected? This unfortunately is not very clear.<sup>77</sup> According to the *Conseil Constitutionnel*, in France the introduction of binding and permanent provisions would require change of several provisions of the Constitution. Alternatively, ‘otherwise guaranteed to be fully respected’ could be satisfied in France through the adoption of an organic law, which is of a permanent nature and would bind the entire public administration.<sup>78</sup>

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76. Article 3(2) Fiscal Compact.

77. Borger & Cuyvers, *supra* n. 9, p. 380; Compare also J.H. Reestman, ‘Een Stille Constitutionele Omwenteling. Het Stabiliteitsverdrag in de Nederlandse Rechtsorde’ [‘A Silent Constitutional Revolution. The Stability Treaty in the Dutch Legal Order’] (2012) forthcoming.

78. *Conseil Constitutionnel*, Décision no. 2012-653 DC of 9

Moreover, it is questionable in some member states, including the Netherlands, whether parliament can bind itself.<sup>79</sup> That it further constrains national parliaments however seems to be undisputed.<sup>80</sup> Member states must also create an automatic correction mechanism, which is triggered in the event of significant observed deviations.<sup>81</sup>

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August 2012, points 20-24.

79. **Editorial. The Fiscal Compact and the European Constitutions: ‘Europe Speaking German?’**, *EuConst* (2012) p. 1-7 at p. 3: “The United Kingdom and the Netherlands are among the countries in which the rule applies that a parliament cannot bind itself. A parliament deciding on the budget cannot be bound by a ‘balanced budget rule’ enacted by act of parliament, if parliament does not want to be bound by it or ignores it when deciding on the budget. Nevertheless the Dutch government has announced that it intends to implement the balanced budget rule by an act of parliament.”

80. Borger & Cuyvers, *supra* n. 9, p. 381; **Editorial. The Fiscal Compact and the European Constitutions: ‘Europe Speaking German?’**, *EuConst* (2012) p. 1-7 at p. 5-6: “The Fiscal Compact, however, strikes at the heart of the institutions of parliamentary democracy by dislocating as a matter of constitutional principle the budgetary autonomy of the member states. It affects the power of the purse of national parliaments (and also for the European Parliament!), historically the primary spring of development of their powers.”

81. See also the Commission communication of 20 June 2012 on Common principles on national fiscal correc-

Nonetheless, again it can be argued that member states are still free to decide what policy choices to make in the design of their automatic correction mechanism.

Hix critically argues that: “As the agreement is currently designed, neither the new constraints on national budgets (...) nor the rules governing the transfer of resources between member states would be accepted as legitimate by citizens and national parliaments in the member states involved.”<sup>82</sup> Should the balanced budget rule then better have been included into secondary EU law? This has implicitly been argued.<sup>83</sup> In contrast, it is here argued that the path of a Treaty, preferably in the form of an amendment of the EU Treaties,

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tion mechanisms.

82. Hix, *supra* n. 67.

83. De Witte, *supra* n. 6, p. 152: “The core of the new treaty and its real novelty, also in terms of democratic practice, lies elsewhere, namely in the introduction of the ‘golden rule’: the obligation to introduce into national law (preferably constitutional) the new budgetary limits defined in Article 3, para. 1, in particular a ‘structural’ deficit not exceeding 0.5% of the GDP. Again, this could have been achieved legally speaking by means of EU legislation, if necessary adopted by means of the ‘enhanced cooperation’ mode of decision-making.”

but in the absence of that in the form of a new intergovernmental Treaty, is to be welcomed. Does secondary EU law, which can be adopted by a qualified majority vote,<sup>84</sup> really have sufficient status and legitimacy to mandate change of formal national constitutions or otherwise of material constitutional rules, in the sense that it requires guarantees implying similar status?<sup>85</sup> I would argue that it does not and that ratification of such an obligation by member states, leading to an active involvement of national parliaments, is desirable.

#### 4.4 The way forward: European or national democratic legitimacy?

Undoubtedly, the most prominent source of legitimacy for European integration lies at the level

of national parliaments and democracy. Is this sustainable in the long term, also in light of the current Eurozone crisis responses? Two opposing positions are found in the academic literature.

Some argue that the national level will have to lend its legitimacy to a solution to the crisis.<sup>86</sup> Weiler argues that “at what will be a decisive moment in the evolution of the European construct, the importance, even primacy of the national communities as the deepest source of legitimacy of the integration project will be affirmed yet again.”<sup>87</sup> Scicluna contends that “democracy is still best preserved by sovereign states within a more limited EU. The Eurozone crisis illustrates the dangers that ‘more Europe’ poses to European democracy much more rapidly than it points to Europeanisation as the solution.”<sup>88</sup>

Others argue that legitimacy must eventually be found at the European level. According to Laffan the increased collective responsibility among executives in the Eurozone leads to a legitimacy gap. The “limits of responsiveness at national level must be compensated for by greater responsiveness at the EU level.”<sup>89</sup> Maduro takes a more extreme position arguing that: “a model that would make EU democracy wholly or fundamentally dependent on national democracies is destined to fail”<sup>90</sup> and proposes several reforms – not requiring Treaty amendment – for the creation of a European political space, including a reform of the EU budget and true electoral competition on the Presidency of the European Commission. Fabbrini takes a similar position on the appropriate level of legitimacy: “as shown by the protests in the streets of many European capitals, the legitimacy of decisions taken on behalf of the EU can-

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84. Note that the so-called “Two-Pack” in which a similar rule was originally included by the Commission has been proposed on the basis of articles 121(6) and 136 TFEU. See article 4 of Proposal for a Regulation of the European Parliament and of the Council on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area, 23 November 2011.

85. Compare Reestman, *supra* n. 77.

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86. J.H.H. Weiler, ‘In the Face of Crisis: Input Legitimacy, Output Legitimacy and the Political Messianisms of European Integration’, *European Integration* (2012) p. 825-841.

87. Weiler, *supra* n. 86, p. 837.

88. Nicole Scicluna, ‘EU Constitutionalism in Flux: Is the Eurozone Crisis Precipitating Centralisation or Diffusion?’, *European Law Journal* (2012) p. 489-503 at p. 501.

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89. Laffan, *supra* n. 75, p. 13.

90. Miguel Pórigues Maduro, *A New Governance for the European Union and the Euro: Democracy and Justice* (Directorate-General for Internal Policies of the European Parliament, September 2012) p. 1-31 at p. 14.

not be a derivative of the legitimacy enjoyed by the governments of its member states”<sup>91</sup>

## 5. Conclusions

In the absence of an increased legitimacy of democratic politics at the level of the European Union, the most important legitimacy source remains at the level of national democracy and parliaments. This predominant national legitimacy source functions through various different steps, be it a *Bundesverfassungsgericht*, Estonian Supreme Court or *Conseil Constitutionnel* judgment, national parliamentary ratification of a new Treaty, a popular referendum in Ireland, a decision on European matters by a national Finance Minister, etc. Where the permissive consensus on the European project has made place for social unrest in several member states, the importance of these legitimacy moments should not be underestimated. Moreover, they should not be avoided.

This leads to a number of conclusions. Firstly, the much criticized Fiscal Compact is to be preferred over secondary EU law as an instrument creating the obligation to introduce at the level of national, preferably constitutional, law, or at least with what can be called materially constitutional guarantees, a Balanced Budget Rule and an au-

tomatic correction mechanism. Secondly, Treaty change, or otherwise use of the flexibility clause in combination with enhanced co-operation, is to be preferred over a too extensive use of article 136 TFEU (as a sort of ‘Euro-flexibility’-clause). Thirdly, ESM Treaty amendment is to be preferred (even though that would mean early amendment of an agreement that has already been renegotiated in the past) over an over-extensive interpretation of article 19 ESM Treaty (reviewing the list of financial assistance instruments) to make direct recapitalization of banks through the ESM possible in the future. And finally, from this perspective, the failure to have a Greek referendum on the outcome of the October 2011 Euro Summit, an idea proposed by then Greek Prime Minister Papandreou, but cancelled under Franco-German pressure, is to be seen as a missed opportunity.

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91. Sergio Fabbrini, ‘The Democratic Governance of the Euro’ in: Maduro, De Witte, Kumm (eds.), *The Democratic Governance of the Euro*, RSCAS Policy Papers 2012/08, p. 27-31 at p. 29: “Decisions made at the EU level require a legitimizing mechanism at that level, not at the level of its member states. Without proper involvement of the EP in those decisions, the latter will lack the justification sufficient to be accepted by the European citizens affected by those decisions.”

## 2. LEGAL ISSUES OF THE ‘FISCAL COMPACT’. SEARCHING FOR A MATURE DEMOCRATIC GOVERNANCE OF THE EURO

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1. The views expressed in this paper are strictly personal. This text was completed early October 2012 and does not consider later developments.

While complementing the EMU with the necessary rules mandating budget discipline at domestic level, the *fiscal compact* inevitably affects the autonomy both of national parliaments and executive powers, as well as the life of millions of European citizens. A culture of financial stability protects democracy from inter-generational conflicts and it is positive *per se*. Arguably, however, some provisions of the *fiscal compact* risk widening the democratic deficiency of the economic governance. Thus, the following legal analysis is carried out with the main aim of assessing the coherence of the *fiscal compact* with the principle of democracy. As tentatively showed, an issue of democratic legitimacy is indeed raised. The policy-making of the euro zone needs to be improved so as to rely less on national legitimacy inputs and more on its own direct source of democratic accountability – the European Parliament.

The following paper is divided into eight parts. After a brief introduction concerning the general features of the new treaty (section 1), the grounds for adopting an instrument of pure international law, concluded by a limited number of states, outside the architecture of the EU legal order, are described (section 2). As to the core of the fiscal

discipline, *i.e.* the balanced budget rule and the obligation to reduce the public debt, the legal appreciation is multi-faceted (section 3). Then the limited new power to adjudicate attributed to the ECJ, is examined (section 4). The reversed qualified majority principle with regard to the decision-making of the excessive deficit procedure, is relevant, since it implies the Commission being given a significant power to direct the decision-making (section 5). Before evaluating *en filigrane* the *fiscal compact* in the light of the principle of democracy (section 7), a synthetic analysis of the rules regarding the economic policy coordination, convergence and governance of the euro area, is carried out (section 6). Finally, some conclusions will be drawn (section 8).

# 1. Introduction

The “Treaty on Stability, Coordination and Governance in the Economic and Monetary Union” has been negotiated – with a minimum involvement of the European Parliament – in a few weeks on the basis of the European Council mandate of December 9<sup>th</sup>, 2011<sup>2</sup>. It was politically agreed upon late January and signed by all member states in Brussels on March 2<sup>nd</sup>, 2012, at the margins of the European Council, except for the United Kingdom and the Czech Republic. Known as the *fiscal compact* (*pacte budgétaire, traité sur la stabilité, patto di bilancio, Fiskalvertrag*) due to its key provisions

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See *Statement by the euro area Heads of State or Government*, Brussels, 9 December 2011 SN/35/1/11 REV 1. The negotiation showed positive results after six revisions of the original draft. Three MP’s represented the EP during the negotiation, Mr. Elmar Brok (PPE), Roberto Gualtieri (S&D) and Mr. Guy Verhofstadt (ADLE). The Commission and ECB were also involved in the negotiation.

on budgetary discipline, it comprises a long preamble (26 paragraphs) and 16 Articles divided into VI Titles. Its outstanding norms are deemed to be applied to the member states whose currency is the euro (hereinafter, euro zone states)<sup>3</sup>. However, the rules regarding the new “Euro summit meetings” are applicable to all, regardless of ratification<sup>4</sup>. This body was established *de facto* at the outset of the financial crisis in order to bring together heads of state or government of the euro area.

To enter into force the fiscal compact requires at least the ratification of twelve euro zone states<sup>5</sup>. Not being a treaty revision of EU primary law,

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3. Article 14(3).

4. Article 14(4). That can easily be explained. The tasks of the new organ – *i.e.* responsibilities regarding the single currency, governance of the euro area, strategic orientations for the conduct of economic policies – require the participation of all the euro zone states.

5. In principle, its entry into force is expected on 1<sup>st</sup> January 2013. However, this is a mere expectation. For, should the twelve ratifications be achieved sooner or later, its entry into force will vary accordingly pursuant to Article 14(2).

its efficacy does not require the ratification of all the signatories. The fiscal compact is obviously open to late accessions<sup>6</sup>. It is essentially tailored to fulfil the need of the euro zone states to preserve the attainment of the Union’s objectives in the framework of the monetary union, by avoiding both excessive government deficit and debt. However, under certain conditions, even the non-euro zone states may accept being bound by it. In particular, as long as they enjoy either a derogation or an exemption from participation in the single currency, they would be bound only by the selected provisions of titles III (fiscal compact) and IV (economic policy coordination and convergence) to which they declare their adhesion at the moment of depositing their instrument of ratification<sup>7</sup>. As a consequence, for them only the accession to the treaty can be selective (*à la carte*). Eight non-euro countries (Bulgaria, Denmark,

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6. Article 15. The accession clause – which was not envisaged in the original draft and was suggested pending negotiation – is useful because it allows the adhesion of the United Kingdom, the Czech Republic or Croatia (or even other future members of the EU) without amending the treaty beforehand and incurring in delays.

7. See last recital of the preamble and Article 14(5).

Hungary, Latvia, Lithuania, Poland, Romania and Sweden) showed their interest to be aligned to the fiscal compact by signing it<sup>8</sup>.

## 2. International treaty versus EU revision procedure

The *fiscal compact* is easier to understand and rationalize if the purpose for which it was enacted and the reasons that led to it, are considered. Its *raison d'être* falls squarely within the financial crisis of the common currency that involved no less than five states. Some of them even faced the risk of leaving or being forced to leave the euro zone, despite the legal complexities of that perspective and the uncertainties of the legal framework<sup>9</sup>, not to mention the fact that nobody knows how exits can affect other euro zone states and the internal market as a whole<sup>10</sup>. The financial crisis of the euro zone clearly shows that the common currency performs only if all its members respect the basic principles of budgetary discipline. **Since the beginning of the crisis, serious shortcomings in the architecture of the Economic and Monetary Union**

(EMU) as designed by the Maastricht Treaty, have appeared<sup>11</sup>. Contrary to the original Delors' suggestion, the EMU did not set both the economic and monetary union, but the latter only<sup>12</sup>. Even the rules on economic *coordination* failed to be fully applied. Suffice it to recall the weaknesses of the excessive deficit procedure – the ECJ enjoys quite a limited role pursuant Article 126(10) TFEU; the Commission prepares reports, addresses opinions and proposes recommendations; yet, the Council never applied the sanctions provided for in Article 126(11) TFEU.

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8. As is usual in the EU treaty practice, the ratification requires the “respective constitutional” processes to be observed. The relevant instruments will be deposited with the General Secretariat of the Council of the EU (Article 14(1)). This element underlines the international nature of the treaty, though it is linked to the functioning of the common currency. Were it a EU treaty revision, it would have been deposited with the Italian Government.

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9. See in general P. Athanassiou, *Withdrawal and expulsion from the EU and EMU. Some reflections*, ECB Legal Working Series, N° 10/December, 2009, 31 et seq.

10. Among other things it seems likely that the state leaving the euro zone would need to impose serious limitations to the free movement of capitals.

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11. C. Callies, C. Schoenfleisch, *Auf dem Weg in die europäische “Fiskalunion”? – Europa- und verfassungsrechtliche Fragen einer Reform der Wirtschafts- und Währungsunion im Kontext des Fiskalvertrages*, *JuristenZeitung*, 2012, 477-488, with regard in particular on the fiscal union process from the perspective of the German Constitution.

12. Much could be said about the structural imbalances of the Maastricht construction between the economic and monetary aspects. One of the best and concise summaries of what happened during the negotiation has been recently reported by J. Delors, *The Maastricht treaty 20 years on* – 7 February 2012, *Notre Europe*, 4.

Acting on the double legal basis of Article 126(9) and Article 136 TFEU, on 8<sup>th</sup> June 2010 the Council adopted a decision addressed to Greece, requiring an impressive set of 45 economic, social and fiscal measures<sup>13</sup>. Meanwhile the euro states had coordinated themselves bilaterally to grant loans facilities to Greece of up to 80 billion euro, alongside the IMF. Similar but lighter steps were taken for Portugal and Ireland<sup>14</sup>. In all cases, sanc-

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13. See the Decision of the Council N° 2010/320/EU, O.J. L 145, 6 et seq., amended by the Decision of 7 September 2010 N° 2010/486/EU, O.J. L 241, 12 seq., and by the Decision of 12 July 2011 N° 2011/734/ EU, O.J. L 296, 38 et seq. For a brief economic evaluation of the measures imposed on Greece see D. Bohle, *The Crisis of the Eurozone*, EUI Working Papers, RSCAS 2010/77, 5. For a detailed view of the events since the Greek financial crisis see A. Viterbo, R. Cisotta, *La crisi del debito sovrano e gli interventi dell'U.E.: dai primi strumenti finanziari al Fiscal Compact*, *Il Diritto dell'Unione europea*, 2012, 323-366.

14. R. Bieber, *Observer – Policeman – Pilot? On Lacunae of Legitimacy and Contradictions of Financial Crisis Management in the European Union*, EUI Working Paper Law 2011/16, 4, focusing on the structural weaknesses of the EU's economic policy, as well as on the lack of its democratic legitimacy. With regard to Portugal and Ireland, see Council implementing Decision N° 2011/77/EU on granting Union financial assistance to Ireland, O.J. L 30, 4 February 2011, 34 et seq.; Council implementing Decision N° 2011/344/EU

tions were not adopted – given the gravity of the economic crisis, they would have been hardly effective and possibly counterproductive. In addition the ECB was enacting some *non standard measures* concerning the acquisition on the secondary market of national bonds of the euro zone states affected by the crisis. Against this background, on 5<sup>th</sup> August 2011 the President of the ECB sent a letter to the Italian government asking for far reaching budgetary and economic reforms, including labour market measures and a constitutional review to tighten fiscal rules<sup>15</sup>.

In autumn 2011, governments acknowledged that a common currency, and the related constraints, could hardly be coupled with national sovereignties on taxes and spending decisions<sup>16</sup>. Hence, the

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on granting financial assistance to Portugal, O.J. L 159, 17 June 2011, 88 et seq.

15. See the Italian newspaper *Corriere della Sera* of 29 September 2011.

16. In brief, firstly, in order to pursue the political need to achieve a success, the EMU weaker economies were allowed to join the common currency without due scrutiny, giving them for over a decade (since the third stage of the EMU, started on 1<sup>st</sup> January 1999) the illusion of borrowing money at roughly the same interest rate as the stronger euro states. Secondly,

euro zone states felt the need to ensure a stricter budgetary discipline and to foster common economic governance among themselves<sup>17</sup>. Some

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insufficient crisis contingencies were provided. Thirdly, despite the two rules on the 3 per cent limit for the deficit ratio and the 60 per cent limit for the debt-to-GDP ratio were established, transgressors were not sanctioned unless a discretionary decision-making process took place within the Council. Indeed, sanctions provided for in Article 126 were never applied. Tellingly, in 2003 Germany and France, having failed to comply with the Pact, did not face any negative consequences (under the Italian Presidency of the Council: see ruling 13 July 2004, C-27/04, *Commission v. Council*, ECJ Reports, 2004, I-6649). Fourthly, even the no-bail out clause did not prevent secondary market interventions. As a result, the financial markets had the last say when the crisis actually hit Greece in 2009 with a high risk of contagion across the euro zone. Cf. *inter alia* J.-V. Louis, *The No-Bail Out Clause and Rescue Packages*, CML Review, 2010, 971 et seq.; House of Lords, *The future of economic governance in the EU*, Volume I: Report, March 2011 HL paper 124-I, 15 et seq., pointing out an asymmetry between a centralised monetary policy and the fragmented (not coordinated) fiscal and supply-side policies, combined with a build-up of competitiveness imbalances among member states. Likewise, G. Peroni, *Il Trattato di Lisbona e la crisi dell'Euro: considerazioni critiche*, *Il Diritto dell'Unione europea*, 2011, 971 et seq.

17. See in particular the *Statement by the heads of State or Government of the Euro area – 26 October 2011*, points 34 and 35, whereby they declared their willingness to “strengthen the economic union to make it

governments, and above all the ECB<sup>18</sup>, argued that Articles 121, 126, 136 TFEU and Protocol N° 12, and Regulations 1466/97 and 1467/97, as revised by the so-called *Six pack*, as well as the approval of the “Euro Plus Pact”<sup>19</sup>, were not enough to re-establish market confidence, though the *Six pack* reform focused on national debts and mac-

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commensurate with the monetary union”, and asked the Presidents of the European Council and the Commission “to identify possible steps to reach this end. The focus will be on further strengthening economic convergence within the euro area, improving fiscal discipline and on deepening economic union, including exploring the possibility of limited Treaty changes. An interim report will be presented in December 2011 so as to agree on the first orientations. It will include a roadmap on how to proceed in full respect of the prerogatives of the institutions ...”.

18. See the European Central Bank opinion of 16 February 2011 on economic governance reform in the European Union (CON/2011/13), OJ C 150 of 20 May 2011, 1 et seq., point 6.
19. “The Euro Plus Pact. Stronger Economic Policy Coordination for Competitiveness and Convergence” is a political agreement concluded by the euro area heads of state or government (and joined by Bulgaria, Denmark, Latvia, Lithuania, Poland and Romania) on 24-25 March 2011. It is annexed to the European Council Conclusions adopted on the same days (see *The European Council in 2011*, Publications Office of the EU, Luxembourg, 2012, 40 et seq.).

roeconomics imbalances, impacting on states with *earlier* sanctions. Nor was a couple of Commission proposals made on 23<sup>rd</sup> November 2011 for a stronger economic governance, considered enough: the first aiming to allow the Commission to ask the euro area countries to review their draft national budgets in compliance with their commitments<sup>20</sup>; and the second enhancing the surveillance for euro area states benefiting from financial assistance or threatened by serious financial instability<sup>21</sup> (the so-called *Two pack*).

At the European Council of 29<sup>th</sup> October 2011, a “limited” revision of primary law was envisaged as a key action instead. Further strengthening of economic convergence within the euro area was

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20. See COM(2011) 821 final – 2011/0386 (COD) (Proposal for a Regulation of the European Parliament and the Council on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area).

21. See COM(2011) 819 final – 2011/0385 (COD) (Proposal for a Regulation of the European Parliament and the Council on the strengthening of economic and budgetary surveillance of Member States experiencing or threatened with serious difficulties with respect to their financial stability in the euro area).

needed<sup>22</sup>, much in the way suggested by Mr. Delors when the EMU was conceived. The main political purpose was to tackle risks of spill-over effects of the crisis from some euro zone states to other states of the same area, their mutual destinies being interwoven<sup>23</sup>. Arguably, a set of comprehensive rules, ensuring sustainability of national fiscal policies in the long run, was considered one of the levers in order to rebuild market confidence on both the euro currency and the related economies.

European rescue funds had been meanwhile set up or about to be finalized by the euro zone states – *i.e.* the two temporary financial support mechanisms established in May 2010<sup>24</sup> and the

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22. See *The European Council in 2011*, cit., at 65.

23. D. Bohle, *The Crisis of the Eurozone*, cit., 1 et seq., noticing that the euro zone countries tied their own fate to that of the weakest member of the club.

24. The European Financial Stabilization Mechanism (EFSM), adopted by a Council Regulation on the basis of Article 122(2) TFEU (N° 407/2010 of 11 May 2010 8OJ L 118, 1 et seq.) and the larger European Financial Stability Facility (EFSF), the so-called special vehicle purpose set up as a company incorporated under the law of Luxembourg. For a description of these funds and the related legal questions see J.-V. Louis, *The No-Bail Out Clause and Rescue Packages*, cit., 971 et seq.; R. Smits, *L'Europe à l'épreuve*, Cahiers de droit européen, 2010,

permanent one, recently finalized to replace its predecessor<sup>25</sup>. In that respect, it was also advocat-

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7 et seq.; A. Viterbo, R. Cisotta, *La crisi della Grecia, l'attacco speculativo all'euro e le risposte dell'Unione europea*, Il Diritto dell'Unione europea, 2010, 961 et seq; U. Häde, *Die Europäische Währungsunion in der internationalen Finanzkrise – An den Grenzen europäischer Solidarität*, Europarecht, 2010, 854 et seq.

25. On 25<sup>th</sup> March 2011, the European Council adopted a Decision adding Article 136(3) to the TFEU, with regard to a stability mechanism for euro zone states (OJ L 91 of 6 April 2011, 1), which runs as follows: "... the Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safe guard the stability of the euro area as a whole" and that "the granting of any required financial assistance under the mechanism will be made subject to strict conditionality" (with regard to the legal reasons for the stability mechanism amendment see B. de Witte, *The European Treaty Amendment for the Creation of a Financial Stability Mechanism*, Sieps Report, 2011, 5 et seq.). This Decision is based on Article 48(6) TEU, that empowers the European Council to make an amendment of the treaties through a simplified revision procedure, provided that the Decision is approved by the all member states of the Union in accordance with their respective constitutional requirements. This is reflected in Article 2 of the Decision, which states that it shall enter into force on 1<sup>st</sup> January 2013, provided that all member states have notified the ratification of the Decision, or, failing that, on the first day of the month following receipt of the last of those notifications. It is worth recalling that a first treaty establishing the ESM

ed that the rescue funds ought to be balanced by

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was signed on 11<sup>st</sup> July 2011, and it did not contain a clause stipulating that access to funds by a euro zone state was conditional on that state ratifying the *fiscal compact*. On the contrary, the second ESM treaty, signed on 2<sup>nd</sup> February 2012, contains a recital 5 according to which: "... It is acknowledged and agreed that the granting of financial assistance in the framework of new programmes under the ESM will be conditional, as of 1<sup>st</sup> March 2013, on the ratification of the" *fiscal compact* "by the ESM Member concerned ...". However, the euro zone states completed the ratification process of the European Stability Mechanism (ESM) sooner, so that it entered into force on 27<sup>th</sup> September 2012. The ESM makes a total of €700 billion of financial support (the capital stock) available to troubled euro zone countries. At a meeting of the financial Ministers on 30<sup>th</sup> and 31<sup>st</sup> March 2012, the so-called firewall has been raised. Actually, the EFSF would be allowed to overlap with the ESM. By a combination of the two rescue funds for perhaps one year, the lending capacity would be about € 740 billion. Concerning the ESM Treaty see M. Ruffert, *The European Debt Crisis and European Union Law*, CML Review 2011, 1777 et seq. After the ruling of the German Constitutional Court (12 September 2012, 2 BvR 1390/12, 2 BvR 1421/12, 2 BvR 1438/12, 2 BvR 1439/12, 2 BvR 1440/12, 2 BvE 6/12), the issue concerning the two reservations imposed by the same ruling, has been solved, with an *erga omnes* effect, through a Declaration of the 17 signatories, deposited with the General Secretariat of the Council on 27<sup>th</sup> October 2012, which is assumed to have an interpretative nature, though it points out that the Declaration "constitute(s) an essential basis for the consent of the contracting

imposing a strict fiscal discipline via primary law. A sort of equation was imposed – more solidarity needs more national discipline. Moreover, the *external visibility* of a treaty could help in showing the international markets the capability of the euro zone to provide for a *fiscal compact* and in contributing to tackling the profound confidence crisis of the euro zone. As a result, it was believed that the financial pressures on some weaker countries would be eased, particularly in those suffering from sovereign bond spread.

Although the main concern of this debate was related to specific problems of the euro zone states, it was plain that any revision of primary law had to be done without affecting the position of the non-euro states, whose consent had to be acquired pursuant to the revision procedures laid down in Article 48 TEU. That requirement, however, soon proved hard to achieve. In the first part of December 2011 it became definitively clear

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States to be bound by the provisions of the Treaty". Clearly, the legal value of the Declaration needs to be assessed having regard to its object and purpose. The Declaration permitted Germany to deposit its ratification instrument so that the ESM treaty entered into force according to its Article 48.

that the United Kingdom would have prevented any resort to Article 48 TEU. Basically, its refusal was justified on the belief that the prospective of fiscal integration between euro zone states threatened British national interest regarding internal market, though it was reasonable to assume that any possible risk of a clash between fiscal discipline and internal market could be and had to be avoided<sup>26</sup>. As a result, a reform process under Article 48 TEU, with all the related positive consequences in terms of democracy and transparency<sup>27</sup>, could not be pursued.

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26. See the statements of the UK Prime Minister David Cameron published in « The Times », 7 December 2011, *Yes to treaty change – but only on our terms*. According to J.-V. Louis, *Les réponses à la crise*, Cahiers de droit européen, 2011, 355, the United Kingdom opposed a EU reform treaty « faute d’avoir obtenu des garanties pour le maintien du marché intérieur et le respect des intérêts de la City ». See also House of Commons, *The Treaty on Stability, Coordination and Governance in the Economic and Monetary Union: Political Issues*, Research Paper, 12/14, 27 March 2012, 5, as to the declaration made by the French President Nicolas Sarkozy concerning the rejection of UK requests, and 6 regarding more details to these requests.

27. I. Pernice, M. Wendel, K. Bettge, M. Mlynarski, L.S. Otto, M. Schwarz, *A Democratic Solution to the Crisis – Reform Model for a Democratic Based Economic and Financial Constitution of Europe*, WHI-Paper 01/2012,

Be as it may, the adoption of an instrument of pure international law, concluded by a limited number of states, outside the architecture of the EU legal order, was a choice pursued in a situation of urgency<sup>28</sup>. Other paths were conceivable, such as measures adopted under Article 136 TFEU, and revisions of Protocol N° 12 (as suggested by the President of the European Council in his *Interim Report* of 6<sup>th</sup> December 2011) or through enhanced cooperation acts<sup>29</sup>. However,

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in particular 9.

28. The doubt whether a member state can behave in such a way as to undermine the attainment of the fundamental achievements of the European integration process in the field of EMU, was not an issue, though it could be argued that the EU treaties, alike any international agreement, must be performed in good faith. As is known, Article 26 of the Vienna Convention and the related authority states the principle of good faith which is a substantive part of the rule *pacta sunt servanda* (see *inter alia* Yearbook of the International Law Commission (1966), vol. II, 172, 211).

29. See *The European Council in 2011*, cit., 73, stressing that treaty amendments would have been more time-consuming than the other two paths (revision of Protocol N° 12 and secondary legislation). For an endorsement of the option suggested by the President of the European Council see J. Ziller, *The Reform of the Political and Economic Architecture of the Eurozone’s Governance. A Legal Perspective*, Governance for the

it is debatable whether a balanced budget rule, implying at that very moment amendments to national constitutions, as informally agreed during the Summit of October 26<sup>th</sup>, 2011 (see *infra* para. 3), could have been adopted through secondary law acts. Under the Lisbon Treaty even for euro zone states the competence of the Union is basically a competence of coordination and surveillance of their budgetary strategy, as well as of setting out economic policy guidelines. Even considering the peculiarities of Article 136 TFEU, this legal basis may not be used as a tool to modify Protocol N° 12: in that respect, pursuant to Article 136(1), it is necessary to apply Article 126(14), second subparagraph. Therefore, one

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Eurozone: Integration or Disintegration (F. Allen, E. Carletti, S. Simonetti, Eds.) FIC Press, Philadelphia, 2012, 115-138, at 130; B. De Witte, *European Stability Mechanism and Treaty on stability, coordination and governance: role of the EU institution and consistency with EU legal order*, Challenges of Multi-tier Governance in the EU – Workshop 4<sup>th</sup> October 2012, 14-17, at 17 (according to the author, “the adoption of the EU legislation would have been preferable – from the perspective of the democratic legitimacy and stability”). Likewise, L.S. Rossi, *Fiscal Compact’ e Trattato sul Meccanismo di Stabilità: aspetti istituzionali e conseguenze dell’integrazione differenziata*, Il Diritto dell’Unione europea, 2012, 293-307, at 295.

may ask whether such a competence includes an obligation implemented at a constitutional level touching upon the autonomy of executive powers and national parliaments to define domestic budgets. That leads to the consequent consideration according to which a balanced budget rule may affect a constitutional value of some member state as long as it poses relevant constraints in terms of determining public revenue and expenditure. After all, the Union is deemed to respect the constitutional identity of its members states (Article 4, para. 2 TEU). Although the concept of “national identity” as embedded in domestic Constitutions is rather

vague<sup>30</sup>, at that very moment one could not avoid recalling two lengthy rulings of the German Constitutional Court that shaped the limits of European integration rather narrowly under that national constitution<sup>31</sup>. In particular, the *LissabonUrteil* held that revenue and expenditure

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30. The ECJ referred to it as a subsidiary point in *Sayn-Wittgenstein* case (ruling 22 December 2010, C-208/09, ECJ Report 2010, I-13693). In a preliminary ruling concerning the law of a Member State with constitutional status abolishing nobility, as well as the title of nobility and the nobiliary particle forming part of a surname, the ECJ acknowledged first, that “it must be accepted that, in the context of Austrian constitutional history, the Law on the abolition of nobility, as an element of national identity, may be taken into consideration when a balance is struck between legitimate interests and the right to the free movement of persons recognized under European Union law” (para. 83); second, that the refusal, by the authorities of a Member State, to recognize all the elements of the surname of a national of that State, as determined in another Member State, is justifiable *inter alia* because “in accordance with Article 4(2) TEU, the European Union is to respect the national identities of its Member States, which include the status of the State as a Republic” (para. 92). On the concept of national identity see A. von Bogdandy and S. Schill, *Overcoming Absolute Primacy. Respect For National Identity Under The Lisbon Treaty*, CML Review, 2011, 1417 et seq.

31. BVerfGE 89, 155 (Maastricht), and BVerfGE 123, 267 (Lissabon).

including external financing were included in the domestic jurisdiction of Germany (paras. 248 et seq., 252, 256), likely to be respected by the EU as a part of its national identity, for they belong to identified core areas of national competence. In the end, it can reasonably be advocated that a balance budget rule entailed a strong interference in the constitutional identity of some member states<sup>32</sup>. In that respect, the direct involvement of national parliaments through their constitutional processes of ratification is a far better solution<sup>33</sup>, instead of using secondary law tools.

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32. It is not to say that a constitutional revision necessarily requires a treaty revision. The French system, for instance, has known some modifications of its Constitution which were adopted to implement a secondary law act (J.-C. Bonichot and F. Donnat, *L'Union européenne et la Constitution de la République Française*, *Il Diritto dell'Unione europea*, 2012, 1 et seq.). However, given the importance of the balanced budget rule and its impact on the national constitution, it is arguable that a secondary law act could raise some concerns in both constitutional and EU law terms.

33. These arguments are underestimated by the scholars favouring a secondary law act. See however J.-C. Zarka, *Le traité sur la stabilité, la coordination et la gouvernance dans l'Union économique et monétaire (TSCG)*, *Recueil Dalloz*, 2012, 893 et seq.

In more general terms, the *fiscal compact* experience dramatically shows that the EU legal order lacks the capacity of a swift self-amendment. Therefore, for formal change it is reliant upon a process that does not depend on its institutional activity<sup>34</sup>. Moreover, a “17 plus” *inter se* agreement immediately raised several legal questions, notably as it touched upon a subject matter covered by EU Treaties, as well as secondary legislation, entailing the risk of inconsistencies. Indeed, the envisaged plan of a fiscal rule in order to attain a domestic balanced budget, coupled with stronger institutions surveillance over national budgets, including additional powers conferred to the Commission and to the Court of Justice, as well as new provisions on economic policy coordination and governance, posed a serious challenge in terms of legality. Admittedly, a customary rule of the law of treaties lays down a technique for modifying a multilateral treaty by only two or more parties to it<sup>35</sup>. But a modification limited to some parties

*inter se* posed several legal constraints, one of which being that the envisaged revision ought not be prohibited by the EU law. In this respect, one could assume that the EU legal order implicitly prevents them from resorting to a revision procedure different from the ones provided for in Article 48 TEU. From the broad logic of the system established by the Treaties, member states are not allowed to breach the rules laid down by Article 48 and thus cannot have recourse to alternative international law procedures to modify the treaties. In *Defrenne* the ECJ made it clear that “apart from any specific provision, the Treaty can only be modified by means of the amendment procedure carried out in accordance with Article 236 (now 48 TEU)”<sup>36</sup>.

Nonetheless, a situation of necessity required the overcoming of the UK veto. Even considering the potential inconsistency with the principles of EU legal framework, the essential need to save the common currency – not to mention the significant

integration results achieved through the EMU since the Maastricht Treaty – was perceived. Hence, *rebus sic stantibus* and bearing also in mind that any form of enhanced economic and fiscal integration would have been limited temporarily, it seems realistic to advocate that a *17 plus* agreement was feasible, if not legitimate. The expected content of the new treaty entailed some positive effects in one of the most remarkable achievements of the European integration, outweighing any potential friction with the EU legal order. In this sort of *rule of reason* perspective, one could argue that an international law instrument aiming at not derogating primary law, but at setting out additional rules could hardly be considered an incoherence with the orthodoxy of EU law. In any case, the argument according to which the EU legal framework does not prevent member states from drawing up agreements among themselves, could be evoked. In fact, the treaty of Lisbon had deleted Article 293 of the European Community Treaty (with regard to the possibility to drawing up agreements between member states in some fields). However, that could not be considered as a decisive counterargument. Tellingly, Article 273 TFUE – which allows member states to submit

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34. See in general N. Walker, *Reframing EU Constitutionalism*, in *Ruling the World? Constitutionalism, International Law and Global Governance* (J.L. Dunoff and J. P. Trachtman eds.), Cambridge, Cambridge University Press, 2009, 149 et seq., at 166.

35. See Article 41 of the Vienna Convention on the law of

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treaties (1969). Cf. *ex multis* M.N. Shaw, *International Law*, 5<sup>th</sup> ed., Cambridge, Cambridge University Press, 2006, at 838.

36. Ruling 8 April 1976, 43/75, ECJ Report, 1976, 455, para. 58.

disputes to the ECJ related “to the subject matter of the Treaties ... under a special agreement between the parties” – does not stop some member states stipulating agreements somehow concerning fields covered by the European integration process<sup>37</sup>. The mandatory condition to comply with is that the agreement must respect the Treaties, the institutional framework of the EU and its *acquis*<sup>38</sup>. Clearly, a *17 plus* treaty could not encroach upon the institutions’ attributions since, evidently, Article 5(2) and 13(2) TEU imply that the institutions act within the limit of

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37. R. Baratta, *Sulle fonti delegate ed esecutive dell’Unione europea*, *Il Diritto dell’Unione europea*, 2011, 295 et seq., whereby, as to the new provisions concerning the EU law sources, we incidentally argued that, despite the fact that the treaties no longer mention international law agreements between member states as a normative instrument anymore, such a form of cooperation remains at their disposal, as long as it is compatible with the legal framework of the EU and its founding principles.

38. See ruling 31 January 2006, C-503/03, *Commission v. Spain*, ECJ Report 2006, I-1122, para. 34 concerning the compatibility of Schengen *Acquis* with Community law. As to the legal constraints and institutional consequences when optin out of EU law see the paper presented at this Conference by B. de Witte, *International Treaties on the Euro and the EU Legal Order*.

the powers conferred to them and pursuing the objectives laid down by the treaties only. As long as those powers and objectives are neither altered, nor undermined, these rules do not prevent a vast majority of member states from providing for additional tasks with respect to some institutions<sup>39</sup>. It is worth recalling that in the *Bangladesh* case the ECJ, as well as the Advocate General Jacobs, stated that member states may confer tasks to the Commission aimed at coordinating their activities outside the treaties<sup>40</sup>. Likewise, in *EDF* case the

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39. For a similar conclusion see A. de Stree, J. Etienne, *Le Traité sur la stabilité, la coordination et la gouvernance au sein de l’Union économique et monétaire*, *Journ. dr. eur.*, 2012, 182-185, at 184 ; and B. De Witte, *European Stability Mechanism and Treaty on stability, coordination and governance: role of the EU institution and consistency with EU legal order*, cit., at 17.

40. Ruling 30 June 1993, joined cases C-181/91 and C-248/91, *European Parliament v. Council and Commission*, ECJ Report 1993, I-3713 et seq. The ECJ stated that the primary law did not prevent the Commission from being entrusted by the members states with coordinating actions which they undertake collectively on the basis of an act of their representatives meeting in the Council, by doing so acting in their capacity of representatives of their governments. Also according to the Advocate General Jacobs, where member states decide to act individually or collectively in a field within their competence, there is nothing in principle to prevent

ECJ accepted without objections the fact that the administration of the European Development Fund established by member states outside the Community budget, had been entrusted to Community institutions<sup>41</sup>.

Undoubtedly, in that context the room for action appeared tiny from an EU law standpoint. For, according to Article 41 of the Vienna convention, a *17 plus* treaty could affect neither the enjoyment of the rights of the non-euro zone countries under EU law, nor the performance of their obligations on the one hand, and could not amount to affect the effective execution of the object and purpose of EU law as a whole, on the other hand. However, one could argue that should a *17 plus* instrument enhance the existing EU mechanisms of national budget surveillance, that outcome would be consistent with the object and purpose of the EU treaties and, ultimately, consistent with the

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them from conferring to the Commission the task of ensuring coordination of such action; it is for the latter to decide whether or not to accept such a mission, provided of course that it does so in a way which is compatible with its duties under the treaties (at I-3707, para. 26). However, the ruling did not address the point.

41. Ruling 2 March 1994, C-316/91, *European Parliament v. Council*, ECJ Report 1994, I-625.

condition laid down in Article 41(1) ii of the Vienna Convention.

All in all, the approach to hold a *17 plus inter se* agreement was in principle considered viable, provided that the future treaty would have avoided inconsistencies with the law and related principles of the EU (*contra legem* provisions)<sup>42</sup>. Furthermore, it was arguable that, if needed, the provisions aimed at supplementing EU legislation (*praeter legem* provisions) could be enacted through the usual legislative procedures based on a Commission initiative, while respecting its autonomous power of initiative. Basically, it could be broadly advocated that attributing some additional tasks to both the Commission and the ECJ could not affect the rights of the states not participating in the *17 plus* Treaty, since the institutions would have continued to work in the general interest in accordance with the EU treaties.

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42. The ECJ jurisprudence is clearly oriented in the sense that the effects of multilateral mixed agreement on the bilateral relations between Member States cannot affect primary law, as well as the allocation of responsibilities defined in the treaties (see, in that regard, ruling 30 May 2006, C-459/06, MOX Plant, ECJ Report 2006, I-4635, para. 123; Opinion 1/91, ECJ Report, 1991, I-6079, para. 35, and Opinion 1/00, ECJ Report 2002, I-3493, paras. 11 and 12).

After all, the history of the EU had experienced some precedents of *pragmatic flexibility*, such as the Schengen Agreement and the Prüm Treaty, albeit regarding subject-matters relatively addressed by EU law and having a less important impact. Moreover, in *Parfums Christian Dior* even the ECJ held that three member states could establish, through an international agreement, a common judge able to refer preliminary rulings in the field of trademark covered by the *acquis*<sup>43</sup>. More generally, nobody underestimated the versatility of an intergovernmental way-out in terms of reducing the minimum number of ratifications and so avoiding risks of rejection by referendum in one or two euro zone states<sup>44</sup>.

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43. See ruling 4 November 1997, C-337/95, *Parfums Christian Dior*, ECJ Report 1997, I-6013, para. 21.

44. As expected, the Irish prime Minister, following the advice of the Attorney General, announced plans to call a referendum on the *fiscal compact* Treaty (see *The Wall Street Journal*, 29 February 2012 “Ireland to Hold A Referendum on EU Treaty”, stressing that “rest of the euro zone had nonetheless hoped to avoid such a vote, which could signal to investors that the plan to bring more fiscal unity to Europe is not well received by the people it is supposed to benefit”) to be likely held on May 31, 2012. Finally, the referendum took place with a favourable result so to enable Ireland to ratify the *fiscal compact*.

For better or worse, an *inter se* international agreement was perceived as the ultimate resort. It is a matter of course that the proper role of the EU institutions outside the EU legal framework was and remains debatable<sup>45</sup>. For instance, the ESM treaty showed that such a use was possible with the consent of all Member States, whilst the draft agreement on the unified patent litigation system is quite a counterexample<sup>46</sup>. The argument according to which Article 13(2) precludes allocation of new tasks to the institutions outside the EU legal framework unless a unanimous will to the contrary, goes too far. A treaty rule may not actually be derogated with the blessing of the 27 governments. So it is not clear that a unanimous will is required in order to attribute additional tasks to the institutions, provided that their role and

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45. Arguably, one may believe that this practice cannot be expanded without limits.

46. Indeed, the last draft agreement is still waiting for finalisation and is supposed to give a preliminary ruling competence to the ECJ, as well as some tasks to the Commission. However, it will hardly be signed by all the members states. See R. Baratta, *National Courts as ‘Guardians’ and ‘Ordinary Courts’ of EU law: Opinion 1/09 of the ECJ*, Legal Issues of Economic Integration, Vol. 38, 2011, 297 et seq.; J. Alberti, *Il parere della Corte di giustizia sul Tribunale dei brevetti europeo e comunitario*, Il Diritto dell’Unione europea, 2012, 367 et seq.

nature are not altered<sup>47</sup>. In any case, the implied assumption was that the non-participating States, having recognized the need for the euro zone to have a proper fiscal discipline and taking part in the negotiations, as observers, could ultimately acquiesce or reduce their objections to the use of the institutions on the basis of a pure international instrument, provided that the EU treaties would be respected and the functioning of the single market would not be undermined<sup>48</sup>.

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47. Opinion 1/92 ECJ Report 1992, I-2821, paras. 32 and 41; and Opinion 1/00, ECJ Report 2002, I-3493, para. 20; see also Opinion 1/09, not yet reported, paras. 74-76.

48. The Prime Minister of United Kingdom has clearly indicated that his Government will not raise objections to the recourse to EU institutions under the *fiscal compact*, provided that the interests of the United Kingdom are not threatened (“Cameron U-turn over policing of tough new euro zone rules”, *The Guardian*, 28 January 2012). However, on 31<sup>st</sup> January the Prime Minister explained to the House of Commons that “The new intergovernmental agreement is absolutely explicit and clear that it cannot encroach on the competencies of the European Union and that measures must not be taken that in any way undermine the EU single market. Nevertheless, I made it clear that we will watch this matter closely and that, if necessary, we will take action, including legal action, if our national interests are threatened by the misuse of the institutions” (House of Lords, *The euro area crisis*, HL paper 260, 30, point

Finally, it seems worth mentioning that the issues concerning the *fiscal compact*’s coherence with primary law are addressed in the several paragraphs of the preamble and in the many references to the EU rules embedded in the Treaty<sup>49</sup>; namely, Article 2, in line with ECJ case law<sup>50</sup>, sets out the principle of conformity with EU law in applying and interpreting the *fiscal compact*, and implicitly recognises the primacy of EU law over the treaty itself. Yet, this is not mere

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89). The Deputy Prime Minister took the view that the Government had agreed to co-operate with the EU by allowing euro zone countries to use the EU institutions to enforce the fiscal agreement (House of Commons, *The Treaty on Stability, Coordination and Governance in the Economic and Monetary Union: Political Issues*, cit., 23). That being said, after the signature of the *fiscal compact*, UK could, but did not actually challenge, its compatibility with the “unanimity rule” being violated. It could have indeed lodged an application against the 25 member states pursuant to Article 259 TFEU.

49. See in particular Article 3, 7 and 10, as well as several *subordination calls* included in the preamble.

50. In *Matteucci* case (27 September 1988, case C-235/87, ECJ Report 1988, 5589, para. 19), the Court held that member states are obliged to take all appropriate measures to ensure fulfilment of the EU obligations even in the case of a bilateral agreement, falling outside the scope of the EU law, concluded between them.

coincidence since some national courts<sup>51</sup> and even the Lisbon Treaty have always been cautious to admit explicitly the supremacy of EU law<sup>52</sup>. In the same vein, the commitment, to bring the *fiscal compact* treaty in the wake of the European legal framework “within five years, at most” (Article 16), should be considered<sup>53</sup>. Incorporating the

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51. In the long *Maastrichturteil* (1994) the Bundesverfassungsgericht warned of the limits of Germany’s acceptance of the supremacy of EU law, focusing in particular on the conditions attached to that principle. However, in the *Honeywell* ruling (2010) the same Court softened the conditions concerning the acceptance of EU supremacy, by stressing *inter alia* the need of a prior involvement of the ECJ before ruling on *ultra vires* act. For discussion on the primacy of EU law and its relationship with the jurisprudence of national constitutional courts see recently C. Grabenwarter, *National Constitutional Law Relating to the European Union*, in von Bogdandy and Bast (eds.), *Principles of European Constitutional Law*, 2<sup>nd</sup> ed., Hart, 2010, 83 et seq.

52. As is well known, the Treaty of Lisbon also refrained from stating the primacy of EU law over national law due to the reluctance of some governments to admit it expressly. It contains Declaration No. 17 concerning primacy stated in an opinion of the Council Legal Service.

53. The incorporation of the *fiscal compact* into the EU primary law within a five years deadline was one of the major requests of the Members of the EP who participated in the negotiation.

substance of the new treaty into the EU primary law would entail a 27 states revision at according to Article 48 TEU. At that very moment, possible inconsistencies, if any, with the EU orthodoxy would terminate.

### 3. The core of the fiscal compact

The core of the *fiscal compact* is laid down in Articles 3 and 4 of the treaty, as they respectively establish the “balanced budget rule” and the obligation to reduce a “public debt” at the ratio of 60% – *i.e.* the same level provided for since the Maastricht Treaty. Unsurprisingly, given the political atmosphere, the *fiscal compact* rules do not contain any reference either to the issue regarding the pooling of national debt, or to any form of euro-bonds or project-bonds<sup>54</sup>. In that respect, it merely engages the parties to improve the reporting of their national debt issuance both to the Council and the Commission in order to coordinate their respective plans (Article 6). Moreover, the parties facing an excessive deficit procedure are expected to set up a budgetary and economic partnership plan (including a detailed description of structural reforms) to ensure an effective and durable correction of their excessive deficit (Article 5). As indicated in point 8 of the preamble, the Commission

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54. Point 7, first sentence of the mandate (“For the longer term, we will continue to work on how to further deepen fiscal integration so as to better reflect our degree of interdependence”) could hardly be fostered in that sense.

is meant to present further legislative proposals for the euro zone in order to implement Articles 5 and 6 within the EU legal order. Secondary law acts would likely solve any issue of potential friction between those provisions and the EU normative framework.

As to the core of the fiscal discipline, Article 4 states that if the ratio of the general government debt to GDP exceeds 60%, the difference between the actual ratio and 60% should be reduced by an average of one-twentieth per year<sup>55</sup>. The final pro-

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55. “When the ratio of a Contracting Party’s general government debt to gross domestic product exceeds the 60 % reference value referred to in Article 1 of the Protocol (No 12) on the excessive deficit procedure, annexed to the European Union Treaties, that Contracting Party shall reduce it at an average rate of one twentieth per year as a benchmark, as provided for in Article 2 of Council Regulation (EC) No 1467/97 of 7 July 1997 on speeding up and clarifying the implementation of the excessive deficit procedure, as amended by Council Regulation (EU) No 1177/2011 of 8 November 2011. The existence of an excessive deficit due to the breach of the debt criterion will be decided in accordance with the procedure set out in Article 126 of the Treaty on the Functioning of the European Union”.

vision reflects what is already laid down in secondary law, despite some attempts to enhance the obligation to reduce public debt pending negotiation. For it contains a mere *renvoi* to Article 2 of Council Regulation (EC) No 1467/97, as amended by Council Regulation (EU) N° 1177/2011. This legislative measure reformed the corrective arm of the Stability and Growth Pact, which is applicable to all member states (except the United Kingdom and Denmark), aside from financial sanction addressed to euro zone states only. It was assumed that the former corrective arm of the Stability and Growth Pact, while referring mainly to the excessive deficit procedure being triggered if a member state deficit went above 3% GDP threshold, did not focus enough on the excessive debt criterion, allowing therefore a member state to run up debts of well above 60% without being sanctioned. However, it seems worth reminding that the excessive deficit procedure set out in Article 126(11) TFEU provided for sanctions, which have never been enforced.

On the contrary, Regulation N° 1177 deters both *excessive deficit* and *excessive debt* and, if they oc-

cur, provides for prompt correction. In short, as to the ratio of government debt to GDP, Article 2 of the Regulation states that the Council and the Commission take into account all the relevant factors and the economic and budgetary situation of the member state concerned, whilst considering the level and evolution of the debt and its overall sustainability, as well as the business cycle. Broadly speaking, this evaluation of the ratio of the government debt requires that the latter be sufficiently diminishing and approaching the reference value at a satisfactory pace, whilst providing a transitional period of three years. Article 4 of the *fiscal compact* endorses these normative elements of secondary law.

The other key provision of the *fiscal compact* is the *balanced (or in surplus) budget rule*, set out in Article 3(1)(a), which is essentially based on the model of *debt brake* laid down in the German

Constitution<sup>56</sup>. Pending the negotiation of the *fiscal compact*, the requirement to implement that rule at national level has been downgraded to a “preferably” constitutional level (from “constitutional or equivalent level”). It refers directly to the general government budget, but it is clear that the practice of accumulating debt outside the general government account undermines the attainment of the Union’s objectives in the framework of the EMU and amounts to a violation of the treaty rules, and in particular of Article 4, para. 3 TFEU. The balanced budget rule indicates a common will of the parties to embrace serious constraints on their sovereign rights when adopting the annual budgetary laws by limiting public indebtedness at an early stage. Despite the fact that this rule is a clear “addition” to the existing rules of EU law, not addressed by the *Six pack*<sup>57</sup>, and only mentioned in the Commission *Two pack* proposal<sup>58</sup>, it

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56. See *infra* footnote 68.

57. See for a different opinion *Editorial. The Fiscal Compact and the European Constitution: Europe Speaking German*, *European Constitutional Rev.*, 2012, at 6.

58. Article 4(1) of COM(2011) 821 final; C. Callies, C. Schoenfleisch, *Auf dem Weg in die europäische “Fiskalunion”? – Europa- und verfassungsrechtliche Fragen einer Reform der Wirtschafts- und Währungsunion im*

pursues and enhances the fulfilment of the general goals of the Union. Clearly, that rule entails no inconsistency with the 3% GDP threshold laid down in Protocol N° 12. The latter is a *ceiling* which does not prevent states to commit themselves in a stricter way. In other words, they are not conflicting provisions, the compliance with the former implying no violation of primary law and vice versa. As a result, there is no need to apply the coordination clause provided for in Article 2(2) of the *Fiscal compact*.

Being somewhat different from the ‘Golden Rule’<sup>59</sup>, the balanced budget rule also seems to provide for four elements of flexibility. First, it is worth considering the presumption according to which the obligation is deemed to be respected if the annual structural balance has a structural deficit of 0,5%. This figure is raised to 1% for states having a public debt significantly below

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*Kontext des Fiskalvertrages*, cit., at 482.

59. Generally speaking, a “Golden Rule” implies that the net of investment spending must be in balance or in surplus. It is derived from the macroeconomic view according to which governments, in the economic cycle, cannot borrow money for the current spending, but only for investments favouring future generations.

60%<sup>60</sup>. However, this provision is defined in terms of the rapid convergence towards the medium-term objective (MTO), pursuant to Regulation N° 1466/97 as amended by Regulation N° 1175/2011<sup>61</sup>. The convergence process entails the consideration of the country-specific sustainability risks, whilst the relevant progress towards the MTO is subject to evaluation in line with the Stability and Growth Pact<sup>62</sup>.

Second, the time-frame for such convergence, as proposed by the Commission, takes into account the relevant “sustainability risks” for each party. The time for convergence (and the “progress”

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60. Article 3(1)(d).

61. This analysis tentatively excludes in itself any risk of incompatibility with the 3% maximum deficit laid down in the TFEU. For a different explanation taking into account that threshold see B. De Witte, *European Stability Mechanism and Treaty on stability, coordination and governance: role of the EU institution and consistency with EU legal order*, cit., at 16.

62. Article 3(1)(b). As a consequence, it seems possible that even if the two figures do not collimate with the relevant rules of that Regulation, they would still be considered in line with this provision. One can even argue that states may accumulate a structural surplus, *i.e.* a positive income balance over expenditures, without taking into account the interests paid on public debt, and yet be considered compliant with the balanced budget rule.

towards the MTO) is evaluated on the basis of an overall assessment with the structural balance as a reference, including an analysis of expenditure net of discretionary revenue measures<sup>63</sup>.

Third, in exceptional circumstances states may temporarily deviate from their respective medium-term objective or the adjustment path towards it<sup>64</sup>. Exceptional circumstances include an “unusual event outside the control of the Contracting Party concerned which has a major impact on the financial position of the general government”, as well as “periods of severe economic downturn”, causing a temporary deviation in the budget that “does not endanger fiscal sustainability in the medium term”<sup>65</sup>. As a result, the treaty does not seem to prevent a party hit by a natural disaster, or a severe economic blow, to adopt some measures of fiscal stimulus.

Fourth, the rule provides for a sort of a *de minimis* principle since only *significant* deviations – that is to say, having an appreciable effect on the commitment undertaken by the relevant state – from the virtuous budgetary conducts entail the

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63. Article 3(1)(b).

64. Article 3(1)(c).

65. Article 3(3)(b).

automatic triggering of a correction mechanism aimed at implementing measures to correct the deviations over a period of time<sup>66</sup>. It is worth noting that the correction mechanism shall be put in place by states at national level in accordance with the principles established by the Commission. As a consequence, this institution acquires a relevant normative power to guide national legislation in terms of common principles regarding “in particular” (the list is thus not exhaustive) the nature, the size and time-frame of the corrective action to be automatically undertaken, also in cases of exceptional circumstances, and the role and independence of the national institution to monitor the compliance with the balanced budget rule<sup>67</sup>. This normative power is institutionally quite delicate and should be carefully evaluated when transposing the *fiscal compact* into the EU legal framework.

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66. Article 3(1)(e).

67. Article 3(2).

## 4. The limited role of the ECJ as regards the respect of the *fiscal compact* rules

The balanced (or in surplus) budget rule (Article 3) plays a pivotal role in the architecture of the *fiscal compact*. The treaty makes it clear by posing constraints on the implementation of the rule in question at national level, as well as by attributing to the ECJ the power to adjudicate over the proper implementation pursuant to Article 8<sup>68</sup>. It may be noted that the treaty empowers the ECJ solely if a party is alleged to have failed to correctly transpose the balanced budget rule into the domestic law<sup>69</sup>. Other violations of the treaty fall within the

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68. The rule must be implemented, within one year from the entry into force of the Treaty, in the domestic law “through provisions of binding force and permanent character, preferably constitutional, or otherwise guaranteed to be fully respected and adhered to throughout the national budgetary processes” (Article 3(2)).

69. Some member states have started a process of introducing a balanced budget rules even before the *fiscal compact* treaty was negotiated. In 2011, the Italian Parliament approved a first round of a constitutional reform incorporating a balanced budget obligation into

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Article 81 of the Italian Charter. The Constitutional reform of Article 81 was finalized on 17 April 2012, when the Senate approved it with a majority superior to two thirds of the Parliament, which prevents the holding of a referendum (provided for by the Italian Constitution in cases where reforms are adopted under a simple majority). The new Article 81, which takes effect from 2014, obliges the State as a whole to ensure the balance between budget revenue and expenditure, taking into account situations of adversity and favorable phases of the economic cycle (“l’equilibrio tra le entrate e le spese del proprio bilancio, tenendo conto delle fasi avverse e delle fasi favorevoli del ciclo economico”). Moreover, the borrowing is permitted for the purpose of considering the effects of the economic cycle only, and with the approval of both Houses by absolute majority if exceptional events occur (“il ricorso all’indebitamento è consentito solo al fine di considerare gli effetti del ciclo economico e, previa autorizzazione delle Camere adottata a maggioranza assoluta, al verificarsi di eventi eccezionali”). Finally, the reform gives the ordinary law the task to define the exceptional events that allow the state to exceed the balanced budget rule. In these cases, the Italian Government shall however present a readjustment plan so that a deficit spending must be redressed or recovered in the subsequent year, without turning out in a new public debt. An ordinary law, adopted by the absolute majority of the Parliament, will set up the basic rules and criteria to ensure that

ordinary international law rules on responsibility. Indeed, the Court has to verify compliance with two essential obligations only – (i) timely implementation (within one year, after the entry into force of the treaty) of the budget rule via binding provisions of permanent character, “preferably constitutional”; (ii) the setting up at national level of the mentioned correction mechanism on

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the balanced budget rule is implemented, as well as the sustainability of the public debt (see V; Lippolis, N. Lupo, G.M. Salerno, G. Scaccia (eds.), *Costituzione e pareggio di bilancio*, Jovene ed., Naples, 2011). The Italian constitutional reform has been considered as a “further major improvement in fiscal governance” and “another sign of Italy’s commitment to sound public finances” (*Commission staff working document. Assessment of the 2012 national reform programme and stability programme for Italy*, SWD(2012) 318 final, Brussels 30.5.2012, 4). Other member states have already reformed their respective Constitutions long the same line. In 2009, the *Grundgesetz* was amended to insert the *Schuldenbremse* (debt brake), a balanced budget provision. The reform will be applied in 2016 for the state and 2020 for the regions. As to Spain, an amendment to article 135 of the Spanish constitution provided for a cap on the structural deficit of the state (national, regional and municipal). The amendment will come into force as of 2020 (J.-V. Louis, ‘*Les réponses à la crise*’, *Cahiers de droit européen*, 2011, 360; ‘*Editorial. The Fiscal Compact and the European Constitution: Europe Speaking German*’, cit., 2, footnote).

the basis of common principles to be proposed by the Commission, presumably via secondary EU legislation<sup>70</sup>. Other obligations stemming from the balanced budget rule do not fall within the power of the ECJ to adjudicate. In other words, the parties, and the euro zone states in particular, are indeed committed to comply in an effective manner with that rule in each economic cycle, but cases of alleged non compliance outside the scope of Article 8 fall under the classical regime of international law responsibility. In that respect, the treaty provides (understandably) no jurisdictional control of the ECJ. Furthermore, while reflecting a somewhat new attitude of the governments as regards the involvement of the ECJ in assessing compliance with obligations related to budgetary situations, Article 8 does not collide with the limited role of the ECJ provided for in Article 126(10) TFEU, given their different scopes<sup>71</sup>.

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70. A view has been suggested so as to enlarge the role of the ECJ to adjudicate disputes between the parties concerning the rules of title III of the treaty (A. Viterbo, R. Cisotta, *La crisi del debito sovrano e gli interventi dell’U.E.*, cit., at 359). This suggestion goes beyond the intention of the contracting parties, as reflected in Article 8.

71. *Contra* J. Ziller, *The Reform of the Political and*

The power to adjudicate is derived from Article 273 TFEU<sup>72</sup>. Thus, it is assumed that the ECJ acts as a judge in a dispute between member states of the EU related to the subject-matter of the EU Treaties. In other words, the dispute is submitted to the Court under a special settlement of disputes clause contained in Article 8. The ECJ will take a binding decision which, if not implemented, can be followed by another proceedings before the same Court with a penalty up to 0.1% of the GDP of the relevant State<sup>73</sup>. This amount will be payable to the European Stability Mechanism if the country’s currency is the euro, otherwise to the general budget of the EU. Needless to stress that, given the binding nature of the ruling, the *fiscal compact* does not alter the basic judicial character

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*Economic Architecture of the Eurozone’s Governance. A Legal Perspective*, cit., 131-132, who seems to conceive Article 8 as having a larger scope.

72. See the preamble, recital 15 and Article 8(3) of the treaty. Likewise, on the basis of Article 273 of the TFEU, Article 37 of the ESM treaty attributes the power to adjudicate a dispute arising between member states and the ESM, or between member states, in connection of the interpretation or the application of the treaty, if a member state contests the decision given at first degree by the Board of Governors of the ESM.

73. Article 8(2).

of the ECJ. It can be noted that Article 8(1) and (2) have the same purpose, *i.e.* to ensure the effective implementation of the balanced budget rule into domestic law. The fact remains however that they constitute two different procedures each having its own object – Article 8(1) is designed to obtain a ruling that the conduct of a contracting party failed to correctly implement the balanced budget rule into domestic law and to terminate that conduct, whilst the procedure laid down in Article 8(2) has a more narrow object, that is to say to decide whether a defaulting party did not comply with the judgment of the ECJ upon finding that failure. That being said, it seems quite obvious to assume that the possibility of a second judgment by the ECJ and the related penalty have been included in the treaty mainly as a deterrent. One should expect that a second negative ruling will not occur, at least in principle.

This special clause has the plain purpose of including the dispute settling mechanism of the *fiscal compact* within the EU legal framework by dint of Article 273 TFEU. Furthermore, Article 8 aims at **de-politicising the perspective of bringing a dispute before the ECJ concerning the im-**

plementation of the rule into domestic law<sup>74</sup>. This explains both the central, but limited, role given to the Commission in issuing a report on whether a party implemented the balanced budget rule into domestic law; and the automaticity of the ECJ involvement, should the Commission report negatively against a party (“.. the matter will be brought to the Court of Justice ... by one or more Contracting Parties”). This is not to say that the Commission will be a party in the proceedings. This outcome would hardly be in compliance with the EU legal framework. Quite to the contrary, only states collectively<sup>75</sup> or unilaterally<sup>76</sup> – and, in the latter case, regardless of the Commission’s report – have the legitimacy to lodge a case against another state. The dispute remains strictly intergovernmental even in the case where a party persists in not taking the necessary implementing measures after the first judgement of the ECJ. Yet, this second action is not automatic and unilateral in

kind (“a Contracting Party ... may bring the case before the Court of Justice ...”).

Finally, it is noteworthy that on March 2<sup>nd</sup>, 2012 all the signatories agreed to annex to the *Minutes of the Signing of the Treaty* six “Arrangements Agreed” deemed to be applied in relation to Article 8(1), second sentence, should the Commission conclude in a report to the parties that one of them has failed to comply with Article 3(2) of the *fiscal compact*. The aim of the Arrangements is to enhance the automaticity of the judicial control by construing the action as a collective and obligatory tool – within three months of the Commission’s report, the ‘Trio of Presidencies’ (as set out in Annex I to Council Decision 2009/908/EU of 1 December 2009) will lodge an application “in the interest of, and in close cooperation with, all the Contracting Parties”. Minimizing the politi-

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74. As is known, member states are unwilling to dispute amongst themselves, as the practice related to Article 259 infringements illustrates.

75. Article 8(1), second sentence.

76. Article 8(1), third sentence.

cisation of the dispute is the aim pursued by the Annex. In addition, the same Arrangements will also be used in relation to Article 8(2), should the Commission assess that a party has not taken the necessary measures to comply with the judgment of the ECJ provided for in Article 8(1) of the Treaty<sup>77</sup>.

The legal status of the Arrangements is to be evaluated having in mind that they were not included in the text opened for ratification by the parties. Thus, the consent of the parties to be bound by the Arrangements is not presumed. This could raise uncertainty since the Vienna Convention on the law of treaties does not address this situation in a conclusive way<sup>78</sup>. Even international case law shows ambiguity on the consequences of a given treaty being silent on the status of documents related to it. Indeed, according to an old ruling of the International Court of Justice (ICJ), if a document, which is separated from a treaty, is

part of the ratification process, this may amount to an important element for assessing its binding force<sup>79</sup>. However, more recent decisions of the ICJ have endorsed a less formal approach by regarding above all the actual terms and the particular circumstances in which a given agreement was drawn up<sup>80</sup>. It would follow that, considered in the perspective of the customary law of treaties,

the lack of ratification does not necessarily entail that the Arrangements in questions are deprived of any legal status. As a minimum, they should be at least considered as a means of interpretation of the treaty in accordance with Article 31(2)a of the Vienna Convention. As a collateral consequence, when applying the rules of procedure of the ECJ, the Arrangements should presumably be communicated to it, in case Article 8 of the *fiscal compact* is triggered.

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77. Doubts may be raised as to the consistency of the *Arrangements* with the nature (non automatic and unilateral) of the action laid down in Article 8(2).

78. M. Dixon, *Textbook on International Law*, 6<sup>th</sup> ed., Oxford, Oxford University Press, 2007, 64; see also M.N. Shaw, *International Law*, cit., 820.

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79. In the *Ambatielos* case, the ICJ argued that since the United Kingdom regarded a declaration as part of the process concerning the ratification of a treaty, it was not possible for the Court to hold that the declaration was not included in the treaty (see *Ambatielos* case (jurisdiction), Judgment of July 1st, 1952, ICJ Reports 1952, 28 et seq., 43).

80. See the case concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain (*Qatar v. Bahrain*)(Jurisdiction – First Phase), ICJ Reports, 1994, 112 et seq., paras. 22 to 30 (for further reference to its own jurisprudence). So it seems reasonable to argue that the need for a formal ratification to putting an agreement into operation, does not reflect the current development of international law, regardless of the fact that issues of consistency with domestic law may arise (R. Baratta, *Trattato internazionale, Dizionario di diritto pubblico* (S. Cassese ed.), vol. VI, Giuffrè, Milan, 2006, 5966 et seq.). That seems even more arguable if one considers that a treaty “may be made or concluded by the parties in virtually any manner they wish. There is no prescribed form or procedure ...” (M.N. Shaw, *International Law*, cit., 815).

## 5. Pursuing a reverse qualified majority in the decision-making of the excessive deficit procedure

Another key provision of the *fiscal compact* is set out in Article 7. It reflects the original will of some euro zone virtuous states, pointed out early December 2011, to amend Article 126 TFEU, whereby it requires the Commission to monitor states' excessive deficit and debt. In the end, the institution proposals would apply unless a qualified majority rejects them. As exposed above, a revision of the treaties could not be pursued.

As an alternative, Article 7 requires the euro zone states to support the Commission proposals or recommendations if one of them “is in breach of the deficit criterion in the framework of an excessive deficit procedure”, *i.e.* pursuant to Article 126 TFEU. The ultimate purpose of the rule is to facilitate the adoption of the measures proposed by the Commission in the course of that procedure leading to a Council decision. Their approval is deemed to become semiautomatic. For it is just founded on the reversed qualified majority principle<sup>81</sup>. In other words, the euro zone

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81. Article 7 reads as follows: “While fully respecting the

states have accepted to endorse the Commission proposal, unless a qualified majority of them – calculated by analogy with the relevant provisions of the EU treaties and without taking into account the position of the state concerned – rejects it.

Given that Article 7 cannot deviate from the decision-making process laid down in Article 126 TFEU<sup>82</sup>, it must be assumed that the former ap-

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procedural requirements of the Treaties on which the European Union is founded, the Contracting Parties whose currency is the euro commit to supporting the proposals or recommendations submitted by the European Commission where it considers that a Member State of the European Union whose currency is the euro is in breach of the deficit criterion in the framework of an excessive deficit procedure. This obligation shall not apply where it is established among the Contracting Parties whose currency is the euro that a qualified majority of them, calculated by analogy with the relevant provisions of the Treaties on which the European Union is founded, without taking into account the position of the Contracting Party concerned, is opposed to the decision proposed or recommended”.

82. It is worth recalling that, in accordance with Article 2, the *fiscal compact* must be applied and interpreted by the Contracting Parties in conformity with the Treaties

plies, so to say, *outside* the EU legal framework. Actually, the semi automatic approval by the Council of the Commission proposals in the excessive deficit (criterion) procedure, raises some issues of consistency with primary law. The reverse qualified majority rule is not unknown in the decision-making process of the EU. Derived from the old *comitology* system, within the current EU institutional architecture that rule is applicable when the Commission adopts both delegated and implementing acts (namely, under the examination procedure of the new *comitology* system). In terms of institutional balance, as we tentatively explained elsewhere<sup>83</sup>, this peculiar rule enjoys a rationale whenever the treaties directly confer to the Commission the competence to adopt that kind of acts. In that respect, the reverse qualified majority rule enhances the role of the Commission, given the double legal assumption that it has to pursue the general interests of the Union (Article 17 TEU) and that it must comply with the principles, rules, conditions and controls predetermined by the legislator pursuant to Articles 290(1) and 291(3) TFEU. A normative “third degree” function fits in within the EU framework and is coherent with the

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on which the European Union is founded.

83. R. Baratta, *Sulle fonti delegate ed esecutive dell'Unione europea*, cit., 293 et seq.

separation of power principle since the treaty and the legislator set limits on the Commission adoption of delegating and implementing act.

On the contrary, doubts arise as to the “obligation” of the euro zone states to support the Commission proposals unless a qualified majority of them is opposed in the domain of an excessive deficit procedure. For there is no legal basis in the EU primary law to do so, the power to approve a given proposal (or recommendation) of the Commission being founded on an international law rule, which is the nature of Article 7 of the *fiscal compact*. Therefore, it seems questionable whether the Council can legitimately deviate from the default rule of positive qualified majority rule provided for in Article 16(3) TEU, which is applicable to the decisions adopted under Article 126 TFEU<sup>84</sup>. The fact that the rule in question

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84. For a different analysis focusing on the principle of loyal cooperation as a mens to explain the compliance of Article 7 with EU primary law, see A. de Streel, J. Etienne, *Le Traité sur la stabilité, la coordination et la gouvernance au sein de l’Union économique et monétaire*, cit., 184-185 ; see also the paper presented at this Conference by W. Van Aken, *A Comparative Analysis of Reverse Majority Voting. The Reinforced Stability and Growth Pact and the Fiscal Compact*.

fosters the achievement of euro zone objectives seems to have relative importance. Another approach is that the legal obligation to support the Commission’s evaluation when a euro zone state is in breach of the deficit criterion, is to be construed as a commitment which operates *outside* the Council and, as a consequence, before such an institution proceeds in the vote. This line of reasoning would entail that Article 7 does not ultimately affect primary law<sup>85</sup>. However, in order to safeguard the coherence with the treaty, the measure proposed or recommended by the Commission must be approved by the qualified majority of the Council members. In other words, the functioning of Article 7 entails that governments not forming (outside the Council) a blocking *majority* against the Commission measure are expected to approve it when they

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85. This seems to be the clear intention of the signing states according to the *incipit* of Article 7 (“While fully respecting the procedural requirements of the Treaties on which the European Union is founded ...”). For a positive evaluation of this provision see C. Callies, C. Schoenfleisch, *Auf dem Weg in die europäische “Fiskalunion”? – Europa- und verfassungsrechtliche Fragen einer Reform der Wirtschafts- und Währungsunion im Kontext des Fiskalvertrages*, cit., 482-483.

enter the Council. In this respect, the added value of Article 7 is not to be underestimated<sup>86</sup>.

Article 7 raises another issue concerning its scope, which is explicitly limited to the excessive deficit procedure as regards the *deficit criterion*. By doing so, the wording of Article 7 complied exactly with the mandate of 9th December 2011, which did not mention the second *volet* of the excessive deficit procedure at all, *i.e.* the *debt criterion*. As is well known, according to Article 126 TFEU, the Commission is entitled to monitor the budgetary situation and the stock of government debt of member states with a view to identifying gross errors on the basis of two criteria – the government deficit to GDP if it exceeds a given reference value (3%), as well as the government debt to GDP if it exceeds a predetermined benchmark (60%)<sup>87</sup>.

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86. The analogy of Article 7 with the so-called “Ioannina compromise” of 1994 is quite limited, however. For that compromise amounted to a political agreement finalized to achieve an accord among governments, whilst Article 7 of the *fiscal compact* sets out a legal obligation. In any event, when incorporating the *fiscal compact* into the legal framework of EU primary law, at the latest within five years of its entry into force (Article 16), it appears inevitable to revise Article 126 TFEU in accordance with the reversed qualified majority rule.

87. These two criteria have been fixed by Article 1 of

The more limited scope of Article 7 entails that it is not *per se* applicable to the excessive deficit procedures relating to the *debt criterion*. Certainly, at the very end of the negotiation, Article 4 of the *fiscal compact* has been completed by adding a last sentence: “the existence of an excessive deficit due to the breach of the debt criterion will be decided according to the procedure set out in Article 126 of the Treaty on the Functioning of the European Union”. However, it does not but restate the obvious necessity to respect the scope of Article 126 and can not have any consequence in terms of expanding the euro zone’s undertaking laid down in Article 7. That being said, it must be acknowledged that the obligation to decide on the basis of the reversed qualified majority does already exist in the excessive deficit procedures related to the debt criterion. Indeed, with the aim of achieving the effective enforcement of the budgetary surveillance in the euro area, Regulation N° 1173/2011 already provides for the reverse qualified majority voting in two key passages of the excessive deficit procedure<sup>88</sup>. Moreover, it

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Protocol N° 12 on the excessive deficit procedure annexed to the Lisbon treaty.

88. First, when the Council obliges a euro zone state to lodge a non-interest-bearing deposit amounting to 0.2% of its

seems likely that when transposing this rule in the EU legal framework the scope of this voting rule will be enlarged.

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GDP in the preceding year (Article 5(2)). Second, when the Council imposes a fine of the same amount against a state that has not taken effective action to correct its excessive deficit (Article 6(2)). Needless to say that these two provisions do not affect the (positive) qualified majority vote in the Council pursuant to Articles 126(6) and 126(8) in conjunction with the default rule enshrined in Article 16(3) TEU. Indeed, Articles 5(2) and 6(2) have to be construed as implementing measures adopted by the Council on the basis of a previous decision approved at (positive) qualified majority vote pursuant to 126(6) and 126(8) respectively.

## 6. The economic policy coordination, convergence and governance of the euro area

Finally, the *fiscal compact* contains a limited (perhaps too limited) number of provisions on the coordination and convergence of member states' economic policies and on governance in the euro area.

As to the coordination of national policies – one of the insufficiencies of the Maastricht legal framework – under Article 9 the parties endorse quite a generic commitment to enhance economic policy coordination as defined by the relevant rules of TFEU. Indeed, they “undertake to work jointly towards an economic policy that fosters the proper functioning of the economic and monetary union and economic growth through enhanced convergence and competitiveness”. Even the general commitment to pursue economic growth (promoting “competitiveness” and “employment”) through the “necessary actions and measures”, seems to be designed in terms of a programmatic provision which again needs to be balanced with contributing “further to the

sustainability of public finances and reinforcing financial stability”. These rules are completed with the commitment, provided for in Article 11, to work “towards a more closely coordinated economic policy”, so that the parties are expected to discuss ex ante “all major economic policy reforms” and, “where appropriate”, to coordinate among themselves. In the same vein, Article 10 concerns only the euro zone states and urges them to make use “whenever appropriate and necessary” of existing procedures in the TFEU to support measures in accordance with Article 136 TFEU and the relevant provisions of the treaties under the enhanced cooperation procedure. Given its wording Article 10 is not prescriptive<sup>89</sup>. It rather envisages forms of enhanced cooperation measures limited to the euro area states, possibly in the field of taxation (the so-called Tobin tax

89. *Contra* L.S. Rossi, ‘Fiscal Compact’ e Trattato sul Meccanismo di Stabilità, cit., at 298.

could be a first experience). In that respect, it seems quite realistic to highlight that an increased use of these normative means by the euro zone states (but not necessarily all of them) could move some of them towards a more integrated process, leaving the others to the periphery of the Union. A sort of Two-Speed Europe may take shape<sup>90</sup>. This seems all the more true if one looks at the governance of the euro area. The *fiscal compact* codifies, as mentioned, the practice of Euro Summit informal meetings, which will take place “when necessary, and at least twice a year”<sup>91</sup>, and therefore (understandably) leaves open the possibility to convene extra meetings. The establishment of this new high level body reflects a recent institutional practice, taking place since the sovereign debt crisis affected some euro zone countries. On 2<sup>nd</sup> March 2012, while signing the *fiscal compact*, the euro area heads of state or government unanimously appointed Mr. Herman

90. This evolution has been suggested by G. Maganza, ‘Can the Enlarged European Union Continue To Be That United?’, *Fordham International Law Journal*, 2011, 1269 et seq.

91. Article 12(2) first part.

Van Rompuy as President of the Euro Summit<sup>92</sup>, the simple majority however being the voting rule for appointment<sup>93</sup>. The task of this new body is to discuss questions relating to the specific responsibility regarding the single currency, issues related to the governance of the euro area and the rules applicable to the governance itself, as well as the strategic orientations for conducting economic policies to increase convergence in the euro area<sup>94</sup>.

All heads of state or government of the euro zone – having no regard to their ratification of the *fiscal compact* – “meet informally”, together with the Commission and the President of the ECB<sup>95</sup>. The participation in discussion is also open to the Contracting states not being party of the euro zone, if the agenda touches upon some defined items, *i.e.* the competitiveness, the modification of the global architecture of the euro

area and the related fundamental rules, as well as “when appropriate and at least once a year” some “issues of implementation” of the *fiscal compact*<sup>96</sup>. This wording clearly shows the need to reach a compromise between, on the one side, the euro zone states pursuing the establishment of a new body tailored for the objectives for which they only bear responsibility, and on the other side, the non euro zone states which feared being put on the outside when discussing the core of the future economic governance.

The sensitive point is the minimal involvement of the European Parliament – its President may be invited to be heard and the institution as a whole is deemed to receive *ex post* a report by the President of the Euro Summit<sup>97</sup>. Unsurprisingly, this feature of the *fiscal compact* has been deeply criticised by the European Parliament<sup>98</sup>. Consequently, it seems likely that the institution which enjoys the directly democratic investiture shall make use of all its powers for any follow-up of the Euro

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92. See the *Statement Euro area Heads of State or Government*, SN 1670/2/12 REV 2 (Brussels, 2 March 2012). See also Agence Europe 02/03/2012 - *Van Rompuy to chair both EU27 and EU17*.

93. Article 12(1), second paragraph.

94. Article 12(2) last part.

95. Article 12(1), first paragraph.

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96. Article 12(3).

97. Article 12(4).

98. J.-C. Zarka, *Le traité sur la stabilité, la coordination et la gouvernance dans l'Union économique et monétaire (TSCG)*, cit., 898-899.

Summit whenever it requires implementation at secondary law level. Indeed, a follow-up in the EU legal framework is an envisaged possibility, given the participation of the President of the Commission to the meetings and the fact that the Euro Group is charged *inter alia* to perform the Euro Summit meetings<sup>99</sup>.

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99. Article 12(4), last part, which provides also that the President of the Euro Group may be invited to attend the meeting for that purpose.

## 7. The *fiscal compact* in the light of the principle of democracy

The normative instruments adopted to tackle the financial crisis of the euro zone – notably the *Six Pack* and the *fiscal compact* – show both merits and grey areas. They are aimed at reinforcing the constraints upon the national authorities of euro zone states, in particular of those whose public finances and fiscal policy are under the supervision of both Council and Commission. As already pointed out above, Article 5 of the *fiscal compact* provides that a party which is subject to an excessive deficit procedure would have to submit to the Commission and the Council “*a budgetary and economic partnership programme including a detailed description of the structural reforms which must be put in place and implemented to ensure an effective and durable correction of its excessive deficit.*” Rescue funds and ECB *activism* are illustrative of the advantages of safety nets that some states actually received or may receive in return. Incidentally, it seems worth noting that even virtuous states continue to take advantage, both in

economic and political terms, from participation in the Union<sup>100</sup>.

In the complex scenario of the new economic governance partially stepping outside the EU framework<sup>101</sup>, what seems to matter is that the national

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100. It would be wise not to underestimate those elements when biasing the restriction to national sovereignty implied by the participation to the EU or when pleading restitutions of some decision-making power to the member states. Pending the financial crisis some argued, even in Germany, for the exit of Greece from the euro zone or for the abandoning the common currency to get back to national currencies. A group of German economic experts replied that the “disadvantages would definitively outweigh the advantages for Germany”: see German Council of Economic Experts, *Annual Report 2011-2*, 95 et seq. Undoubtedly, the participation in the Union has historically produced a set of advantages for each member in a game that, in political and economical terms, is clearly “a positive sum game” (E. van Veen, *The Valuable Tool of Sovereignty: Its Use in Situations of Competition and Interdependence*, cit., 17 et seq.).

101. *Supra* par. 2 with regard to the dilemma of adopting the *fiscal compact* rules under international law of the treaties or as a secondary law instrument. For

budgetary autonomy is going to be affected all the more in terms both of a duty to reduce government debt<sup>102</sup>, and to enact programs of structural reforms to ensure an effective correction of excessive deficits<sup>103</sup>. These obligations affect the national autonomy to determine the level and distribution of public spending, as well as its funding. In practice, Articles 3, 4 and 5 of the *fiscal compact* are mandatory in terms both of the results to be achieved, and of social and economic instruments to use internally to pursue the same results. Although the adoption of national budgets pertains to national parliaments, the Commission and the Council have the competence to review the obligations of the *pays sous programme* and to monitor their correct implementation. As a matter of fact, the space left to national parliaments to deviate from objectives provided for in the relevant

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a more general doctrine debate on the ‘treaty games’ touching upon matters related to the EU system, see the thorough analysis of B. De Witte, *Treaty Games – Law as Instrument and as Constraint in the Euro Crisis Policy*, Governance for the Eurozone: Integration or Disintegration (F. Allen, E. Carletti, S. Simonetti, Eds.) FIC Press, Philadelphia, 2012, 139-160).

102. *Supra*, par. 3.

103. *Supra*, paras. 5 and 6.

excessive deficit procedure, even in terms of debt criterion, is extremely tiny, if any. To say the least, governments of indebted states will be prevented from exercising expansionary fiscal policies.

The problem is that these constraints do not flow from a mature democratic political process<sup>104</sup>.

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104. The scope of this paper leaves no room for considering the more general issue of the so-called democratic deficit of the EU. In that respect the literature is remarkable in terms both of its quantity and heterogeneity (see *ex multis*, *Debating the Democratic Legitimacy of the European Union* (B. Kohler-Koch & B. Rittberger, eds), Rowman & Littlefield Publ. Group, Lanham, Maryland, 2007, *passim*; V. Cuesta Lopez, *The Lisbon Treaty’s Provisions on Democratic Principles: A Legal Framework for Participatory Democracy*, European Public Law, 2010, 123 et seq.). One of the most acute critics of the EU system is Joseph Weiler: given the “non demos”, the EU lacks the structural conditions to become a genuine democratic system. He stresses *inter alia* that the transfer of national powers to the supranational system removes these powers from the control of national parliaments (J.H.H. Weiler, *The Constitution of Europe*, Cambridge University Press, 1999, 264 et seq.). This concern is further exacerbated by the weakness of the European Parliament. The author also points to the lack of proper European-wide elections, arguing that the European Parliament elections are ultimately simple national popularity contests (see recently J. Weiler, *Democracy and limits of EU competence*, Challenges of Multi-tier Governance in

Indeed, the normative instruments adopted to tackle the financial crisis – while confirming the paradigm of the supranational model of the Union<sup>105</sup> – show structural shortcomings in terms of

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the EU – Workshop 4<sup>th</sup> October 2012, 31-32, arguing that the two most fundamental features of any democracy which connect the people to governments - in that respect see the concept of democracy according to K. Popper, *All Life is Problem Solving*, Routledge, New York, 2010, 93 et seq. -, the principle of accountability and the principle of representation, have no place in European politics). Although a different and more pragmatic approach could be suggested, noticing the existence of other models of democracy for the EU that does not have a state-like character (A. von Bogdandy, *The European Lesson for International Democracy: The Significance of Articles 9-13 EU Treaty for International Organizations*, EJIL, 2012, 315 et seq.; J. Habermas, *The Crisis of the European Union in the Light of Constitutionalization of International Law*, EJIL, 2012, 335 et seq., at 339-345), the evolution of the EU economic governance will have to pay more attention to the criticism addressed to the EU system.

105. The new discipline is meant to be a step forward to a more sophisticated level of integration, being it conceived as an irrevocable step in a fostered construction of the EMU, as reiterated by Heads of state and government when they reached the political agreement on the *fiscal compact*. In a joint declaration called “Agreed lines of communication by euro area Member States” (30 January 2012), they declared that the *fiscal compact* “represents a major step forward

democratic legitimacy. This seems all the more so if one considers the limited role reserved to the European Parliament in the economic governance of the EU<sup>106</sup>. In this scenario, more democratic legitimacy has to be injected by means of the national systems, as the *Bunerverfassungsgericht* rightly demanded with regard to the rescue funds instruments recently adopted by the euro zone states<sup>107</sup>. However, this is true only if national par-

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towards closer and irrevocable fiscal and economic integration and stronger governance in the euro area”.

106. As is well-known, the primary law provides for no significant role to the EP when adopting broad guidelines of the economic policies of the member states and monitoring their economic developments under the *multilateral surveillance procedure* (Article 121 TFEU), and when monitoring the budgetary situation with regard to both governments deficit and debt under the *excessive deficit procedure* (Article 126 TFEU).

107. See the ruling 7 September 2011 (on the applications 2 BvR 987/10, 2 BvR 1099/10 e 2 BvR 1485/10) concerning the compliance of the German laws authorizing financial aid to Greece with Articles 38, 110, 115 and 14 of the *Grundgesetz*; see also ruling 28 January 2012 (on the application 2 BvR 8/11). See L. Dechâtre, *La décision de Karlsruhe sur le mécanisme européen de stabilité financière: une validation sous condition et une mise en garde sibylline pour l'avenir*, Cahiers dr. eur., 2011, 303-342. As to the issue raised in the text see K. Auel, A. Benz, *Expanding National*

liaments have the strength to effectively scrutinize the respective governments.

Arguably, the *fiscal compact* seems to widen the democratic deficit of the EU economic governance. As already noted, the prerogatives of national parliaments are formally respected when applying the balanced budget rule and the automatic “correction mechanism” that is closely linked to it. In concrete terms, however, the margin of manoeuvre for national authorities facing budgetary problems is quite reduced. It has been observed that an imbalanced national budget may still be approved. Nonetheless, should that happen, this action would violate both national law (in some states, at Constitutional level) and the *fiscal compact*, with the related international responsibility – not to mention the possible consequences laid down in the *Six pack*. Even assuming the full implementation of the rule regarding the *joint discussion* between the national and European Parliaments (through a “Conference”) of budgetary policies and other issues covered by the *fiscal*

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*Parliamentary Control: Does it Enhance European Democracy?, Debating the Democratic Legitimacy of the European Union*, cit., 57 et seq.

*compact*<sup>108</sup>, this would not be the panacea for recovering democratic accountability (if one adopts the idea of deliberative democracy through deliberation of citizens’ elected representatives<sup>109</sup>). Creating a system of rules affecting the autonomy

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108. Article 13. See the *Proposition de résolution européenne sur l’ancrage démocratique du gouvernement économique européen, présentée par M. C. Caresche à l’Assemblée nationale française le 25 septembre 2012*, that requires *inter alia* « la création rapide de la Conférence prévue à l’article 13 du traité sur la stabilité, la coordination et la gouvernance au sein de l’Union économique et monétaire ». Literally considered, Article 13 does not prevent the MPs of European Parliament elected in the states not being part of the *fiscal compact*, from being present at the “Conference”. According to A.de Streel, *La nouvelle gouvernance économique européenne. Description et critique*, Collection Cepess, Bruxelles, 2012, 51, in order to tackle the democratic deficiency of the economic governance the « TSCG représente déjà une avancée importante en prévoyant une conférence réunissant des parlementaires européens et nationaux pour débattre des politiques budgétaires et économiques visées dans le traité ». However, the author underlines the issue of efficacy of the Conference: « En particulier, elle devra être suffisamment rapide, malgré la diversité linguistique de ses membres, pour s’insérer utilement dans les délais serrés du semestre européen ou des procédures correctives en matière budgétaire et de déséquilibres macro-économiques ».

109. A. Sen, *The Idea of Justice*, Allen Lane –Penguin Books, London, 2009, 324 et seq.

of national economic policy has an impact both on the functioning and powers of domestic institutions and the daily life of (millions of) citizens and companies through the austerity measures likely to be related to the application of the correction mechanism<sup>110</sup>. In this context, as pointed out previously, the Commission role is enhanced – it will adopt the “common principles” to complement the “correction mechanism” that the euro zone states have to set up when they deviate from virtuous budgetary actions; likewise, the reversed qualified majority rule in the framework of the excessive deficit procedure pursuant to Article 7 of the *fiscal compact*, facilitates the adoption of the measures proposed by the Commission, making it *semiautomatic*<sup>111</sup>. Needless to say that this

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110. J. Habermas, *The Crisis of the European Union in the Light of Constitutionalization of International Law*, cit., at 337, observes that it remains unclear “how harsh austerity policies imposed from above ... can be reconciled with a tolerable level of social security in the long-run. The revolts by young people are a portent of the threat to social peace”.

111. *Supra* par. 5. Incidentally, it may be noted that the new economic governance framework (*Sixpack*) provides for the Commission’s stronger role, in particular when it comes to the new ‘comply or explain rule’. Article 2ab (2) of Regulation 1466/97 on the strengthening of the

principle aims to tackle the mutual indulgence among members states that prevented the procedure from being effective. This positive result being achieved, the broader question of democratic deficiency remains open.

Conferring a normative role to the Commission poses an issue of democratic legitimacy, since one may wonder whether the Commission enjoys a full-fledged democratic mandate to play such a prominent role, being it still a semi-technocratic institution. In the meantime the EP, representing the European citizens directly, does not emerge as a net beneficiary in the *fiscal compact*, whereas the decision-making power of governments is reinforced. The EP is not involved in the shaping of the decision concerning the duty to reduce public debt pursuant to Article 4 and the relevant decision of the corrective arm (the excessive deficit procedure) of the Stability and Growth Pact under

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surveillance of budgetary positions and the surveillance and coordination of economic policies, which makes part of the section on “Economic dialogue”, states that ‘*The Council is respected to, as a rule, follow the recommendations and proposals of the Commission or explain its position publicly*’. The enhanced role of the Commission in the decision making process could be balanced by a major involvement of the EP.

Regulation 1177/2011. A democracy issue arises also from the fact that the EP is hardly involved in the Euro Summits since its President may be invited to be heard, whilst the institution representing the European citizens receives *ex post* a report by the President of the Euro Summit<sup>112</sup>. This is not to say that the governments are deprived of democratic legitimacy, but that their legitimacy depends upon effective accountability to their national parliaments<sup>113</sup>. Even assuming that the Commission constantly pursues the general interests of the euro zone populations, that is not enough. Being legitimacy a concept with variable intensity *per se*<sup>114</sup>, it may be enhanced by injecting more accountability of the decision-making towards the EP. It is true that the legal instruments to address the euro zone financial crisis have shaped new opportunities for the European integration

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112. *Supra* par. 6.

113. As to the actions taken within the Council, national ministers have traditionally been considered democratic, accountable through the means of their respective national parliaments.

114. Since there are several democratic forms in which a human organization may exercise the governmental authority, ultimately the democratic legitimacy is a relative concept.

process. However, some deficiencies deserve to be corrected when the *fiscal compact* is incorporated into EU system<sup>115</sup>. The multilevel democratic nature of the EU system needs to be reinforced so that it will rely less on national legitimacy inputs and more on its own direct source of democratic accountability<sup>116</sup>. A genuine European political

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115. The democratic legitimacy and accountability of the EU, as long as the decisions on national budgets are more and more affected by European institutions, seem to be perceived as an issue to be tackled in the future developments of the EU legal order. See *Towards a Genuine Economic and Monetary Union*, Report by President of the European Council Herman Van Rompuy, Brussels, 26 June 2012 EUCO 120/12, at 6-7.

116. As it has been recently pointed out, “it is not enough to ensure that the executive branch of national governments is closely supervised” by “national parliamentary process (the path the German Constitutional Court has consistently focused on). The possibility to democratically control the national executive on the European level is limited for structural reasons” (M. Kumm, *Democratic Challenges arising out of the euro-crisis*, Challenges of Multi-tier Governance in the EU – Workshop 4<sup>th</sup> October 2012, 33-35, at 34). However, focusing on the parliamentary own structures of the EU is only one of the way in which governance might gain legitimacy, according to A. Maurer, *The European Parliament between Policy-Making and Control, Debating the Democratic Legitimacy of the European Union*, cit., 75 et seq. More proposals in order to tackle the demo-

cratic problem of the euro governance has been suggested by M. Poiars Maduro, B. De Witte, M. Kumm, *The Euro Crisis and the Democratic Governance of the Euro: Legal and Political Issues of a Fiscal Crisis*, EUI-R. Schuman Centre for Advanced Studies, Global Governance Programme, *The Democratic Governance of the Euro*, RSCAS Policy Paper 2012/08, 3 et seq.; R. Bieber, *Democratic Governance of the Euro: Shortcomings and proposals for reform*, ivi, 13 et seq.; C. Closa Montero, *The Democratic Governance of the euro: Some Proposals*, ivi, 21 et seq.

democracy is needed in order to pursue a sense of collective identity when the citizens evaluate the output side of the measures adopted under the economic policy-making. In that perspective, more focus ought be placed on European economic growth, as Article 9 seems quite poor in that respect<sup>117</sup>. That explains why this issue was rightly addressed by the European Council of 28<sup>th</sup>/29<sup>th</sup> June 2012, following the signing of the *fiscal compact*<sup>118</sup>. The ultimate objective is to enhance the social dimension of the EU in order to stimulate more popular support in a period of acute economic recession and the related

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117. *Supra*, par. 6.

118. See the *Compact for Growth and Jobs*, Annex to the European Council Conclusions of 28/29 June 2012.

social crisis faced in several euro zone states<sup>119</sup>. It cannot be overlooked that, according to its founding principles<sup>120</sup>, the Union’s aim is to promote the well-being of European peoples and that democracy is naturally related to the idea of economic development and social welfare<sup>121</sup>.

That being said, the *fiscal compact* also has its own merits. Should it, as expected, be incorporated into the EU legal framework, for some states national Constitutions will amount to being instruments to achieve the objectives of the European integra-

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119. For instance, more emphasis on growth seems necessary to tackle the risk of condemning the euro zone to austerity, as several MEPs argued (see the arguments raised by EMPs Sylvie Goulard, Daniel Cohn-Bendit, Guy Verhofstadt and Pervenche Berès, as reported by Agence Europe N° 10565, 2 March 2012). However, new commitments in that direction can always be endorsed at EU or international level. New forms of economic stimulus can also be inserted outside of the *fiscal compact*.

120. Articles 3(1) TEU and 9 TFEU (as to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health): B. de Witte, A.H. Trechsel et al., *Legislating After Lisbon. New Opportunities for the European Parliament*, EUDO Report 2010/1, 58 et seq.

121. A. Sen, *The Idea of Justice*, cit., 345 et seq.

tion. It has been argued that by doing so the *fiscal compact* speaks German<sup>122</sup>. This is probably so. It nonetheless also speaks the language of social equity and, indirectly, of democracy. The new rules will arguably prevent the elites governing a country from adopting unethical debt-creating policies which will be paid by the future generations. Limits on national budget deficits may, as a consequence, protect democracies from inter-generational conflicts. A fiscal discipline seems one of the basic elements of a social pact among generations. After the *Six Pack*, the *fiscal compact* is to be considered another clear signal – and perhaps not the last one, as well as not sufficient *per se*<sup>123</sup> – that the euro zone states are giving up the laxity of the Maastricht Treaty and its related practice. The perspective of including a reverse qualified

majority in the decision-making of the excessive deficit procedure is an outstanding demonstration of that intention, countering the habit of mutual indulgence amongst the euro zone states. Likewise, the competence attributed to the ECJ is to be considered, though it is limited to compliance with the obligation to correctly transpose the balanced budget rule into the domestic law.

Given that the euro zone is embracing a culture of financial stability to overcome its debt crisis, those states hit by the financial crisis have a serious chance to adopt virtuous behaviours and to get more confidence in their public finances in the medium run. Indeed, the swift negotiation and signing of the *fiscal compact* was considered – in those weeks of severe crisis – as an important element to help restore confidence in the euro zone. In fact, in accordance with a general principle of treaty law, the signing of an international agree-

ment, pending ratification procedures, entails that states must refrain from acts that could undermine its object and purpose, unless their respective intentions not to become party to the agreement itself have been made clear<sup>124</sup>. True, this does not imply a legal obligation to ratify the *fiscal compact*. Yet, its signature is not deprived of any legal significance, since every government has the responsibility under general international law to take all the possible steps for the entry into force of the *fiscal compact*, unless it declares a clear intention to the contrary.

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122. Editorial. *The Fiscal Compact and the European Constitution: Europe Speaking German*, cit., 3 et seq.

123. It has been pointed out that “arguments against legally disciplining fiscal policy are also democratic”; that a fiscal discipline “is also insufficient to address the current crisis”, and that “a Union of rules and disciplines will also be democratically unacceptable” (M. Poiares Maduro, *A new Governance for the European Union and the Euro: Democracy and Justice*, European Parliament, Directorate-General for Internal Policies, Brussels, 2012, at 16-17).

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124. Article 18 of the Vienna Convention on the law of treaties; cf. *inter alia* M. Dixon, R. McCorquodale, S. Williams, *Cases & Materials on International Law*, Oxford, Oxford University Press, 2011, 65, referring to the letter sent by the USA Government to the UN Secretary General about the refusal of the USA to accede to the Rome Statute of the International Criminal Court.

## 8. Conclusions

Given the situation of urgency beforehand and pending negotiation, the choice of a *17 plus* treaty stepping outside the EU legal framework, is legally viable, and more solid than the way-out based on secondary law tools. Since it is an international treaty requiring the national constitutional processes of ratification to be observed, the *fiscal compact* enjoys quite an evident standard of democratic legitimacy. Admittedly, a revision process under Article 48 TEU entails a high level of democracy and transparency. However, this path could not be pursued. The *fiscal compact* experience dramatically shows that the EU legal order lacks the capacity of a swift self-amendment. Unavoidably, an international instrument poses some issues of inconsistencies with the law and principles of the EU, which were examined throughout the paper, whilst suggesting interpretative solutions. However, the incorporation of the treaty into EU legal framework (Article 16) would terminate possible incoherencies, if any, with the EU orthodoxy.

The *17 plus* treaty shows that the euro zone is embracing a culture of financial stability aimed at pre-

serving the common currency as a fundamental achievement of the EMU. It shows also a serious commitment to consider the euro as an essential and irreversible normative value of the European integration process, even in terms of competences conferred to the EU institutions. The core of the fiscal discipline – laid down in Articles 3 (balanced or in surplus budget rule) and 4 (obligation to reduce public debt which exceeds 60% of the GDP) – is complemented by Article 8 which confers a limited role to the ECJ as regards the proper implementation into domestic law of two normative elements laid down in Article 3. This new power to adjudicate, based on Article 273 TFEU, intends to ensure the effective implementation of the balanced budget rule into domestic law, on the one hand, and to de-politicise some elements of the dispute concerning that implementation, on the other hand. It does not alter the judicial character of the ECJ.

By preventing the elites governing a country from adopting unethical debt-creating policies to be put on the backs of future generations, the *fiscal com-*

*pact* speaks the language of social equity. Thus, it can be conceived as one of the basic element of a social pact among generations and is positive *per se*: it protects national democracies from inter-generational conflicts. Inherent flexibilities of Articles 3 and 4 may partially ease the social impact of austerity measures. That being said, Articles 3, 4, as well as the commitments stemming from Article 5, pose serious limits to the autonomy of national parliament and executives in terms of determining public revenue and expenditure. Furthermore, the Commission role is enhanced at least in two ways, pursuant to Article 3(2) and 7. The problem is that all these constraints do not flow from a full-fledged democratic decision-making of the euro zone governance. **The EP, representing the European citizens directly, does not emerge as a net beneficiary in the *fiscal compact*.** The EP is not involved in the shaping of the decision concerning the duty to reduce public debt and in the relevant decision of the excessive deficit procedure. Even at the Euro Summits, the role of President of the EP is quite limited. On the contrary, the decision-making power of governments, within the Council, is reinforced.

Searching for a more mature governance of the euro zone that enhances its democratic accountability, will be the challenge of the future steps of economic integration. The democratic governance of the euro needs to be improved so as to rely less on national legitimacy inputs and more on its own direct source of democratic accountability, *i.e.* the EP. A genuine European political democracy is thus needed. The democratic credentials of the Union will then be re-affirmed and improved.



### 3. CONTRADICTION, CIRCUMVENTION AND CONCEPTUAL GYMNASTICS: THE IMPACT OF THE ADOPTION OF THE ESM TREATY ON THE STATE OF EUROPEAN DEMOCRACY



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1. A member of Mr Pringle's legal team in litigation concerning the ESM, the present paper, though referring to and summarizing the judgment of the Court of Justice, is oriented towards broader constitutional and democratic implications of the legal framework governing the establishment and operation of the ESM. I wish to thank Dr. Floris De Witte, Fellow at the London School of Economics and Political Science for insightful comments on an earlier draft.

# 1. Introduction

This paper makes the claim that the legal framework governing the European Stability Mechanism is contradictory, conceptually incoherent and may be characterised as a circumvention of Union law. It is further claimed that such circumvention, and the resulting establishment of a significant permanent institution outside and beyond the scope of the Union legal order, represents a challenge to European democracy and to the principle of respect for the rule of law.

The paper will first provide a brief overview of the background and legal framework governing the Treaty establishing the European Stability Mechanism (ESMT).<sup>2</sup> It will then address recent litigation challenging the compatibility of that le-

gal framework with obligations under Union law. Finally, it will assess how the process by which the European Stability Mechanism was established is liable to impact upon the quality of European Democracy and the integrity of the Union legal order.

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2. Treaty establishing the European stability mechanism between the Kingdom of Belgium, the Federal Republic of Germany, the Republic of Estonia, Ireland, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Italian Republic, the Republic of Cyprus, the Grand Duchy of Luxembourg, Malta, the Kingdom of the Netherlands, the Republic of Austria, the Portuguese Republic, the Republic of Slovenia, the Slovak Republic and the Republic of Finland, concluded in Brussels on 2 February 2012.

## 2. Background and Legal Framework

The ESMT was conceived in the context of an ongoing financial crisis in Europe which is claimed to threaten the very survival of the Union's single currency, the euro. The ESM, developed as a response to this threat, is intended to safeguard the financial stability of the euro area as a whole and of its Member States.<sup>3</sup> The ESMT creates a mechanism by which the eurozone Member States pool their resources to ensure that individual Member States in financial difficulty possess sufficient liquidity to be able to meet their debts. The ESM has an initial authorised capital stock of €700 billion, which may be used as a security against further borrowing.<sup>4</sup> The initial maximum lending capacity of the ESM fund (combined with the capacity of the European Financial Stability Facility (the EFSF) an existing bail-out fund) was set at €500 billion.<sup>5</sup> The Euro Member States have since agreed to increase that limit to €700 billion and to accelerate the contribution of paid-in capital to

3. Article 3 of the ESM Treaty.

4. Article 8 of the ESM Treaty.

5. Recital 6 and Article 39 of the ESM.

the fund.<sup>6</sup> The ESM can be seen as a signal to the financial markets that significant resources stand behind the debts of individual eurozone Member States.

The establishment of a debt-crisis mechanism was initially proposed by a Task Force on Economic Governance set up by the European Council of 25 and 26 March 2010. In its report, dated 21 October 2010, the Task Force recommended establishing a “credible crisis resolution framework for the euro area capable of addressing financial distress and avoiding contagion”.<sup>7</sup> Agreement on the need to establish a permanent crisis mechanism was announced at a European Council Meeting on 28 and 29 October 2010.<sup>8</sup> In setting up such a mech-

6. Statement of the Eurogroup dated 30 March 2012. This alters the terms of Article 39 of the ESM Treaty.

7. “Strengthening Economic Governance in the EU” – Report of the Task Force to the European Council, 21 October 2010. [http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/ec/117236.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/117236.pdf)

8. Conclusions of the European Council, 28-29 October 2010 (EUCO 25/1/10 REV 1) accessible at: [http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/ec/117496.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/117496.pdf)

anism, Member States were confronted with the challenge of identifying or creating a legal framework within which such a crisis mechanism could operate.

The Union had previously operated bailout funds through a European Financial Stabilisation Mechanism (the EFSM) and a European Financial Stability Facility. The former was established by Council Regulation 407/2010 on the basis of Article 122 TFEU.<sup>9</sup> The latter was framed as a public limited company governed by the laws of Luxembourg.<sup>10</sup> Yet, even if Article 122(2) TFEU was considered to be capable of serving as a legal basis for the EFSM, it was not clear that the provision could serve as the basis for the proposed permanent stability mechanism. Article 122(2) TFEU is expressed in restrictive terms. Its wording suggests that financial assistance may be granted only in exceptional *force majeure* type circumstances, such as natural disasters or comparable events the occurrence of which are beyond the control of

9. Council Regulation 407/2010 of 11 May 2010 establishing a European financial stabilization mechanism

10. Registered as a Société anonyme, having a registered office 43, Avenue John F. Kennedy, L-1855 Luxembourg, R.C.S. Luxembourg B n° 153.414

Member States. It is not evident that Article 122(2) TFEU was intended to authorise the permanent bailout of Member States facing challenges of an economic nature.<sup>11</sup> This restrictive interpretation is reinforced when Article 122 TFEU is read in combination with other provisions contained in Part Three, Title VIII of the TFEU. In particular, Article 123 TFEU prohibits the European Central Bank from extending credit facilities in favour of central governments and public bodies of Member States or from the purchase of their debt instruments. Article 125 TFEU, often referred to as the “no bailout” clause expressly prohibits the Union or Member States from becoming liable or assuming commitments of other Member States.

Appreciating that a bailout mechanism might not sit comfortably in a “no bailout” economic and monetary Union, the European Council invited consultation on the “*treaty change required*” to establish a permanent stability mechanism.<sup>12</sup> Fol-

lowing this consultation the European Council, meeting on 16 and 17 December 2010, agreed that the TFEU should be amended and decided to effect such amendment using the simplified revision procedure (SRP) provided for in Article 48(6) TEU.<sup>13</sup> The SRP permits modification of Part Three of the TFEU by the adoption of a European Council Decision that must be approved by the Member States in accordance with their domestic procedures.

The proposed Treaty amendment would add a new third paragraph to Article 136 TFEU authorizing euro Member States to establish a permanent stability mechanism that would operate subject to strict conditionality. European Council Decision 2011/199/EU amending Article 136 of the TFEU was adopted on 25 March 2011.<sup>14</sup> Pursuant to its Article 2, the Decision was to enter into force once approved by all Member States and, in any event, not earlier than 1 January 2013.<sup>15</sup>

The ESMT was negotiated at the same time as an inter-governmental agreement and a first version signed on 11 July 2011.<sup>16</sup> However, following its signature, the Member States considered further amendments were necessary and a revised draft of the ESMT was concluded on 2 February 2012. At first, the ESM was to become operational in July 2013.<sup>17</sup> However, it was subsequently agreed that the entry into force of the ESMT should be accelerated so that the ESM would become operational in July 2012, that is, at least half a year prior to the entry into force of the European Council Decision authorising Member States to establish a permanent stability mechanism.<sup>18</sup> A number of legal

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the amendment contained in the Decision that is to enter into force at the relevant date.

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11. This interpretation was confirmed by the Court of Justice in Case C-370/12, *Pringle v. Ireland*, at para 65.

12. Conclusions of the European Council, 28-29 October 2010 (EUCO 25/1/10 REV 1). See also Recital 2 of European Council Decision of 25 March 2011 (2011 OJ L 91/1).

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13. Conclusions of the European Council, 16-17 December 2010, accessible at: [http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/ec/118578.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/118578.pdf)

14. European Council Decision 2011/199/EU amending Article 136 of the TFEU (2011 OJ L 91/1).

15. It is of note that it is the Decision as opposed to merely

16. See “Factsheet on the ESM”, published by the European Commission setting out the background and chronology to the adoption of the ESM Treaty and accessible at: [http://ec.europa.eu/economy\\_finance/economic\\_governance/documents/127788.pdf](http://ec.europa.eu/economy_finance/economic_governance/documents/127788.pdf)

17. “European Stability Mechanism (ESM) is inaugurated” – Press release issued by the ESM and accessible at: [http://www.esm.europa.eu/press/releases/20121008\\_esm-is-inaugurated.htm](http://www.esm.europa.eu/press/releases/20121008_esm-is-inaugurated.htm). The July 2013 date is also mentioned on the web-site of the European Commission at: [http://ec.europa.eu/economy\\_finance/articles/financial\\_operations/2011-07-11-esm-treaty\\_en.htm](http://ec.europa.eu/economy_finance/articles/financial_operations/2011-07-11-esm-treaty_en.htm)

18. See “Factsheet on the ESM”, published by the European

challenges to the ESM were filed with the German Federal Constitutional Court and the July 2012 date was postponed. On 12 September 2012 the German Federal Constitutional Court delivered a preliminary judgment permitting Germany to proceed with ratification of the ESM Treaty.<sup>19</sup> The ESM was launched on 8 October 2012.

### 3. The Legal Framework Governing the ESM Treaty and its compatibility with Union law

In addition to the challenges to the ESMT brought before the German Federal Constitutional Court, proceedings questioning the compatibility of the ESMT with national constitutional law or Union law were also instituted before the Courts in Estonia and Ireland.<sup>20</sup> The challenge in Ireland was instituted by Thomas Pringle, an independent Member of Parliament and resulted in a reference for a preliminary ruling by the Irish Supreme Court.<sup>21</sup> That Court sought clarification on three

points: (1) the validity of the European Council Decision of 25 March 2011; (2) whether the provisions of the ESMT were compatible with Member States' obligations under the Union Treaties; and (3) whether the entry into force of the ESMT was subject to the prior entry into force of the European Council Decision authorising Member States to establish a permanent stability mechanism.

It is clear that, in establishing a permanent stability mechanism, the European Council and the Member States were confronted with a significant legal obstacle. How could the Union or the Member States establish a bailout fund when it appeared that bailouts were expressly prohibited by the Union Treaties? It is worth recalling that the prohibition on bailouts, originally agreed as part of the 1992 Maastricht Treaty, may not easily

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Commission cited at 15 *supra*.

19. Cases 2 BVR 1390/12, 2BvR 1421/12, 2BvR 1438/12, 2BvR 1439/12, 2BvR 1440/12, and 2BvE 6/12, Decision of the Federal Constitutional Court of 12 September 2013. For further details, see contributions in this special edition from Susanne K. Schmidt and Karsten Schneider.

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20. Supreme Court of Estonia, judgment no 3-4-1-6-12, of 12 July 2012 introduced by Request of the Chancellor of Justice of 12 March 2012 and *Pringle v. Government of Ireland, Ireland and the Attorney General* Supreme Court, Ref no. 339/2012 pending before the Supreme Court of Ireland. Certain aspects of the case have already been subject to rulings by the Supreme Court [2012] IESC 47.

21. Ruling of the Supreme Court of Ireland, delivered on 31 July 2012 by Chief Justice Denham [2012] IESC 47. See [http://www.courts.ie/\\_\\_80256F2B00356A6B.nsf/0/E7504392B159245080257A4C00517D6A?Open&Highlight=0,Pringle,~language\\_en~](http://www.courts.ie/__80256F2B00356A6B.nsf/0/E7504392B159245080257A4C00517D6A?Open&Highlight=0,Pringle,~language_en~) The Reference is available at:

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[http://www.courts.ie/\\_\\_80256F2B00356A6B.nsf/0/E44922F2B6DBED2F80257A4C00570284?Open&Highlight=0,Pringle,~language\\_en~](http://www.courts.ie/__80256F2B00356A6B.nsf/0/E44922F2B6DBED2F80257A4C00570284?Open&Highlight=0,Pringle,~language_en~)

be dismissed as the product of some kind of oversight. On the contrary, it is apparent from records of the negotiations that Member States intentionally agreed that the particular form of Economic and Monetary Union established would be a “no bailout” EMU.<sup>22</sup> This approach had been agreed and ratified by democratically mandated Governments of the Member States.

In his challenge to the compatibility of the ESM Treaty, Pringle argued that an institution established to carry out economic and monetary activities with the objective of saving the Union’s single currency must be established within the Union.<sup>23</sup> He observed that both the European Parliament and the European Central Bank favoured estab-

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22. See for example, the records of the proceedings of the Inter-Institutional Conference on Economic and Monetary Union accompanying the Intergovernmental Conferences, held on Tuesday 11 June 1991, at [http://ec.europa.eu/economy\\_finance/emu\\_history/documentation/chapter13/19910611fr14analyticalsummary.pdf](http://ec.europa.eu/economy_finance/emu_history/documentation/chapter13/19910611fr14analyticalsummary.pdf). See also the records of the Monetary Committee, working on the preparation of the Maastricht Treaty.

23. Observations of Pringle in Case C-370/12, *Pringle v. Ireland* at p. 7. This position rests on arguments concerning competence of Union in economic and monetary policy set out in pages 20 to 28 of the submissions.

lishing the ESM within the Union.<sup>24</sup> In its Opinion on the European Council Decision, the European Parliament warned that establishing a permanent stability mechanism outside the EU institutional framework posed a risk to the integrity of the Treaty-based system<sup>25</sup>. The European Parliament further expressed regret that the European Council had not explored all the possibilities contained in the Treaties for establishing a permanent stability mechanism within the Union legal order<sup>26</sup>. The

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24. Observations of Pringle in Case C-370/12, *Pringle v. Ireland* at p.7.

25. Resolution of the European Parliament of 23 March 2011. At paragraph 7 the European Parliament “Warns that the intention to establish the permanent stability mechanism outside the EU institutional framework poses a risk to the integrity of the Treaty-based system”. The Resolution is accessible at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P7-TA-2011-0103+0+DOC+PDF+V0//EN>

26. Resolution of the European Parliament of 23 March 2011. Paragraph 9 states the European Parliament “*Regrets that the European Council has not explored all the possibilities contained in the Treaties for establishing a permanent stability mechanism; considers in particular that, in the framework of the present Union competences with regard to economic and monetary union (Article 3(4) TEU) and monetary policy for Member States whose currency is the euro (Article 3(1)*

ECB similarly expressed support for recourse to the “Union method.”<sup>27</sup>

Nevertheless, the Heads of State or Government of the eurozone opted to establish the ESM by means of an intergovernmental treaty outside the framework of the Union legal order. In his submissions Pringle argued that this approach was adopted as a means of overcoming the TFEU’s prohibition on bailouts. This view was corroborated by observations lodged by Member States before the Court of Justice. A number of interveners sought to rely on the international status of the ESM to argue that it would not be subject to Union law or the prohibition on bail-outs in particular.<sup>28</sup> Pringle argued

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*(c) TFEU), it would have been appropriate to make use of the powers conferred on the Council in Article 136 TFEU, or in the alternative to have recourse to Article 352 TFEU in conjunction with Articles 133 and 136 TFEU”.*

27. Opinion of the European Central Bank of 17 March 2011 (2011/C 140/05). Paragraph 8 observes: “*A key element of the draft decision is that it provides for an intergovernmental mechanism instead of a Union mechanism. The ECB supports recourse to the Union method and would welcome that, with the benefit of the experience gained, the ESM would become a Union mechanism at an appropriate point in time.*”

28. Observations of Cyprus, Ireland, Austria in Case 370/12 *Pringle v. Ireland*. Cyprus states “*the prohibition*

that the notion that Member States may collectively step outside of the Union in order to carry out – on a permanent basis – activities that otherwise would be prohibited inside of the Union is difficult to reconcile with Union law or indeed with a Union founded on the rule of law.

The Union legal order rests on a number of principles that are constitutional in nature and that have been developed by the European Court of Justice (ECJ) in case-law spanning six decades. Such principles may be regarded as the conceptual backbone of Union law. They provide a consistent framework through which the extremely diverse legal and factual contexts that arise in the Union legal order may be approached and exam-

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*in Article 125 TFEU relates to the Union and the Member States, not to a third party such as the ESM, which has a legal personality distinct from Member States". The Government of Ireland submitted at para 72 of its observations that "The Article 125(1) TFEU prohibition applies to "[a] Member State", while the ESM will be an international financial institution. The ESM will have legal personality, which will be separate and distinct from the ESM Members". Austria submitted that "Article 122 TFEU expressly relates only to the Union. An international organisation such as the ESM is therefore not covered by that provision, especially since, furthermore, the Union is not a contracting party".*

ined. These “constitutional” principles include: the doctrine of supremacy and the direct effect of Union law; respect for general principles of Union law, including the principles of legal certainty and non-retroactivity; the principle of effective judicial protection; and rules on the division of competences within the Union legal order as well as the principle of sincere co-operation.

In his action, Pringle maintained that the establishment of the ESM outside the Union legal order was inconsistent with a number of these constitutional principles. First, he argued that it followed from the principle of supremacy and loyal cooperation that, if the Union Treaties prohibit Member States from engaging in a particular activity, then that prohibition applies to Member States regardless of the legal framework in which they operate, and in particular, regardless of whether they are acting inside or outside the Union.<sup>29</sup> Pringle observed that the ECJ has consistently held that the principle of loyalty precludes a Member State from entering into international agreements that would be incompatible with its obligations under the

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29. Observations of Pringle in Case C-370/12, *Pringle v. Ireland* pp. 37 to 40. Express reference was made to Case 22/70 *Commission v. Council (AETR)* [1971] ECR 263.

Union Treaties.<sup>30</sup> Pringle argued that if the Treaties prohibit bailouts *inside* the Union, then such bailouts are also prohibited *outside* the Union.

Second, Pringle submitted that, according to settled case-law, Member States were not merely prohibited from breaching Union law directly, but from tolerating breaches *through the intermediary of organizations set up or recognized by them*.<sup>31</sup> He noted that the ECJ has consistently held that breaches of Union law by entities under the decisive control of Member States may be attributed to the relevant Member States.<sup>32</sup>

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30. Observations of Pringle in Case C-370/12, *Pringle v. Ireland*, p.38, para 3.97. Reference was made to cases Case C-307/97 *Saint Gobain ZN* [1999] ECR I-413, paras. 33 and 34; Case C-55/00 *Gottardo* [2002] ECR I-413, paras. 33 and 34, and Case C-376/03 *D* [2005] ECR I-5821, para 52.

31. Observations of Pringle in Case C-370/12, *Pringle v. Ireland*, pp. 34 to 38, and in particular paras 3.85 and 3.91. Reference was made to Case 50/76 *Amsterdam Bulb* [1977] ECR 137, para. 35.

32. Case 249/81 *Commission v. Ireland* [1982] ECR 4005; Joined Cases 67, 68 and 70/85 *Van der Kooy BV and others v. Commission* [1988] ECR 219; Case C-188/89 *Foster v. British Gas* [1990] ECR I-3313, Case C-306/97 *Connemara Machine Turf Co. Ltd v. Coillte Teoranta* [1998] ECR I-8761, and Case C-325/00 *Commission v. Germany* [2002] ECR I-9977. See also, by analogy, Case

Third, Pringle argued that the legal framework establishing the ESM was incompatible with the principle of the division of competences delimiting the boundaries between the Union legal order and that of its Member States.<sup>33</sup> He submitted that it was well established that the Union and the Member States are required to respect each other's competences and that, in this context, Member States are subject to “*special duties of action and abstention*” to ensure that they do not encroach upon Union competences.<sup>34</sup> The Union is conferred with exclusive competence in the field of monetary policy and shared competence in the

field of economic policy.<sup>35</sup> Pringle argued that the Union has been conferred with and exercises a substantial degree of economic coordinating competence in relation to measures that concern the single currency.<sup>36</sup> Moreover, it was recalled that

the TFEU expressly requires that the coordination of economic policy take place *within* the Union.<sup>37</sup> Pringle submitted the nature of monetary and economic competences conferred on the Union was consistent with the fact that the euro constitutes a core element of EMU and an intrinsic and fundamental part of the Union Treaties.

Pringle concluded that having regard to the principle of the division of competences, and the specific competences of the Union in economic and monetary policy, it is anathema that an entity entrusted with stabilizing the euro currency could be established outside the Union legal order and would be able to dictate conditions that will be imposed on Member States in matters so fundamental and integral to the Union as its economic policy and its currency.<sup>38</sup> Moreover, he argued that creating the ESM by means of an international treaty largely removed the institution from the legislative, judicial and democratic safeguards that formed an integral part of the Union legal order.

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C-196/04 *Cadbury Schweppes and Cadbury Schweppes Overseas* [2006] ECR I-7995 concerning creation of legal structures designed to avoid tax. The “decisive control” test was advocated by Advocate General Van Gerven in his Opinion in Case C-188/89 *Foster v. British Gas* [1990] ECR I-3313

33. Observations of Pringle in Case C-370/12, *Pringle v. Ireland*, pp 20 to 28. See also page 51, para 3.146 of the observations.

34. Observations submitted on behalf of Pringle before the ECJ, p. 52, para 4.3. Case C-266/03 *Commission v. Luxembourg* [2005] ECR I-4805. See also Case C-433/03 *Commission v. Germany* [2005] ECR I-6985 paras 57 and 59. See also Case 22/70 *Commission v. Council (AETR)* [1971] ECR 263.

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35. Article 2(3). Lenaerts and Van Nuffel, *EU Law* (3<sup>rd</sup> Edition, 2011, Sweet & Maxwell), para. 7-023 “*Since all competences outside the areas referred to in Arts 3 and 6 are shared by the Union with the Member States (see Art.4(1) TFEU) [the coordination of the economic and employment policies of the Member States] can only be classified as falling within the general category of shared competences.*”

36. See, for example, Council Regulation (EC) No 1466/97 of 7 July 1997 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies (1997 OJ L 209/1) as amended by Regulation (EU) No 1175/2011 of the European Parliament and of the Council of 16 November 2011; Regulation (EU) No 1173/2011 of the European Parliament and of the Council of 16 November 2011 on the effective enforcement of budgetary surveillance in the euro area (2011 OJ L 306/1); Regulation (EU) No 1174/2011 of the European Parliament and of the Council of 16 November 2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area (2011 OJ L 306/8); Regulation (EU) No 1176/2011 on the prevention and correction of macroeconomic imbalances (2011 OJ L 306/25). Council Regulation (EC) No 1467/97 of 7 July 1997 on speeding up and clarifying the implementation of the excessive deficit procedure (1997 OJ L 209/6) as amended by

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Council Regulation No 1177/2011 of 8 November 2011 (2011 OJ L 306/33).

37. Article 5(1) TFEU.

38. Expressed in Oral observations on behalf of Pringle at the hearing of 23 October 2012.

Fourth, Pringle submitted that the legal framework governing the ESM Treaty was inconsistent with the principle of legal certainty and non-retroactivity. He claimed that it was clear from the wording of the European Council Decision and of the October 2010 European Council Conclusions that the Member States and the European Council considered that the establishment of an institution such as the ESM “required” Treaty change. Moreover, he noted that even the ESM appeared to attribute its foundation to the authorisation contained in the Treaty amendment.<sup>39</sup> Yet the In-

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39. On its own web-site, the ESM expressly referred to the amendment to the TFEU as its legal basis, See: <http://www.esm.europa.eu/pdf/FAQ%20ESM%2008102012.pdf>. In reply to the question “What is the legal basis of the ESM and how was it established”, it is stated that “the European Council agreed that the Treaty on the Functioning of the European Union (TFEU) should be amended in order for a permanent mechanism - the European Stability Mechanism - to be established by the Member States whose currency is the euro to safeguard the financial stability of the euro area as a whole. The amendment (in Article 136 of the Treaty) was adopted by the European Council on 25 March 2011.” Although, this assertion was subsequently withdrawn and references to the European Council Decision removed. This revised explanation of the legal basis is available on the Frequently Asked Question section of the ESM Web-site <http://www.esm.europa.eu/pdf/FAQ%20ESM%2012112012.pdf>.

stitutions and Member States nevertheless considered it was permissible to launch the ESMT even prior to the approval of the TFEU amendment by all Member States and prior to that amendment entering into force.<sup>40</sup>

Finally, Pringle argued that amendment of the Treaties to permit bailouts ought to have been carried out using the ordinary revision procedure.<sup>41</sup> He asserted that the SRP represents an exception to the general rules governing Treaty amendment and that its scope should be interpreted restrictively. He further argued that the substance of the amendment did not respect substantive limits imposed on the SRP by Article 48(6) TEU.<sup>42</sup>

In their turn, the intervening Institutions and Member States essentially argued that the European Stability Mechanism is a funding facility that is a matter of economic policy and not monetary

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[12112012.pdf](http://www.esm.europa.eu/pdf/FAQ%20ESM%2012112012.pdf).

40. Observations of Pringle in Case C-370/12, *Pringle v. Ireland*, pp. 18 and 19, paras 3.6 to 3.10.

41. Observations of Pringle in Case C-370/12, *Pringle v. Ireland*, p. 54, para 5.4.

42. Observations of Pringle in Case C-370/12, *Pringle v. Ireland*, p. 55, paras. 5.6 and 5.7.

policy.<sup>43</sup> As a consequence, it was to be qualified as an activity in respect of which competence is shared between the Member States and the Union. The intervening Institutions and Member further submitted that Member States retained competence over the provision of financial assistance to safeguard the euro and therefore were free to establish a stability mechanism outside the framework of the Union legal order.<sup>44</sup>

The intervening Institutions and Member States also argued that the granting of financial assistance under the ESM was subject to strict conditions, including a repayment obligation and did not amount to the assumption of liability that would be prohibited by Article 125 TFEU.<sup>45</sup> Moreover, it was argued that provisions of EMU that are concerned with the overall objective of establishing and promoting a single currency should

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43. Observations of Ireland, para 78. See also, for example, Observations of Greece, para 24, Observations of France, para 67, Observations of Cyprus, para 52, Observations of the Netherlands, paras. 46 to 56.

44. See Observations of Austria, para 24 and Observations of the European Commission, para 78.

45. See Observations of Austria, para 27 and Observations of the European Commission, paras. 69 to 72.

not be interpreted in a manner that would threaten its survival.<sup>46</sup> The intervening Institutions and Member States also considered that it was permissible to amend Article 136(3) TFEU by means of the SRP because the relevant European Council Decision did not increase the competences of the Union.<sup>47</sup>

The intervening Institutions and Member States also defended the entitlement to launch the ESM in advance of the entry into force of the amendment to the TFEU. They claimed that the proposed amendment was not in fact necessary and did not constitute a legal basis for the establishment of the ESM. They argued that it merely served to clarify and confirm Member States' existing competence to establish the ESM.<sup>48</sup>

In its judgment, the ECJ upheld the entitlement of Member States to participate in the ESMT as well as the validity of the European Council Decision

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46. See Observations of Germany and Observations of the Netherlands, paras. 60 to 66.

47. See for example Observations of Germany, para 77 and Observations of the Commission para 97.

48. See for example Observations of Germany, para 77 and Observations of the Commission para 97.

amending Article 136 TFEU.<sup>49</sup> First, approaching the “no bailout” clause enshrined in Article 125 TFEU from a teleological perspective, the Court concluded that it did not prohibit the granting of financial assistance by the ESM.<sup>50</sup> The Court observed that the prohibition on bailouts sought to ensure that Member States remain subject to the logic of the market when they enter into debt so as to ensure that budgetary discipline is maintained.<sup>51</sup> In this regard, the Court noted that financial assistance granted by the ESM was subject to conditions and the recipient Member State remained liable for its own debts.<sup>52</sup> Article 125 TFEU was therefore considered not to preclude financial assistance to Member States under the ESM as such assistance did not diminish the incentive of the recipient Member State to conduct a sound bud-

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49. Case C-370/12, *Pringle v. Ireland and others*, Judgment of 27 November 2012, not yet reported.

50. Case C-370/12, *Pringle v. Ireland and others*, Judgment of 27 November 2012, not yet reported, paras. 129 to 147.

51. Case C-370/12, *Pringle v. Ireland and others*, Judgment of 27 November 2012, not yet reported, para 136.

52. Case C-370/12, *Pringle v. Ireland and others*, Judgment of 27 November 2012, not yet reported, paras. 137, 138, 141, 143, and 145.

getary policy.<sup>53</sup> Moreover, the Court clarified that financial assistance could only be granted when indispensable to safeguard the stability of the Euro area as a whole.<sup>54</sup>

The ECJ agreed with the intervening Member States and Institutions that the ESM was not an instrument of monetary policy.<sup>55</sup> The Court noted that the defining feature of monetary policy was the maintenance of price stability. Although acknowledging that the activities of the ESM could affect price stability, the Court held this was not its purpose.<sup>56</sup> The Court observed that the ESM falls within the area of economic policy, which is a shared competence between the Union and its Member States.<sup>57</sup> Considering that the Union Treaties did not confer any specific power on the

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53. Case C-370/12, *Pringle v. Ireland and others*, Judgment of 27 November 2012, not yet reported, paras. 136 to 138.

54. Case C-370/12, *Pringle v. Ireland and others*, Judgment of 27 November 2012, not yet reported, para 142.

55. Case C -370/12, *Pringle v. Ireland and others*, Judgment of 27 November 2012, not yet reported, paras. 53 to 57.

56. Case C -370/12, *Pringle v. Ireland and others*, Judgment of 27 November 2012, not yet reported, para 56

57. Case C-370/12, *Pringle v. Ireland and others*, Judgment of 27 November 2012, not yet reported, para 60.

Union to establish a stability mechanism such as the ESM Treaty, the Court concluded that it was permissible for the Member States to create such a mechanism outside the Union.<sup>58</sup> Even if it may be argued that the Union could have created such a mechanism within the Union pursuant to general powers provided for in Article 352 TFEU, the Court observed that the Union had not exercised such powers and was not obliged to have done so.<sup>59</sup>

Finally, the Court noted that since the Treaties did not at present preclude Member States participating in the ESM, Member States could ratify the Treaty without it being necessary to await the entry into force of the European Council Decision amending Article 136 TFEU.<sup>60</sup>

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58. Case C -370/12, *Pringle v. Ireland and others*, Judgment of 27 November 2012, not yet reported, paras. 64 to 68.

59. Case C -370/12, *Pringle v. Ireland and others*, Judgment of 27 November 2012, not yet reported, para 67.

60. Case C -370/12, *Pringle v. Ireland and others*, Judgment of 27 November 2012, not yet reported, paras. 183 to 185.

## 4. The Impact of the ESM Treaty on European Democracy

It is suggested that even if the legal framework governing the ESM has been held to be entirely compatible with obligations enshrined in the EU Treaties, the process by which the Member States and the European Council established the European stability mechanism may be characterised as a circumvention of Union law which is liable to have an adverse effect on the integrity of the Union legal order and to the quality of European Democracy.

This claim rests on three principal arguments. First, it is normatively incoherent to use intergovernmental treaties to side-step restrictions and obligations contained in the Union Treaties. Second, it is conceptually incoherent to regulate matters of fundamental and intrinsic concern to the EU Treaties outside the Union legal order. Third, the establishment and operation of an important institution outside the constitutional framework of the Union and beyond the reach of its citizens (and the rights they are guaranteed under the

Charter) is inconsistent with the principle of democratic governance. Each of these arguments will be considered in turn.

### 4.1 Normative Incoherence in Establishing the ESM Outside the Union Legal Order

The establishment and operation of the ESM outside the Union legal order represents a challenge to the scope and authority of binding EU Treaty norms.

Article 123 TFEU expressly prohibits the European Central Bank or the central banks of other Member States from granting overdraft facilities or any other type of credit facility to public authorities and bodies of the Union and of Member States from purchasing directly from them their debt instruments.<sup>61</sup> Yet the Member States have

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61. Case C -370/12, *Pringle v. Ireland and others*, Judgment

established, outside the framework of the Union Treaties, a new autonomous institution the essential function of which is to provide loans to Member States and to purchase their debt instruments on the primary and secondary markets. The ECJ confirmed that as Article 123 TFEU is addressed specifically to the ECB and to the central banks of the Member States, it does not prohibit such assistance by a group of Member States.<sup>62</sup> Nevertheless, even if not prohibited, it is difficult to escape the conclusion that the establishment of a financial institution outside the Union that operates in liaison with and parallel to the ECB and is entrusted with carrying out *precisely* the activities that the ECB is prohibited from carrying out, constitutes a circumvention of the spirit of the prohibition contained in Article 123 TFEU.

Equally, the so called “no bailout” clause enshrined in Article 125 TFEU has now been interpreted to permit a €700 billion bailout fund in circumstances where prohibition on bailouts was found not in secondary legislation, but enshrined in a provision

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of 27 November 2012, not yet reported, para 123.

62. Case C -370/12, *Pringle v. Ireland and others*, Judgment of 27 November 2012, not yet reported, paras 123 to 128.

of primary Treaty law. It is clear that the inclusion of the “no bailout” clause in the Maastricht Treaty was intended to provide a clear signal to the financial markets that “*neither the Community nor the other Member States stand behind a Member State’s debts.*”<sup>63</sup> But this is precisely what the ESM will do.

In its judgment in *Pringle* the ECJ held that the Member States’ obligation under the ESM to grant financial assistance or to cover Member States failure to make contributions into the ESM Fund<sup>64</sup> does not constitute a *guarantee* or even an *assumption of commitments* prohibited by Article 125 TFEU essentially because the primary debtor remains liable for its debts and that financial assistance was subject to conditions.<sup>65</sup> However, such a position implies the premise that a defining characteristic of a *guarantee* is that it absolves a pri-

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63. See records of the Monetary Committee, working on the preparation of the Maastricht Treaty, cited by the Commission.

64. Case C -370/12, *Pringle v. Ireland and others*, Judgment of 27 November 2012, not yet reported, paras 144 and 145, referring to obligations under Article 25(2) of the ESM Treaty.

65. Case C -370/12, *Pringle v. Ireland and others*, Judgment of 27 November 2012, not yet reported, paras 138 and 145.

mary debtor of its debtor status. However, the creation of a guarantee does not necessarily or even ordinarily affect the primary liability of a debtor.<sup>66</sup> The defining feature of a guarantee is that it provides creditors with an alternative source of redress in the event of a debtor’s default. A guarantor is under an obligation to assume the financial commitments of a debtor’s debt regardless of the fact that the initial and primary duty of payment remains with the debtor. In other words, the fact that a primary debtor is legally liable for a debt does not mean that the guarantor called upon to pay that debt is not assuming the debtor’s financial burden.

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66. See for example Geraldine Andrews and Richard Millett “*Law of Guarantees*” (*Sweet & Maxwell, 6<sup>th</sup> edition, 2011*). At para 1-005, the authors observe that “The essential distinguishing feature of a contract of guarantee is that the liability of the guarantor is always ancillary, or secondary, to that of the principal, who remains primarily liable to the creditor”. At para 1-001, the authors define suretyship as “the generic term given to contracts by which one person (the surety) agrees to answer for some existing or future liability of another (the principal) to a third person (the creditor), and by which the surety’s liability **is in addition to, and not in substitution for,** that of the principal” – (emphasis added).

Moreover, in practice, the provision of financial assistance on the scale envisaged by the ESMT will always be subject to conditions. It is practically and politically inconceivable that Member States would directly and fully assume such financial burden without imposing any conditions on the recipient Member State. To suggest that Article 125 TFEU was only intended to prohibit unconditional indemnities that fully absolve a debtor Member State of its liability for debts would significantly restricts its scope of application. Perhaps it was for this reason that the Court was careful to limit the permissibility of providing financial assistance to circumstances in which it is indispensable for the safeguarding of the financial stability of the euro as a whole.<sup>67</sup> Yet, even this limitation finds no basis in the text of Article 125 TFEU. That provision does not in any way qualify the prohibition on granting financial assistance depending on the particular purpose of such financial assistance.

In the context of the *Pringle* case, a number of interveners argued that the Union Treaty provi-

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67. Case C -370/12, *Pringle v. Ireland and others*, Judgment of 27 November 2012, not yet reported, para 136.

sions and prohibitions on financial assistance laid down in Articles 122 and 125 TFEU referred to the Union and the Member States alone and not to independent entities they might choose to create.<sup>68</sup> Therefore, even if Article 125 TFEU prohibited the granting of financial assistance for the purposes of safeguarding the euro, such prohibition would not in any event extend to the ESM, which, as an international organization, possessed distinct legal personality and was not subject to Union law.<sup>69</sup>

Ultimately, the ECJ did not have to address this particular argument because it found that Article 125 TFEU did not prohibit the kind of financial assistance envisaged by the permanent stability mechanism. Nevertheless, the nature and tenor of such arguments lend support to the view that the establishment of the ESM outside the Union legal order was considered to facilitate the circumvention of the prohibition of bail-outs in the Union legal order. This interpretation of Union law would be inconsistent with the principle of su-

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68. Observations of Cyprus, Ireland, Austria in Case 370/12 *Pringle v. Ireland*. See footnote [27] *Supra*.

69. *Ibid.*,

premacy of Union law and incompatible with the authority of the EU legal order.<sup>70</sup> Indeed, the ECJ emphasized that, in operating outside the Union, the Member States were not performing functions that were prohibited inside the Union. The Court noted that, even when acting in areas of reserved competence, Member State must ensure that these competences are exercised in conformity with Union law.<sup>71</sup>

Finally, proceeding outside the framework of the Union Treaties facilitated the circumvention of the requirement to amend the TFEU using the ordinary revision procedure, which would have entailed the establishment of a Convention and the participation of representatives of national parliaments. Article 48(6) TEU restricts the use of the SRP to amendments that do not increase the competence of the Union. An amendment authorising the *Union* to provide bailouts would, however,

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70. See for example the approach of the ECJ in Case 50/76 *Amsterdam Bulb* [1977] ECR 137, para. 35, Case 106/77 *Simmenthal* [1978] ECR I-629, para 14 and Case C-135/08 *Rottman v. Freistaat Bayern* [2010] ECR I-1449, para 41.

71. Case C -370/12, *Pringle v. Ireland and others*, Judgment of 27 November 2012, not yet reported, paras 69, 124 and 126.

have entailed an increase in the competences of the Union, since no such entitlement presently exists in the Union Treaties and consequently the SRP could not have been used.<sup>72</sup>

It is submitted that the decision to establish the ESM outside the EU legal order was intended to permit Member States to circumvent provisions prohibiting or restricting the granting of financial assistance by Member States or by the ECB. In addition, it facilitated Member States to side-step the requirement to amend the Union Treaties using the ordinary revision procedure. Taken cumulatively, the use of international agreements to bypass or circumvent provisions of Union law may be regarded as challenging the normative coherence of the Union legal order.

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72. It is noteworthy that this point was also identified by the ECJ at the hearing of the *Pringle* case on 23 October 2012. The Court inquired whether the establishment of the ESM outside the Union legal order could not reasonably be regarded as a circumvention of the requirement to amend the Treaties using an ordinary revision procedure.

## 4.2 Conceptual Incoherence in Establishing the ESM Outside the Union Legal Order

The Union's single currency is at the core of EU economic and monetary Union and forms a fundamental and intrinsic part of the Union legal order. Article 3(4) TEU expressly entrusts the Union with establishing an economic and monetary union with the euro as its currency. To this end, the Treaty confers the Union with exclusive competence in monetary policy for eurozone Member States.<sup>73</sup> While economic policy is a field of shared competence, Member States are required to exercise their residual competence with a view to achieving the objectives of the Union, which include EMU.<sup>74</sup> Article 5(1) TFEU expressly requires that Member States coordinate their economic policies "within the Union." It is clear from Articles 119 TFEU that the activities of both the Union and Member States include the adoption of an economic policy that is based on the close co-

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73. Article 3(1)(c) TEU.

74. Article 120 TFEU read in combination with Article 3(4) TEU.

ordination of Member States' economic policies, as well as on the internal market and on defined common objectives. Article 119(2) TFEU clarifies that these activities also include the single currency and the definition and conduct of a single monetary policy and exchange-rate policy. Article 136(1) TFEU confers upon the Union the competence to adopt measures specific to the Member States the currency of which is the euro in order to ensure the proper functioning of economic and monetary Union. The Union has made extensive use of the competence afforded to it in adopting a series of measures designed to strengthen economic governance of the Union.<sup>75</sup>

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75. See for example, Council Regulation (EC) No 1466/97 of 7 July 1997 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies (1997 OJ L 209/1) as amended by Regulation (EU) No 1175/2011 of the European Parliament and of the Council of 16 November 2011; Regulation (EU) No 1173/2011 of the European Parliament and of the Council of 16 November 2011 on the effective enforcement of budgetary surveillance in the euro area (2011 OJ L 306/1); Regulation (EU) No 1174/2011 of the European Parliament and of the Council of 16 November 2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area (2011 OJ L 306/8); Regulation (EU) No 1176/2011 on the prevention and correction of mac-

It is clear from these provisions that economic and monetary Union and the effective functioning of the eurozone is a matter falling within the scope of Union law. It is equally clear that, while the ESM may provide financial assistance to specific Member States, it is essentially concerned with preserving the stability of the Union's single currency and the euro area as whole.<sup>76</sup> Given the fundamental and intrinsic place of economic and monetary union within the EU treaties, it is conceptually incoherent for a mechanism that is intimately concerned with the preservation and functioning of that union to be established and to operate outside the Union legal order.

In *Pringle* the ECJ observed that the Union Treaties do not confer any specific power on the Union to establish a funding mechanism as envisaged by the European Council Decision. Indeed, the ab-

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roeconomic imbalances (2011 OJ L 306/25). Council Regulation (EC) No 1467/97 of 7 July 1997 on speeding up and clarifying the implementation of the excessive deficit procedure (1997 OJ L 209/6) as amended by Council Regulation No 1177/2011 of 8 November 2011 (2011 OJ L 306/33)

76. Case C-370/12, *Pringle v. Ireland and others*, Judgment of 27 November 2012, not yet reported, para 136. See also Article 3 of the ESM Treaty.

sence of such an express power is to be expected in circumstances where the provision of financial assistance had been expressly prohibited by Article 125 TFEU. However, the mere fact that a specific legal basis for establishing a funding facility does not exist in Union law, does not mean that it is appropriate for such a mechanism to be established outside the EU legal order once the mechanism relates to a matter that is of intimate concern to the Union Treaties and where that mechanism could have been established using more general powers conferred on the Union. It will be recalled that the European Parliament expressed regret that the European Council had not explored all the possibilities contained in the Treaties for establishing a permanent stability mechanism within the Union legal order.<sup>77</sup> Having regard to the present Union competences concerning economic and monetary union<sup>78</sup> and monetary policy for eurozone Member States,<sup>79</sup> the Parliament considered it would have been appropriate to make use of the powers conferred on the Council in Article 136 TFEU, or,

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77. See Resolution of the European Parliament of 23 March 2011 footnote 25, *supra*.

78. Article 3(4) TEU.

79. Article 3(1)(c) TFEU.

in the alternative, to have recourse to Article 352 TFEU in conjunction with Articles 133 and 136 TFEU. In its Opinion the ECB equally supported recourse to the “Union method.”

The approach advocated by the European Parliament would have been more consistent with the competences of the Union in the field of economic and monetary policy. It is well established that in areas of shared competence, Member States may only exercise their competence to the extent that the Union has not exercised its competences.<sup>80</sup> Given that Member States conferred competence upon the Union to ensure the proper functioning of economic and monetary Union, and that such competence has been exercised, the Union framework could have and ought to have been used to safeguard the stability of the eurozone area. Such an approach would moreover have ensured the incorporation of legislative, judicial and democratic safeguards that form part of the Union legal order.

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80. Articles 2(2) TFEU.

### 4.3 Implications of Establishing the ESM Outside the Union Legal Order on Democracy and the Rule of Law

The Union is a highly complex political entity that mediates and balances numerous and varying interests of different Institutions, of the Member States as well of different civil and political groupings within the Member States. Dawson and De Witte have argued that the Union's response to the euro-crisis has significantly altered the Constitutional balance upon which the Union's stability is premised.<sup>81</sup> These commentators note that, in the context of the Union legal order, the doctrine of institutional balance ensures that the generation of legal norms takes account of three distinct sets of interest: individual EU citizens (represented by the European Parliament); sovereign States (represented by the Council); and the supra-national interests (represented by the Commission). They further observe that the legislative process offers

81. Mark Dawson and Floris de Witte, "Constitutional Balance in the EU after the euro-crisis" (2013) 76 *Modern Law Review* (forthcoming).

multiple forums through which the citizen's interests can be articulated ensuring that citizens have authorship over the norms that bind them. Dawson and De Witte conclude that the balance between the different Union institutions' decisions and their different prerogatives within the decision-making process ultimately ensures the legitimacy of the law-making process and serves to stabilize the Union's role as a supra-national setting for the generation of binding norms.<sup>82</sup>

The establishment of the ESM by way of an inter-governmental treaty outside the framework of the Union Treaties means, however, that the activities of the ESM are no longer subject to the legislative and democratic safeguards that are inherent in the Union legal order.

First, as mentioned above, the creation of the ESM institution as an intergovernmental treaty has side-stepped the requirement for Member States to amend the Union Treaties using the ordinary revision procedure. Instead, it was possible for the European Council to introduce an amendment through the adoption of a Decision in accordance with the simplified revision procedure provided

82. *Ibid.*, pages 10 and 11.

for under Article 48(6) TEU. It may be perfectly comprehensible for Member States in times of crisis to use as simple and swift a Treaty amendment procedure as possible. However, the SRP is also a less democratic procedure. It removes the requirement for a Convention and, in particular, for the participation of representatives of national parliaments. In relation to the Treaty on Stability, Co-ordination and Governance in the Economic and Monetary Union, Craig has noted that

[w]hatever one believes about its desirability or not, this new treaty does raise an issue of principle, which you can call a rule-of-law issue of principle, that is concerned with whether we should bear with equanimity the idea [of decision making rules] being circumvented by a treaty outside the fabric of the Lisbon Treaty in circumstances where the rules as to how change should be undertaken within the Lisbon Treaty are not capable of being met, particularly given that the SCG [Stability, Co-ordination and Governance] Treaty can only work through the participation of the EU institutions in the way that is written into that treaty.<sup>83</sup>

83. Oral Evidence of Professor Paul Craig before the Eu-

Arguably similar considerations arise in connection with the use of an inter-governmental treaty that circumvents the requirement for an ordinary amendment of the Union Treaties.

Second, the form of stability mechanism that has been established by the Member States operates beyond the Union legal order and is largely unaccountable to its citizens. Pursuant to Article 32(3) of the ESMT, the ESM enjoys “immunity from every form of judicial process” except to the extent that the ESM expressly waives its immunity.<sup>84</sup> Moreover, as the ESM is not a Union body, it is not subject to the EU Treaties, the Charter of Fundamental Rights, or General principles of Union law. As the ECJ has confirmed, the Charter only applies in the field of Union law and is not binding on the ESM Institution.<sup>85</sup> At the same time, the activities of the ESM and, in particular, the “strict

conditions” attaching to its grants of financial assistance, may well impact upon economic and social rights protected by the Charter. For example, Title IV of the Charter enumerates rights concerning fair and just working conditions, the entitlement to social security and social assistance, and access to health care. Economic conditions attaching to the ESM’s financial assistance have the potential to directly and personally impact on citizens’ social rights.<sup>86</sup> However, the ESM, in the performance of its functions, will not be subject to review against the provisions of the Charter. The ESM is set to operate outside the reach of the democratic and constitutional limitations that form part of the Union legal order.

Third, the accumulation of contradictions with and circumventions of the Union legal order gives the impression that, taken as a whole, the legal

framework governing the ESM avoids a number of prohibitions and obligations set out in law. The extent of the circumvention becomes clear when one analyses the arguments raised in support of the legal framework governing the ESMT in the context of the challenge in *Pringle*. Defenders of the ESMT maintained that Article 125 TFEU, referred to as the “no bailout” clause did not prohibit bailouts;<sup>87</sup> that the ESM “bailout” fund ought not to be regarded as a “bail-out fund.”<sup>88</sup> It was suggested that the ESM is immune from EU law prohibitions as it operates under international law and is an independent entity,<sup>89</sup> even though it is

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European Scrutiny Committee of the House of Commons. Answer to Question 12. The transcript is available at: <http://www.publications.parliament.uk/pa/cm201012/cmselect/cmeuleg/uc1817-i/uc181701.htm>

84. Article 32(3) of the ESMT.

85. Case C-370/12, *Pringle v. Ireland and others*, Judgment of 27 November 2012, not yet reported, paras. 178 to 182.

86. For example, see cases giving rise to a preliminary reference in Cases C-434/11 *Corpul Național al Polițiștilor*, Order of 14 December 2011 and C-134/12 *Ministerul Administrației și Internelor (MAI)*, Order of 10 May 2012. See cases giving rise to a reference in Cases C-128/12 *Sindicato dos Bancários do Norte and Others v. BPN* and C-264/12 *Sindicato Nacional dos Profissionais de Seguros e Afins v. Fidelidade Mundial* pending before this Court.

87. Observations of Germany and the Netherlands in Case 370/12 *Pringle v. Ireland*. These Member States argued that the prohibition of Article 125 TFEU should be read teleologically in the context of the ongoing financial crisis. Germany argued that the prohibition on bailouts should be read restrictively “in certain exceptional cases which were not foreseeable when the provision was adopted”.

88. Observations of Ireland and France in Case 370/12 *Pringle v. Ireland*. France argued that ESM is not “a bail-out” fund precluded by Article 125 TFEU because financial assistance is subject to repayment and conditionality. It was submitted on behalf of Mr Pringle that a conditional bail-out remains a bail-out.

89. Observations of Cyprus, Ireland, Austria in Case 370/12 *Pringle v. Ireland*. See footnote 27 *Supra*.

entirely controlled by the Member States. It was simultaneously argued that the ESM is *not* an independent entity so that disputes with the ESM should be regarded as disputes between Member States relating to the subject matter of the Union Treaties,<sup>90</sup> affording the ECJ jurisdiction to rule on disputes under Article 273 TFEU. It was argued that the ESM is not concerned with monetary policy – although its task is to save the euro;<sup>91</sup> that the ESM falls outside the economic competence reserved to the Union – even though it is directly concerned with coordinating financial assistance to support the Union’s single currency;<sup>92</sup> that the establishment of a bail-out fund *requires* a Treaty amendment<sup>93</sup> – yet the ESM may operate before the amendment takes effect. Arguably the accu-

mulation of such contradictions and the circumvention of prohibitions contained in the Union Treaties represent a challenge to the Union’s fundamental commitment to respect for the rule of law as enshrined in Article 2 TEU.

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90. Observations of the Netherlands in Case 370/12 *Pringle v. Ireland*. That government states “*Disputes concerning the interpretation and application of the ESM Treaty are evidently disputes which relate to the subject matter of the Treaties*”.

91. Observations of Belgium, Germany, Netherlands, Ireland, Greece, France, Cyprus, Austria in Case 370/12 *Pringle v. Ireland*.

92. Observations of Germany and the European Commission in Case 370/12 *Pringle v. Ireland*.

93. See Recital 2 of European Council Decision of 25 March 2011 (2011 OJ L 91/1).

## 5. Conclusion

When attention is devoted to avoiding one particular hazard, it can be all too easy to fall into another. In seeking to avoid restrictions on the provision of financial assistance or the requirement to amend the Treaties using the ordinary revision procedure, the Member States and Institutions proceeded to adopt measures that may be considered to impact adversely on the quality of European democracy.

The adoption of measures that are inconsistent with or circumvent prohibitions or obligations laid down in the Union Treaties gives the impression that legal principles and provisions, which are negotiated and adopted by democratically mandated representatives of the Member States, may be subordinated and ancillary to considerations of a political nature. This writer subscribes to the view that selective or inconsistent application of Union law risks undermining the integrity of the legal reasoning within the Union legal order.<sup>94</sup>

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94. Paul Craig, “The Stability, Coordination and Governance Treaty” (2012) 37 E.L. Rev, June 2012.

The establishment of a body that is fundamentally and intrinsically concerned with the Union’s single currency outside the Union Treaties is not easily reconcilable with the central place of economic and monetary union within the Union legal order. The creation of a permanent stability mechanism that is liable to have a direct impact on the lives of Union citizens and yet lies outside and beyond the reach of the Union legal order, and is subject neither to general principles nor the rights enshrined in the Charter of fundamental rights, may be regarded as undermining of the principle of effective judicial protection and democratic accountability.

It has been argued that the Union is not so much defined by a common people or *demos* as by a shared commitment to common values, particularly democracy and the rule of law.<sup>95</sup> Even in exceptional circumstances, the adoption of permanent measures that are inconsistent with such val-

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95. See for example the characterization of the Union legal order by Professor Walter Van Gerven in *The European Union: A Polity of States and Peoples* (Stanford University Press, 2005).

ues risks undermining the integrity of the Union legal order as a whole.





SECTION II:  
AT THE MARGINS  
OF THE UNION:  
INSTITUTIONAL  
EXPERIMENTS IN THE  
EURO CRISIS

# 4. INTERSTITIAL INSTITUTIONAL CHANGE IN EUROPE: IMPLICATIONS OF THE FINANCIAL AND FISCAL CRISIS

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# 1. Introduction

The European Union (EU) in general, and its Economic and Monetary Union (EMU) component in particular, are going through a protracted crisis of heretofore unknown magnitude. That crisis has led to important institutional changes. Some of them have occurred upfront in formal political arenas, are very visible, and openly contested – e.g. the adoption of the European Stability Mechanism (ESM). Others, by contrast, have occurred in a more covert or invisible way, unfolding *after* the adoption of a *different* formal rule – e.g. the transformation of comitology rules in the monitoring of excessive economic imbalances. In this article we focus on the latter type of institutional change and its consequences. We ask: Under what conditions does interstitial institutional change (IIC, defined as change between formal institutional decisions) occur, and what are its consequences?

Note preliminarily that, although our approach is that of positive political science, our motivation is normative. In seeking to highlight and explain recent episodes of IIC in a “community of law” (ECJ 1986) such as the EU, we wish to elucidate the im-

pact of the current financial, fiscal, and political crisis in the Euro-zone on a set of relatively well-functioning institutions. Of course, fully-fledged democracy and total transparency belong to the realm of normative aspirations rather than to that of positive observations. Therefore, it should perhaps not come as a surprise that institutions may change following unexpected, perhaps a-legal or extra-legal, procedures. Nevertheless, the process of European integration should, and can, be assessed against its reliance on the transparent adoption, implementation, and change of substantive and procedural rules (e.g. Héritier 1999; Pescatore 1972; Rideau 1999, 2000). In fact, even official rhetoric adopts a “constitutionalist” tone, and argues that *“the EU’s legal order is the true foundation of the Union, giving it a common system of law under which to operate. Only by creating new law and upholding it can the Union’s underlying objectives be achieved.”* (EUR-Lex 2012)

We also fully acknowledge the fact that not all laws can be designed, adopted, and implemented efficiently if abstract legal procedure is held para-

mount. For example, substantive legal rules, especially those emanating from “framework treaties” such as those of the EU, are constantly reinterpreted. According to the structurationist school of legal methodology (‘Strukturierende Rechtslehre’), that is precisely the *raison d’être* of all legal scholarship: think through all the practical implications of an abstract norm which can be conceived as a text-based programme (‘Sprachdaten’), and do so in light of all the detailed cases which can be encountered during its implementation (‘Realdaten’) (Müller 1993; Riesenhuber 2010). Similarly, going “by the book” may sometimes introduce unnecessary rigidities whereas real-world circumstances demand quick adaptations of substantive and procedural rules. That has been particularly true during the recent (and on-going) financial and fiscal crisis, on which we focus in the rest of this paper.

With these points in mind, we build on Farrell and Héritier (2005) and Héritier (2008: 47) and define IIC as informal institutional change which occurs *between* two formal rule revisions. For example, at time  $t_1$  a committee may initially formally agree to strictly adopt all its decisions by unanimity; progressively, and informally, it may accept to delegate

decision-making powers to individual members; and finally, and formally, at time  $t_2$  it may reconvene to discuss its decision-making rules. IIC is the second step in that sequence, i.e. the informal step taken between  $t_1$  and  $t_2$ . What happens then may hugely affect the decision at  $t_2$ . The study of this type of institutional change is therefore not only interesting from a policy-oriented perspective, but also relevant from a theoretical point of view because it informs the burgeoning literature on the nature of institutions and the conditions for institutional change.

The main descriptive argument we make is that the current crisis in the Euro-zone has led to certain IICs with potentially far-reaching consequences for the governance of the EU as a whole, including its democratic attributes. To be sure, some important changes in fiscal and economic governance rules have occurred upfront in the formal political arenas. The examples we examine here include (1) the transformation of comitology rules in the monitoring of excessive macro-economic imbalances; (2) the contested emergence of a super-Commissioner for the Euro; and (3) the shifting mandate of the European Central Bank (ECB). On this basis, we make the following theoretical

argument: far from fitting squarely into the main theoretical models currently used in the literature to analyze institutions and institutional change in the EU (i.e. principal-agent and/or transaction cost economics), IIC episodes in 2010-2012 create altogether new theoretical categories.

The remaining of this paper is organized as follows. Section 2 describes the two dominant approaches to institutions in political science (the functionalist and the power-based approaches), and theorizes their implications in terms of the amendment of clear (“complete”) and less clear (“incomplete”) rules. Section 3 briefly presents the methodology followed in this research, namely analytic narratives. Section 4 turns to the actual cases of IIC identified above. Section 5 concludes with some thoughts on the refined theory of IIC.

## 2. Political science approaches to institutions and institutional change

We are interested in the reasons why apparently stable institutions (“equilibrium institutions”) may come to change – in this case, under the pressure of the current financial and fiscal crises. Accordingly, this section first presents the two dominant approaches to institutions and institutional change, namely “institutions as game forms” and “institutions as equilibria”. It then summarizes the two main theoretical tools used to study institutions in the EU, namely the principal-agent framework (PA) and transaction cost economics (TCE). We then note that both PA and TCE exhibit a functionalist bias, whereby institutions and institutional change work to the benefit of at least one stakeholder and to the detriment of none. Building on that argument, we propose to examine less functional forms of institutional change, i.e. cases of IIC which clearly create winners and losers. We thereby arrive at the following hypothesis: the more complete (incomplete) the rule to be amended, the more (less) contested and uncertain the amendment will be at the interstitial stage.

### 2.1 Institutions as game forms vs. institutions as equilibria

According to Kenneth Shepsle, there are currently two dominant approaches to institutions and institutional change in political science: “institutions as game forms” and “institutions as equilibria” (Shepsle 2006: 1032-1040). The former is a concept emanating from the work of economic historian Douglass North, who defined institutions as “the rules of the game in a society or, more formally, the humanly devised constraints that shape human interaction” (North 1990: 3). Institutions are thus understood as venues for strategic social interaction and choice. Examples from EU politics would be the Ordinary Legislative Procedure (‘OLP’, Articles 289 and 294 TFEU, formerly known as the co-decision procedure), the simple-majority decision-making rule in the European Commission (Article 250 TFEU), or the rule according to which only the Council of

Ministers can decide to increase the number of Advocates General in the ECJ (Article 252 TFEU). As Shepsle notes, although this concept is useful to analyze the play of the game and its outcomes, it is insufficient when attention is riveted to understanding institutional creation and change. The mere fact that players keep playing the game does not explain they are playing this, as opposed to another, game.

A more promising concept to understand institutional choice and change is “institutions as equilibria”. According to Shepsle, “rather than take an institution as an exogenously provided game form that induces equilibrium outcomes, one might instead think of the game form itself as an equilibrium – as an endogenous product of a more primal setting, or what may be called an *equilibrium institution*” (Shepsle 2006: 1033). For example, rather than treating the EU’s OLP as a fixed and exogenous parameter, we can attempt to endogenize it and treat it as a variable that is the product of a more encompassing game (perhaps one played between large member states with many MEPs on the one hand, and smaller member states with considerably fewer MEPs on the other). Attention shifts from focusing on the operations of OLP

to an understanding of why co-decision was introduced, whose interests it served, and for what purposes it was re-branded “ordinary legislative procedure”.

Despite its seemingly abstract character, this theoretical discussion bears crucially on how we interpret current developments in the EU. Note first that North’s approach takes for granted the rationality of conforming to institutional practices. Yet, under certain conditions, this assumption may become incompatible with the more basic assumption of actor rationality. Shepsle’s approach, by contrast, requires demonstrating exactly why adherence to specific equilibrium behaviour is in an actor’s best self-interest – which includes showing what negative consequences actors would face if they ever decided to defect, and therefore why, on balance, it may not be rational for them to do so after all. Of course, for the purposes of the present paper, it is the flipside of this question which is of greater interest: under what conditions can certain national governments change the rules of the game? Once that question is posed, the issue of IIC comes to the foreground.

## 2.2 Institutional change in principal-agent models and in transaction cost economics

The literature on EU governance uses two different theoretical methodologies to answer the question of institutional choice and change: the complete contracts approach of PA models, and the incomplete contracts approach of TCE. First, PA models are used to investigate institutions created between a poorly informed principal (‘*P*’, ‘she’) and a better-informed agent (‘*A*’, ‘he’) in a frictionless world where the only imperfection is that asymmetry of information. The main issue for PA analysts is to determine what institution *P* can propose to induce *A* to act on her behalf. For example, following Winkler (1999), we can model the politics of the Stability and Growth Pact of the Treaty on European Union as a contract signed between anti-inflationary principals (Germany and The Netherlands) and traditionally inflationary agents (France and Italy). Alternatively, following Steunenberg (2010), we can model the politics of Economic and Monetary Union since Greece’s entry as a contract signed between the Commission

(as principal) and the Hellenic government (as agent). In both cases, *P* hires *A* to perform a task which bears on her welfare.

Invariably, the interests of *A* and *P* are not aligned: there is at least some distributive dimension in their cooperative venture. In addition, *A* always benefits from informational asymmetries: he always has more information regarding his own type and/or actions. And finally, *P* may not know the type or actions of each specific *A*, but she knows the compensation requirements of all different types of *A*. Given these elements, *P* can propose a menu of different games to *A*, such that each game maximizes the objective function of *A* and her own utility given the real type or action of *A*.

In PA models of adverse selection (AS), *P* may be the pivotal voter in the Council of Ministers who wishes to spend her time on the campaign trail rather than in Brussels, and therefore wishes to hire a supranational agent, *A*, to make EU policy. The AS problem stems from the fact that, at the time of hiring *A*, only *A* knows his own abilities. He therefore has an incentive to misrepresent his type: by claiming to be inefficient, he can hope to

command higher compensation for each given task. *P*'s task therefore consists in devising contracts ( $c_1$  and  $c_2$ ) which act as screening devices, so that only a truly inefficient *A* would choose  $c_1$ , and only an efficient *A* would choose  $c_2$ . (Of course, in political science ability is usually not taken literally; rather, it refers to *A*'s ideal policy point.)

If *P*'s offer covers *A*'s participation constraint the latter starts exerting an effort to produce  $x$  (e.g. policy-making activities to produce specific outcomes). At this second stage *P*'s welfare depends on the occurrence of moral hazard (MH). Once the terms of the contract are set, *A* can choose any level of effort that maximizes his own utility given that contract. Crucially, however, the final level of  $x$  depends both on *A*'s level of effort and certain entirely exogenous factors (e.g. floods, financial crises, etc). Whereas *P* can only wait to observe the final amount of  $x$ , *A* knows what effort he exerted and what conditions prevailed. This creates a problem, since *A* must be paid for his effort, but the effect of this effort cannot be separated from the effect of his type and/or external random conditions. Hence, to avoid type I and type II errors, *P* must incur some additional cost. In political sci-

ence, such costs are usually interpreted as monitoring costs (whereby *P* does not pay *A* a rent, but incurs a significant cost herself) and/or delegating more discretion to *A* (where the rent extraction – efficiency trade-off is resolved in the opposite direction).

Finally, assuming that *P* has met *A*'s participation constraint and that the institution covers his incentive compatibility constraint, it is worth asking what might happen if either of the two parties wished to redraft the contract – e.g. if *P* wished to lower *A*'s remuneration, or if *A* started economizing on his effort, engaging in “shirking” or “slipping”. Here, PA theory is clear: re-negotiation is possible, but only as long as the party who proposes it is willing to pay the corresponding fine. Absent that, a perfectly functioning judiciary will intervene to redress the situation and impose the status quo ante.

That last point provides a transition to the second theoretical methodology commonly found in the literature on EU governance, TCE. In TCE, compensation may be a possibility, but it remains a rather distant one. The reason is that contracts here are seen as essentially incomplete, and there-

fore legally inconsequential. Contractual incompleteness, in turn, is due to the bounded rationality of actors.

More specifically, TCE starts from the question of an organization's external boundaries: why do some organizations internalize production, while others rely on external providers? To answer such questions, TCE first establishes a distinction between production costs (PC – e.g. the time and money needed to acquire raw materials and create a good or service) and transaction costs (TC – e.g. the time and money needed to scan the market for the best inputs, plus the time and money needed to negotiate, draft, register, and enforce the ensuing contract). Although PCs and TCs are substitutes, limiting TCs is difficult because bounded rationality combines with whatever positive TCs to produce contractual incompleteness. That, in turn, combines with pervasive opportunism (defined by Oliver Williamson as “self-interest seeking with guile” – Williamson 1996: 8-9) to create a ubiquitous “hold-up problem”, which even a benevolent judiciary can do little about (because contracts are incomplete). The TCE solution to such problems is institutional: where investments

are so transaction-specific as to make the risk of hold-up expensive, parties seek to make their mutual commitments credible by merging (Williamson 1975). Hierarchy thus supersedes the market; or, in the EU, supranational institutions are created (Moravcsik 1998).

What we wish to point out here is not so much the obvious differences in the assumptions and inner workings of PA and TCE (for this, see Karagiannis 2007). Rather, it is that neither PA nor TCE can form an adequate basis for an insightful political analysis of institutional change in the EU. TCE is overtly functionalist. This is most obvious in Williamson's a-political (or perhaps outright "anti-political") theory, where hierarchy not only supersedes the market through a process of efficient mergers and acquisitions, but also becomes "its own court of ultimate appeal" (Williamson 1996: 98). Seen from outside the organization, there are no conflicts of interest inside it. The theory says nothing regarding the possible anti-competitive effects of mergers and acquisitions – or, in politics, the possible anti-democratic consequences of creating ever bigger and more integrated structures.

PA models of institutional choice and change are more analytical, in the sense that they do allow for the definition of conditions under which a proposed contract may not be Pareto-efficient. Similarly, they do recognize that conflicts of interest may exist both between and inside organizations, because hierarchy does not change *A*'s identity. Ultimately, however, many PA models too are quite a-political. First, all the bargaining power lies with *P*. Second, when *P* wishes to re-negotiate the contract, a well-functioning judiciary is assumed to operate, whereby *A* is adequately compensated for the institutional change. Like TCE, PA models thus end up proposing a rather consensual view of institutional choice, and an even more consensual view of institutional change.

### 2.3 Less functional forms of interstitial institutional change

Is it possible to imagine cases where institutional change occurs in a way which clearly benefits some actors and clearly penalizes some others? If so, where would these cases stand in the context of

current theory? To guide our quest for answers to these questions, we provide a two-by-two typology illustrated in Table 1 below. On the horizontal axis we distinguish between complete (clear and fully-specified) institutions and incomplete (unclear or only partly specified) ones. That distinction roughly captures the difference between TCE (an incomplete contracts theory) and PA (a complete contracts theory).<sup>1</sup> On the vertical axis, we distinguish between Pareto-efficient and Pareto-inefficient (i.e. redistributive) institutional change.

TABLE 1: In quest for cases

	Complete Contract
Pareto efficient change	Principal-Agent
Redistributive (i.e. Pareto-inefficient) change	Case 1

1. Note that PA models do not invariably assume that all contracts are complete; they do assume, however, that various types of incompleteness are acknowledged and appreciated ex ante.

Using this typology, our research task becomes clear: given that PA theory cannot explain change and that TCE theory can do so but only from an overtly a-political perspective, we are looking for cases of IIC which either (a) contravene a complete contract while at the same time not offering any guarantees of gains to all stakeholders (Case 1), or (b) contravene a less complete contract while at the same time not offering any guarantees of gains to all stakeholders. If we find such cases and are able to explain them, then we will have made a step forward in the understanding of current EU politics.

Note that from the point of view of current international relations theory, we are far from stating the obvious. According to neo-realism,

for example, absolutely all cases of institutional creation and change should obey the logic of relative gains, whereby no country allows its partners to benefit from a new rule more than it does (e.g. Grieco 1988). Similarly, according to liberal institutionalism (e.g. Keohane 2005) and liberal inter-governmentalism (Moravcsik 1998), although some countries may sometimes focus on absolute rather than relative gains, all cases of institutional creation and change should either be consensual or otherwise follow predetermined procedures. Clearly, although both of these theories have proven their usefulness, it is also very easy to come up with cases which do not fit the theories well. By putting the bar even lower, we go one step beyond this: we make it more difficult to find cases which truly can question the usefulness of PA and TCE.

### 3. Methodological comments: analytic narratives

Turning to our methodology, in what follows we focus on well-chosen “token” (as opposed to “typical”) events. Rational choice analysis is usually associated with the analysis of typical events (i.e. large N data: after asserting typical actors’ preferences and posited some generic game, analysts derive comparative statics on the basis of hypothetical values of the independent variables which constitute the game’s payoffs; hence, generic theory can be tested against any number of cases). Although that methodology can generate interesting insights, it can also equally easily lead to well-known aberrations, such as anachronistic attributions of preferences, reification of ontologically dubious actors, errors of commission, and under-researched specifics. For that reason, and because our goal is to discover cases where PA and TCE views on institutional creation and change are inadequate, we focus on the small-n, qualitative analysis of specific, micro-political events.

Further, we use the concepts of: (a) analytic narratives; and (b) clearly defined events. *Analytic narratives* combine researchers’ interest for specific historical events with social scientific theory (Bates et al., 1998). There exist two non-mutually exclusive types of analytic narratives. The first type consists of analytic narratives that aim at adjudicating between competing historiographies. Here, the “analytic narrator” assumes that historical actors are rational, and explores which of the competing historiographical claims is more consistent with that assumption. The second type aims at interpreting specific events using established social scientific approaches. The goal is to uncover and explain issues or historical events for which we still lack some convincing explanation (e.g. Bates et al., 1998). In what follows, we mainly use the second type of analysis.

Finally, we focus on *clearly defined events* as opposed to explananda focusing on long-term, complex processes which may lead to faulty inferences

because they blur different events. We rely on Riker’s definition of analysable events, defined as “the existence ... of some sort of perceived motion or action, sometime, somewhere” in a larger context of an infinitely moving reality. This presupposes imagining starts and stops. “What lies between the starts and stops we call events”. Riker distinguished between (1) *a situation*, defined as “an arrangement and condition of movers and actors in a specified, instantaneous, and spatially extended location”, and (2) *an event*, defined as “the motion and action occurring between an initial situation and a terminal situation such that all and only the movers and actors of the initial situation ... are included in the terminal situation” (Riker 1957: 61).

## 4. Case studies

### Case 1: The Regulation on the Prevention and Correction of Macroeconomic Imbalances (EU 1176, 2011)

The first case refers to a new institutional rule in the application of delegated and implementing acts under the “six-pack” regulations revising the EU’s Stability and Growth Pact of 1997 as revised. The *Regulation on the Prevention and Correction of Macroeconomic Imbalances* contained a number of vague provisions whose specification and implementation required the passing of delegated legislation. The Treaty on the Functioning of the European Union (TFEU 2009) distinguished, for the first time, between legislative delegation and executive delegation, and provided for two separate procedures for “delegated acts” and “implementing acts” (Ponzano 2010). Under “delegated acts” (Art. 290 TFEU), the Commission – by legislation – may be delegated the power to adopt acts of general scope supplementing or amending certain non-essential elements of the legislation in

question. The legislators must explicitly define the objective, content, scope and duration of this delegation. They also can choose the mechanism(s) in order to control the Commission when it applies these delegated powers, revocation and objection. In the case of revocation, either the Council or the Parliament may revoke a delegation. Similarly, an objection on the part of either the Council or the Parliament would prevent an individual “delegated act” from entering into force (see also Blom-Hansen 2011).

The new provisions of the Lisbon Treaty leave open many questions as to how delegated acts (Art. 290) and implementing acts (Art. 291) should be applied. In other words the provisions constitute an incomplete contract. As a rule, when the Commission proposes a “delegated act” a conflict ensues between the Parliament, the Council and the Commission. The Council seeks to oppose it entirely or to reduce its scope, or to translate it into an implementing act. Frequently, in order to reach an agreement linkages are performed across various issues as to whether to use “delegating” or

implementing acts (Interview Commission, Jan. 2012).

A recent instance of such a conflict over the choice of either Art. 290 or Art. 291 in recent legislation<sup>2</sup> is precisely the adoption of the Regulation on the prevention and correction of macro-economic imbalances. When deciding how to flesh out the scoreboard regime, i.e. the indicators used to measure and monitor macroeconomic and macro-financial imbalances, the Commission and the Parliament favoured “delegated acts” (Art. 290) whilst the Council wished to use an implementing act (Art. 291) for the reasons described above. A deadlock ensued which after a round of negotiations led to the use of an informal new type of procedure which is *neither* Art. 290 nor Art. 291, the “compromise”. The respective recital 12 of the Regulation stipulates

*“The Commission should closely cooperate with the European Parliament and the Coun-*

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2. Other recent instances of a conflict between the Council, the Parliament and the Commission about the selection of a delegated or implementing act are the Cross-Border Health Care Directive and the Novel Food Directive.

*cil when drawing up the scoreboard and the set of macroeconomic and macrofinancial indicators for Member States. The Commission should present suggestions for comments to the competent committees of the European Parliament and of the Council on plans to establish and adjust the indicators and threshold. The Commission should inform the European Parliament and the Council of any changes to the indicators and threshold and explain its reasons for suggesting such changes.”*

Note the difference to the “real” use of a delegation act used in another six-pack regulation on the effective enforcement of budgetary surveillance in the euro area.<sup>3</sup> It states, as prescribed in the Comitology Regulation of 2010, that the Commission shall be empowered to adopt “delegated acts” regarding the criteria establishing fines, procedures for investigations (Art. 8.4); that the Commission

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3. Regulation (EU) No 1173/2011 of the European Parliament and of the Council of 16 Nov. 2011 on the effective enforcement of budgetary surveillance in the euro area

shall draw up a report in respect of the delegation of power; and that the delegation may be revoked at any time by the Parliament or by the Council (Art. 11.2, and 3).

What is striking from our theoretical perspective of covert institutional change under pattern one is that the existing formal rules constitute ambiguous terms of contract, which in the situation of a decision stalemate were re-bargained and transformed in such a way as to overcome the impasse. By so doing the power of the Commission was clearly strengthened.

### Case 2: A super-commissioner in charge of the Euro?

Our second case refers to the (attempted) creation of a super-commissioner in charge of the Single currency.

Unlike many other international organizations, the executive organ of the EU has traditionally been organized around the principles of majoritarian and collegial decision-making. This institution is not innocuous; on the contrary, it raises several issues pertaining to social choice theory

(how does a majority of commissioners reach a stable decision in the absence of dictatorial powers?), transaction cost-economizing (how can agreements between commissioners be enforced in the face of changing circumstances?), incentives schemes (how can an appointed official be held accountable if she does not have full ownership of her decisions?), and even legal certainty (e.g. how can a party negotiate with one member of the Commission when her decisions risk being overturned in the college?).

The origins of collegial decision-making can be traced back to the Schuman Declaration of May 9, 1950. Then, French foreign minister Robert Schuman proposed that “Franco-German production of coal and steel as a whole be placed under a common High Authority.” Regarding the High Authority (the predecessor of the Commission), he said that it would be “composed of independent persons appointed by the governments, giving equal representation.” Less than a year later, the ‘Six’ signed the Paris Treaty creating the European Coal and Steel Community, and the most supranational executive bureaucracy the world had known. A key aspect was the majority

rule for High Authority decisions (Article 13(1) ECSC). Schuman and Jean Monnet had proposed to create a collegial common Authority instead of a series of separate, specialized agencies in charge of well-defined policy areas, because France and Germany held very different preferences on common antitrust rules (Karagiannis 2013). France, which wanted antitrust, had to offer Germany, which loathed it, assurances that no policy would be implemented by French agents against German targets. The institutional form of these assurances was multi-task and collegial governance.

Over time EU politics generated new preferences and new events, some anticipated and some unforeseen. In two of the most central policies, competition policy and the Single Market, most state actors eventually became “Europeanized”, meaning that they readily could grant some specialized European regulator full authority. Yet the institution of collegiality was not abandoned. On the contrary, it proved to be both workable and robust. Not only did it continue to support the same equilibrium behavior despite greatly changing circumstances; it also facilitated the creation of new common policies (e.g. environmental policy, IT

policy, etc) and the incremental enlargement of the Union to new Member States, including the United Kingdom.

On the other hand, the idea to grant a member of the college independence has a long history. Such a possibility was already discussed in the late 1950s and the 1960s, but was vehemently denied by Presidents Monnet and Hallstein (Monnet 1976: 435; Hallstein 1962: 59). In July 1975, the Commission introduced into its Provisional Rules of Procedure a new Article 27 according to which, “subject to the principle of collegiate responsibility being respected in full the Commission may empower its members to take, in its name and subject to its control, clearly defined measures of management and administration.” (Official Journal, L 199, at 43) That was accompanied by an internal Commission decision laying down the principles and conditions on which delegations of authority to particular persons would be granted. Among these were the following: (a) the decision to delegate authority internally could only be made by a meeting of the full Commission; (b) it could only concern designated categories of routine measures; and (c) the delegate could only make a de-

cision if (s)he were satisfied that all departments concerned were in agreement.

In the autumn of 2011 President Barroso announced the end of across-the-board collegiality as the main mechanism of governance of the executive branch of government of the EU. More specifically, Olli Rehn, the commissioner responsible for the common currency, would become Vice-President “with a reinforced status and additional working instruments”, including the power to operate without previously consulting the college of commissioners. President Barroso’s decision was officially explained as: “the best way to guarantee the independence, objectivity, and efficiency in the exercise of the Commission’s responsibility of coordination, surveillance, and enforcement in the area of economic governance of the Union and of the euro area in particular.” (Barroso 2011) It soon emerged that commissioner Rehn’s new powers should grant him exclusive authority to control the national budgets of eurozone states, including the power to control tax and spending plans before national parliaments could do so. As Commissioner Rehn himself declared: “Rest assured, I will make full use of all these new in-

struments from day one of their entry into force.” (Financial Times 2011a; Le Monde 2011; Note the use of the singular form, as opposed to more conventional expression “the Commission”, or the more diplomatic “we”.)

President Barroso’s decision triggered off numerous immediate responses, most of them skeptical if not outright critical. According to the Financial Times, “Europe is moving toward the creation of a ‘budget tsar’ with expanded powers [...] Rival commissioners would have limited means to challenge the decisions of the commissioner for economics and monetary affairs” (Financial Times 2011a). According to a popular blog, “EU Commissioner Olli Rehn [is] to get Reichmarschall powers from XXI century” (Ironiestoo 2011). Later, as the German, Dutch, and Finnish governments pushed on with the implementation of the decision, the Financial Times noted that “the latest spark to anti-German tinders is a Berlin policy document, which contemplates giving the EU commissioner the authority to overrule Athens’ taxation and public spending decisions.” (Financial Times 2012) Thus, whereas the Commission had always been governed as a collegial body (of-

ten at the cost of policy effectiveness), its functioning was now being interstitially re-designed to insulate certain policy areas from the usual horse-trading politics of the college.

In the end, new French President François Hollande effectively vetoed the super-commissioner, and at the time of writing negotiations seem to still be going on. We can nevertheless clearly place this case in our analytical grid as a clear and complete contract which is nevertheless re-negotiated with no compensation.

### *Case 3: Delegation to the European Central Bank*

The ECB was delegated the task to conduct European monetary policy. The Statute of the ESCB (European System of Central Banks), as laid down in the protocol to the Maastricht Treaty, empowers the ECB with the primary monetary policy objective of achieving price stability. The bank is independent within a clear and precise mandate, and is accountable to the citizens and elected representatives for the execution of this mandate (Scheller 2006). To obtain its main objective of price stability, the ECB sets key interest rates for

the Eurozone seeking to keep inflation rates below but close to 2% over the medium term. The ECB is also the sole issuer of bank notes and bank reserves for the euro area. It manages, moreover, the eurozone’s foreign currency reserves to keep exchange rates in check and supports national authorities in supervising financial markets and institutions.

Recently, there have been heated debates about whether the ECB has gone beyond the mandate delegated to it by member states. This is because in the course of the present European sovereign debt crisis the ECB has taken new innovative measures. It repeatedly engaged in rounds of government bond purchases. Basically, it can purchase bonds of the struggling GIPSI (Greece, Ireland, Portugal, Spain, or Italy) governments in two ways: directly, or indirectly by making additional loans to commercial banks that in turn acquire GIPSI bonds (White <http://www.free-banking.org/2012/09/07/>). The ECB declared that it would not refinance the European Stability Mechanism (ESM) by giving it a mechanism with a banking license. However, it decided that it will support any ESM bond/purchase operations

with potentially unlimited amounts of interventions in the secondary market<sup>4</sup>, albeit limited to shorter maturity. The President of the ECB, Mario Draghi, described the new bond-buying program of July 2012, the Outright Monetary Transactions (OMT), intending to ease financial conditions for member states in financial and fiscal crisis, as clearly within the mandate of monetary policy. Yet, formally, the ECB is prohibited from directly financing governments which renders its purchases of governments bonds – even in the secondary market – highly controversial.

These crisis-driven activities raised questions of whether the ECB has stepped outside its traditional role and gone beyond its mandate. It was argued that due to the slowness of European political decision makers, i.e. governments, a vacuum was created that resulted in the ECB being “the only institution in the euro area capable of intervening promptly and decisively, into territory far outside its custom and practice” (Economist, October 2011; Schelkle 2012). “The ECB

has shown it is willing to step in when fiscal authorities have not,...but also knows it is stretching its mandate” (Begg 2012 .....). Critique from Germany was particularly acute. The chief of the German Bundesbank, Jens Weidmann, challenges the ECB’s bond-buying and argues that the ECB is engaging in “monetary financing” or providing direct financial support to governments which is illegal under the EU Treaty. The broader debate, however, is whether the ECB should engage in bond-buying in Eurozone countries threatened by sovereign debt crisis, and – if so – which kind of budgetary and structural conditions should be attached to it (Wolff 2012).

From the perspective of our theoretical argument, the recent activities of the ECB offer an example of an agent which – forced by external shocks - engages in a redefinition of its mandate leading to a deepening of integration and, as a result, meets with attempts of some principals to contain the redefinition.

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4. An ESM fund endowed with limited funds cannot work as a back stop mechanism in case of liquidity crisis, especially if a large member state is in financial difficulties

## 5. Conclusion: a theory of interstitial institutional change

From the analysis of the above cases we conclude that in order to capture IIC it is useful to build on the *theory of continuous institutional change* (Héritier 1997; 2007; 2012; Farrell and Héritier and 2003, 2004; Stacey and Rittberger 2003). That theory emphasizes the renegotiation or re-interpretation of incomplete institutional rules and policies, often at no obvious cost (no “fine”). We find that IIC emerges not only once informal and/or incomplete contracts have been taken, but also when exogenous reasons come to shake participants’ beliefs regarding the stability of complete contracts.

Regarding IIC after incomplete contacts, it is clear that incompleteness offers the possibility to renegotiate and re-specify rules in the course of their application. This can be explained by reference to the assumptions of goal-oriented, boundedly rational actors who seek to maximize their institutional power and thereby their power over policy outcomes. Answers to why patterns of deepening

integration appear interstitially may be derived from the existence of external problem pressure, specific institutional conditions, and the relative bargaining power of the actors involved when re-defining incomplete institutional or policy rules.

Interestingly, our case on the super-commissioner for the single currency shows that parts of the same pattern can be found in cases of IIC after complete contracts – though of course here incompleteness cannot be identified as a necessary condition for IIC. Before rushing to conclude that “power politics” is all that matters, however, it may be advisable to remind ourselves that the mere election of François Hollande (a critique of the super-commissioner proposal) was a sufficient condition for the shelving of the plan.

We conclude from this that given problem pressure and a demand for coordination of national policies, it is crucial whether decisions to coordinate at the higher level represent complete or incomplete contracts. If member states have simi-

lar preferences and agree in a detailed decision to upload competences to the higher level which also clearly circumscribes the power given to supranational actors, a limited transfer of national powers has occurred in a complete contract and in an overt way in the main political arena. If by contrast member states have diverse preferences regarding the desired policy solutions and appropriate limits of supranational power, the outcome of the decision process in the main arena is likely to be vaguely formulated (an incomplete contract) and/or at the lowest common denominator. An incomplete contract – for strategic reasons and reasons of substantive uncertainty (Cooley and Spruyt 2007) – leaves many details yet to be specified, and thereby opens the door for subsequent institutional and policy changes (Héritier 2007). These changes often happen outside the formal political arena. The renegotiation may give rise to informal rules regarding the handling of national powers emerging alongside the formal political arena. The outcome of the re-bargaining of the incomplete contract will be determined by the most powerful actors (as defined by their fallback position), the existing decision-making rule and exogenous events. When specifying the incomplete

contract supranational executive actors may form an alliance with judicial actors in interpreting the details of the contract and – through court rulings - make an inroad into national competences previously not formally mandated.

*In short, a deepening integration may result from the fact that – given external problem pressure - the formal political decision-makers due to diverging preferences and consensus or unanimity rules commit themselves to only vaguely formulated institutional rules or policy goals. Given the ambiguity of the rule or policy mandate, implementing actors, i.e. executive actors, and judicial actors, but also political actors at the national level, are able to redefine the generally stated goal. Depending on the preferences and the relative power of the actors involved in the re-negotiation of the incomplete contract and given institutional restrictions deepening integration may ensue (Héritier 2007).<sup>5</sup> This leads to conjec-*

5. S.Schmidt (2012) points out that case law often is “fuzzy” (p.3), and in turn may create new legal uncertainty in drawing “the line between the remaining

*ture one that “An incomplete institutional rule or policy may lead to a deepening of integration in the course of its application if pro-integration executive and judicial actors with pro-integration preferences specify the incomplete rule or lower level political actors with pro-integration preferences prevail in the re-negotiation.”*

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national competences and European obligations” (p.3). Thereby it gives private actors and the legislature “an incentive to settle on the most far-reaching interpretation of the ambiguous case law, as otherwise an interpretation of secondary law in the light of case law may again fail to secure legal certainty” (p.23). S.Schmidt thereby underlines a highly interesting corollary of the pattern of judicial specification of incomplete contracts addressed here.

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# 5. THE OUTCOMES OF INTERGOVERNMENTALISM THE EURO CRISIS AND THE TRANSFORMATION OF THE EUROPEAN UNION

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# 1. Introduction

The aim of the article is the following: to show the difficulty of the intergovernmental EU in dealing with the euro crisis. According to the Lisbon Treaty, financial policy is a prerogative of the national governments of the EU member states. It is thus a policy that should be managed within an intergovernmental framework. The extremely complex system of economic governance set up during the euro crisis (in the period 2010-2012) has been largely defined and implemented on the basis of the intergovernmental approach. An analysis of how the EU has dealt with the euro crisis is thus an opportunity to assess the effectiveness and legitimacy of that approach. Indeed, after the failure of the Constitutional Treaty in the 2005 French and Dutch popular referendum, the intergovernmental 'moment' has become predominant within the EU, to the point that the defenders of the alternative Community method had to wonder whether the latter has in the meantime become 'obsolete' (Dehousse 2011). However, as a result of the financial crisis that broke out in 2008, taking a serious turn for the worse in 2010 and deepening since then, the intergovernmental structure set up

in the Lisbon Treaty soon started to totter. The financial bankruptcy of Greece and Ireland and the serious financial difficulties of Portugal, Spain and Italy determined the need to reconsider the EU intergovernmental arrangement constructed in the course of the last two decades. An arrangement that was based on a centralized monetary policy (in the Frankfurt-based European Central Bank or ECB) and a decentralized financial, fiscal and budgetary policies (in the member states).

Under the financial threat of the euro's collapse, the heads of state and government of the EU member states eventually ended up in dramatically redefining the intergovernmental system of economic governance in Europe (and the euro-area in particular). New radical legislative measures were approved (from the 2010 European Semester to the so-called 2011 Six Packs and 2012 Two Packs) within the institutional frame of the Lisbon Treaty and new intergovernmental decisions (the 2010 European Financial Stability Facility or EFSF and the European Financial Stability

Mechanism or EFSM<sup>1</sup>) and new intergovernmental treaties (the 2011 Treaty on European Stability Mechanism or ESM<sup>2</sup> and the 2012 Treaty on the Fiscal Compact<sup>3</sup>) were set up outside of the Lisbon

1. The European Financial Stability Facility (EFSF) was instituted in May 2010 "at the very same time as a new EU law instrument serving the same purpose of giving financial support to countries facing a severe sovereign debt crisis, namely the European Financial Stability Mechanism (EFSM) was established by a Council Regulation based on Article 122(2) TFEU (...) Both instruments have been used simultaneously and cumulatively with respect to Ireland and Portugal" (De Witte 2012:4). The EFSM will be superseded by the ESM when the latter will enter into force.
2. The Treaty on the European Stability Mechanism (ESM) was signed by all the EU member states on 25 March 2011 on the basis of a European Council's decision, taken on 16 December 2010, to amend TFEU Art.136 for authorizing the euro-area member states to establish a specific stability mechanism for their currency. It was finally established on 27 September 2012 and it will become operative by January 2013 replacing the EFSM.
3. It is generally used the term of Treaty on Fiscal Compact for the sake of simplicity. Indeed, its name is Treaty on Stability, Coordination and Governance in the Economic and Monetary Union of which the fiscal compact is only one component. Signed by all the heads of state and government (except the Czech Republic and the United Kingdom or UK's ones) in the meeting of the European Council of 2 March 2012, it will enter into force on 1 January 2013, provided that 12 contracting parties

Treaty. The new measures and treaties attempted to ameliorate market pressures on the weaker and indebted member states of the euro-area, but they didn't work as expected. They were considered ineffective by the financial markets and illegitimate by the affected citizens (as shown by the strikes and riots in the capitals of the indebted EU member states). Thus, if one defines the euro crisis as an *existential crisis* (that is, a crisis which antagonizes EU member states to the point of not allowing for a politics of normal bargaining between them based on side payments, trade-offs, postponed benefits, mutual recognition), then the intergovernmental Union has shown to be unable to generate effective and legitimate decisions in crisis condition. The euro crisis has thus called into question the intergovernmental EU rather than the EU as such.

The article is divided into three sections. The first section aims to show that the Lisbon Treaty has institutionalized a dual constitution or decision-making regime (supranational regarding the policies of the single market and intergovernmental regarding *inter alia* economic and financial

policies), with the aim of qualifying the features and the logic of the latter. The second section will describe the measures taken in the period 2010-2012 on the basis of the intergovernmental decision-making regime for dealing with the euro crisis, with the aim of showing their inability to offer effective and legitimate answers to the crisis. The third section will discuss the reasons why the euro crisis did not find a satisfactory solution in the period in question, with the aim of identifying the basic dilemmas of collective action the intergovernmental framework couldn't resolve. This helps to explain the political reaction to the intergovernmental decisions and to reconsider the constitutional basis of the EU.

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whose currency is the euro have deposited their instrument of ratification.

## 2. The Lisbon Treaty: The Dual Constitution

### 2.1 The supranational side

The Treaty of Lisbon came into force on 1 December 2009 (Foster 2010)<sup>4</sup>. Although the Treaty of Lisbon has scrapped any constitutional symbolism, it has defined (in terms of roles and functions) the EU's institutional structure (as constitutions do). For a large majority of policies where integration proceeds through formal acts (*integration through law*), it is plausible to argue that the Lisbon Treaty has set up a system of democratic government (that is, using David Easton's (1971) classic formulation, a formal structure of institutions endowed with the power and legitimacy of allocating values authoritatively). The Lisbon Treaty has formalized a governmental structure organized around two distinct legislative chambers and two distinct executive institutions.

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4. The Lisbon Treaty is constituted of the amendments to the two consolidated treaties, the Treaty on the European Union or TUE of 1992 and the Treaty on the European Community, renamed as Treaty on the Functioning of the European Union or TFUE, of 1957, plus the Declaration concerning the Charter of Fundamental Rights considered *de facto* as a third treaty.

It is possible to argue that the Treaty has brought to maturity a long process of distinction between the executive and the legislative branches. Celebrating the codecision procedure as “the ordinary legislative procedure” (TFEU, Art. 289), the Treaty has institutionalised a two-chamber legislative branch, consisting of a lower chamber representing the European electorate (the European Parliament or EP) and an upper chamber representing the governments of the member states (the Council). According to TFEU, Art. 289, “the ordinary legislative procedure shall consist in the joint adoption by the European Parliament and the Council of a regulation, directive or decision on a proposal from the Commission”. The Treaty has thus celebrated the growing role acquired by the EP since its direct election in 1979 (Shackleton 2005). The EP has finally become an institution of equal standing with the Council representing (in its various ministerial formations, 10, included the General Affairs Council, as of 2012) the ministers of the EU member states' governments. The inter-institutional balance between the EP and the Council has contributed legitimacy to the law

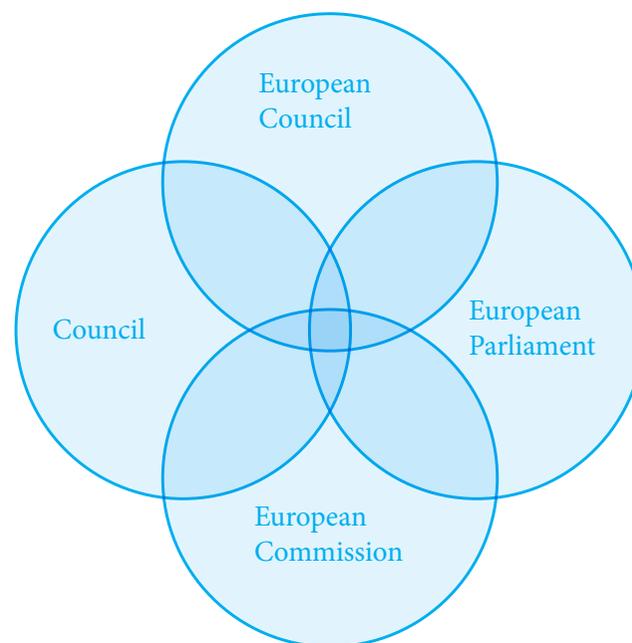
making process of the EU. At the same time, by recognising the European Council (which consists of the heads of state or government of the EU member states, chaired by a president elected “by a qualified majority” of them “for a term of two and half years, renewable once”, TEU Art. 15(5)) as the body responsible for setting the general political guidelines and priorities of the EU, the Treaty has finally transformed it into a political executive of the Union, while confirming the Commission in its role of technical executive of the latter. The European Council, therefore, can no longer be considered a body linked to the Council as it was in the past (Naurin and Wallace, 2008), because the latter exercises legislative functions, while the former executive ones (Kreppel 2011). The Lisbon Treaty has therefore built a four-sided institutional framework for governing the EU policies (on the single market), with a bicameral legislature and a dual executive branch.

The four institutions are separate because formed through different electoral procedures, representing different communities of interest, operating according to different prerogatives and nevertheless connected through several mechanisms of checks and balances. The European Council and

the Council are expressions of member state governments, and their composition depends on the outcomes of the staggered national elections in the member states. The EP depends on the outcome of the elections organized in districts within member states every 5 years<sup>5</sup>. The Commission's president is nominated by the European Council, but should then receive the EP's approval. Moreover, the Treaty requires (TFEU, Art. 17.7) the European Council "of taking into account the elections to the European Parliament" in the appointment of the president of the Commission. The commissioners are nominated by the European Council, in cooperation with Commission's president, but even they have to pass through a process of approval by the EP. Thus, in the large majority of single market's policies, where integration is taking place through legal acts, the EU decides through a complex interplay of those institutions each independent from the other (see Fig. 1).

5. It should be stressed that the Lisbon Treaty does not apportion the 751 seats of the EP strictly according to the population of the member states. Indeed: (1) a minimum of 6 EP seats are assigned to each member states (162 seats); (2) the remaining 589 seats are assigned to member states in proportion to their population; (3) the larger member state (Germany) can obtain a maximum of 96 seats.

Fig.1 The supranational institutional system of the EU



It is a decision-making system complex and nevertheless balanced. In fact, "where reference is made in the Treaties to the ordinary legislative procedure for the adoption of an act", the above procedure shall apply (TFEU, art. 294): the Commission has monopoly over legislative proposals (although its proposals might increasingly reflect European Council's political inputs) that have the form of a directive, regulation or decision; before

submitting its proposal, the Commission will have to consult the various committees of the representatives of the member states (COREPER) supporting the activities of the Council, the parliamentary committees and interested or influential social and functional private organizations; once submitted, the Commission's proposal will have to be discussed, amended and approved by both legislative branches (the EP and the Council). It is interesting to notice that, in the first years after the Lisbon Treaty came into force, when the Commission's proposal was finally submitted to one or another legislative chamber it was generally approved at the first reading, avoiding passage through the time-consuming procedure of reconciliation between their different views on the proposal (Costa, Dehousse and Trakalova 2011). This decision-making system tries to satisfy the effectiveness' criteria, with the competitive cooperation between the European Council and the Commission, and the legitimacy's criteria, thanks to the legislative role of the EP and the Council and the supervisory role of European Court of Justice (ECJ), together with member states' constitutional courts.

The institutionalization of the quadrilateral decision-making system has had contradictory effects on the so-called *Community method*, which is at the origin of the EU's transformation into a supranational organization. In fact, according to this method, "the European Commission alone makes legislative and policy proposals. Its independence strengthens its ability to execute policy, act as the guardian of the Treaty and represent the Community in international negotiations. Legislative and budgetary acts are adopted by the Council of Ministers...and the European Parliament...The use of qualified majority voting in the Council is an essential element in ensuring the effectiveness of this method. Execution of policy is entrusted to the Commission and national authority. The European Court of Justice guarantees respect for the rule of law" (Dehousse 2011: 4). According to this method of integration, therefore, there is no role for the European Council in the EU decision-making system, although it has become an institution of strategic importance for the EU. At the same time, the strengthening of the EP has certainly cohered with the Community logic envisioned by Jean Monnet at the foundation of the integration process (although then the EP was an

assembly constituted by representatives nominated by national parliaments). How do we reconcile the European Council's decision-making role with the decision-making independence of the Commission (which is the hinge of the Community method), given that both institutions exercise executive functions? Remaining within a strict Community method perspective, it would be difficult to find an answer<sup>6</sup>. In any case, with the Lisbon Treaty, the European Council has formally entered into the supranational EU decision-making system with its role of defining the ends of the integration process (Kreppel 2008). Because the European Council has come to stay, probably it is less confusing to speak of a supranational, rather than Community, method for the management of single market policies. In sum, in the supranational side, the EU has institutionalized a quadrilateral decision-making system trying to combine the effectiveness of the executive power with the legitimacy of the legislative power.

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6. Indeed, in the most articulated study on the Community method (Dehousse 2011), there are no references to the role acquired by the European Council in the supranational EU. For a discussion on the erosion of the Commission's power of initiative, see Ponzano, Hermanin and Corona (2012).

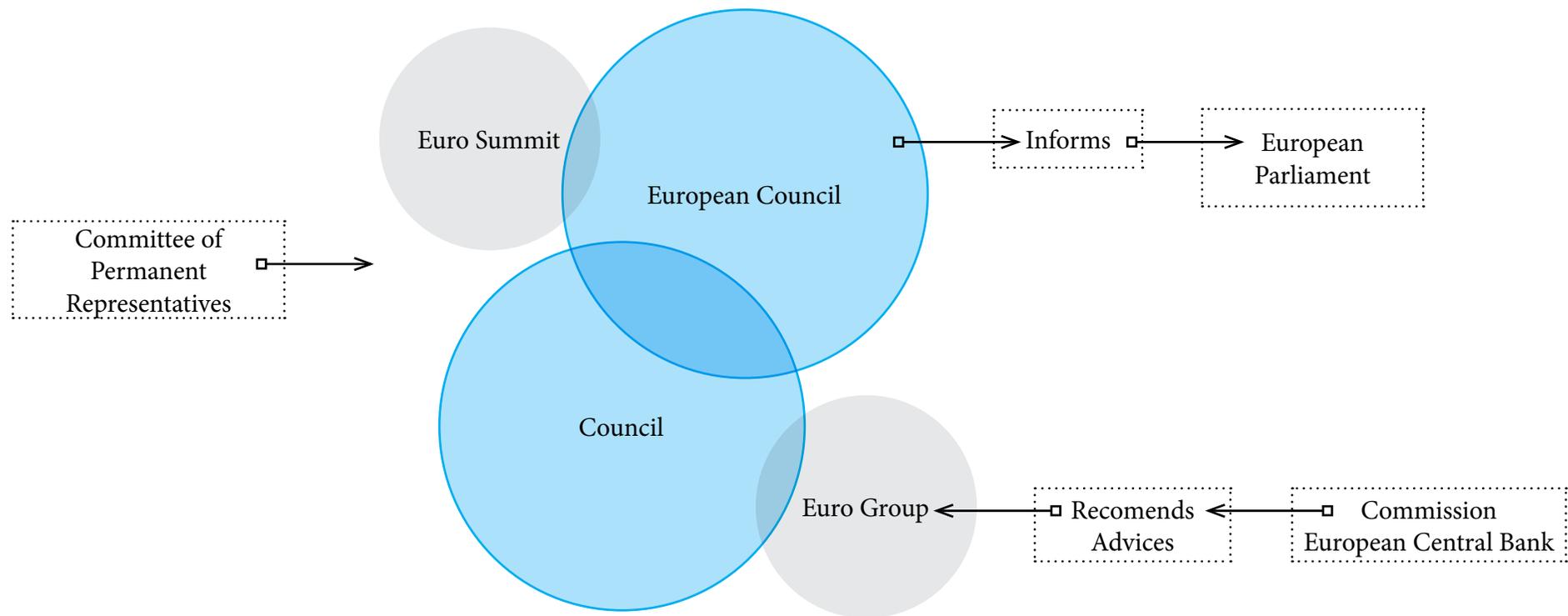
## 2.2 The intergovernmental side

Integration through law does not represent the only logic celebrated by the Lisbon Treaty. With the extension of the integration process to policy realms traditionally considered sensitive to the national sovereignty of the member states, such as welfare and employment policies, foreign and security policy (Common Foreign and Security Policies or CFSP), military and security policy (European Security and Defence Policy or ESDP) and economic and financial policies (and the Economic and Monetary Union or EMU<sup>7</sup>), the EU has looked to organize the decision-making process by new modes of governance. Since the 1990s, scholars have analysed and discussed this new approach to policy-making based on open method of coordination, benchmarking, mainstreaming, peer review and, more generally, *intergovernmental coordination* (Heritier and Rhodes 2010; Trubek and Trubek 2007; Kohler-Koch and Rittberger 2006; Caporaso and Wittenbrinck 2006; Idema and Keleman 2006). Indeed, it was the 1992

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7. The EMU is constituted only by the member states whose currency is the euro.

Fig. 2 The intergovernmental institutional system of the EU



Maastricht Treaty that institutionalized a *compromise* between those asserting the need to promote integration also in policy's areas historically at the centre of national sovereignty, as monetary and economic policy or foreign and security policy,

and those unwilling to downsizing the powers of national governments in those policy's realms. The compromise consisted, on one side, in integrating at the Union's level also those policies and, on the other side, in interpreting this integration

as *voluntary coordination* between member states' governments, with minor if not insignificant role of the supranational institutions. Indeed, for distinguishing between different models of integration, the Maastricht Treaty set up three distinct

institutional pillars or decision-making regimes, although some authors (Wallace and Wallace 2007) identified at least five different regularized patterns of decision-making within and across those pillars.

The Lisbon Treaty has abolished the institutional distinction between pillars, giving a unified legal personality to the EU, but it has maintained the distinction between different decision-making regimes, the supranational and the intergovernmental. Although each regime accommodates several patterns of decision-making, the two decision-making regimes embody two distinct constitutional logics, one multilateral (because based on both supranational and intergovernmental institutions, i.e. the quadrilateral) and the other unilateral (because based exclusively on the intergovernmental institutions). Certainly, the boundary between the supranational and intergovernmental methods is not fixed and insurmountable, as shown by the home affairs and justice policy that since Maastricht was gradually transformed from an intergovernmental to a supranational policy. The so-called ‘cross-pillarization’ affected also other realms of policy, as foreign and security pol-

icy (Stetter 2007). Nonetheless, the Lisbon Treaty has formally entrenched the intergovernmental decision-making regime, thus celebrating an alternative model of integration based on (Allerkamp 2009: 14): (a) “policy entrepreneurship (coming, *n.d.r.*) from some national capitals and the active involvement of the European Council in setting the overall direction of policy”; (b) “the predominance of the Council of Ministers in consolidating cooperation”; (c) “the limited or marginal role of the Commission”; (d) “the exclusion of the EP and the ECJ from the circle of involvement”; (e) “the involvement of a distinct circle of key national policy-makers”; (f) “the adoption of special arrangements for managing cooperation, in particular the Council Secretariat”; (g) “the opaqueness of the process to national parliaments and citizens”; (h) “the capacity on occasion to deliver substantial joint policy”. What we have here is a simplified decision-making regime, based on the European Council and the Council, within which national governments play an exclusive role (see Fig. 2).

Regarding CFSP and EMU in particular, the intergovernmental Lisbon Treaty has formally es-

chewed the principle that integration should proceed through legislative acts that are directly binding for all subjects involved. These policies are based on *soft law*, not *hard law*. As TEU, Art. 24(1), states expressly, in CFSP “the adoption of legislative acts shall be excluded” and the decisions are implemented through actions and positions (TEU, Art. 25). Thus, not only is the EP excluded from the decision-making process, but, as TEU, Art. 24 clarifies, “the Court of Justice of the European Union shall not have jurisdiction with respect to these provisions”, unless the foreign policy decisions infringe upon fundamental principles and rights the EU should respect, as stated in TEU, Art. 2 (“The Union is founded on the values of respect for human dignity...”) and TEU, Art. 3 (“The Union’s aims is to promote peace...”). It is certainly plausible to argue that the EP may be indirectly involved in foreign policy through its connection with the High Representative of the Union for Foreign Affairs and Security Policy (HR). Indeed, reformation of the HR’s role was considered by many scholars (Howorth 2011) one of the main innovations introduced by the Lisbon Treaty for bringing foreign and security policy as close as possible to the supranational institu-

tions. The HR role was initially introduced in the 1997 Amsterdam Treaty with the aim of giving technical support to the Foreign Affairs Council. Through the HR, the latter did not need to rely solely on the work of the General Affairs Council's secretariat, thus giving the Foreign Affairs Council an autonomous functional structure.

The Lisbon Treaty has apparently transformed this technical role into a more political one. According to the Treaty (TEU, Art. 18.2), in fact, the HR must now wear a 'double hat', being assigned the role of vice-president of the Commission and permanent chair of the Foreign Affairs Council. He or she must be appointed by the European Council in agreement with the president of the Commission – an appointment that must then be approved by the EP. The HR is a member of both the executive (in his/her capacity as vice president of the Commission) and legislative branches (because s/he permanently presides over the Foreign Affairs Council, the only configuration of the Council not chaired by the half-yearly rotating presidency of the Council). The Treaty has thus tried to institutionalize a sort of ambiguous role for the HR, expecting s/he might bridge the supra-

national culture represented by the Commission and the intergovernmental interests protected by the Foreign Affairs Council. Notwithstanding this innovation, however, the CFSP has continued to function according to that regularized pattern of decision-making called as 'intensive transgovernmentalism' (Wallace and Wallace 2007). A pattern that, although it fosters a process of socialization between national civil servants and ministers and Union's officials engaged in this policy realm, recognizes mainly the Foreign Affairs Council as the institution authorized to decide 'actions' and 'positions' for the EU (Thym 2011).

A similar logic governs the functioning of the economic and financial policy of the EU (and in particular of EMU) (Heipertz and Verdun 2010). Although monetary policy was centralized in the ECB, economic and financial policies were left in the hands of national governments. This is why TFEU, Art. 119, states that "the adoption of an economic policy (...) is based on the close coordination of Member States' economic policies". For the Treaty, economic and financial policies are reserved territories of the Council with the Commission allowed to play a technical role, although

important, in monitoring the economic performance of member states. Regarding excessive deficit procedures of the euro-area member states (annexed as Protocol n. 12 to the Lisbon Treaty, called the Stability and Growth Pact, or SGP, as regulated by TFEU, Art. 126), the Council monopolizes the policy's decision, although the latter is generally based on reports or recommendations of the Commission. As stated in TFEU, Art. 126(14), "the Council shall, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament and the European Central Bank, adopt the appropriate provisions" for implementing agreed-upon economic guidelines. According to the special legislative procedure, the Council, acting either unanimously or by a qualified majority depending on the issue concerned, can adopt legislation based on a proposal by the Commission after consulting the EP. However, while being required to consult the EP on some legislative proposals concerning economic and financial policy, the Council is not bound by latter's position. Indeed, the Council took frequently decisions without even waiting for the EP's opinion. **The Council (in its configuration as Council on Economic and Financial Af-**

fairs known as ECOFIN) is supported in its activities by an Economic and Financial Committee whose task (TFEU, Art. 134) is to supervise the economic and financial situations of the member states. It is an advisory body to ECOFIN to which “the Member states, the Commission and the European Central Bank shall each appoint no more than two members” (TFEU, Art. 134.2). Also the EMU functions according to a variant of intergovernmentalism, a decision-making pattern that Puetter (2012) has defined as ‘deliberative intergovernmentalism.’ In any case, either through recommendations or special legislative procedure, the ECOFIN is the institution with the power of making decisions concerning the economic and financial policies of the Union.

In fact, although it is recognized (TUE, Art. 126(6) and 126(7)) that the Commission may initiate a procedure against a member state running an excessive budget deficit, the Commission’s recommendation has however the status of a proposal, because only the Council can take the appropriate measures (that may go from requests of information addressed to the member state that fails to comply to fines imposed on it). It is thus up to

the Council to decide whether or not to proceed along the lines of the Commission’s proposal (as it didn’t do in 2003, when the Commission proposed opening an infringement procedure against France and Germany, who were not respecting the parameters of the SGP). The Lisbon Treaty has thus institutionalized the principle that financial policy is based on voluntary coordination. The sanctions for excessive deficits and debts should be subject to the wills of member states’ governments (or their financial ministers in the ECOFIN). This is even truer for euro-area member states, whose main deliberations take place either in the Euro Summit or in the Euro Group (consisting respectively of the heads of state and government and the ministers of economics and finance of the EU member states adopting the common currency, as regulated by Protocol n. 14 annexed to the Lisbon Treaty), with the technical support of the Commission. The Euro Group has the status of an ‘informal institution,’ embodying a specific approach to policy-making defined as ‘informal governance’ (Puetter 2006). Protocol n. 14 doesn’t even mention the EP, at least as the institution required to be informed about the decisions made. And, as in the CFSP, no supervisory role is rec-

ognized or assigned to the ECJ. By establishing a common currency (the euro adopted by 17 member states as of 2012), the EU has thus centralized monetary policy (assigning its management to a proper federal institution, the ECB). At the same time, by introducing the coordination framework, it has allowed for the decentralization of those financial, fiscal and budgetary policies structurally connected to monetary policy.

The terms of coexistence between the supranationalism of the policies for the single market and the intergovernmentalism of the CFSP and EMU in particular were left uncertain by the Lisbon Treaty. In both realms, the Treaty has given a strategic role to the European Council, which is now the real political head of the Union (Scoutete 2011). Certainly, the permanent president of the European Council (although the half-yearly rotating presidency has remained in all configurations of the Council but Foreign Affairs Council) was supposed to dilute the strictly intergovernmental nature of the institution. Indeed, the first new president (Herman Van Rompuy) was quick to set up his permanent office in Brussels (at the Justus Lipsius building), which also symbolized that the

European Council's presidency is now based in the Union's capital and no longer in those of member states. At the same time, the decision to maintain a commissioner for each member state in the Commission (although due to contingent reasons<sup>8</sup>) had the effect of introducing intergovernmental biases into the traditionally most supranational institution of the Union<sup>9</sup>. That notwithstanding, the Lisbon Treaty has formalized two different decision-making regimes or constitutional frameworks for dealing with the policies of the single market and the policies of financial stability (as well as foreign affairs, security policy, welfare and unemployment policies). This is why it has been

the intergovernmental Union that was tested by the dramatic events of the euro crisis. For the first time since its post-2005 ascent to dominance, the pretension of the intergovernmental decision-making regime of being more adept, than the supranational one, in dealing with the challenges of integration has been empirically falsified.

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8. The decision was made in order to appease Irish voters required to vote on the Lisbon Treaty for a second time (on October 2009) after having rejected it in a previous referendum (on June 2008).
  9. Certainly, the Lisbon Treaty, TEU Art, 17.5, states that each member state has a right to propose a national as commissioner till 1 November 2014, thus adding that after that date the Commission will be composed of "two thirds of the number of the Member States, unless the European Council, acting unanimously, decides to alter this number". However, it is likely that the small member states will exert pressure to preserve the *status quo*, exactly because they want to guarantee the equally-weighted geographical composition even within the Commission regardless of what the treaty states.

## 3. Intergovernmentalism: Ascent and Crisis

### 3.1 The politics of intergovernmentalism

Once the financial crisis arrived to Europe in 2009-2010, the EU had already in place the Lisbon Treaty with its intergovernmental constitution. This intergovernmental Union enjoyed also the support of a powerful constellation of political leaders and public opinions. Once the EU entered the throes of a crisis after the failure of the Constitutional Treaty in the French and Dutch popular referendum of 2005, the intergovernmental approach emerged as the only feasible strategy for promoting integration. As *The Economists' s Charlemagne* (2012) wrote, after “the French and Dutch voters killed the proposed EU constitution ... intergovernmentalism (became) the new fashion”.

The apex of the intergovernmental moment was reached between 2009-2011. In that period, in fact, French and German governments converged towards an intergovernmental interpretation of the integration process. President Sarkozy, in his

2007-2012 mandate, behaved as the coherent heir of Charles De Gaulle's vision of a 'Europe of nation states', that is, of a process of integration primarily controlled by the member states' executives (Calleo n.d.). In Sarkozy's vision (as in De Gaulle's) there was no room for the EP and the Commission in the decision-making process, not to mention the ECJ. One might argue that, in France in particular, after the popular refusal of the Constitutional Treaty in the 2005 referendum, this vision came to be shared by much of the ruling elite of the country, not only by Gaullists (Grossman 2008). This vision appears to cohere quite well with a domestic semi-presidential system based on the decision-making primacy of the president of republic. At the same time, it may be surprising that such an intergovernmental vision of Europe came to be shared by the post-2009 German government of Angela Merkel. After Helmut Kohl's chancellorship, a new generation of German politicians with no experience of WWII has come into power. This change emerged clearly with the Schroeder government which followed the last Kohl government in 1998 and which last-

ed till 2005. Since then, “generational change... allowed (German) political leaders to *normalise* EU policy in the sense of becoming more like other large member states” (Sloam 2005: 98). The new generation was “ready to articulate material German interests” (Ibidem: 88) and not only to profess guilty for the country's past. During the first half of the 2000s, the social-democratic and green governmental elites began questioning the paymaster role that Germany traditionally played within the process of European integration (for instance, asking for a renegotiation of the EU budget), did not refrain from mobilizing German military force abroad (for instance, participating in the 1999 Kosovo war), and articulated a vision of a German interest distinct from the European interest<sup>10</sup>. However, this new German assertiveness remained within the federal perspective of an increasingly economically and politically integrat-

10. In a famous 1997 statement, the new leader of the SPD (Social-democratic Party) Gerhard Schroeder said: “Kohl says the German have to be tied into Europe or they will stir up old fears of the ‘*furum teutonicus*’. I say that's not the case. I believe that Germans have become European not because they have to be, but because they want to be. That is the difference” (now in Sloam 2005: 89).

ed Europe. This continuity was clearly expressed by the famous speech by the German Foreign Affairs Minister Joschka Fischer at Humboldt University in Berlin on 12 May 2000, a speech not by chance titled “From Confederacy to Federation: Thoughts on the Finality of European Integration”.

When Angela Merkel took power for the first time in 2005<sup>11</sup>, the generational change acquired also a new ‘territorial’ connotations. Angela Merkel was and is the first chancellor coming from the Eastern part of Germany (the *Deutsche Demokratische Republik* or DDR), remained under Soviet control during the Cold War era. The DDR was not involved in the public self-analysis of German responsibilities for the Holocaust and WWII that instead developed in the Western part of Germany (the *Bundesrepublik Deutschland*). A ‘territorial’ origin that might explain why Angela Merkel is considered to be a European more in the head than the heart<sup>12</sup>. Moreover, with the outcome of

the 2009 German elections, which led to the formation of a coalition government between the CDU and the *Freie Demokratische Partei* (FDP), the chancellorship of Angela Merkel became more exposed to the intergovernmental tone. The FDP took increasingly a clear euro-realistic position, quite unusual for German politics. At the same time, the German constitutional court or *Bundesverfassungsgericht* (BVerfG)<sup>13</sup> has introduced powerful hurdles to the further transfer of national sovereignty to the EU. And finally the German public seemed increasingly wary of paying taxes to aid countries with high public debts and deficits. It was probably this combination of factors that led the Merkel’s government formed in 2009 to search for institutional and policy solutions to the euro crisis that would not be questioned by the Court, her coalitional partner, or her voters. Merkel’s government gradually moved from a re-affirmation of national interests (as the previous gov-

ernments did) to a preference for an intergovernmental solution to the crisis, a preference at odds with the political structure and public culture of her country. The German parliamentary-federal system, in fact, is quite different from the French semipresidential-unitary system. In Germany the bicameral legislature (the *Bundestag*, representing the citizens, and the *Bundesrat*, representing the *laender’s* executives) plays a crucial role in the policy-making process, and the judiciary is the indispensable mediator of any constitutional dispute. Thus, if France, in the 2007-2012 period, came to adopt the German economic paradigm, enshrined in the two new intergovernmental treaties, in the same period Germany came to adopt the French political paradigm, accepting that decision-making power in the EU should remain in the exclusive hands of the governments meeting within the European Council and the ECOFIN Council. This marked a significant change for a country like Germany, which was traditionally the defender of the Commission and the EP (Pederson 1998). Finally, among the larger countries, the intergovernmental vision was supported not only by the British coalition government of David Cameron (elected in 2010), but also by the Ital-

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11. She was elected chancellor of a **grand coalition** government constituted by her party (the Christian Democratic Union, CDU), the sister party of the latter (the Christian Social Union, CSU) and the Social Democratic Party (SPD).

12. See Charlemagne, ‘Angela the lawgiver’, *The Economist*,

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<http://www.economist.com/blogs/Charlemagne>.

13. From the sentence of 30 June 2009 stating that the Treaty of Lisbon (*Zustimmungsgesetz zum Vertrag von Lissabon*) is compatible with the German Basic Law to the sentence of 6 September 2011 upholding the country’s participation in bailing out financially-ailing Eurozone member states such as Greece.

ian government of Silvio Berlusconi (2008-2011), the latter in clear discontinuity with the previous government of Romano Prodi (2006-2008) and the country's traditional preference for a supranational approach.

In sum, at the turn of the first decade of the 2000s, the consensus was that integration has reached such depth that only member states' governments can drive it properly. As President Sarkozy made clear in his speech in Toulon on 2 December 2011, "the reform of Europe is not a march towards supra-nationality. (...) The crisis has pushed the heads of state and government to assume greater responsibility because ultimately they have the democratic legitimacy to take decisions. (...) The integration of Europe will go the intergovernmental way because Europe needs to make strategic political choices". A month before President Sarkozy's speech, on 2 November 2011<sup>14</sup>, German chancellor Angela Merkel assessed that "the Lisbon Treaty has placed the institutional structure (of the EU) on a new foundation", out-dating the traditional distinction between the "Community

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14. Opening ceremony of the 61th academic year of the College of Europe in Bruges.

and the Intergovernmental methods"<sup>15</sup>. Indeed, she added, the EU is functioning according to a "new Union method", which consists of "coordinated action in a spirit of solidarity". For her, coordination referred inevitably to the decision-making role of national governments, not supranational institutions.

If the decision-making pre-eminence of national governments was justified by the legitimacy coming to them from their own domestic electorates, as both Sarkozy and Merkel asserted in several occasions, then the control of their action should be assigned to national legislatures, not the EP. Which is, indeed, the position expressed by the German constitutional court in its sentences. Thus, the intergovernmental logic brings with it an inter-parliamentary balancing: national parliaments should coordinate for controlling the coordinated national governments. The Lisbon Treaty prefigured this possibility, when (Protocol N. 1) it encourages "greater involvement of national Parliaments in the activities of the European Union and...enhance(s) their ability to express their views on draft legislative acts of the European

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15. On this, see Dehousse (2011).

Union as well as on other matters which may be of particular interest to them". In a speech given on 11 January 2012, the then French minister for European Affairs, Jean Leonetti, proposed the creation of an indirectly formed "Euro-area parliament", consisting of parliamentarians of the national parliaments of the euro-area, as an institution balancing the Euro Summit.

### 3.2 The crisis and its dynamic

Thus, when the crisis started to hit Greece, there was in place a decision-making regime for structuring the institutional and policy's answer to financial turmoil. As established by the intergovernmental constitution, the European Council and the ECOFIN Council took immediately the centre-stage of the policy-making process, while the Commission was marginalized and the EP left dormant. Continuous meetings of the European Council and ECOFIN Council were organized between 2010 and 2012<sup>16</sup>, although none of them

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16. It is interesting to note that, while the Lisbon Treaty (TUE, Art. 15.3) states that "the European Council shall meet twice every six months", in the 2010 it met 6 times (8 times if one considers two meetings of the Euro-area member states' heads of government), in 2011 it met 7 times (9 times if one considers also the meetings of the

did come out as decisive. At least there were four rounds of crucial decisions concerning the new economic governance of the EU.

The first round took place in 2010. At the ECOFIN Council of May 2010, first it was adopted a regulation to create the EFSM as a new EU law instrument and then, at the margin of that meeting, “the members of the Council from the 17 euro area countries ‘switched hats’ and transformed themselves into representatives of their states at an intergovernmental conference; in that capacity, they adopted a decision by which they committed themselves to establish the EFSF outside the EU legal framework” (De Witte 2012:2). The EFSF consisted of an executive agreement (not a new formal treaty), in the form of a private company established under Luxembourg law, thus authorized to negotiate with its 17 shareholders. Moreover, in the Council of 7 September 2010, it was approved the European Semester, an instrument for enhancing time consistency in EU economic policy coordination, entered into force by January

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Euro-area member states’ heads of government) and in 2012 it met six times, any time followed by a meeting of the euro-area member states’ heads of state and government.

2011. If the former was an instrument of crisis management (to help Ireland and Portugal to face the crisis of sovereign debt), the latter was rather a framework for promoting crisis prevention because finalized to coordinate *ex ante* the budgetary and economic policies of the EU member states, in line with both the SGP and Europe 2010 strategy (see Hallerberg, Marzinotto and Wolff 2012).

The second round took place in the first half of 2011. Between the European Council of 24-25 March and the European Council of 23-24 June, several measures were taken. First of all, the so-called Six Pack consisting of legislative proposals finalized to tighten further the policy coordination required by both the European Semester and the Stability and Growth Pact (SGP). All of these became operative by 13 December 2011. They were: (1) the strengthening of the surveillance of budgetary positions and coordination of economic policies through a regulation amending Council Regulation 1466/97 approved with the codecision procedure on Commission’s proposal; (2) the speeding up and clarification of the excessive deficit procedure through a Council regulation amending Council Regulation 1467/97 approved with a special legislative procedure (with the EP

only consulted); (3) the enforcement of budgetary surveillance in the euro area through a new regulation approved with the codecision procedure on Commission’s proposal; (4) the definition of a budgetary framework of the member states through a new Council directive implemented with a non-legislative procedure (with the EP only consulted); (5) the prevention and correction of macroeconomic imbalances through a new regulation approved with the codecision procedure on Commission’s proposal; (6) the enforcement of measures for correcting excessive macroeconomic imbalances in the euro area through a new regulation approved with the codecision procedure on Commission’s proposal. To these measures it should be added the Euro Plus Pact, consisting of a political commitment (a sort of intergovernmental agreement) between the euro area member states, but also open to non-euro area ones (Denmark, Poland, Latvia, Lithuania, Bulgaria and Romania) aimed to foster stronger economic policy coordination. The signatories of the Pact made concrete commitments to a list of political reforms intended to improve the fiscal strength and competitiveness of each country. The Pact was intended as a more stringent successor to the SGP although it

was based on the open method of coordination. It was finally adopted in March 2011.

The third round developed in the second half of 2011 and the first month of 2012. In July 2011 it was signed a first version of the ESM Treaty, thus renegotiated in February 2012, as a permanent successor of the temporary EFSF. The ESM was located outside the EU legal framework on the basis of a European Council decision of 25 March 2011 to amend TFEU Art.136 that states that “the member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole”. The ESM was thus established as a new treaty among the euro-area member states, endowed of its own institutions<sup>17</sup>, “as an intergov-

17. The Conclusions of the European Council of 24-25 March 2011 states: “The ESM will have a Board of Governors consisting of the Ministers of Finance of the euro-area Member States (as voting members), with the European Commissioner for Economic and Monetary Affairs and the President of the ECB as observers. The Board of Directors will elect a Chairperson from among its voting members. (...) The ESM will have a Board of Directors which will carry out specific tasks as delegated by the Board of Governors. (...) All decisions by the Board of Directors will be taken by qualified majority (...) A qualified majority is defined as 80 percent of the

ernmental organisation under public international law”, to enter into force by January 2013 (having to wait the decision of the German constitutional court regarding its constitutional congruence with the German Basic Law, decision finally and positively expressed in September 2012). In the second half of 2011, other crucial decisions were made, particularly during the European Council’s meeting of 8-9 December 2011. Under the irresistible leadership of German chancellor Angela Merkel, followed by French president Nicolas Sarkozy, a proposal to amend the Lisbon Treaty for integrating the fiscal policies of the member states was advanced. This time, automatic mechanisms of sanctions on member states who would not respect more stringent criteria of deficit-GDP percentage (0,5 per cent a year) and debt-GDP percentage (60 per cent, with the downsizing of 1/20 of the over stock every year) were advanced, with the request that each member state would introduce the golden rule of a mandatory balanced budget domestically at the constitutional or equivalent level. The UK’s opposition to pursuing fiscal integration within the Lisbon Treaty’s legal framework, motivated by the need to protect the

votes”, *EUCO 10/11, Concl 3*, pp. 22-23.

London financial district from possibly-restrictive fiscal regulations, made it necessary to move beyond the Lisbon Treaty, an outcome that the French president, given his mistrust if not distrust of the supranational features present in the Lisbon Treaty, aimed for. Indeed, it may have been possible to recur to the procedure of reinforced cooperation (TEU, Art. 20), on the basis of which a group of EU member states is allowed to advance towards deeper integration in policy fields that are not of exclusive competence of the Union or do not concern the common foreign and security policy (CFSP) (Dyson K. and Sepos, 2010).

However, this institutional strategy was not considered viable because of German domestic reasons (chancellor Merkel had to appease her electoral constituencies by displaying her capacity to impose stricter rules on the euro-area member states) and also because the activation of the reinforced cooperation’s procedure would have required (TFEU, Art. 326-334) the consent of the entire Council (UK included). For these reasons, it was decided that a new intergovernmental treaty, the Fiscal Compact Treaty with its own governance structure, would be set up outside the

Lisbon Treaty and signed by all the 17 euro-area member states plus those non-euro area member states (all of them, apart from the UK and the Czech Republic) interested in participating in the Treaty.

Finally, a fourth round developed from the European Council of 28-29 June and 13-14 December 2012. If the June's European Council moved the agenda of the EU from fiscal rigor to the need of promoting economic growth, the December's European Council has formalized a road map for moving "towards a genuine economic and monetary union". This direction implies, in particular for the euro-area member states, to share an integrated financial framework, an integrated budgetary framework, an integrated economic policy framework and to strengthen democratic legitimacy and accountability of the euro-area institutions. In this period, two regulations were approved through the codecision procedure (the so-called Two Pack), applicable to the euro-area member states only on the basis of TFEU, Art. 136, aimed to further strengthening the surveillance mechanisms in the euro-area. The two regulations build on the SGP and the European Semester and

impose the euro-area member states to submit their budgetary plan for the following year to the Commission and the Euro Group before 15 October along with the independent macro-economic forecast on which they are based. The exercise in Autumn introduced by the Two Packs would allow the monitoring and sharing of information on the member states' budgetary policies before their adoption. The Two Pack is a further and more stringent contribution to the crisis prevention regime of the euro-area member states.

Considering the complex of the measures adopted in the period 2010-2012, one has to acknowledge their policy magnitude and institutional complexity. Some of them, as the Six Pack and the Two Pack, have strengthened the supranational side of the EU, given they consisted of regulations and directives approved predominantly through the codecision procedure. However, with the deepening of the euro crisis, the EU has more and more shifted in an intergovernmental direction. In fact, a multiplicity of treaties were set up, as the EFSF thus substituted by the ESM for crisis management and the Fiscal Compact for crisis prevention. It was observed that those decisions have

put "the EU system...in the throes of a revolution (although) like all revolutions, this one (too) displays numerous evolutionary features" (Ludlow 2011a:5). However, that revolution was not sufficient to appease the financial markets that indeed began demanding higher interest rates for buying public bonds from Italy and other southern and peripheral euro-area member states. Market pressures became so powerful that many of these countries with high ratios of public debt to GDP had to register the collapse of their incumbent governments. In some cases (Ireland, Portugal, Spain), the crisis was resolved through new elections, while in others (Greece, Italy) it was resolved through the substitution of the parties in government with a 'national solidarity' executive composed by technocrats and supported by a large trans-parties alliance in the parliament (Greece and Italy). The formation of executives independent from electoral consensus was considered necessary not only to promote the required reforms (previously vetoed by powerful electoral constituencies), but also to guarantee the virtuous euro-area member states (Germany, Netherland, Finland, Austria) that Greece and Italy would be serious in cutting their public debt and rational-

izing their general systems of public expenditure. The hope was to show the financial markets (and the domestic electorates of the virtuous countries) that the entire euro-area was committed to achieving financial stability. But nevertheless markets' speculation continued. In sum, even the most audacious decisions arrived late for answering to the market's pressures, were too limited in their reach and were perceived as illegitimate by the affected interests. It is possible to argue that the contradictory evolution of the euro crisis does not vindicate the claim that intergovernmentalism constitutes a more effective approach (than the supranational one) for dealing with the challenges of integration. The euro crisis is to the 'intergovernmental method' what the French and Dutch referendum were to the 'Community method'.

## 4. Intergovernmentalism: Dilemmas and Reaction

### 4.1 The dilemmas of intergovernmentalism

Why has the intergovernmental EU set up an extremely complex system of economic governance that nevertheless was unable to appease the markets and to convince the citizens of the indebted countries? One might answer that the euro crisis has hit so deeply the EU to require the setting up of amazingly complex instruments of both crisis management and crisis prevention. But why have crucial policy's instruments been located outside the legal structure of the EU? Such institutional intricacy has to be considered the logical outcome of a decision-making regime that is based primarily on national governments' coordination. Coordination is insufficient for solving basic dilemmas of collective action. If any decision-making regime should be able to generate effective and legitimate solutions for the problems it has to deal with, the intergovernmental regime has shown to be based on shaky foundations for doing that.

Let's start from considering the effectiveness' side of the intergovernmental decision-making regime. Three basic dilemmas emerged during the euro crisis. The *first* was the *veto dilemma*: how to neutralize oppositions in a decision-making process requiring unanimous consent? This dilemma accompanied the entire evolution of the euro crisis, bringing the European Council and the ECOFIN Council to answer the crisis regularly 'too late and too little'. Although the financial crisis was initially circumscribed only to Greece, it gradually began expanding to other euro-area member states because of the decision-making stalemate produced by divergent strategies for dealing with it. Divergences in the domestic electoral interests of the various incumbent governments (governments with a sound budget did not want to pay for the difficulties of indebted countries whose governments expected instead to be helped for surviving politically) made the decision-making process dramatically muddled. The opposed financial needs of creditors and debtors caused endless ne-

gotiations between governmental leaders despite the crisis required immediate answers. Indeed, for neutralizing the British veto on fiscal coordination, it was necessary to move outside of the Lisbon Treaty, setting up a new treaty. At the same time, the difficulty in speeding up the decision-making process during the crisis increased the stake of the leadership's role in driving the EU toward the necessary answers. As the financial crisis deepened, the bi-lateral leadership of Germany and France, in the period 2009-2011, was transformed into a compelling *directoire* of the EU financial policy. Analytically it is not clear where to locate the boundary between bi-lateral leadership on one side and bi-lateral *directoire* on the other. To be sure, as Heipertz and Verdun (2010: 20) argued, "when Member States governments bargain with one another, the largest countries have the greater influence". And, of course, the bi-lateral leadership of France and Germany has historically represented the engine of the integration process, although the various waves of enlargement, increasing the number of the EU member states, have inevitably reduced its efficacy (Cole 2010). Their bi-lateral leadership was not resented by the other member states as long as the two countries,

although sharing a strategic goal, "started from quite diverging points when it came to sketching the road toward this common goal" (Schild 2010: 1380). As Webber (1999: 16) put it, the greater the divergence between French and German preferences on the policy before reaching a common goal, the easier it was for the other member states to 'multilateralize' that common goal.

The deepening of euro crisis prevented however this multilateralization, for two reasons. First, Merkel's Germany and Sarkozy's France came to share the same ends and means for dealing with the crisis. Although France initially used a strategy different than Germany's, fear of playing victim to market speculations if unprotected by an alliance with Germany brought France closer and closer to the Germany's restrictive monetary position (no role for the ECB to act as lender of last resort, no Euro-bonds, no expansive policies either at the EU or domestic level). With the coordination of the Brussels office of President Herman van Rompuy, the financial strategy for dealing with crisis came to be dictated by Berlin and Paris sharing not only the same strategic goals (financial stability and fiscal integration), but also poli-

cies with which to reach them (the introduction of a balanced budget clause in the constitution of the member states even through a new treaty, domestic structural reforms, fiscal discipline). Second, Sarkozy and Merkel, in their attempt to solve the veto dilemma proper of the intergovernmental method, came to 'verticalize' the decision-making process. They regularly met (in Berlin or Paris more than in Brussels) before the European Council meetings to identify common or shared positions that were later imposed in the following formal meeting of the heads of state and governments<sup>18</sup>. Probably, the epitome of this attitude was the meeting between the two leaders in Deauville on 5 December 2011 where they took decisions then 'reported' to the European Council meeting of the following 8-9 December. Indeed, it became common to talk in the press of a 'Merkozy' government within the European Council. Is a *directoire* compatible with the logic of integration of and

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18. It is worthwhile to read the chronicles of the preparation of the various European Council held into 2011 by Peter Ludlow with their detailed description of the triangulation between chancellor Angela Merkel and her staff, president Nicolas Sarkozy and his staff and the office of president. Herman Van Rompuy. A good example is Ludlow (2011b).

between asymmetrical states (i.e., states of different demographic size, economic capacity, cultural and linguistic patterns, historical identities)?

The second is the *enforcement dilemma*: how to guarantee the application of a decision taken on a voluntary bases? The enforcement dilemma emerged dramatically with regard to the approval of the new treaties (the ESM and the Fiscal Compact) by their contracting parties. In fact, to avoid jeopardizing the entire project by the possible rejection of one or another intergovernmental treaty by few of their contracting parties, the Fiscal Compact Treaty (Title VI, Art. 14.2) had to state that it “shall enter to force on 1 January 2013, provided that twelve Contracting Parties whose currency is the euro have deposited their instrument of ratification”. Twelve and not all the 17 member states of the euro-area. It is the first time (in the European integration experience) that unanimity has been eliminated as a barrier for activating an intergovernmental treaty (that would require, by its own logic, the unanimous consent of all the contracting parties). Or, anticipating plausible rejection of the Fiscal Compact Treaty, the ESM Treaty had to state (Point 5) that “the granting of financial as-

sistance...will be conditional, as of 1 March 2013, on the ratification of Fiscal Compact Treaty by the ESM Member concerned”. This threat was efficacious in cooling down the euro-sceptical mood of Irish voters (in the referendum on the Fiscal Compact held on 31 May 2012) or the anti-European mood of Greek voters. However, in moving in this direction, the intergovernmental logic had not only to contradict itself, but it had to introduce explicit threats not properly congenial with “the spirit of solidarity” celebrated by Angela Merkel in her 2 November 2011 speech.

The third is the *compliance dilemma*: once enforced an agreement, how to guarantee the respect of its rules even when they no longer fit the interest of one or the other of the voluntary contracting parties? This dilemma emerged dramatically in the case of the disrespect of the rules of the SGP. It became apparent in 2009 that Greece cheated the other member states’ governments (manipulating its statistical data regarding public deficit and debt) for remaining in the euro-area. However, the same dilemma emerged in 2003, when France and Germany were saved from sanctions by a decision of the ECOFIN (and in contrast to

a Commission’s recommendation) notwithstanding their disrespect for the SGP’s parameters. The Fiscal Compact Treaty tries to deal with the non-compliance possibility providing for a binding intervention of the ECJ upon those contracting parties that do not respect the agreed rules. It is stated (Art. 8.1) that “where a Contracting Party considers, independently of the Commission’s report, that another Contracting Party has failed to comply with Article 3(2), it may also bring the matter before the Court of Justice. (...) the judgment of the Court of Justice shall be binding on the parties in the procedure”. This also applies when the Commission issues a report on a contracting party failing to comply with the rules established by the Treaty. In the latter case, if the Commission, after having given the contracting party concerned the opportunity to submit its observations, still confirms the non-compliance by the contracting party in question, the matter will be brought to the ECJ. Art. 17 of the Fiscal Compact Treaty has come to stress that, in order to neutralize a recommendation of the Commission to intervene against a member state breaching a deficit criteria, “a qualified majority of the member states (should

be) opposed to the decision proposed or recommended”.

The clause of the reversed qualified majority is an attempt to make less likely non-compliance. Indeed, the discretion of the Council has been reduced (if compared with the rules concerning the SGP institutionalized in the intergovernmental side of the Lisbon Treaty), not only by the Treaty but also by the combination of the Six Pack and Two Pack, recognizing the need to rely on third actors (the ECJ or the Commission) for keeping the contracting parties aligned with the agreed aims of the Treaty. Even the ESM Treaty states that, in case of a dispute between an ESM Member and the ESM (Art. 37.2), “the dispute shall be submitted to the Court of Justice of the European Union. The judgement of the Court of Justice of the European Union shall be binding on the parties in the procedure, which shall take the necessary measures to comply with the judgement within a period to be decided by said Court” (Art. 37.3). At the same time, majority voting is extended even in the ESM. In fact, its Board of Directors “shall take decisions by qualified majority, unless otherwise stated in this Treaty” (Art. 6.5). In any case, it may be impracticable to recur to QMV, corresponding

to 80 per cent of the votes, without Germany that detains 27,1461 of ESM keys.

However, the various solutions of the non-compliance dilemma seem problematic. It is problematic, in fact, that a new organization (set up by the Fiscal Compact Treaty or ESM Treaty) might use an institution (such as the ECJ) of another organization (the EU of the Lisbon Treaty) to bind its own member states. This may also apply to the technical expertise of the Commission or ECB, upon which both treaties rely. In the ESM Treaty, for instance, it is stated (Art. 17(5)) that “the Board of Directors shall decide by mutual agreement, on a proposal from the Managing Director and after having received a report from the Commission, ... the disbursement of financial assistance to a beneficiary Member State”; or (Art 18(2)) that “decisions on interventions...shall be taken on the basis of an analysis of the ECB recognising the existence of exceptional financial market circumstances...”, although the Commission and the ECB are not allowed to play an independent role in the decision-making process. Certainly, the intervention of the ECJ is justified by TFEU, Art. 273, that states: “the Court of Justice shall have jurisdiction in any dispute between Member States which relates to the subject matter

of the Treaties if the dispute is submitted to it under a special agreement between the parties”. Nevertheless, the ECJ or the Commission or the ECB are institutions operating within a legal structure defined also by the UK and the Czech Republic that did not agree upon the Fiscal Compact Treaty that utilizes them. Which are the political implications of this discrepancy? More in general, it is problematic, from an institutional perspective, to have established new treaties to solve the contradictions of an old treaty and keep them alive simultaneously. It seems reasonable to argue that such coexistence between different treaties might be the source of new legal, technical and political problems.

If the above dilemmas constrained the effectiveness of the intergovernmental Union (regarding crisis management in the first case and crisis prevention in the other two cases), that Union met also difficult hurdles in dealing with the *legitimacy dilemma*: how to guarantee legitimacy to decisions reached by national executives in the European Council or the ECOFIN Council that were never discussed, let alone approved, by the institution representing the European citizens (the EP)? Indeed, this dilemma became evident as the crisis deepened and the citizens of the indebted

member states had to pay high costs for making the necessary structural adjustment of their country possible. Not only did they have to abide by decisions imposed by impersonal financial markets, but above all by the Council and the European Council where the national executives of the larger member states (they never voted) played a predominant role. The problem does not concern the content of the decision but the procedure for reaching it. Moreover, the highly centralized crisis prevention regime, set up during the euro crisis, will operate under the control of the larger and creditor member states, not the supranational institutions, that would impose their criteria to the small and debtor member states. The effects of the intergovernmental centralization were and will be uneven. Contrary to what happens in federal union, the transfer of sovereignty in financial policy has not gone from the states to the Union but from a group of states to another. Making content analysis of quality newspaper's articles on the euro crisis in six European countries (Austria, UK, France, Germany, Sweden and Switzerland) from December 2009 to March 2012, Kriesi and Grande (2012: 19) arrived to the conclusion that "by far the most important individual actor in in

this (euro crisis, *n.d.r.*) debate was the German Chancellor Angela Merkel (...) followed by the (then) French President Nicolas Sarkozy". Indeed, the affected citizens have continued to protest against Angela Merkel and not Herman van Rompuy or Manuel Barroso. This effect has inevitably increased the public perception of the illegitimacy of the intergovernmental decision-making regime. The intergovernmental framework cannot identify a satisfactory solution to this dilemma because it assumes that the legitimacy of the EU derives from the legitimacy of its member states' governments, as asserted by President Sarkozy in his Toulon speech on 2 December 2011. However, the legitimacy of decisions taken on behalf of the EU cannot be a derivative of the legitimacy enjoyed by the governments of its member states. Decisions made at the EU level would require a legitimizing mechanism at that level, not at the level of its member states. Without a proper involvement of the EP in those decisions, the latter inevitably lacks the justification for being considered legitimate by the European citizens affected by those decisions.

## 4.2 Reacting to intergovernmentalism

From an intergovernmental point of view<sup>19</sup>, the emergence of a German-French *directoire* in financial policy was considered a logical political outcome in a Union that exists thanks to the will of domestic governments. Indeed, with regard to the establishment of the ESM and the Fiscal Compact Treaties, it was argued that Germany inevitably had to play a domineering role in setting them up and defining the policy's priorities of the euro-area, given its condition as the continent's most powerful economy and the major financier of the various instruments of financial stability. However, with the deepening of the crisis, this intergovernmental statement came to be questioned.

Facing the German-French writhing into the intergovernmental logic, the EP and the Commission started to react, more and more vociferously, to the *directoire* and its lack of legitimacy. Particularly under EP's pressure, both intergovernmental treaties were subjected to several revisions. The

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19. This view was largely diffused in the press by 'realist' observers (journalists, analysts, politicians).

Fiscal Compact Treaty, which passed through five different drafts in less than two months (8-9 December 2011-31 January 2012) before a final version was published, was particularly affected (Krellinger 2012). In the final version, for instance, it refers to the necessity of applying it (Art. 2.1) “in conformity with the Treaties on which the European Union is founded (...) and with European Union law”. Moreover, because of the EP’s mobilization, the Treaty declares that (Art. 16) “within five years at most following the entry into force of this Treaty, on the basis of an assessment of the experience with its implementation, the necessary steps shall be taken, in compliance with the provisions of the Treaty on the European Union and the Treaty on the Functioning of the European Union, with the aim of incorporating the substance of this Treaty into the legal framework of the European Union”. Indeed, the EP was fast to notice, already during the decision to create the ESM Treaty, that the latter “poses a risk to the integrity of the Treaty-based system” of the EU<sup>20</sup>. At the same time, the supranational institutions’ criticism of the Fiscal Compact Treaty pressured the

20. Text adopted by the European Parliament at the sitting of Wednesday 23 March 2011, O.7.

Treaty’s framers to recognize that the operation of the intergovernmental Summit of the Heads of State and Government should rely on the president of the Commission. As stated in Art. 12(4), “the President of the Euro Summit shall ensure the preparation and continuity of Euro Summits meetings, in close cooperation with the President of the European Commission.”

The Fiscal Compact Treaty has finally arrived to formalize (Art. 10) the possibility for member states whose currency is the euro to recur “to enhanced cooperation as provided for in Article 20 of the Treaty on the European Union (TEU) and in Articles 326 to 334 of the Treaty on the Functioning of the European Union (TFEU)”, thus making the new Treaty *de facto* redundant. After a long negotiation, the Fiscal Compact Treaty has come to recognize, first, that the Commission’s role in monitoring the excessive deficit’s member states is necessary and, second, that the EP cannot be considered an outsider on par with the EU member states whose currency is not the euro (both conditions absent in the initial announcement of the Fiscal Compact Treaty). However, if the Commission has been finally included in the policy-mak-

ing process, the EP continues to be kept on the margins. According to Art. 12(5), “the President of the European Parliament may be invited to be heard (by the Euro Summit, *ndr*). The President of the Euro Summit shall present a report to the European Parliament after each of the meetings of the Euro Summits”. Thus, the EP has entered the Treaty, but its powers on Euro Summit’s Reports remain undefined. At the same time, the EP is never mentioned in the ESM Treaty. Although the intentions of the German and French promoters of the new treaties were originally much more intergovernmental, the reaction coming from the EP and the Commission has tamed them, but only to a certain extent.

A part from the EP and the Commission, also private think-tanks and national governments came to criticize and to resent a Union dominated by a *directoire*. The influential think-tank Friends of Europe made public on 22 June 2011 a document which denounced “the trend in which Europe’s national governments rather than the EU are increasingly in the driving seat... This is especially true in the economic domain where there is a global perception that Germany matters more

than the EU...” (Friends of Europe 2011). Or, commenting on the decisions to be taken by the European Council of 8-9 December 2011, an influential European group denounced “the temptation of a Franco-German *coup de chefs d’Etat*”<sup>21</sup>. The election in May 2012 of the new French president, Françoise Hollande, brought to a resetting of the relations between France and Germany and more in general to a multilateralization of the decision-making process in financial policy. The new Italian government of Mario Monti (that substituted that of Silvio Berlusconi in November 2011) unmoored Italy from the intergovernmental coalition, returning the country to its supranational position. Medium-sized member states such as Spain or Belgium started to distance themselves from intergovernmental consensus, stressing the importance of involving supranational institutions in financial policy. Finally, also in Germany, Chancellor Merkel gradually silenced the previous intergovernmental attitude. In a talk given at the Berlin’s *Neues Museum* on 7 February 2012, she indicated the need for “a political union, something

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21. Statement by the Spinelli Group (a coalition of influential politicians and scholars) based in Brussels made public on 8 December 2011.

that wasn’t done when the euro was launched”, thus stressing the importance of having an effective Commission and a strengthened EP within an established bicameral legislature (Peel 2012). The distance from the intergovernmental approach was thus made explicit in the speech she gave to the EP on 8 November 2012, when she stated that “legitimacy and oversight are to be found on the level where decision are made and implemented. That means that if one of the European level’s competences is strengthened, the role of the European Parliament must also be strengthened”, thus adding “we should not contemplate – as is sometimes suggested- establishing an additional parliamentary institution. The European Parliament is the bedrock”. Finally, the growing isolationism of UK contributed to the further weakening of the coalition in favour of the intergovernmental approach<sup>22</sup>. Of course, it remains to be seen how the

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22. The *European Union Act*, enacted in UK on 19 July 2011, calls even into question the constitutionalization of the EU brought about by the European Court of Justice decisions of the 1960s on direct effect and supremacy of Community law. Indeed, it states that “there are no circumstances in which the jurisprudence of the Court of Justice can elevate Community Law to a status within the corpus of English domestic law to which it could not aspire by any route of English law itself (...)”.

reaction to intergovernmentalism will be elaborated by the critics of the latter.

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The conditions of Parliament’s legislative supremacy in the UK necessarily remain in the UK’s hands”.

## 5. Conclusion

The intergovernmental ‘moment’ has been called into question by the euro crisis. The intergovernmental EU, because constrained by its intrinsic logic, has not solved the dilemma of collective action in an effective and legitimate way. At the origins of the intergovernmental EU there was the assumption that crucial policies (as the financial one) may be europeanized only if controlled by the member states’ governments in the European Council and ECOFIN Council. Supranational institutions like the Commission and the ECJ were considered necessary for reducing the transaction costs of the intergovernmental negotiation, but not for making more effective the decision-making process. The euro crisis has shown that this assumption is unwarranted. The intergovernmental EU had not only difficulty in taking timing decision of crisis management, but it had also to rely more and more on the discretion of those supranational institutions for making credible commitments of crisis prevention. Furthermore, it has contradicted itself introducing rules contrasting the logic of voluntary coordination. At the same time, the intergovernmental EU was based on the

assumption that the EP is a redundant institution, given that the legitimization function is or should be performed by the parliaments of its member states. The euro crisis has called into question also this assumption, showing that indirect legitimacy is insufficient for justifying decisions taken at the level and on behalf of the Union. The euro crisis has thus triggered the crisis of the intergovernmental EU, not of the EU as such, calling into question the viability of the Maastricht compromise as constitutionalized in and by the Lisbon Treaty. The future of the EU seems to depend again on its capacity to find a new balance between intergovernmental and supranational institutions. While the debate has started (Piris 2012), a paradox has emerged, namely that the EU of the single currency (constituted by the more integrated member states) has unsuccessfully tried to operate according to the intergovernmental constitution while the EU of the single market (constituted also by the less integrated member states) continues to function successfully according to the supranational constitution of the Lisbon Treaty.

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# 6. REVERSE MAJORITY VOTING IN COMPARATIVE PERSPECTIVE<sup>1</sup>

*Wim Van Aken & Lionel Artige*

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## List of Abbreviations

DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
EC	European Commission
ECB	European Central Bank
EP	European Parliament
EU	European Union
GATT	General Agreement on Trade and Tariffs
QMV	Qualified Majority Vote
RMV	Reverse Majority Vote
RQMV	Reverse Qualified Majority Vote
RSMV	Reverse Simple Majority Vote
TSCG	Treaty on Stability, Co-ordination and Governance
TFEU	Treaty on the Functioning of the European Union
WTO	World Trade Organization

## 1. Introduction

Enforcement is central to the functioning of the Stability and Growth Pact (SGP or the Pact). Effective enforcement enhances the credibility of the Pact because it ensures that EU Member States comply with the fiscal rules embedded in the Pact. Such credibility is particularly important in a system where monetary policy is conducted at the EU level while fiscal policy remains largely under the responsibility of the EU Member States. The mechanism that effectively enforces the rules of the SGP provides a credible backstop for the decentralised fiscal policies set at the Member State level.

Nevertheless, an effective enforcement mechanism has been wanting since the inception of the SGP in 1997 ([Eichengreen and Wyplosz, 1998](#)). Hitherto, the enforcement mechanism has not delivered on one of the SGP's primary objectives: EU Member States respecting the rules of the Pact. The failure has been largely ascribed to the half-hearted implementation of the SGP because the enforcement mechanism of the Pact was weak ([European Central Bank, 2012, p. 79](#)).

The rules that trigger the enforcement mechanism are laid down in the Treaty on the Functioning of the European Union (the TFEU) and the SGP. They require that the euro area Member States avoid excessive government deficits on the basis of a specific deficit (3% of GDP) and a debt (60% of GDP) criterion and maintain sound and sustainable public finances. More precisely, the so-called *preventive arm* of the Pact forces EU Member States to work towards a medium term budgetary objective (MTO) while the so-called *corrective arm* of the Pact guarantees the correction of excessive deficits. The corrective arm of the Pact comprises severe financial sanctions for euro area countries in case of non-compliance.

Such sanctions have never been imposed to date despite a number of EU Member States breaching the Pact's fiscal deficit criteria. The closest the EU has come to sanctions was in 2003 when the enforcement mechanism of the Pact's corrective arm triggered an excessive deficit procedure (EDP) for France and Germany. The EU Council (the Council of Ministers or the Council) blocked the EDP

and no further steps were taken against the two countries ([Council press release, 25/11/2003](#)). The event had a highly symbolic value with a long tail that laid bare the stand-off between the European Commission (the Commission) as the guardian of the Pact and the EU Council representing the EU Member States. In the following years the SGP was the subject of reform and the stalemate between EU Council and Commission disappeared from sight. The reform efforts significantly watered down the Pact because the fiscal rules could not properly be enforced ([European Central Bank, 2008](#)).

The financial crisis that erupted in 2007 exposed the Pact's weaknesses and the EU enacted a fundamental reform of the EU fiscal governance framework in three steps. The reform process started in the spring of 2010 with the Task Force on Economic Governance and the European Commission in parallel discussing proposals that resulted in the reinforced EU fiscal governance framework or the so-called *Six Pack* referring to six legislative changes (5 regulations and one directive) that entered into force on 13 December 2011. In the wake of the Six Pack the EU Member States negotiated the so-called *Fiscal Compact* as part of the *Treaty*

*on Stability, Co-ordination and Governance in the Economic and Monetary Union* (TSCG). With the exception of the Czech Republic and the UK all the EU Heads of State or Government signed the TSCG on 2 March 2012. Finally, the Commission proposed in November 2011 two more legislative proposals, the so-called *Two Pack*, to further strengthen fiscal and economic surveillance of the euro area Member States.

Central to the reinforced EU fiscal governance framework is a more credible and effective enforcement of the SGP ensuring that sanctions are more automatic in relation to budgetary discipline. To strengthen effective enforcement the EU introduced the policy innovation of *automaticity for sanctions* making recurrent breaches of the SGP subject to a more efficient treatment. Such automatic enforcement mechanism would enhance the credibility of the Pact, strengthen the role of the Commission and attach importance to a rule-based as opposed to the political based decision-making mechanism ([Task Force on Economic Governance, 21/10/2010](#)).

The mechanism underlying the automaticity of sanctions is based on the so-called *reverse major-*

*ity voting (RMV) procedure* in the EU Council. Under the RMV the Commission can impose a sanction on a Member State unless the Council decides by a reverse majority to reject the Commission recommendation within a specified period. More precisely, the decision-making mechanism supporting the automaticity of sanctions is based on a *reverse qualified majority voting procedure* (RQMV) in the Council of Ministers. It requires a *minority* of EU Member States to agree on the Commission's proposals or alternatively a *qualified majority* of Member States to block the Commission's proposals.

This reverse majority rule raises two questions: Does RMV effectively strengthen the enforcement mechanism? Second, does the importance of the minority in the RMV procedure suggest a trade-off between the decision-making capacity (effective enforcement) and its legitimacy?

To answer both questions this paper considers the motivation to introduce the RMV procedure and the likely impact it has on Council decision-making, the Member States and the Commission. The focus of the analysis is on the likelihood of measures being adopted under the reverse majority rule relative to the majority rule. To that end

the paper compares three cases where RMV has been introduced, i.e. the dispute settlement of the World Trade Organisation (WTO), the EU Trade Defence Policy (anti-dumping policy) and the reinforced SGP and Fiscal Compact. To our knowledge the case selection represents the universe of cases where the different versions of reverse majority voting have been introduced. The cases show variation as to the institutional setting underlining the common elements of the voting procedure. In each case we identify the institutional and procedural setting including the voting rule prior to the introduction of RMV. Subsequently, we discuss the causes for the procedural change and the objectives followed by an impact analysis. The key findings are based on a completely new database of EU Member States voting behaviour in the area of EU anti-dumping policy. The database (68 roll calls or 1692 observations of individual votes cast) allows us to measure the dynamic effect of the introduction of reverse majority voting on Council legislative politics for the period (2002-2007).

The remainder of the paper is structured as follows: The first section deals with the introduction in 1995 of reverse consensus in the dispute

settlement system of the WTO. The second section studies the introduction in 2004 of reverse simple majority in the EU's anti-dumping policy. The last section discusses the reform of the SGP and the new Fiscal Compact. The conclusions of the paper tie in the main findings.

## 2. RMV and the Dispute Settlement Mechanism of the WTO

Under the General Agreement on Trade and Tariffs (GATT) member countries decided trade disputes by consensus with each country representing one vote. The latent presence of individual vetoes weakened the enforcement mechanism and in 1995 the WTO introduced reverse consensus voting. The reverse consensus voting rule rendered the WTO's dispute settlement system more effective, predictable and credible but had some unintended consequences in the area of accountability and legitimacy.

### 2.1 Institutions and Procedures

In the WTO member governments attempt to settle and negotiate common issues related to trade. One of the most important functions of the WTO is the mechanism that allows members to settle trade disputes under the WTO's Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). The fundamental objective of the DSU is to provide a rapid, efficient, predictable and rule-based system

to resolve those disputes under the provisions of the WTO agreement ([WTO Secretariat, 2004, p. 1](#)).

The DSU has evolved out of the regulations, procedures and practices that have been developed since 1947 with the inception of the General Agreement on Trade and Tariffs (GATT). Initially the Chairman of the GATT Council decided disputes between the contracting parties with a ruling. Later on working parties comprising the representatives of all contracting parties, including the disputants, dealt with these disputes and adopted their reports by *consensus*. Over time panels of independent experts replaced the working parties and would recommend reports and rulings to the GATT Council made up of representatives from all WTO member countries. Only after *unanimous approval* from all Council members would these reports become legally binding on the disputants. The practice allowed the GATT panels to 'built up a body of jurisprudence, which remains important today, and followed an

increasingly rules-based approach and juridical style of reasoning in their reports' ([WTO Secretariat, 2004, p. 13](#)).

Under the 1947 GATT dispute settlement system the final decision-making power resided with the GATT Council deciding by consensus. The *consensual decision-making* operated at different levels and at key stages in the decision-making procedure. A single GATT party, including the party against whom a dispute was filed, could veto the key steps in the dispute settlement system such as the establishment of an expert panel, the adoption of a panel report and the final authorisation of countermeasures.

Surprisingly, the system worked well despite the unanimity voting rule and the actual risks of vetoes. The parties' short-term gains from opposition were weighed against long-term systemic risk whereby opposition today always involved the risk of a response in kind in the future. Owing to what one could call the *boomerang effect* the contracting parties' use of a veto was measured. Empirical research shows that in a large majority of cases the GATT 1947 dispute settlement system resulted in satisfactory outcomes ([Read, 2007](#)).

## 2.2 A weakened Enforcement Mechanism

Nevertheless, the empirical research on the effectiveness of the 1947 GATT dispute settlement mechanism is only based on complaints that were actually filed. It neglects those instances that were never brought before the GATT because 'the complainant suspected that the respondent would exercise its veto' ([WTO Secretariat, 2004, p. 14](#)). This rationale laid bare the structural weakness of the 1947 GATT dispute settlement system.

The rulings reflected the legal merits of the complaints but also the political criteria as consensual decision-making required the agreement to be acceptable to all parties. This structural weakness contributed to the danger for paralysis that was increasingly on display in the 1980s. For instance, in politically sensitive cases disputes were used as currency between the parties in ongoing negotiations in unrelated areas. The consensus requirement resulted sometimes in a *diplomatic* or *political* breakdown in which losing countries decided to veto the adoption of unfavourable reports. Losing parties could also reject the panel reports on the basis of substantive disagreements

with a panel's legal analysis. They argued that the dispute settlement ruling was unfair, erroneous or incomplete because certain legal aspects had not been dealt with.

The structural weakness resulted in delays in the establishment of panels, forum shopping, the growth of pending cases and the non-compliance with dispute settlement rulings. The 1947 GATT dispute settlement system also experienced a high percentage of legal failures and a rise in recourse to unilateral trade sanctions ([Petersmann, 1997, pp. 90-91](#)). In an area such as international trade where expedient decision-making is *time critical* to the interests of the contracting parties the absence of predictability was considered to be a major disadvantage to the dispute settlement system. The contracting parties agreed that the system required strengthening and in particular the enforcement mechanism needed change from a diplomatic to a more judicial approach.

## 2.3 The Reform: the Introduction of Reverse Consensus Voting

In the Uruguay Round (1986-1994) the negotiations on improving the dispute settlement system received high priority and resulted in the reform of 1 January 1995 that introduced three major changes. First, a new political body, the Dispute Settlement Body (DSB), composed of representatives of all WTO members would deal with disputes arising under any of the WTO agreements in accordance with the provisions of the DSU. The DSB supervises the entire process from the establishment of panels, the adoption of panel reports, the supervision of the implementation to the authorisation of countermeasures when a WTO member fails to comply with a ruling.

Second, a new expert body, the so-called Appellate Body, was created as a permanent body of seven members entrusted with the task of reviewing the legal aspects of the panel reports. The Appellate Body corrects potential legal errors in the panel reports and provides consistency of the decisions increasing the predictability of the dispute settle-

ment system. The Appellate Body can also modify or reverse panel reports in case a party launches an appeal with the DSB ([WTO Secretariat, 2004, pp. 22-23](#)).

Third and most importantly, the DSB takes decisions by consensus except when (a) it establishes panels (Article 6:1); (b) adopts panel (Article 16:4) and Appellate Body (Article 17:4) reports; and, (c) when it authorises retaliation (Article 22:6) within the time limits prescribed in each of the procedures. For these key steps the reform abolished the consensus driven decision-making process and introduced one of the most important policy innovations: *the reverse consensus voting rule*. Other than in the dispute settlement system the negative consensus applies nowhere else in the WTO decision-making framework ([WTO Secretariat, 2004, pp. 18-19](#)).

Under a reverse consensus only a single member country is needed to (a) approve the establishment of panels; (b) adopt panel and Appellate Body reports; and (c) authorise counter measures in case of non-compliance. For each of those key steps the DSB must approve the decision by a reverse or so-called negative consensus, which is

a consensus opposing the proposed decision. In practice, this means that for the three mentioned stages of the process (establishment, adoption and retaliation) the DSB must *automatically decide to take the action unless there is a consensus not to do so*. One single member can always prevent such a reverse consensus and avoid the obstruction of the decision.

The significance of the reversed consensus rule becomes clear against the background that no member (including the effected or interested parties) is excluded from participation in the decision-making process. The member requesting the establishment of a panel can ensure that its request is approved by merely placing it on the agenda of the DSB. The adoption of panel and Appellate Body reports is guaranteed because there is always one party (out of more than a 100 members) with a strong interest in the adoption of the reports unless the winner of the dispute agrees that it should not be. In contrast, any member intending to block the decision to adopt the reports must convince all other WTO Members (including the adversarial party in this case) to join the opposition or at least abstain from voting.

The introduction of reversed majority voting in the form of a negative consensus rule at key stages in the decision-making process in combination with firm deadlines guarantees the virtual automaticity of the new dispute settlement process. Unlike GATT 1947, the DSU does not provide an opportunity for its members to block the decision making mechanism. The sweeping reforms were accepted in exchange for having checks and balances introduced in the system such as the interim review by the panel (Article 5) and the creation of a standing Appellate Body composed of seven independent experts appointed for a four-year term (Article 17). The interim review and the Appellate Body offered safeguards against potentially erroneous panel reports ([Petersmann, 1997, p. 185](#)).

## 2.4 The Impact: the Judicialisation of the WTO's Dispute Settlement System

The reinforcement of the dispute settlement procedures by means of the reverse consensus has rendered the procedure more effective and contributes to the predictability and credibility of the

multilateral trading system. However, the reform also resulted in a number of unintended consequences in the area of accountability and legitimacy. Since its introduction the WTO witnessed a growing tension between the reformed, more judicial and rule-based decision-making mechanism of the dispute settlement system and the unreformed, more political and legislative decision-making system of the WTO.

Compared to the 1947 GATT the dispute settlement system under the WTO has become more effective and expeditious as a result of the reverse consensus voting rule. Between 1995 and 2005 the panels and Appellate Body handled a large number of controversial cases and caught up with delays that built up in the previous era. For the period from 1995 to 2012 the system handled 446 complaints at systemic and factual level demonstrating that WTO members frequently resorted to the DSU. A review of the system in 1998-1999 confirmed the general satisfaction among WTO member countries with its functioning and suggesting that the reform's objectives were satisfied: a well-functioning legal and judicial system that contributes to the predictability and credibility

of the multilateral trading system ([Petersmann, 2005, p. 141](#)). Today many cases have continued to experience delays but they have not threatened the credibility of the enforcement mechanism and the predictability of the global trading system ([Davey, 2005](#), [Grimmett, 2012, p. 3](#)).

On the contrary, the growing efficiency and effectiveness of the WTO's dispute settlement system has resulted in a potential imbalance within the organisation between judicial and political decision-making.

The 1995 reform *de-facto de-politicised* the 1947 GATT dispute settlement mechanism in favour of a significant *legalisation* and a *quasi-judicialisation* of the process ([Petersmann, 1997, p. 186](#)). The old 1947 GATT dispute settlement system derived its political or diplomatic epitaph from the consensus driven decision-making process. It required all GATT parties to agree and often strike political deals in the GATT Council to make progress. In the absence of an accord the system was prone to delays and deadlock. The virtual automaticity of the reversed consensus has removed these obstacles. Panel and Appellate Body reports are virtually automatically adopted and are instantly

binding when they reach the DSB, the political body composed of representatives from the WTO member countries. In short, the process changed the enforcement mechanism in favour of a far more procedural, rules-based dispute settlement system reducing the risks of unpredictability ([Petersmann, 1997, pp. 185-186](#), [Lewis, 2006, pp. 897-898](#)).

Simultaneously the virtual automaticity of the reversed consensus implies that the DSB as a political body has less formal control over the key steps in the process and the eventual outcomes. The panels and in particular the standing Appellate Body increasingly resemble independent structures producing binding settlements upon the WTO members. This opens the decision-making structure to criticism on the grounds of obscuring accountability. While the DSB is formally responsible for approving the panel and Appellate Body reports the actual decision-making capacity moved upstream in the process to the panels and in particular to the more permanent Appellate Body. Despite the fact that quasi automaticity significantly reduced the control of the DSB its members continue to be held accountable for the deci-

sions taken by the panels and the Appellate Body. This risk has been reinforced by the uniform opinions of the panel and Appellate Body reports. The strong desire to reach unified decisions despite the fact that the Appellate Body can resort to decision making by *a simple majority vote* of its members contrasts with the frequent display of dissenting views in the political and legislative decision-making process of the WTO (Lewis, 2006, p. 899).

Similarly, the contrast between the active, virtual automatic and effective dispute settlement system and the more difficult political decision-making process suggests tensions between the two spheres within the WTO. While the mechanism used in dispute settlement depends on a limited and rather independent number of experts (adjudicators) that *must* decide on the basis of regulations, the political and legislative area of the WTO is run by a large number of government representatives who receive mandates from their respective capitals and who *may* decide (Ehlermann and Ehring, 2005, p. 69). The advent of the binding dispute settlement system subject to *minority ruling* has spurred activity and development in the area of adjudication. At the same time the 1995 reform of the dispute settlement system did not have a bearing on the functioning of the WTO's politi-

cal procedures, which continues to operate under consensus. In this domain agreement is more difficult to attain and WTO member countries risk being unable to respond legislatively when they disagree with the panel's or the Appellate Body's legal interpretation. The imbalance has resulted in a new relationship between the political and judicial processes in the WTO (Ehlermann and Ehring, 2005, Cottier, March 2009).

For WTO member countries such evolution is problematic from a legitimacy perspective. The automatic and binding effect of panels and Appellate Body rulings make them increasingly intrusive on their domestic political economies. The rulings no longer allow the unilateral exit of member countries and the cost of non-compliance has grown considerably. This in turn raises also important issues about the competing demands of the Member countries' obligation under international agreements and their domestic democratic mandates. The WTO frequently stands accused for 'usurping' the democratic process by enforcing externally imposed rules on sovereign states (Read, 2007).

In view of the duality between a stalling burdensome political/legislative process and a binding

expeditious judicial process member countries have become cautious in entering new obligations. They want to ascertain sufficient domestic support in the negotiation process (Cottier and Takenoshita, 2008, pp. 183-185, p. 192, Howse, 2003, p. 17). Moreover, a number of observers have argued that the dispute settlement system is not only independent with a compulsory enforcement mechanism but also a body that independently develops a body of law strengthening the (quasi-)judiciary beyond what was foreseen and thereby threatening the legitimacy of the WTO (Ehlermann and Ehring, 2005, p. 52, 69, von Bogdandy, 2001, pp. 616-617).

## 3. RMV and EU Anti-Dumping Policy

Until 1994 EU Member States decided definitive anti-dumping proposals by a qualified majority vote and subsequent to the EFTA enlargement (1995) by a simple majority vote. However, with the growing EU membership and associated risk of Commission proposals being rejected in the Council the enforcement and effectiveness of the EU's anti-dumping policy weakened. To strengthen the EU's anti-dumping policy the EU introduced a reverse simple majority voting rule just before the Big Bang enlargement of 2004. The reform rendered EU anti-dumping policy more effective and strengthened the discretion of the Commission.

### 3.1 Institutions and Procedures

The competences for administering EU anti-dumping regulations are shared between the EU Member States, the EU Council and the Commission. The General Court gained competence over anti-dumping cases in 1994 and deals with the appeals against decisions made in the course of anti-dumping proceedings. The European Court of

Justice (ECJ) addresses appeals against the judgments of the General Court.

According to the EU anti-dumping regulations EU producers can file an anti-dumping complaint about third countries imports with the Commission. Following such a complaint an anti-dumping procedure with several stages is initiated. First, the Commission starts an investigation followed by an injury investigation and finally an analysis whether the imposition of anti-dumping duties would serve the Community's interest. For each key step in the procedure the Commission consults the EU Member States during meetings of the so-called anti-dumping Advisory Committee. While these consultations are compulsory the Member States opinions are not legally binding upon the Commission investigation. When the Commission decides in favour of definitive anti-dumping measures it needs to address a proposal to the EU Council for adoption to become effective. In the meantime the Commission can impose preliminary duties.

Until March 1994 the EU Council approved these definitive anti-dumping proposals by a qualified majority vote. In an EU of 12 Member States the qualified majority threshold made it relatively straightforward to form a blocking minority against such a proposal, however, that did not happen very often. The political constellation in the EU Council guaranteed that more protectionist Member States were at ease with the voting rule. Instead, they were concerned that Austria, Sweden and Finland as aspiring EU Member States would upset the political balance in the Council carrying the risk that anti-dumping proposals would increasingly be defeated following their accession. The three new Member States were perceived as potential candidates for joining the so-called free-trade coalition comprising the UK, the Netherlands, Germany and Denmark. Particularly France favoured the lowering of the voting threshold and in March 1994 ahead of the EFTA enlargement (1995) the decision-making procedure was changed. Definitive anti-dumping measures were to be adopted with a simple majority vote instead and strict time-limits were inserted from 1 September 1995 onwards ([Bellis and Van Bael, 2011, p. 20-22](#)). The reform lowered the

majority threshold in the Council and within the EU of 15 Member States it became more difficult to block a Commission anti-dumping proposal.

### 3.2 A Weakened Enforcement Mechanism

The EU anti-dumping policy process performed relatively well with proposals typically passing the majority threshold in the Council of Ministers. However, in the first half of the 2000s the EU Member States rejected a number of the Commission proposals in the Council. Disagreements between the Member States and between the EC and the EU Council occurred more often. The rejection of the proposals brought these disagreements to the fore and placed the Commission in an awkward position. The investigations had confirmed the need for the adoption of anti-dumping measures and from the Commission's perspective the adoption was time critical. For the complainants the rejection also came in the last stage of the decision-making process ([Bellis and Van Bael, 2011, pp. 518-519, Commission of the European Communities, 27/12/2004, p. 8, pp. 38-41](#)).

In those instances the required simple majority could not be found in the EU Council because of the unusual high number of abstentions that effectively counted as votes against. Rather than clearly supporting or opposing the proposals with a 'yes' or a 'no' vote the EU Member States choose to abstain from voting. This in turn, resulted in a situation whereby a Commission proposal was not adopted due to the number of abstentions. These abstentions had the effect of undermining the effectiveness of the Commission's anti-dumping policy and weakening the EU's enforcement mechanism. The weakening carried all the more weight because of the presence of strict time limits in the anti-dumping procedure making expedient and effective enforcement particularly acute for EU producers.

One symbolic case concerned a complaint brought by *Eurocoton* against imports of unbleached cotton fabrics originating from China, Egypt, India, Indonesia, Pakistan and Turkey. Following the Commission investigation the Council rejected the proposal failing a simple majority in favour because of the high number of abstentions. Eurocoton disagreed with the Council decision and

appealed to the General Court but the complaint was rejected. As a last resort Eurocoton appealed to the ECJ and on 30 September 2003 the ECJ ruled in favour of Eurocoton against the Council. The ECJ stated that the EU Council's failure to adopt the proposal affected the interests of Eurocoton. Moreover, the Court declared that the EU Council needed to clearly state the reasons for rejecting a Commission proposal ([Bellis and Van Bael, 2011, pp. 519-520](#)). The ruling resulted in a reform of the decision-making procedure and the voting rule governing anti-dumping policy in the EU Council (the so-called Basic Anti-Dumping Regulation).

### 3.3 Reform: the Introduction of Reverse Simple Majority Voting

On 20 March 2004 the amended Basic Anti-Dumping Regulation entered into force. The new regulation established that definitive anti-dumping measures would be adopted in the EU Council *unless a simple majority of the Member States rejected* the Commission proposal within a period of one month after its submission ([Council](#)

Table 1: EU anti-dumping policy

Votes and majority thresholds in the EU Council (average in %)

year	yes votes	no votes	abstentions	supporting	opposing	majority threshold
02	73.3	20.6	6.1	73.3	26.7	50+1
03	na	na	na	na	na	na
04	85.6	10.7	3.7	89.3	10.7	47.3
05	80.2	13.0	6.8	87.0	13.0	43.2
06	77.5	12.8	9.7	87.2	13.8	40.3
07	74.1	12.9	14.0	88.1	11.9	36.0
av.'04-'07	79.4	12.4	8.6	87.9	12.4	41.2

**Legend:** averages as a % of total annual public anti-dumping votes with opposing votes in 2002 calculated as the sum of negative votes and abstentions. Supporting votes for '04-'07 calculated as the sum of positive votes and abstentions. **Note:** data for 2003 are not public. **Source:** All acts on which a vote was recorded (except confirmatory replies) from the Council minutes (1999-2010) and the Council press releases (1995-2010) of all individual Council sessions between the 1826th Council meeting for Agriculture (23 January 1995) and the 3061st Council meeting for Environment (20 December 2010). They were triangulated with the data from the monthly summaries of Council acts (1999-2010) and the Council Secretariat summary statistics (1996-2010).

[press release, 09/03/2004](#)). If the Council decides against a Commission proposal it must clearly indicate its motivation. The voting procedure and the new mandatory time limits were also adopted for other key steps in the procedures such as reviews, reinvestigation, circumvention and suspension of measures. The procedural reform was considered to be expedient in order to 'facilitate

*the Community's decision-making process without changing the respective roles of the Commission and the Council in the application of the Basic Regulations, and without implying any changes for the decision-making procedures in other areas of the common commercial policy or other sectors* ([WTO, 2004, p. 2](#)). Coincidentally, the reformed Basic Regulation entered into force just before 1

May 2004 when the EU's membership grew from 15 to 27 Member States potentially upsetting the political balance in the Council on anti-dumping policy once more.

### 3.4 Impact: the Growing Discretion of the Commission

Before the reform eight of the 15-EU Member States had to vote in favour of imposing anti-dumping measures with abstentions effectively counting against a Commission proposal. Under the reverse simple majority rule (RSMV) abstentions count as positive votes forcing Member States to take a clear position and obliging them to explicitly vote against definitive duties, rather than following a more politically expedient route of abstaining.

To study the impact of the RSMV on the EU Council and the Member States' voting behaviour we base our analysis on a robust collection of data stretching over a period from 2002 to 2007. The data are a subset of a new database representing the total population of public votes and public roll calls between 1995 and 2010 in the EU Council of Ministers ([Van Aken, 2012:2](#)). The subset on EU Council public votes in the area of anti-dumping measures covers all publicly available roll calls between 1995 and 2010 representing 68 roll calls

(1692 observations of individual votes cast) on individual regulations imposing definitive anti-dumping measure on imports of certain goods. One caveat concerns the smaller number of observations before the introduction of RSMV in 2004 (12 roll calls in total or 180 votes cast) compared to 56 roll calls subsequently. It is also important to note that roll calls on anti-dumping are not systematically published and only those that were adopted are published ([Van Aken, 2012:2, see annex pp. 62-70](#)).

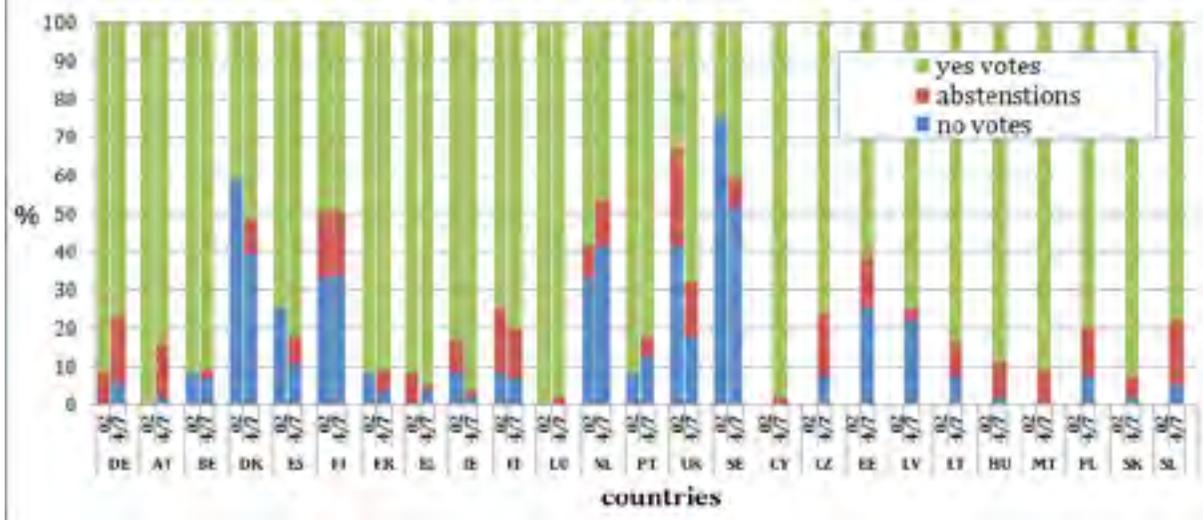
Despite these drawbacks secondary sources partly corroborated our findings ([Evenett and Vermulst, 2004, Evenett and Vermulst, 2005](#)).

The empirical analysis of the new data reports four main findings. First, under RSMV abstentions have a dramatic effect on the majority threshold as demonstrated by the voting data on antidumping measures. Normally, the threshold for passing a Council decision is fixed at 50%+1 with one Member State representing one vote. In contrast, under the RSMV rule the majority threshold becomes dynamic and largely depends on the number of abstentions. More precisely, under a simple majority vote negative votes or abstentions have

no effect on the majority threshold as a decision requires 50%+1 votes in favour. Under the reverse variant the majority threshold is determined by the number of abstentions as positive votes are effectively counted towards the majority. For example, in an extreme case the EU Council of 25 Member States can pass a Commission proposal with a single Member State voting in favour, 12 Member States voting against and 12 Member States abstaining. The majority voting threshold is therefore 4% of all the votes cast knowing that the 12 abstentions (48%) effectively count as positive votes. The empirical analysis demonstrates that this is not just a theoretical observation but that a minority can effectively prevail against a majority of 'no votes'.

Second, despite the lower majority threshold under RSMV the data show that decisions on average receive approval from a large majority in the Council (see Table 1). In our sample on average decisions are approved with an 89% majority in 2004; an 87% majority in 2005 and 2006; and with 88% in 2007. In other words, the support for anti-dumping measures in the Council rises between 14 and 16% compared to the simple majority vot-

**Figure 1: Explicit voting of EU-15 and EU-27 (% of total, 2002, 2004-2007) legislation**



**Legend:** Country codes from two-letter ISO code (except Greece: EL, United Kingdom: UK). Source: All recorded votes (except confirmatory replies) under all voting procedures (QMV, Simple Majority and Unanimity) collated from the Council minutes (1999-2010) and the Council press releases (1995-2010) of all individual Council sessions between the 1826th Council meeting for Agriculture (23 January 1995) and the 3061st Council meeting for Environment (20 December 2010). They were triangulated with the data from the monthly summaries of Council acts (1999-2010) and the Council Secretariat summary statistics (1996-2010). **Note:** Measure calculated on the basis of total votes against and abstentions (except confirmatory replies) for individual Member States as a % of total contested legislation in 2002 and 2004-2007.

ing rule. But these figures could be misleading as the sample shows that in 2006 two decisions would have failed the simple majority threshold with just 48% of support. In addition, secondary

literature has confirmed more extreme cases occurring where the votes were not published in the Council records. One such instance was an informal poll on the proposal for imposing anti-dump-

ing measures against shoe imports from Vietnam and the Republic of China in March 2006<sup>2</sup>. The Commission proposal was approved by 3 Member States only with 9-10 Member States voting against while 11-12 Member States abstained. In October 2006 the EU Council voted again on the proposal but this time with 9 Member States voting in favour, 12 against and 4 abstaining. These cases demonstrate that in practice proposals can be approved with the support of a minority of EU Member States ([COUNCIL REGULATION, 05/10/2006, EU Observer, 22/03/06, Financial Times, 22/09/2006](#)).

Third, when observing the majority threshold under RSMV (2004-2007) we empirically find a small but continuous declining majority threshold from on average 47% in 2004 to 36% in 2007 (see Table 1). The decline indicates that decisions are increasingly approved by a smaller group of countries that explicitly support the Commission proposals, i.e. with a 'yes' vote. The corollary of that finding is the gradual but steady rise in the

2. Footwear with uppers of leather from Vietnam and the Republic of China: initiation/review (2005 O.J. (C166)14); Provisional duty (2006 O.J. (L98)3); Definitive duty (2006 O.J. (L275)1).

number of abstentions from 3% in 2004 to 14% in 2007. Most interesting is the sudden drop in 'no' votes from 27% before 2004 to 12% of total after the reform. These changes can be the result of the reform in the voting rule (March 2004) or the growth of EU membership from 15 to 27 (May 2004).

Our calculations indicate that changing voting behaviour among the EU-15 are causing the decline (see Figure 1) rather than just the growth of EU membership confirming the research in other domains ([Van Aken, 2012:2, pp. 44-50](#)). When only observing the EU-15 in 2002, Denmark, Finland, the Netherlands, Sweden and the UK regularly appear in the anti-dumping coalition with a vote against. Overall these countries continue to oppose anti-dumping proposals for the period 2004-2007, but they also and abstain more often. Countries like Germany, Austria, Spain and Portugal that usually explicitly support anti-dumping measures now often tacitly agree by abstaining. Assuming that governments are not ignorant to the new voting rule they are able to qualify their support for anti-dumping legislation. Of the new Member States only Estonia and Latvia regularly vote against. All other countries differentiate their

vote between explicit and tacit approval highlighting that countries are willing lower the majority threshold in the Council.

Finally, the combined effect of a dynamic majority threshold and the Member States changing voting behaviour in the EU Council show that the Commission's discretion vis-à-vis the Council has increased considerably. The cliff-hangers approved with the marginal support among the Member States in 2006 are a case in point. While under the normal voting rule abstaining countries play an important role for the potential rejection of Commission proposals they become the pivot for sanctioning Commission proposals under a RSMV particularly for those proposals that do not enjoy extensive support among EU Member States.

On 1 March 2011 a third reform of the voting procedure entered into force as a consequence of the new rules on the implementing powers of the Commission as part of the normal comitology procedure ([EUROPEAN PARLIAMENT AND COUNCIL, 16/02/2011](#)). Anti-dumping measures will be decided by a reverse qualified majority vote under the Lisbon Treaty rules representing a double majority of at least 55% of the Member

States votes and 65% of the EU population. As we will discuss in the section on the EU fiscal governance the new double majority requirement will lower the voting threshold even further rendering the procedure virtually automatic.

## 4. EU Fiscal Governance: the SGP and the Fiscal Compact

From 1997 onwards EU Member States required a 2/3rds majority to decide on Commission proposals in the area of the EDP. However, during that period Member States have been reluctant to agree sanctions against other Member States in the EU Council as the EDP procedure on France and Germany in 2003 demonstrates. To address this fundamental weakness of the enforcement mechanism the EU introduced reverse qualified majority voting in the SGP in 2011 and the Fiscal compact in 2012. The reform renders EU fiscal governance more effective and strengthens the discretion of the Commission.

### 4.1 Institutions and Procedures

The competences for administering fiscal policy in the EU are shared between the EU Member States, the EU Council and the Commission. The Commission monitors economic and fiscal developments and the conduct of the Member States in observing the SGP, it prepares reports and has the right of initiative in the area of the EDP proce-

dures. At different stages in the policy process the Commission consults with the Member States at the preparatory level and political level in the ECOFIN Council. The ECOFIN Council has the competence to adopt Commission proposals and recommendations with respect to the Member States' fiscal policies and has a final say over the imposition of sanctions on Member States that fail to respect their commitments under the SGP.

### 4.2 A Weakening Enforcement Mechanism

An effective enforcement mechanism of the SGP has been wanting since its inception in 1997. From the outset a number of institutional weaknesses of the Pact were present. In essence the weaknesses related to the likelihood of the Commission initiating proceedings against EU Member States not respecting the Pact and the Member States agreeing to such proposal with a two-thirds majority in the ECOFIN Council. These flaws became particularly apparent between 2002 and 2003 with

the faltering EDP procedure for France and Germany (Council press release, 25/11/2003, Council press release, 09/03/2004). The institutional conflict between the Commission and the EU Council weakened and cast a long shadow on the SGP. EU leaders have regularly referred to the negative impact of the decisions taken in 2003 on EU fiscal governance ([Dams and Greive, 7/10/2011](#), [Agence France-Presse, 29/09/2010](#), [Little, 29/01/2012](#)). For instance, in June 2010 Jean-Claude Trichet, former President of the ECB, referred to the 2003 decisions in the following terms: 'The governments were extremely unreliable, over the course of months and years' ([Agence France-Presse, 20/06/2010](#)).

To understand the weakening of the SGP it is important to appreciate *how and why the Pact broke down*. The complete EDP for France and Germany including all the key steps, from the Commission's report up to the ECJ's annulment of the EU Council conclusions, lasted almost two years (see Table 2).

The Commission started an EDP against Germany in November 2002 and against France in

**Table 2: EDP Procedure (2002-2004)**

Step	Article	Step in the Procedure	France	Germany
			Date	
1	104(3)	Commission report	02/04/2003	19/11/2002
2	104(5)	Commission opinion on the existence of an excessive deficit	07/05/2003	08/01/2003
3	104(6)	Commission recommendation for a Council decision on the existence of an excessive deficit	07/05/2003	08/01/2003
4	104(7)	Commission recommendation for a Council recommendation to end the excessive deficit situation	07/05/2003	08/01/2003
5	104(6)	Council decision on the existence of an excessive deficit	03/06/2003	21/01/2003
6	104(7)	Council recommendation to end the excessive deficit situation	03/06/2003	21/01/2003
7	104(8)	Commission recommendation for a Council decision establishing inadequate action	08/10/2003	18/11/2003
8	104(9)	Commission recommendation for Council decision to give notice	21/10/2003	18/11/2003
<b>Adoption in the Council</b>				
	104(8)	Council Decision	25/11/2003	25/11/2003
	104(9)	Council Decision	25/11/2003	25/11/2003
		Council conclusions	25/11/2003	25/11/2003
		European Court of Justice annuls conclusions	13/07/2004	13/07/2004

**Legend:** Under Article 104 of Title VII (Economic and Monetary Policy) of the Treaty (consolidated versions 2002) **Source:** European Commission and EU Council

April 2003 with the preparation of a report. It subsequently requested the Council to formally acknowledge the existence of an excessive deficit in both countries in the form of an opinion and a recommendation. On 21 January 2003 the ECOFIN Council *unanimously* agreed with the Commission and adopted the recommendation that Germany needed to take measures before 21 May 2003 to keep its deficit under control. The ECOFIN Council also adopted with *France abstaining* a recommendation for an early warning

to prevent an excessive deficit in France ([Council Press release, 21/01/2003](#)). The French abstention was all the more symbolic against the background that France seldom votes in the EU Council particularly in the area of economic and financial matters ([Van Aken, 2012:2, p. 43, Hayes-Renshaw et al., 2006](#)). On 3 June 2003 the ECOFIN Council agreed *unanimously* with the Commission on the existence of an excessive deficit in France and decided that France needed to take effective action before 3 October 2003 to bring the deficit

under control. Denmark and the Netherlands voted against the Council decision because in their view France received special treatment compared to other countries in a similar situation ([Council press release, 03/06/2003](#)).

Despite the severity of the situation France and Germany did not respect their commitments under the Treaty, the SGP and the ECOFIN Council decisions. The EDP could not be *abrogated* and the Commission was left with little choice but to propose an additional two recommendations for each country, i.e. one for establishing insufficient action and another one to give notice to Paris and Berlin to take effective action within a certain deadline. It is important to note that these recommendations were still one step ahead of the effective sanctions in the procedure. The provisions on sanctions in the SGP would have come into play only later in the process. Moreover, a number of technical difficulties in the EDP prevented the Commission from exercising its role as guardian of the Treaty ([Gros et al., 2004, pp. 13-15](#)).

The procedure culminated in the ECOFIN Council of 23 November 2003 when the Italian Presidency, perhaps supported by a majority of the

**Table 3: Votes on Commission Recommendation under the Stability and Growth Pact: EU-15 and Eurozone (EU-12)**

Nr.	legal basis	decision/vote																weighted votes			result
			DE	AT	BE	DK	ES	FI	FR	EL	IE	IT	LU	NL	PT	UK	SE	2/3rds	blocking minority	total	
1	Art. 104(8)	recommendation for France	2	1	1	1	1	1	*	1	2	2	2	1	2	2	1	37	40	77	rejected
2	Art. 104(9)	recommendation for France	2	1	1	*	1	1	*	1	2	2	2	1	2	*	*	30	30	60	rejected
3	Art. 104(7)	Council conclusions for France	1	2	1	*	2	2	*	1	1	1	1	2	1	*	*	40	20	60	adopted
4	Art. 104(8)	recommendation for Germany	*	1	1	1	1	1	2	1	2	2	2	1	2	2	1	37	40	77	rejected
5	Art. 104(9)	recommendation for Germany	*	1	1	*	1	1	2	1	2	2	2	1	2	*	*	30	30	60	rejected
6	Art. 104(7)	Council conclusions for Germany	*	2	1	*	2	2	1	1	1	1	1	2	1	*	*	40	20	60	adopted
Art. 205(2) weighted votes			10	4	5	3	8	3	10	5	3	10	2	5	5	10	4				

**Legend:** 1=vote in favour, 2=vote against or abstention; \*=excluding the vote of the representative of the Member State concerned, 2/3rds=two thirds of the weighted votes **Note:** According to the voting rule under the Nice Treaty (entry into force 01/02/2003) of Art. 104 (13) only countries which have adopted the euro are allowed to vote on decisions on the Article 104(9) of the Treaty. Recalling that France or Germany were not allowed to vote and represented 10 votes each at least 52 out of a total of 77 votes were necessary for the adoption of an ECOFIN Council decision. When only euro area countries were allowed to vote a Council decision required at least 40 out of a total of 60 votes excluding France or Germany and the non-euro area countries (DK, UK and SW) representing a total of 27 votes. **Source:** Press release of the 2546th Council meeting (Economic and Financial Affairs) of 25 November 2003

Council Members, decided to subject the four Commission recommendations to a vote (Van Aken, 2012:2, p. 18-19). The outcome of the vote prevented the sanction mechanism from being triggered and brought the EDP to a sudden halt. A blocking minority of Member States in the Council rejected all four Commission's recommendations (see Table 3). On all counts the blocking minority prevented the formation of 'a majority of two-thirds' (not a qualified majority) of

the weighted votes in support of the Commission's proposal. The Member States concerned could not participate in the roll call<sup>3</sup> and only countries which had adopted the euro were allowed to vote on the decisions under article 104(9) of the Treaty. It is important to note that the vote could not be taken within the group of euro area countries be-

3. Under Article 104(13) of the Treaty.

cause at the time the so-called *Eurogroup* had an informal status only.

Instead the vote was held within the remit of the ECOFIN Council and the four Commission recommendations needed to garner at least 66.6% of the weighted votes in favour or less than 33.3% of the weighted votes against. Crucially, the abstentions are counted as votes against. In practice this meant that the Commission recommendation establishing *inadequate action* under article 104(8) needed to muster at least 52 out of 77 weighted votes in the ECOFIN Council (see Table 3). The decision only received 37 weighted votes in favour (48%) with a blocking minority of 40 votes (52%), which outweighs the required 26 votes by a significant margin. On the decision Belgium, Denmark, Greece, Spain, the Netherlands, Austria, Finland and Sweden voted in favour. Germany or France, the UK, Italy, Ireland, Portugal and Luxembourg voted against.

Similarly, for the approval of the Commission recommendation *to give notice* under article 104(9) the ECOFIN Council required at least 40 out of 60 weighted votes in favour among the euro area countries (excluding the UK, Denmark and Swe-

den and France or Germany). A blocking minority represented at least 20 weighted votes. On the decision Austria, Belgium, Spain, Finland, Greece and the Netherlands voted in favour representing 30 votes (50% of the weighted votes) while France or Germany, Italy, Ireland, Luxembourg and Portugal opposed either by voting against or abstaining from voting (50% of the weighted votes). In short, the defeating coalition on both decisions within the EU-15 and the Euro area-13 had a substantial winning margin of nearly 20% of the votes in the EU Council.

The rejection of the Commission proposals represented a conundrum for the EU as it would end the procedure on France and Germany despite the fact that the Commission and the Council had previously acknowledged the existence of an excessive deficit. *The four decisions on two large EU Member States laid bare the weakness of the SGP and indirectly the Commission as the guardian of the Treaty* (Gros et al., 2004). To remedy the situation the Italian Presidency and the euro area countries adopted with a vote the so-called 'Council conclusions on assessing the actions taken' by France or Germany in the ECOFIN Council. The

vote proved to be a cliff-hanger with the euro area countries only just reaching the required 2/3rds majority (66.6%) of 40 weighted votes needed against a blocking minority of 20 weighted votes (33.3%).

It remains doubtful whether this vote and the Council conclusions addressed the SGP's credibility problem. At the time the ECB stated in uncharacteristically strong wording: '[...] the Governing Council took the view that the recommendations of the European Commission for the next steps in the excessive deficit procedure pushed the room for the interpretation of the rules and procedures to the limit [...]' The Conclusions adopted by the ECOFIN Council carry serious dangers. The failure to go along with the rules and procedures foreseen in the Stability and Growth Pact risks undermining the credibility of the institutional framework and the confidence in sound public finances of Member States across the euro area' (European Central Bank, 25/11/2003).

The Commission also profoundly disagreed with the ECOFIN Council decisions: 'The Commission takes note of the rejection by the Council [...] without giving the adequate explanation as laid

down in the European Council Resolution on the Stability and Growth Pact [...] The Commission deeply regrets that the Council has not followed the spirit and the rules of the Treaty and the Stability and Growth Pact that were agreed unanimously by all Member States. *Only a rule-based system can guarantee that commitments are enforced and that all Member States are treated equally*' (Council press release, 25/11/2003). In January 2004 the Commission challenged the Council conclusions before the ECJ arguing that 'the Treaty rules cannot be ignored or changed for the sole reason that the Council could not reach the majority to adopt the decisions under articles 104(8) and 104(9), as recommended by the Commission' (Commission Presse Release, 13/01/2004, IP/04/35). The ECJ agreed with the Commission on 13 July 2004 and annulled the ECOFIN Council conclusions on procedural grounds, however, it also confirmed the *EU Council's competence* in the area of deciding budgetary discipline (Court of Justice of the European Communities Press Release, 13/07/2004).

Three important elements emerged with respect to the EDP procedure on France and Germany. First, the Treaty, the SGP and the EDP procedure

did not anticipate the possibility of a stalemate between the EU Council (the Member States) and the Commission. The Treaty did not specify what would happen under such circumstances. Second, the ECJ confirmed that the ultimate decision-making power rested with a political body, the EU Council, rather than the executive, the Commission. As a result the Commission's proposals carried less weight until they were formally endorsed (with a vote) in the EU Council particularly in view of the procedures, including the voting rules and majority thresholds that are crucial to the credibility of the enforcement mechanism. Finally, the Council's rejection of the Commission recommendations left the enforcement mechanism of the SGP very much weakened. Despite the reform efforts over the following years the SGP never fully (re)gained the needed credibility.

### 4.3 The Reform: the Introduction of Reverse Qualified Majority Voting

The financial crisis that erupted in 2007 exposed the weakness of the SGP's enforcement mechanism even further particularly in view of the ma-

majority of EU (20 out of 27) and Euro area (12 out of 17) countries that found themselves in an EDP procedure.<sup>4</sup> Against this background and in view of the experience with the EDP procedure for France and Germany in 2003 the EU embarked on a reform of the SGP.

To that end the 2010 Spring European Council requested the establishment of a task force comprising the representatives of the EU Member States, the ECB, the Commission, the EU Presidency and the President of the European Council. Following intense preparations within this so-called EU Task Force on Economic Governance the Commission's services put forward six proposals (5 regulations and one directive) on 29 September 2010. The proposals strengthened the SGP's enforcement mechanism by introducing *the principle of automaticity for key steps in the procedure within clearly specified time limits*. The mechanism guaranteeing the automaticity is the use of RQMV as the preferred voting rule.

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4. For details see website of the Economic and Financial Affairs website of the European Commission: [http://ec.europa.eu/economy\\_finance/economic\\_governance/sgp/deficit/index\\_en.htm](http://ec.europa.eu/economy_finance/economic_governance/sgp/deficit/index_en.htm)

In the preventive part of the Pact the Commission proposed for euro-area countries the introduction of RQMV for imposing sanctions (an interest-bearing deposit of 0.2% of GDP). Under the RQMV such a proposed sanction is automatically adopted unless the Council objects with a QMV within ten days of its submission. Moreover, the Council may only alter the text of the sanction unanimously or based on a Commission proposal and a reasoned request from the Member State concerned. Only after the EU Council is satisfied with a remedy will the deposit be returned with interest (see Annex: Relevant Legal Texts).

In the corrective part of the SGP the Commission also envisaged strengthening the key steps in the EDP procedure for euro area Member States. More precisely, at each step of the EDP a Commission proposal is virtually automatically adopted unless the Council decides to vote against under an RQMV within ten days of its submission. The text of the sanctions (a non-interest-bearing deposit of 0.2% of GDP) can only be changed unanimously unless the Commission submits a proposal on grounds of exceptional economic circumstances and/or a reasoned request by the

Member State concerned ([European Commission, 29/09/2010b](#)).

In a follow-up to the EDP and according to a similar enforcement mechanism the Commission also proposed to introduce fines (0.1% of the GDP) for euro-area countries that fail to correct excessive macroeconomic imbalances. The procedure for the application of the fines *'should be construed in such a way that the application of the fine on those Member States would be the rule and not the exception'* ([European Commission, 29/09/2010a](#)).

The German government supported the Commission proposals but France opposed the virtual automaticity of the enforcement mechanism. Christine Lagarde, the French Finance Minister at that time, argued that France 'has always been favourable to a solid and credible economic governance but not for a totally automatic mechanism, a power that would be exclusively in the hands of experts' ([Agence France-Presse, 29/09/2010](#)). In October 2010 France and Germany found a compromise which they presented ahead of the European Council. In

the preventive and corrective arm of the Pact the Council would progressively impose sanctions but only with a qualified majority instead of an RQMV ([Franco-German declaration, 18/10/2010](#)). In the course of 2011 the discussions between the EP and the Council centred on the automaticity, the type of the sanctions and the voting procedure. Against the background of profound market turmoil a compromise emerged in the form of the so-called Six Pack in November 2011.

Compared to the original Commission proposals the enforcement mechanism in the preventive and corrective arm of the Pact was significantly watered down (see Annex: Relevant Legal Texts). While automaticity would be maintained virtually guaranteeing the adoption of a Commission proposal the Council has the option of amending the proposed text with a QMV. This leaves the enforcement mechanism almost unchanged as RQMV and QMV cancel each other out. In its opinion the ECB highlighted that the automaticity did not go far enough ([European Central Bank, 16/02/2011](#)) and that the enhanced fiscal framework still lacked 'sufficient automaticity in case of non-compliance with

the rules. In particular, the Council continues to have substantial room for discretion under the reinforced SGP. For example, the Council – on the basis of an overall assessment – has to decide by qualified majority that an excessive deficit exists' ([European Central Bank, 2012, p. 82](#)).

The Fiscal Compact negotiated in the autumn and winter of 2011 and 2012 addresses these concerns and re-introduces complete automaticity to reinforce the EDP (see Annex: Relevant Legal Texts). In the area of the preventive arm the ECJ becomes the backstop for the effective enforcement and the Court can impose financial sanctions *provided* a case is brought before it. The corrective arm fully introduces virtual automaticity for each key step under strict deadlines. The RQMV applies for the decisions on the existence of an excessive deficit, for not having taken effective action, to give notice and for imposing financial sanctions in case of non-compliance. In short, the Fiscal Compact compensates for the limitations of the enforcement mechanism in the new SGP.

Table 4:  
Evolution of QMV in the EU Council (EU 27, 2007-2017)

	2007-2014		2014 onwards
	Nice 01/01/2007	Lisbon 01/11/2014*	Pop (000,0)
AT	10	1	8,404,252
BE	12	1	10,951,665
DE	29	1	81,751,602
DK	7	1	5,560,628
ES	27	1	46,152,926
FI	7	1	5,375,276
FR	29	1	65,048,412
GR	12	1	11,309,885
IE	7	1	4,480,858
IT	29	1	60,626,442
LU	4	1	511,840
NL	13	1	16,655,799
PT	12	1	10,636,979
SE	10	1	9,415,570
UK	29	1	62,435,709
CY	4	1	804,435
CZ	12	1	10,532,770
EE	4	1	1,340,194
HU	12	1	9,985,722
LT	4	1	3,244,601
LV	7	1	2,229,641
MT	3	1	417,617
PL	27	1	38,200,037
SK	7	1	5,435,273
SL	4	1	2,050,189
BG	10	1	7,504,868
RO	14	1	21,413,815
Qualified	255/345	15/27 (55% votes)	502,477,005.000
Majority**	and	and	
	14 MS		62% (311,535,740.00)
	62 % pop.	65% pop.	65%(326,610,050.00)
Qualified	255/345	20/27MS (72%)	
Majority***	18/27MS	65%pop.	
Blocking	91		
Minority		35% of the pop. of the participating MS+1MS	35%(175,866,951.80)
RQMV****	91/345	13/27 and	
		>35% pop.	35%(175,866,951.80)

**Notes:** \*transition period from 01/11/2014 until 31/03/2017: a Member state can request that the voting rule for a particular decision will be reverted to the rules under the Nice Treaty. \*\* QMV for an act proposed by the Commission; \*\*\* QMV for an act not proposed by the Commission; \*\*\*\* abstentions are counted as votes in favour **Source:** population data from Eurostat (2011)

## 4.4 Impact: towards a Rule-based Decision-making Mechanism

Before the reform decision-making power largely rested with the EU Council as the 2003 votes in the ECOFIN Council on France and Germany demonstrate. The approval of a Commission recommendation to formally launch the EDP and subject a Member State to a sanction regime required a 2/3rds (66.6%) majority of weighted votes in the EU Council. The recommendation failed if a blocking minority garnered at least 33.3% of the weighted votes. Abstentions were counted as votes against, the countries concerned could not participate in the vote and only members of the euro area could vote on decisions concerning euro area countries.

With the entry into force of the Six Pack in December 2011 the balance of decision-making power leans towards the Commission, but only marginally. The approval of a Commission recommendation in the preventive and corrective arm of the Pact requires the approval with an RQMV in the Council for *two key steps* in the EDP procedure

with strict time limits. The countries concerned are not allowed to participate and for decisions concerning euro area countries only members of the euro area are allowed to vote. This means that on paper at least the Council continues to take the final decisions but informally the RQMV shift the discretion towards the Commission because a recommendation only requires just over 26% of the Council's weighted votes for approval.

Moreover, abstentions play an important role for the approval of Commission recommendations because they lower the threshold to pass a proposal under RQMV even further. As our analysis of reverse majority voting in the area of EU-anti dumping policy illustrates, the majority threshold becomes dynamic depending on the effective number of abstentions. For example, in the extreme case Malta with 3 weighted votes in favour of a Commission recommendation could pass a decision against a majority of Member States voting against as long as an equally strong group of Member states would abstain.

Unexpectedly, the reformed SGP cancels out the nearly automatic adoption of a Commission recommendation under RQMV as it allows the

Council to change the text of the recommendation with a qualified majority (at least 73.91% of the Member States' weighted votes under the Nice Treaty voting rules)<sup>5</sup>. That is a significant weakening of the enforcement mechanism considering the 2003 EDP procedure on France and Germany. If we apply the new voting rules and follow the voting weights of the Nice Treaty to the 2003 EDP procedure the Commission recommendations could not have been blocked nor altered at the time. In contrast, when we apply the voting weights of the Lisbon Treaty the Commission recommendations would have been adopted but the Council would have had the opportunity to change the text of the recommendation. In other words, under the Lisbon Treaty voting rules and weights the discretion is likely to veer back in the direction of the Council (see Table 4).

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5. The proposal also requires the support of a majority of the Member States (14 Member States out of 27) and a Member State can always request verification that the majority represent at least 62% of the total EU population. The proposal is not adopted if a blocking minority of Member States represents at least 90 out of 345 weighted votes. Note that abstentions under QMV are counted as votes against.

The Fiscal Compact addresses these weaknesses of the Six Pack and eliminates the possibility of the Council to change a Commission recommendation for euro area countries. The Fiscal Compact introduces *RQMV in all the key steps of the EDP procedure under strict deadlines*. Approval of a Commission proposal is virtually automatic requiring only just over 26% of the weighted votes (Nice Treaty) or at least 4 Member States representing 35% of the population of the participating countries (Lisbon Treaty)<sup>6</sup>. Countries that abstain from voting in the procedure lower the necessary votes for approval even further. As a consequence, the Fiscal Compact shifts the decision-making capacity virtually entirely in the direction of the Commission and reduces the political discretion of the EU Council almost completely, notwith-

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6. The rule on the four countries is designed to prevent three of the four larger Member States (France, Germany, Italy and the UK) from being able to block a Commission proposal with a QMV. They need to draw in at least a fourth Member State to block a proposal. For the measures referred to in Articles 4, 5, 6 and 8, only members of the Council representing Member States whose currency is the euro shall vote, and the Council shall act without taking into account the vote of the member of the Council representing the Member State concerned.

standing that the EU Council and the Member States continue to be fully responsible for the final approval of the measures.

Therefore, the Commission's right of initiative in the area of fiscal policy will become the focus of attention. With a virtual automatic decision-making and enforcement mechanism much more consideration will be given to the Commission and its interpretation of the fiscal rules and procedures. These rules have become even more complex with the Fiscal Compact adding another layer to those already in place. Under the SGP and Fiscal Compact all the ingredients are now in place for a fully functioning rule-based system with experts and officials interpreting the rules and their proposals supported by the virtual automatic procedures of reverse majority voting.

Admittedly, the enforceability of the Fiscal Compact largely depends on its legal status. The Fiscal Compact is an *inter se international agreement* between two or more EU Member States that recognises the primacy of EU law. In practice this means that primary and secondary EU law both take undisputed precedence over conflicting provisions in inter se agreements between the Member States

([De Witte, 2012](#), [Craig, 2012](#), [Baratta, 2012](#)). According to this logic the weaker enforceability of the EDP procedure in the Six Pack takes precedence over the stronger enforceability of the EDP procedure in the Fiscal Compact. Provided that is the case the impact of the reformed enforcement mechanism of the EDP is likely to remain limited and much will depend on the discretion for Member States to respect their intentions and commitments under the Fiscal Compact and the TSCG as well as their preparedness to challenge their fellow Member States in front of the ECJ ([Baratta, 2012](#)).

## 5. Conclusions

With the agreement on the reinforced SGP in 2011 and the Fiscal Compact in 2012 the EU approved a new set of rules for economic and fiscal surveillance of the EU Member States. To strengthen the effective enforcement the SGP and the Fiscal Compact introduce the policy innovation of reverse qualified majority voting in the EU Council. Under the RQMV the Commission can impose a sanction on a Member State when a *minority* of EU Member States agree within a specified time limit. The EU Council can only block such a sanction with a *qualified majority* of the Member States.

The reverse majority voting rule raises two questions: Does it effectively strengthen the enforcement mechanism of the SGP and the Fiscal Compact? And, does the importance of the minority in the voting procedure suggest a trade-off between effective enforcement and the legitimacy of the SGP and the Fiscal Compact? To answer the research questions this paper compares three cases where three different types of reverse majority voting have been introduced: the dispute settle-

ment mechanism of the World Trade Organisation and reverse consensus; the EU anti-dumping policy and reverse simple majority; and, the reinforced SGP and Fiscal Compact and reverse qualified majority.

The comparison demonstrates that the RMV decision-making procedure significantly lowers the majority threshold to pass legislation. In addition, under a reverse majority decisions are approved by a *dynamic* majority. The latter is the result of abstentions that effectively count as votes in favour lowering the required number of votes to adopt a Commission proposal. Since abstentions during roll call are often present in the Council the probability of decisions being approved rises considerably. The analysis of Member States voting behaviour on the basis of a new dataset in the area of the EU-antidumping policy also demonstrates that Member States adjust their voting behaviour to the reverse majority voting rule and abstain more frequently. Most importantly, decisions under a reverse majority are approved by a steadily declining majority of Member States vot-

ing in favour. In some instances decisions are adopted with the explicit support of a minority of Member States only. Therefore, under the reverse majority voting rule abstentions become increasingly important for sanctioning Commission proposals that do not carry a broad support in the EU Council.

The combination of a lower majority threshold to approve Commission proposals and the ensuing adjustment of the Member States voting behaviour makes the RMV procedure virtually automatic. With reverse qualified majority voting and strict time limits introduced at the start, the middle and the end of the enforcement mechanism the automaticity of the EDP is therefore almost guaranteed once the Commission formally submits a proposal. As a result, the RMV effectively strengthens the enforcement mechanism and enhances the automaticity and the predictability of the SGP and the Fiscal Compact.

However, the advent of a binding enforcement mechanism subject to an effective *minority ruling* highlights the potential trade-off between decision-making capacity and legitimacy in the area of economic and fiscal governance. In all three

cases the virtual automaticity of reverse majority voting has moved decision-making power upstream in the process adding weight to the right of initiative and the interpretation of the rules and procedures. It increases the independence of the expert-body that produces the binding proposals and recommendations. It is therefore likely that under the SGP and Fiscal Compact the discretion of the Commission in the area of fiscal and economic governance stands to grow considerably.

Simultaneously, the virtual automaticity implies that the political decision-making body has less formal control over the key steps in the process and the eventual outcomes. In the case of the EU it limits the discretion of the EU Council which continues to be, at least on paper, fully responsible. This opens the decision-making structure to criticism on the grounds of obscuring accountability. Despite the fact that the Member States in their legislative capacity agreed to the procedure of virtual automaticity it is the Commission that decides while the Member States are held accountable. In the area of fiscal policy, traditionally part of national sovereignty, such observation gains additional weight. The automatic and binding ef-

fect has the potential of making of Commission proposals increasingly intrusive on the Member States domestic political economies as the cost of non-compliance grows considerably.

Evidence from the WTO's dispute settlement system also suggests that the reverse majority procedure alters the balance between the rule- and political-based decision-making. The rule-based system becomes more efficient and expedient as a result of decisions taken by fewer officials on the basis of a rule book. The political body in contrast is less efficient and takes decisions based on negotiations among a larger group of national representatives. The imbalance suggests a new relationship between the political and rule-based processes. In the EU the two distinct dynamics are likely to create tensions between the legislative and executive branches of fiscal policy with the Commission much more likely to be effective relative to the national governments and the EU Council. With the reluctance to embark on another EU treaty reform the imbalance might give way to growing Commission activity spurred by the automatic procedure of reverse majority vot-

ing with spill over effects in other domains less subject to automaticity.

These findings shift our attention to the Commission and how it fulfils its newly gained discretion vis-à-vis the EU Council. Will Commission policy reflect the views held among a majority of the Member States? Or, alternatively will the Commission interpret and enforce the fiscal rule book increasingly as an independent expert body? In both instances it is likely that the Commission will act as a uniform body, however, internally it might be divided and perhaps ironically take decisions on Member States' fiscal policy with a *simple majority vote* of its members.

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## 7. Annex: Relevant Legal Texts

### A. Commission proposals (29/09/2010)

1. **COM(2010) 524 final: Proposal for a regulation of the EP and the Council on the effective enforcement of budgetary surveillance in the euro area**

**The preventive part of the SGP:**

**Chapter II: Sanctions in the preventive part of the Stability and Growth Pact**

**Article 3**

**Interest-bearing deposit**

1. If the Council addresses to a Member State a recommendation in accordance with Article 121(4) of the Treaty to take the necessary adjustment measures in the event of persisting or particularly serious and significant deviations from prudent fiscal policy-making as laid down in Article 6(3) of Regulation (EC) No 1466/97, the lodging of an interest bearing deposit shall be imposed by the Council, acting on a proposal from the Commission. **The decision shall be deemed to be adopted by the Council unless it decides by quali-**

**fied majority to reject the proposal within ten days of the Commission adopting it.** The Council may amend the proposal in accordance with Article 293(1) of the Treaty.

**The corrective part of the SGP:**

**Chapter III: Sanctions in the corrective part of the Stability and Growth Pact**

**Article 4**

**Non-interest-bearing deposit**

1. If the Council decides in accordance with Article 126(6) of the Treaty that an excessive deficit exists in a Member State, the lodging of a non-interest-bearing deposit shall be imposed by the Council, acting on a proposal from the Commission. **The decision shall be deemed adopted by the Council unless it decides by qualified majority to reject the proposal within ten days of the Commission adopting it.** The Council may amend the proposal in accordance with Article 293(1) of the Treaty.

**Article 5**

**Fine**

1. If the Council decides in accordance with Article 126(8) of the Treaty that the Member State has not taken effective action in response to a Council recommendation within the period laid down, the Council, acting on a proposal from the Commission, shall decide that the Member State shall pay a fine. **The decision shall be deemed adopted by the Council unless it decides by qualified majority to reject the proposal within ten days of the Commission adopting it.** The Council may amend the proposal in accordance with Article 293(1) of the Treaty.

**Chapter IV: General Provisions**

**Article 8**

**Voting within the Council**

For the measures referred to in *Articles 3, 4 and 5*, **only members of the Council representing Member States whose currency is the euro shall vote and the Council shall act without taking into account the vote of the member of the Council representing the Member State concerned.**

A qualified majority of the members of the Council mentioned in the previous paragraph shall be defined in accordance with Article 238(3)(a) of the Treaty.

2. **COM(2010) 525 final: Proposal for a regulation of the EP and the Council on enforcement measures to correct excessive macroeconomic imbalances in the euro area**

### Article 3

#### Fines

**The decision shall be deemed adopted by the Council unless it decides, by qualified majority, to reject the proposal within ten days the Commission adopting it.** The Council may amend the proposal in accordance with Article 293(1) of the Treaty.

### Article 5

#### Voting within the Council

For the measures referred to in Article 3, only members of the Council representing Member States whose currency is the euro shall vote and the Council shall act without taking into account

the vote of the member of the Council representing the Member State concerned.

A qualified majority of the members of the Council mentioned in the previous paragraph shall be defined in accordance with Article 238(3)(a) of the Treaty.

## B. EP and Council Legislative Acts (16/11/2011)

1. **Regulation (EU) No 1173/2011 of the European Parliament and of the Council of 16 November 2011 on the effective enforcement of budgetary surveillance in the euro area**

### Chapter III : Sanctions in the Preventive Part of the Stability and Growth Pact

#### Article 4

##### Interest-bearing deposits

2. **The decision requiring a lodgement shall be deemed to be adopted by the Council unless it decides by a qualified majority to reject the Commission's recommendation within 10 days of the Commission's adoption thereof.**

3. **The Council, acting by a qualified majority, may amend the Commission's recommendation and adopt the text so amended as a Council decision.**

6. If the situation giving rise to the Council's recommendation referred to in the second subparagraph of Article 6(2) of Regulation (EC) No 1466/97 no longer exists, the Council, on the basis of a further recommendation from the Commission, shall decide that the deposit and the interest accrued thereon be returned to the Member State concerned. **The Council may, acting by a qualified majority, amend the Commission's further recommendation.**

### Chapter IV: Sanctions in the corrective part of the Stability and Growth Pact

#### Article 5

##### Non-interest-bearing deposits

2. **The decision requiring a lodgement shall be deemed to be adopted by the Council unless it decides by a qualified majority to reject the Commission's recommendation within 10 days of the Commission's adoption thereof.**

3. **The Council, acting by a qualified majority, may amend the Commission's recommendation and adopt the text so amended as a Council decision.**

#### Article 6

##### Fines

2. **The decision imposing a fine shall be deemed to be adopted by the Council unless it decides by a qualified majority to reject the Commission's recommendation within 10 days of the Commission's adoption thereof.**

3. **The Council, acting by a qualified majority, may amend the Commission's recommendation and adopt the text so amended as a Council decision.**

#### Article 12

##### Voting in the Council

1. For the measures referred to in Articles 4, 5, 6 and 8, only members of the Council representing Member States whose currency is the euro shall vote, and the Council shall act without taking into account the vote of the member of the Council representing the Member State concerned.

2. *Regulation (EU) No 1174/2011 of the European Parliament and of the Council of 16 November 2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area*

#### Article 3

##### Sanctions

3. The decisions referred to in paragraphs 1 and 2 shall be **deemed adopted by the Council unless it decides, by qualified majority, to reject the recommendation within 10 days of its adoption by the Commission. The Council may decide, by qualified majority, to amend the recommendation.**

#### Article 5

##### Voting in the Council

1. For the measures referred to in Article 3, only members of the Council representing Member States whose currency is the euro shall vote, and the Council shall act without taking into account the vote of the member of the Council representing the Member State concerned.

2. A qualified majority of the members of the Council referred to in paragraph 1 shall be de-

finied in accordance with point (b) of Article 238(3) TFEU.

3. *Regulation (EU) No 1176/2011 of the European Parliament and of the Council of 16 November 2011 on the prevention and correction of macroeconomic imbalances*

#### Article 10

##### Assessment of corrective action

4. Where it considers that the Member State has not taken the recommended corrective action, the Council, on a recommendation from the Commission, shall adopt a decision establishing non-compliance, together with a recommendation setting new deadlines for taking corrective action. In this case, the Council shall inform the European Council, and shall make public the conclusions of the surveillance missions referred to in Article 9(3).

**The Commission's recommendation on establishing non-compliance shall be deemed to have been adopted by the Council, unless it decides, by qualified majority, to reject the recommendation within 10 days of its adoption by the**

**Commission.** The Member State concerned may request that a meeting of the Council be convened within that period to take a vote on the decision.

## Article 12

### Voting within the Council

For the measures referred to in Articles 7 to 11, **the Council shall act without taking into account the vote of the member of the Council representing the Member State concerned.**

C. Treaty on Stability, Co-ordination and Governance in the Economic and Monetary Union (signed by Head of State or Government 02/03/2012)

## Title III: Fiscal Compact

### Article 7

While fully respecting the procedural requirements of the Treaties on which the European Union is founded, the Contracting Parties whose currency is the euro commit to supporting the proposals or recommendations submitted by the European Commission where it considers that a

Member State of the European Union whose currency is the euro is in breach of the deficit criterion in the framework of an excessive deficit procedure. **This obligation shall not apply where it is established among the Contracting Parties whose currency is the euro that a qualified majority of them, calculated by analogy with the relevant provisions of the Treaties on which the European Union is founded, without taking into account the position of the Contracting Party concerned, is opposed to the decision proposed or recommended.**

# 7. UNIONS WITHIN THE UNION: CONTESTED AUTHORITY OVER REGULATORY RESPONSES TO THE FINANCIAL CRISIS IN EUROPE

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# 1. Introduction

Although crises are commonly expected to generate innovative approaches and fresh outlooks, the current financial crisis in Europe has given rise to solutions that may remake the Union into something completely new. In an attempt to save the day, a number of regulatory undertakings have been launched which question the coherence of the European legal system, as well as the established and functioning distribution of authority within the Union. Initiatives such as the Euro Plus Pact<sup>1</sup> and even more the Fiscal Compact<sup>2</sup> create new subgroups among the Member States, already divided in terms of participation in common financial arrangements. They also create new dynamics not only with regard to economic governance, but also in the overall functioning of the

Community. Consequently, juxtaposing the position of the EU and its Member States, they transgress the traditional division of authority between the national and the supranational level, creating new hybrid forms of regulation and governance. Irrespective of their eventual capacity to facilitate Europe's way out of the crisis, they need to be analysed from the point of view of the long-term systemic consequences they may have on the legal as well as political aspects of European integration.

This contribution will address those challenges by examining shifts of established modes of distribution of competences between states and a supranational organization, concentrating on the two related, but significantly different examples in the field of economic governance. The first one, the Euro Plus Pact, entails the intervention of the supranational organization in fields, which, in accordance with the Treaty, have been reserved for the Member States. By those means, the Euro Plus Pact questions the constitutional principle of the limited competences of the European Union. By contrast, the second example – the Fiscal Compact

– pertains to matters which should be decided in the forum of the European Union and its institutions, but which will now be partly governed by an international agreement among a group of participating states. Much debate about those two documents is devoted to the issue of participation of individual countries in the various setups they create. What is crucial, however, and not so openly discussed, is the fact that they both concern values of higher importance. They both question fundamental constitutional rules and arrangements that have previously been seen as cornerstones of the European project.

The next part of this contribution sketches the background of the core analysis, presenting first some theoretical reflections on the traditional balance of powers and authority distribution in the EU. Second, it introduces the larger perspective of economic governance reform in the EU. Third, in part three, the two core documents, the Euro Plus Pact and the Fiscal Compact are presented and analysed from the perspective of their impact on the distribution of authority over economic governance, as well as their long-term systemic implications. Fourth, a short overview of measures fol-

1. European Council, 2011/ Conclusions/EUCO 10/11 of 25 March 2011, Annex 1.
2. Fiscal Compact, properly, Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, available at: [http://european-council.europa.eu/media/639235/st00tscg26\\_en12.pdf](http://european-council.europa.eu/media/639235/st00tscg26_en12.pdf). Initially the term was used in reference to the entire document. Upon the adoption of the TSCG, the fiscal part of it is referred to as the “Fiscal Compact”.

lowing the adoption of the Pact and the Compact, which continue the trend of regulation outside the traditional framework, is presented. Finally, in part five, the outcomes of the analysis are summed up and generalized, and some preliminary conclusions are drawn.

## 2. Conferral, power balance and economic governance at the time of crisis

### 2.1 Traditional patterns of power balance in the EU

#### Towards clear distribution of power in the EU: general scheme after Lisbon

European Communities have been built on a concept of attributed competence, which implies that the EU only possesses the competences which had been conferred on it by the Treaty. Continuous striving towards an ever clearer division of responsibilities has been among the fundamental moves throughout the formation of the Communities, embedded in the Treaty and interpreted in the jurisdiction of the Court of Justice of the European Union (CJEU). It is only in the Lisbon Treaty, however, that the clear-cut categories and limits of competences have been established and constitutionalized.<sup>3</sup>

3. For a general, yet all-encompassing description of the current state of competence distribution in the EU,

The overarching principle of conferral, expressed in Article 5(2) of European Union Treaty (TEU) stipulates that the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein, while competences not conferred shall remain with the Member States. Within this sphere, the Lisbon Treaty organizes EU competence into three categories: exclusive competence, shared competence and competence only to take supporting, coordinating or supplementary action. It has to be pointed out, however, that borders between the three are not always clear, and that there are areas of competence which do not fall under any of the categories, or which cannot easily be subsumed under just one of them.

Apart from the question of existence of an EU competence, the question of its scope should also be considered. Here, the scope of EU competence

see: P. Craig, G.de Burca, *EU Law: Text, Cases, and Materials*, Fifth Edition, Oxford University Press 2011, pp.43–102.

shall be judged in accordance with the principles of subsidiarity and proportionality. Yet again, even in the revised version of the Treaty, expressions of those principles, as well as the additional guidelines provided by respective Protocols attached to the Treaty, still leave room for interpretation and potential disagreements.

The last general issue to highlight in this introductory paragraph is the issue of implied powers. In a narrow understanding, existence of a given power implies the existence of any other power that is reasonably necessary for the exercise of the former. In accordance with a broader definition, however, even the existence of a given objective implies the existence of a power which is reasonably necessary to attain the objective in question.<sup>4</sup> In the European context, the narrow definition has commonly been accepted,<sup>5</sup> but some of the CJEU jurisdiction has also incorporated the broader meaning.<sup>6</sup> Irrespective of the applied un-

derstanding, the mere existence of implied powers additionally blurs the picture, as they escape the general categorization and create competence where there may be a lack of explicit conferral.

In order to provide a theoretical background for my further queries, in the following part of this paper, I will briefly characterize the three categories of EU competence and I will make brief remarks about the interpretation of the type and scope of certain competences.

### Demarcation of competence - authority struggle

Article 2(1) of Treaty on the Functioning of the European Union (TFEU) establishes a category of exclusive competence, which implies that only the European Union can legislate and adopt legally binding acts, while the Member States can do so solely if empowered by the Union or in implementing the acts of the Union. The scope of areas which fall under the exclusive EU competence is set forth in Article 3(1) TFEU and it includes “monetary policy for the Member States whose currency is the euro”.

Article 2(2) TFEU defines shared competence, where both the Union and the Member States may legislate and adopt legally binding acts. In those areas, the Member States may exercise their competence to the extent that the Union has not done so, and again to the extent that the Union decided to cease exercising its competence. The wording of the Treaty is in itself rather confusing. Its interpretation and application is, however, even more complicated. To make matters worse, the scope of application of the shared competence is not clearly delimited either. The list of “principal areas” of application prescribed in Article 4(2) is not exhaustive, and to further complicate the picture in our particular case, the economic and employment policies were extracted into a special category, subject to Article 5 TFEU. Hence, the real delimitation of competences will have to be established case by case, on the basis of detailed provisions assigning EU competence in the various areas of shared powers.

The third category of competence, under Article 2(5) TFEU allows the EU to take actions to support, coordinate or supplement Member States’ activities. Although there is no general power to

4. Ibid, p.77.

5. See for example Case 8/55, *Fédération Charbonnière de Belgique v. High Authority*, [1956], ECR 245.

6. For example, Cases 281, 283–285, 287/85, *Germany v. Commission*, [1987], ECR 3203, and Case 176/03, *Commission v. Council*, [2005], ECR I-7879.

harmonize in those areas, the EU can pass legally binding acts on the basis of the provisions specific to those areas, which will constrain actions of the Member States to the extent established therein. The list of areas which fall within that scope, contained in Article 6 TFEU, is again not exhaustive. The most problematic subject areas, namely some aspects of social and employment policies, although intuitively fitting under this category, are not mentioned. The mere notions of support and complementation give an idea of the width of the scope of possible measures and potential interpretation problems. The most important distinguishing feature to keep in mind, however, is the lack of competence to harmonize, which nonetheless leaves the EU with a wide variety of potential legal measures, from coordinative and legal incentive measures, to persuasive soft law, guidelines and best practices.<sup>7</sup>

Although categorization and its interpretation are technical and rather complicated issues, this short introduction was meant to sketch out the general rules and divisions, and to point out that com-

petences over the wider scope of economic and monetary governance can be found in all three categories, which signals the width of potential cross-influences, and controversies with inclusion and delimitation of authority over particular subject matters.

### Authority over economic, employment and social policy after Lisbon

As introduced above, authority over economic, employment and social policies is included under a separate competence category, which is constructed with the help of two Treaty provisions. In accordance with Article 2(3) TFEU, the Member States shall coordinate their economic and employment policies within arrangements as determined by this Treaty, which the Union shall have competence to provide. Article 5 concretizes this general provision by stating, *inter alia*, that the Union shall take measures to ensure coordination of the employment policies of the Member States, in particular by defining guidelines for those policies, while in the field of social policies, the Union may take initiatives to ensure coordination among Member States. It also lays down grounds

for specific provisions to apply to those Member States whose currency is the euro. This creates three different sub-categories, with various degrees of intervention, within just this one special category of competences. Here, again, it is difficult to imagine that problems with cross-penetration of certain measures through a number of those sub-categories, and possible problems connected with authority questions, could be avoided. It is also symptomatic that the category in question was at all created. It may illustrate the high degree of politicization of EU law making in this area. It emphasizes the reluctance of Member States to include the economic, employment and social issues, traditionally considered “national”, in the more general sphere of shared competences, as the possibility of pre-emption of national action in case of the exercise of EU power was unacceptable to many of them.

To add yet another layer of complexity, it has to be noted that the mere reading of the Treaty provisions does not give the full picture of the situation. The regulatory rationale of this very specific segment of the common market needs to be considered in order to really understand the issue of

7. See broader and well exemplified description in P. Craig, G.de Burca, *EU Law...*, op. cit., pp.86–87.

competence and authority over economic governance. The European Monetary Union (EMU) in itself is a controversial beast. Elevating monetary governance above the national electorates and separating new currency from popular democratic processes and accountability, it constitutes an exercise in de-territorialization of matters which are in themselves very national and territorial.<sup>8</sup> This breakaway can, however, be no more than partial, leaving a considerable portion of fiscal, social and employment policies in the hands of Member States. Such separation is to a large extent fictitious and hardly possible to realize in practice. Hence, a lack of “political union” supporting monetary union has aggravated the situation the EU is currently facing. The growing complexity of economic governance in the global context, as well as the unavoidable interconnections between the EU polity and the national spheres of competence and decision making, had built up a confusing governance architecture with unclear responsibil-

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8. D. Bohle, ‘The Crisis of the Eurozone’, EUI Working Paper RSCAS 2010/77, pp.1–4; see also D. Chalmers, ‘Fiscal Governance and the Problems of Masking Europe’s Conflicts’, paper presented at the Dahrendorf Symposium, Berlin, 9–10 November 2011, in particular pp.3–9.

ity and control demarcation, as well as lax procedural rules which, lacking sufficient accountability, could be easily neglected and blended by their drafters themselves where necessary.

## 2.2 Economic governance at the time of crisis

Departing from the more theoretical background sketched in the paragraphs above, it is important to also provide an outlook towards the empirical background of the regulatory responses to crisis which will be analysed in this paper. It is, hence, interesting to look at the totality of initiatives which have been undertaken in recent years in the broader framework of economic governance in the EU. Both regulatory acts under study must be considered as elements of this larger European exercise in economic governance. Hence, in order to place them in the context of the economic reform agenda, a brief and simplified overview of the reform framework will first be provided.

The new EU economic governance programme is guided by three major objectives: to reinforce the economic agenda with closer EU surveillance, to safeguard the stability of the euro area and to re-

pair the financial sector. In order for those three aspects to be adequately tackled, a number of initiatives have been undertaken. Among them, it is valuable to mention new strategic policy documents, new legislation, new institutional architecture, new planning and surveillance mechanisms as well as supporting measures. In general, the counter-crisis measures went in two main directions. First, there were measures providing assistance to the states in trouble, which culminated in the establishment of the European Stability Mechanism (ESM). Second, there was a sequence of measures aiming to increase fiscal discipline in the Eurozone countries and improve supervision over national decision making on budgetary issues. The improvement took the form of the introduction of new techniques of oversight, but also an increase in the degree of EU authority over national procedures.<sup>9</sup>

Henceforth, in the light of the reform agenda, the EU activities in the economic governance

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9. For a more detailed overview and analysis of the economic governance reform agenda see D. Adamski, ‘National power games and structural failures in the European macroeconomic governance’, *Common Market Law Review*, Vol. 49, 2012, pp.1319–1364.

area will be guided by priorities agreed upon in the Europe 2020 strategy,<sup>10</sup> and will aim to reinforce the Stability and Growth Pact<sup>11</sup>. They follow new regulations proposed as an economic governance legislative package, referred to colloquially as a “six-pack”.<sup>12</sup> The regulations are implemented

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10. European Commission Communication 2010/COM(2010) 2020/EC 3 March 2010, Communication from the Commission: *EUROPE 2020. A European Strategy for Smart, Sustainable and Inclusive Growth*.

11. European Council Resolution 1997/ OJ C (97) 236/1/EC 17 June 1997, Resolution of the European Council on the Stability and Growth Pact.

12. “Six-pack” is a colloquial nick-name for a package of legislative instruments, which entered into force in December 2011, and which strengthen fiscal surveillance, as well as macroeconomic surveillance under the new Macroeconomic Imbalance Procedure. The six pack consists of the following legal instruments: Regulation (EU) No 1173/2011 of the European Parliament and of the Council of 16 November 2011 on the effective enforcement of budgetary surveillance in the euro area; Regulation (EU) No 1174/2011 of the European Parliament and of the Council of 16 November 2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area; Regulation (EU) No 1175/2011 of the European Parliament and of the Council of 16 November 2011 amending Council Regulation (EC) No 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies; Regulation (EU) No

in accordance with the new working method referred to as the European Semester,<sup>13</sup> which facilitates effective coordination of the Member States’ economic and structural policies with EU considerations already at an early stage in their national budgetary processes. Moreover, in order to diminish macroeconomic imbalances between states, a new surveillance mechanism was proposed to monitor national economies for emerging macroeconomic imbalances and to initiate corrective actions where necessary. Common principles for national fiscal correction mechanisms were also proposed.<sup>14</sup> Additionally, with the aim of further strengthening budgetary surveillance in the euro

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1176/2011 of the European Parliament and of the Council of 16 November 2011 on the prevention and correction of macroeconomic imbalances; Council Regulation (EU) No 1177/2011 of 8 November 2011 amending Regulation (EC) No 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure; Council Directive 2011/85/EU of 8 November 2011 on requirements for budgetary frameworks of the Member States (OJ L 306, 23.11.2011).

13. Economic and Financial Affairs Council, 2010/PRESSE 229/EFAC 7 September 2010, *The European Semester*.

14. Communication from the Commission. Common principles in national fiscal correction mechanisms, COM(2012) 342 final.

area, the Commission also proposed two new regulations on the monitoring and surveillance of budgetary planning and processes, referred to as the “two-pack”.<sup>15</sup> Furthermore, the Commission has initiated a discussion on the issue of stability bonds with a Green Paper setting out three main options for such an instrument in Europe.<sup>16</sup>

With regard to the institutional structure, new agencies were established in the financial sector, to facilitate early detection of problems and proper supervision of financial institutions in Europe. Hence, the European System of Financial Supervisors (ESFS), which consists of three new European Supervisory Authorities (ESAs) for banking, insurance and securities markets, was established to reinforce the European framework for micro-

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15. Proposal for a Regulation on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficits of the Member States in the euro area, COM(2011)821 final; and proposal for a Regulation on the strengthening of economic budgetary surveillance of Member States experiencing or threatened with serious difficulties with respect to their financial stability in the euro area, COM(2011) 819 final.

16. Green Paper on the feasibility of introducing Stability Bonds, COM(2011) 818 final.

and macro-prudential supervision; and the European System Risk Board (ESRB) was created, to monitor, identify and prioritize systemic risks to financial stability. Additionally, in October 2012, the new permanent ESM was initiated<sup>17</sup> with the objective of replacing the temporary support mechanism established in response to the 2010 crisis, namely the European Financial Stability Facility (EFSF), and assuming the tasks currently fulfilled by the European Financial Stabilization Mechanism (EFSM) in providing, where needed, financial assistance to euro-area Member States.

Many other ideas have been discussed during those last couple of months, ranging from the establishment of Eurobonds to various institutional solutions for further integration and surveillance of financial institutions and banks.

Finally, as a complementary element of this entire economic governance exercise, the Euro Plus Pact is intended to support national implementation of the reform, through the National Reform Programmes that will be adopted by the participating states.

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17. Treaty establishing the European Stability Mechanism (ESM), 2 February 2012, OJ L 91, 2011.

## 3. From the Pact to the Com-Pact - shifting authority over economic governance

### 3.1 Euro Plus Pact<sup>18</sup>

The Euro Plus Pact, subtitled, “Stronger Economic Policy Coordination for Competitiveness and Convergence”, is a product of a Franco–German effort for better economic policy coordination. Initially, it was referred to as the Competitiveness Pact, or later the Pact for the Euro; as such, it is designed as a more stringent successor to the Stability and Growth Pact, which received criticism for being implemented inconsistently.

The Euro Plus Pact disciplines the Member States of the European Union to make concrete commitments to a list of political reforms, which are intended to improve economic and fiscal policy coordination, with a view to strengthening competitiveness and convergence. Hence, it contro-

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18. Previous version of some parts of the analysis pertaining to the Euro Plus Pact form part of the author’s policy analysis undertaken at SIEPS. For more details see: K. Zurek, ‘Euro Plus Pact: Between Global Competitiveness and Local Social Concerns’, SIEPS, *European Policy Analysis*, No.13, 2011.

versially concentrates primarily on actions in areas that fall under the national competence of the Member States.<sup>19</sup> The Pact was adopted by the Eurozone countries with the participation of six non-Eurozone states, and remains open for other Member States to participate. However, the Czech Republic, Hungary, Sweden and the UK deliberately opted out of it, thus manifesting resistance towards extending the EU’s influence to important, traditionally national policies, which participation in the Pact entails.

Perhaps, if read optimistically and in isolation from other developments in the area of economic governance, the Euro Plus Pact would not make such a consequential impression. Hence, perhaps the criticism and resistance would not find such fertile ground in some EU Member States. How-

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19. On the consequences of the divided sovereignty over Europe’s Economic and Monetary Union, see N. Jabko, *Which Economic Governance for the European Union. Facing the Problem of Divided Sovereignty*. SIEPS Report No.2, 2011.

ever, if read and analysed in conjunction with a number of other recent initiatives and undertakings, which were briefly outlined in the preceding paragraph, the firm and one-sided move towards economic strengthening seems much more significant and far-reaching. The Stability and Growth Pact, the European Semester, and Europe 2020 all follow a similar rationale. If we consider their aggregated impact, the degree of influence on national regulatory systems may, in fact, build up into something significant.

The following section will provide a very brief and simplified outlook on the provisions of the Pact. Its aim, however, is not to analyse the potential impact of every individual provision in depth; rather, it aims to provide an overall idea of the Pact's undertaking.

The efforts for stronger economic policy coordination under the Euro Plus Pact shall be directed by four guiding rules:

1. they should be in line with existing economic governance in the EU and strengthen it while providing an added value. They should, thus, be consistent and coordinated with the exist-

ing instruments in the area. Yet, they should go beyond that scope by including concrete commitments and actions, supported by a timetable for implementation and included in National Reform and Stability Programmes, which will be subject to regular surveillance;

2. they will focus on priority policy areas that are essential for fostering competitiveness and convergence, concentrating on the actions where the competence lies with the Member States. In those selected areas, common objectives will be agreed upon at the Governmental (Heads of State) level, and participating states will pursue those objectives within their own policies with regard to their specific challenges at hand;

3. concrete national commitments will be undertaken each year by each participating Member State. Implementation of those commitments and progress towards policy objectives will be monitored politically by the Governments or Heads of State on a yearly basis; and, finally,

4. the Pact will fully respect the integrity of the Single Market, as all participating states remain committed to its development.

5. In line with those general guiding principles, Member States participating in the Pact commit to undertake all necessary measures to pursue a number of defined goals. They are: a) to foster competitiveness; b) to foster employment; c) to contribute further to sustainability of public finances; and d) to reinforce financial stability.

Each participating state will individually develop and present the specific national measures it will undertake to achieve those goals. Although the choice of those specific actions remains the responsibility of each state, particular attention will be paid to the set of measures listed in the Pact.

Finally, progress towards the common objectives will be monitored on the basis of a set of indicators covering: competitiveness, employment, fiscal sustainability and financial stability. Participating states which face particular challenges in any of those areas will have to commit to addressing those challenges in a given timeframe. For each

defined policy objective, concrete policy commitments together with monitoring indicators are foreseen.

### 3.2 Ownership of the Pact vs. authority over the areas covered

The legal nature of the Pact is in itself somewhat dubious. As a regulatory measure falling outside the traditional EU legal system, and rather considered as an instrument of intergovernmental cooperation, the Pact can, in the European context, be understood to be a tool of the new soft law type of governance. Contrary to this general comprehension, however, thorough reading of its provisions suggests a rather different qualification. The nature of the commitments induced by the Pact goes far beyond that by which the new governance tools are characterized. Thus, it contradicts this first impression. To be more precise, on the surface, the Pact constitutes a soft regulatory instrument, open for participation on a voluntary basis. If adhered to, however, it imposes a number of firm, defined, time-restricted and verifiable commitments for participating states. While

many of the obligations are indeed of a general new governance type, with referral to consultations, best practices, benchmarking, indicators, and so forth, a significant number of provisions demand concrete commitments, where specific objectives have to be achieved within a defined time-period, and participating states are subject to surveillance. Even if the concrete yearly commitments undertaken by the participating states are based on their own assessments of need and abilities, and on their own planning of national reforms (“guided” by the objectives of the Pact), the National Reforms Programmes and Sustainability Programmes are submitted for assessment by the Commission, the Council and the Eurogroup. Hence, the commitments, in a way, become binding upon those states, irrespective of the fluctuations in the overall conditions.<sup>20</sup>

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20. This emphasis on national commitment is further amplified in the so-called Van Rompuy Report, according to which national economic policy reforms and their implementation are supposed to be subject to individual arrangements of a contractual nature with the EU institutions. See: European Council, Towards a Genuine Economic and Monetary Union. Interim Report, Brussels, 12 October, 2012, p.7.

In that perspective, the Euro Plus Pact can be seen as stepping on the national turf, which is probably why some Member States chose to opt-out. The stepping on national turf is performed not by means of negative integration through judicial activism, but more indirectly, through quasi-positive means. Namely, the Pact creates a situation where planning and implementation of national regulatory developments are steered by an external actor (the EU), instead of the state’s democratically accountable framework. Moreover, this external guidance is directed towards delicate and sensitive national regulatory spheres, such as labour or fiscal regulation. Hence, although the Pact underlines the “voluntariness” of participation, it does not warn enough about its consequentiality.

The Pact may be a cause for interference in national social contracts as well as sensitive systems of provision and protection of labour and welfare. It openly positions itself as focusing primarily on areas that fall under national competence. Therefore, it is important to judge whether it does this with due proportionality and sensitivity which are required in situations where an indirect breach, as soft as it may be, of the principle of enumerated

competences occurs. The objectives of increased competitiveness and higher convergence are definitely important, but only if carried out in respect of the variety of Europe's social models. Otherwise, there is a risk of striving for competitiveness at a cost of social welfare and national social regulatory balance, which would again "assign supremacy to economic freedoms over political citizenship".<sup>21</sup>

Initiatives such as the Euro Plus Pact extend the European influence in domestic policymaking. Despite the declaration about "ownership" of the Pact by the participating states, the reality is that for those states, national activities undertaken in a number of important and sensitive areas will be subjected to external influence and control. Despite its voluntary and soft character, the Pact will result in a transfer of a portion of Member States' national sovereignty to make independent decisions within their Treaty-reserved field of activity. It is difficult to presently judge whether actions

such as an indirect transfer of supervisory powers to the EU institutions will result in serious consequences, and how serious the outcome of such actions will be. Only the factual implementation of the Pact will show how the EU and the participating states use the new dynamics, and how it affects those states which chose not to join.

Finally, an important element in the assessment of such situations of *de facto* competence transfers is a simple cost-benefit analysis, or what the CJEU refers to as the proportionality test. What do we expect to gain and what do we risk losing? In the case of the Euro Plus Pact, an instrument of soft experimentalist governance with an insecure impact and unknown outcomes, this estimation is difficult. For a number of states, the risks seem to have outweighed a potential benefit. The time and the implementation process will show whether their cautiousness was warranted. It will also be interesting to observe how this division affects the development of initiatives proposed by the Pact in the participating states and in the EU as a whole. A careful preliminary impact assessment of the Euro Plus Pact suggests that, despite the important concessions that the participating states have

made, there is no guarantee that its objectives will be fulfilled, or that reinforced crisis-resistance will materialize. It may, however, at least for some of those states, require a stepping down in their domestic social policy and withdrawing from the political commitments they have undertaken towards their citizens.

### 3.3 Fiscal Compact

The Council summit of December 2011 concluded with yet another pact to be introduced in the EU economic governance regime. The outcomes of the summit mark an attempt to rescue the crisis-tormented Eurozone, and to propose a more sustainable long-term solution for future economic union. At the same time, however, this solution marketed as the best available at the time of trouble and resistance, indicates a new twist in the institutional and regulatory tradition of the EU.

Instead of the Council Conclusions, which were typically outcomes of previous summits, this one concluded with a "Statement by the Euro-Area Heads of State or Government".<sup>22</sup> Instead of a pro-

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21. Ch. Joerges, "Unity in Diversity as Europe's Vocation and Conflicts Law as Europe's Constitutional Form," in: Ch. Joerges (ed.), *After Globalisation. New Patterns of Conflict and their Sociological and Legal Re-constructions*, RECON Report No15/2011, 2011, p.91.

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22. Statement by the Euro Area Heads of State or Government, European Council, Brussels, 9 December 2011,

posal to reform existing *acquis* in the economic area, we received an invitation to join a pact, an international agreement referred to as “the new Fiscal Compact”. Although the long-term objective is to incorporate the new provisions into the Treaties, in the absence of unanimity among the EU Member States, the decision was taken not to continue negotiating and bargaining as the European law-making tradition would imply, but rather to circumvent the resistance and resort to inter-governmental cooperation instead. In an attempt to save the day, the Eurozone Member States decided to continue the intergovernmental path of building the system outside the system. Unlike in the case of the Euro Plus Pact, however, this time it does not concern complementary issues, but the core of European economic governance.

As a point of departure, it is interesting to recall that other options of responding to the immediate needs of the crisis were discussed in this context. One alternative, suggested by the President of the European Council was a revision of Protocol 12 to the Treaty, on excessive deficit procedure, which

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available at: [http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/ec/126658.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/126658.pdf).

could be exercised by a unanimous decision of the Council on a proposal from the Commission after consultation with the European Parliament and the European Central Bank, and which could introduce the immediate necessary changes without the need of Treaty revision. The other alternative was in fact the fully-fledged Treaty revision in accordance with Article 48, which entails a time- and resource- consuming process of negotiations as well as ratification by all Member States. In view of the direct and firm opposition of the UK towards the Treaty reform, this option was abandoned, opening up the way for a new external internal treaty, hanging somewhere between inter-governmental agreement and an intra-European regulatory instrument.

In March 2012, the Treaty on Stability, Coordination and Governance (TSCG) was adopted, and signed by 25 Member States, with the UK and the Czech Republic abstaining. It is currently subject to the ratification process, with an assumption that its entry into force is dependent on ratification by at least 12 euro-area Member States. When in force it will be binding for all euro-area Member States, while other contracting parties will

be bound once they adopt the euro or earlier if they wish. In the latter case, partial application is also possible, allowing the non-euro participating states to choose the provisions they wish to comply with.

The overarching objective behind the TSCG, similarly to all the other elements of the economic governance reform programme outlined above, is to remedy the structural weakness of the Stability and Growth Pact by strengthening discipline and control. In view of those targets, the TSCG establishes, first, a “golden rule” of balanced budgets, which reduces the states’ fiscal discretion, and which is supposed to be implemented in national law through provisions of “binding force and permanent character, preferably constitutional”.<sup>23</sup> Second, it grants the CJEU the power to control the observance of those provi-

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23. See Article 3 of the TSCG for details. In brief, the rule in detail requires that states ensure convergence towards a country-specific medium-term objective, as defined in the Stability and Growth Pact, with a lower limit of structural deficit of 0.5% GDP, or 1.0% of GDP for countries with a debt ratio significantly below 60%, and where correction mechanisms should be triggered automatically whenever significant deviation from the objective or the adjustment path occurs.

sions, including the competence for the Court to impose financial sanctions of up to 0.1% GDP in cases of non-compliance. Third, it aims to reinforce the Stability and Growth Pact by restating the rule set up already in the “six-pack”, applying the Reverse Qualified Majority Voting to all stages of the Excessive Deficit Procedure against euro-area Member States. Hence, it commits the contracting parties to support the Commission’s position, and reverses the power of the qualified majority. Finally, the TSCG reinforces economic governance in the euro area by providing for the Euro Summits to take place at least twice a year, as well as strengthening surveillance and coordination of economic policies. This simplified and brief presentation does not pay attention to all the details of course, but highlights the most important directions of engagement as well as emphasizing the channels of competence distribution, which should facilitate later discussion of authority issues.<sup>24</sup>

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24. For a thorough analysis of the legal design of the TSCG see R. Baratta in this volume, as well as A. Kocharov (ed.), ‘Another Legal Monster? An EUI Debate on the Fiscal Compact Treaty’, EUI Working Paper LAW 2012/09.

### 3.4 TSCG: contested authority over economic governance in Europe

If one analyses the TSCG from a strictly regulatory perspective, its added value appears rather doubtful. The great majority of its provisions are in fact already present in other elements of EU legislation in particular the “six-pack”. Hence, it seems, primarily to be of political or even symbolic significance. The strengthening of procedural rules, with the aim of introducing austerity in place of previous vagueness and laxity by which the Stability and Growth Pact proved to be affected, is, at the same time, put into doubt by the choice of the intergovernmental character of the instrument. Following the same line of reasoning, reliance on the EU institution by a treaty remaining outside the scope of the EU legal system can be questioned not only from the point of view of effectiveness, but also legitimacy. What seems to be the most upsetting is that, irrespective of whether the doubtful crisis-repellent effect of the TSCG ever occurs, the problematic legal and systemic consequences of its adoption will remain.

Renaud Dehousse, in his short analysis of the Fiscal Compact preceding its official adoption, talks about it in terms of “legal uncertainty and political ambiguity”.<sup>25</sup> He is analysing the new instrument in the light of the right to conclude a separate treaty and its restrictions, and emphasizes the disproportion between the modest scope of the agreement and the formal shape it was given. He also points out another important aspect of the exercise, namely the fact that the TSCG intervenes in a heavily regulated area, including spheres where strong competences were ascribed to the EU. Rejection of Community control in those areas results in increased uncertainty about the legal solutions. This may be the case not only with regard to their content, scope and procedural application, but also with regard to their legality as such. In such situations, effectiveness of the established rules is highly dependent upon the goodwill of the parties to the agreement. It is, on the one hand, a question of goodwill to abide by the agreed provisions, but it is also an issue of goodwill to accept the agreed framework and not question the legal-

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25. R. Dehousse, ‘The “Fiscal Compact”: Legal Uncertainty and Political Ambiguity’, *Notre Europe Policy Brief*, No.33, 2012.

ity of the undertaking altogether. As far as it may be possible to achieve such goodwill at the time of commitment and an enthusiastic engagement in the new wave of political action to combat the crisis, it is not always equally easy to sustain the support when the burden of implementation and enforcement starts to build up. In situations such as the one at hand, there is an additional factor of the need for national ratification and implementation, which requires mobilization of societal approval on the home front, for commitments which were taken outside the established framework, and in a doubtful legitimacy and accountability setup.

Another important issue to point out in this context is that a political act, such as the signing of the Compact, can turn out to be a double-edged sword. Although it may temporarily strengthen the commitment and the spirit of political cooperation within the euro area, it may, on the other hand, seriously weaken trust in and commitment to the European integration project in general. By showing how easy it is to disregard and transgress the communally established rules on the functioning of the Union, it puts into question the fundamental principles of constitutionalizing

value for EU integration, such as the principle of conferral. Considering that the legitimacy of the EU is already a constructed one,<sup>26</sup> and is frequently put into question, such games with principles of higher importance risk devaluing the general agreement, and wasting some of the political capital and trust built up during the decennia of the relatively successful integration process.

Finally, one last noteworthy aspect to be emphasized here is that the adoption of the TSCG can be interpreted as practically revoking the requirement of unanimity, which was traditionally necessary for Treaty amendment. The unanimity requirement had been one of the fundamentals of European integration and an important guarantee of the “authority” of individual Member States in situations where crucial provisions of primary law (seen as elements of the initial constitutional agreement among them) are being altered. Hence, the paradigm of the “strict construction” of EU law has never been seriously questioned, and theoreti-

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26. See the writing of F. W. Scharpf, e.g. ‘Legitimacy in the multilevel European polity,’ *European Political Science Review*, Vol. 1, Issue 2, 2009, pp.173–204, but also in his flagship: *Governing in Europe. Effective and Democratic?* Oxford University Press, 1999.

cal considerations of such possibility, expressed on a number of occasions have been treated as dismissive if not even unlawful.<sup>27</sup>

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27. C. Closa Montero, *Moving Away from Unanimity. Ratification of the Treaty on Stability Coordination and Governance in the Economic and Monetary Union*, RECON Online Working Paper 2011/38, pp.4–6; B. De Witte, ‘Saving the Constitution: The Escape Route and Their Legal Feasibility’, in: G. Amato, H. Bribosia, B. De Witte (eds.), *Génèse et Destinée de la Constitution Européenne – Genesis and Destiny of the European Constitution*, Brussels: Bruylant, pp.929-38.

## 4. Not the first and definitely not the last

To start with, it has to be pointed out that this was not the first example of initiatives regulated by the EU Member States outside the EU Treaty framework. The most important precedents of this type are probably the Schengen Agreements<sup>28</sup> and the Prüm Treaty.<sup>29</sup> The Schengen Agreement, signed in 1985 between five original states, later joined by more, concerned abolishing border controls between a number of EU Member States. It was supplemented by the Implementing Convention, which was signed in 1990 and took effect in 1995,

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28. Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, OJ L 239, 22.9.2000, pp.13–18, and Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, OJ L 239, 22.9.2000, pp.19–62.

29. The Prüm Convention (also referred to as Schengen III), signed in 2005, involved an agreement between seven EU Member States on cross-border cooperation on exchange of data on vehicle registration, DNA and fingerprints, and cooperation on anti-terrorism matters.

abolishing checks at the internal borders of the signatory states and creating a single external border.

Schengen was adopted in the form of an inter-governmental instrument outside the EU regular system due to the inability to reach agreement between all Member States, and strong opposition by some of them to enhance cooperation to the extent proposed by the initiators. Following the signing of the Treaty of Amsterdam, this intergovernmental cooperation was in fact incorporated into the EU framework on 1 May 1999, with opt-outs for the abstaining Member States. The inter-governmental history of the instrument, however, still seems to remain and affect its current operation. One of the illustrations of this legacy is the higher degree of willingness and ease to criticize and claim suspensions, threats thereof as well as threats of exit, which are being invoked in cases of problem and unrest, often of purely internal character.<sup>30</sup> This gives the impression that the Schen-

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30. See for example S. Veljanovska, ‘Danish “No” for Schengen Agreement – Beginning of the Disintegration of the

gen provisions, although now officially a part of the EU *acquis*, are perceived as somewhat weaker and easier to lift.

The example of Schengen shows that there was arguably a history of unions outside the Union and within the Union as well, before the Fiscal Compact, even though the question of authority and competence struggle was much less controversial in the previous case, where strict EU competence was restricted to movement of workers for economic purposes, while free movement of people in general remained outside it. Fiscal Compact, on the other hand, intervened in an area highly regulated by the EU, often repeating the provisions of the *acquis*, which in itself is a controversial exercise. What is even more interesting, however, for my argument is that which comes after the Fiscal Compact and illustrates its precedential character in the sphere of economic governance, which I am attempting to highlight here. In striving to take the EU out of the crisis, the Pact and the Compact do not seem to be isolated examples of breaching the governance patterns and creating solutions which

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European Union?’, *Singidunum Journal of Applied Sciences*, Vol.9 (1), 2012, pp.88–94.

go against the regulatory logic of the system. In fact, it started a trend, if not an avalanche.

Chronologically speaking, in fact in conjunction with the adoption of the Fiscal Compact, the ESM was established. It was adopted in the form of a treaty signed by 17 Eurozone members, creating a permanent financial institution. The institution is correctly characterized as “international” as it was established by a public international law agreement, and it does not constitute an EU agency, although through its operation it is factually linked to the EU economic governance structures.<sup>31</sup> Its legal status and rules, as evaluated by Maduro, De Witte and Kumm, seem to fail to live up to its institutional ambition.<sup>32</sup>

The second example is the European initiative for growth, which took the form of another ambiguous legal creature. In response to the Germany-pushed strengthening of austerity

measures, French President François Hollande called for a Growth Pact for Europe. The idea was to counter the austerity, as well as to complement the growth related component of the Stability and Growth Pact. The interesting thing, to start with, is that no strictly EU legal or policy instrument relating to growth was discussed as a serious alternative option. A pact was the first choice, as if this was the most natural scenario to follow. In the end, the pact transformed into a compact, and, at the European Council summit of 28–29 June 2012, a decision was taken on adoption of the “Compact for Growth and Jobs”.<sup>33</sup> What the Compact entails in this case is unclear as are the legal form and consequences it produces. It seems most probable that it should be understood as a declaration of intent and strategic programming, rather than a legal act with binding obligations. Why call it a Pact, in that case? Why did European leaders, during the time of the greatest crisis ever faced by the EU, instead of showing firm commitment to the established rules of the game chose to turn to rhetoric and political name games?

It may be seen as a way of covering up the actual inability to act efficiently against the developments of the crisis. Where nothing meaningful can be decided, another toothless and declaratory document is being adopted and called by a serious name in order to show that actions are being taken. In the particular case of the Growth Compact, this suspicion is confirmed to a large extent by the Commission Report of October 2012.<sup>34</sup> It is significant that a report on implementation uses predominantly the future tense, where “will”, “should” and “need” are used with regard to progress in almost every priority area envisaged by the Growth Compact. The progress reported was mainly the range of the Commission’s legislative proposals, which had, in any case, been progressing in the framework of implementation of the Europe 2020 strategy. The most tangible element of the Growth Compact, namely the 120 billion euros-worth of investment to boost the economy, has not been realized, and, in accordance with the report, “(t)he Commission does not have sufficient payment credits available

31. For a detailed analysis of the legal framework and the controversies about the establishment of the ESM see J. Tomkin in this volume.

32. M. P. Maduro, B. De Witte, M. Kumm, ‘Policy Report. The Euro Crisis and Democratic Governance of the Euro: Legal and Political Issues of a Fiscal Crisis,’ Global Governance High-level Policy Seminar; The Democratic Governance of the Euro, 10 May, 2012, pp.8–9.

33. European Council 28/29 June 2012 Conclusions, EUCO 76/12, Brussels, 29 June 2012.

34. European Commission, Implementation of the Compact for Growth and Jobs, Report to the European Council, 18–19 October 2012.

to pay the payment requests now being submitted by the Member States”.<sup>35</sup> Decisions to be taken on the 2013 budget as well as on the Multiannual Financial Framework seem to constitute important prerequisites in mobilizing the financial package promised and advertised in June.

Finally, the most recent illustration of the tendency of building unions within the Union is the creation of the Banking Union. The project was launched in June 2012 and planned during the October European Council meeting, which concluded with a range of ideas on “completing the EMU”.<sup>36</sup> The European Council invited the legislators to prioritize proceeding with establishing the framework for the Single Supervisory Mechanism (SSM), with the objective of agreeing on the legislative framework by 1 January 2013. Under that scenario, work on the operational implementation is supposed to take place in the course of 2013. Although it is emphasized that the process should fully respect the integrity of the Single Market, doubts as to the treatment by the new system of the Eurozone “outs” remains a cause for concern.

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35. Ibid, p.2.

36. European Council Conclusions on completing the EMU, Brussels, 18 October 2012.

At the core of the problem is how to include the euro “outs” in the supervisory scheme if they want to opt in, given that the governing council of the European Central Bank (ECB) is legally a Eurozone-only body.<sup>37</sup> Hence, we cannot exclude the possibility of having yet another set of countries participating in this Banking Union, in addition to those in the framework of other pacts, compacts and unions within the Union.

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37. V. Pop, Ministers at odds on banking supervision, Euobserver, 14 November 2012, available at: <http://euobserver.com/economic/118185>.

## 5. Conclusions

Regulating at the time of crisis and, more importantly, with the aim of combating it, requires intensified commitment and effort. It is often accompanied by pressure, discontent, and sentiments which make it difficult to explain the need to take time to perform the necessary impact assessment and choose the best possible option. A crisis can, however, also be seen as an opportunity to take difficult decisions, gain new momentum, and reinforce commitment. It can be used to move forward with a new speed, propelled by the shared necessity of facing unfavourable circumstances. This article questions whether instruments adopted during recent years in order to combat the financial crisis in the EU managed to make good use of this opportunity.<sup>38</sup>

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38. For discussion on the wider implications of the euro crisis reforms on the EU constitution and the integration project see: Ch. Joerges, 'The European Economic Constitution and its Transformation through the Financial Crisis', forthcoming in: D. Patterson, A Södersten (eds.), *Blackwell Companion to EU Law and International Law*, Wiley-Blackwell, 2013; G. Majone, 'Rethinking European Integration after the Debt Crisis', UCL Working Paper No.3/2012.

The regulatory initiatives analysed in this paper, especially the two that were examined in detail, namely the Euro Plus Pact and the Fiscal Compact, seem, in fact, to provide arguments for contrary allegations. Although they represent shifts in authority in two different directions – into and outside the EU sphere of competence – they have a lot in common. First, both illustrate the phenomenon of the crossing of the established competence divisions, which is built on political consensus rather than following an established procedural path, and which *de facto* changes the distribution of authority in the organization of the Union. Second, they are both questioned with regard to their possible impact and usefulness in the crisis-recovery process, not only that their material provisions are of limited scope and objective, but also the extent to which they can be effectively enforced in the intergovernmental setup they themselves created is doubtful. Which brings me to the third common feature, namely, in both cases it was decided to abandon the established EU normalcy, and resort to an alternative intergovernmental path outside the general EU legal and institutional system. Yet,

both documents relate to the system in various ways, create cross-dependencies and cross-influences, and in fact build new contexts and setups, adding to the already existing complexity of the economic governance area. The immediate question which emerges is: why? Why risk so much in terms of established balance, institutional memory and accumulated trust in return for so little and something so doubtful? One can only hope that those measures bear more significance and more optimistic prospect in the eyes of the economists, because, from the legal systemic perspective, they are rather questionable.

Europe is gradually becoming more and more about “packs”, “pacts”, and “compacts”, where the lingo outgrows the content, where some are in and some are out, and where the situation becomes more and more confusing and difficult to navigate. Irrespective of the decisions of individual states to move along or stay out, it is now already clear that there will be new divisions in Europe. The “two Europes” as President Nicolas Sarkozy put it in his comments to the December 2011 summit, will develop different dynamics, and will gradually diverge, as the decisions taken following

the adoption of the TSCG will not only reform financial and budgetary issues, but will directly or indirectly affect cooperation and decision making in other fields of European integration.

What is even more worrying, however, is the evolution of the EU mode of operation towards increased incidentality, which seems to be developing here. It marks a tendency to break away from the established forms of cooperation towards other solutions, be they intergovernmental or hybrid, in order to achieve short-term gains, at times of merely political character. *Ad hoc* changes, intergovernmental solutions to Community problems, as well as complex public-private institutionalization have gone very far from the constitutionalized procedures established by the Treaty and on its basis. As the crisis-recovery process has largely been driven by political will, law seems to have been degraded to fulfilling a rather subordinate role in that process.

The establishment of the Eurozone created a formal division along the lines of participation. The Euro Plus Pact attempted to transgress those boundaries by introducing the factor of political commitment, and created new lines of delimitation. The TSCG adds another layer of complexity to

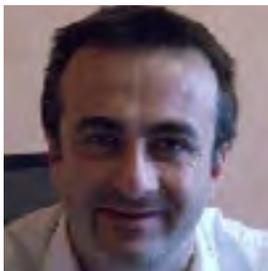
the already difficult setup. The Banking Union may open up the way for yet another setup. Hence, the development of the reforms leads to increased fragmentation, and complicates further the simple original EU Member States divide. Not only do various sets of countries participate in various instruments, but also the scope and level of participation varies among the countries within those groups. One may wonder how many more speeds will be required for Europe's escape from the crisis, and how much of the European Union will be left in the end.

SECTION III:  
THE EURO CRISIS  
AND THE EUROPEAN  
CENTRAL BANK



# 8. THE CRISIS OF THE EURO AND THE NEW ROLE OF THE EUROPEAN CENTRAL BANK

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vol. 4, pp. 971-998; "Risarcimento da inadempimento di direttiva comunitaria e dies a quo della prescrizione", in *La Cittadinanza europea*, 2012, vol. 1, pp. 63-76; *Alcune considerazioni sulla personalità giuridica dell'Unione europea dopo Lisbona*, in *Diritto del Commercio Internazionale*, 2011, vol. 3, pp. 809-823; *La responsabilità sociale dell'impresa multinazionale nell'attuale contesto internazionale*, in *Ianus, International Journal of Law and Finance*, 2010, vol. 2, pp.1-46; *La riforma della Governance economica globale ed il ruolo dell'Unione europea*", in *Collana "I Quaderni europei"*, 2010, vol. 17, pp. 1-18.

# 1. Introduction

One of the most important effects of the economic and financial downturn, which started in late August 2007, was the sovereign debt Crisis of some of the Euro zone States, namely: Portugal, Ireland, Italy, Greece and Spain. <sup>(1)</sup>.

This group of States is known by the acronym PIIGS, a clearly depreciatory term indicating States who are unable to respect the fiscal constraints established both the Maastricht Treaty and the Stability Growth Pact (SGP): the ceilings of 3% of Gross Domestic Production (GDP) on budget deficits and of 60% of GDP on government debt:

1. () The Crisis can be divided in two phases: a first stage corresponding to the burst of the financial downturn (2007-2008) and a second stage (2010-2012) that has specific characteristics to Euro zone and this has required many different actions of the European Union institutions and above all of the European Central Bank. It is important to underline that until 2010 the interest rate spreads on sovereign bond issued by each of the State member of Euro zone didn't represent for European Monetary Union a problem; in fact, for international investors Greek, Italian, Spanish and German bonds were the same.

probably the best known elements of the European Monetary Union (EMU) framework.

The issue of sovereign debt is the climax of the economic and financial Crisis and it is the direct consequence of the inefficiency of those States to satisfy the macroeconomic provisions mentioned above. This topic has not only shown the fragilities of the global financial system and, in particular, of the EMU <sup>(2)</sup> in front of speculative attacks <sup>(3)</sup>, but above all it highlights the lack of confidence of

2. () According to P. DE GRAUWE (see *Only a More Active ECB Can Solve the Euro Crisis*, in *CEPS Policy Brief*, n. 250 August 2011, p. 1.) 'The reason is that national governments in a monetary union issue debt in a foreign currency, i.e. one over which they have no control. As a result, they cannot guarantee to the bond holders that they will always have the necessary liquidity to pay out the bond at maturity. This contrast with stand alone countries that issue sovereign bonds in their own currencies'.

3. () It should be noted that speculative attacks, justified or not by economic fundamentals, always start from small items (e.g. Grecian sovereign bonds) to arrive big ones. The former, because relatively cost less, is used as a test for verifying and implementing strategies against the latter, normally most expensive.

the financial markets in the economic stability of the Euro area and of the single currency: the Euro <sup>(4)</sup>. In fact, even the possibility of one of the PIIGS leaving the Euro zone has not been excluded <sup>(5)</sup>.

At the moment, we know that this hypothesis is not mentioned in any article of the European treaties. If it were to happen, the economic effect on the Euro zone could be devastating. In fact, an exit from the Euro by one of its members would mean that country was no longer able to respect the EMU provisions and above all to repay its debts, particularly to its foreign investors.

In order to avoid this dramatic scenario the European Union, has during the last two years developed a set of new macro economic provisions

4. () See P. DE GRAUWE, *Crisis in the Eurozone and How to Deal with it*, in *CEPS Policy Brief*, No. 204, 2010, February; B. HALL, Q. PEEL, *Paris and Berlin at Odds over Default System*, *Financial Times* 2010, Oct. 26; R. CANALE, O. NAPOLITANO, *The Recessive Attitude of EMU Policies: Reflections on the Italian Experience, 1999-2008*, in *MPRA Paper No. 20207*, 2009.

5. () See C. PROCTOR, *The Future of Euro. What Happens if a Member State Leaves?* in *European Business Law Review*, 2006, pp. 909-937; P. ATHANASSIOU, *Withdrawal and Expulsion from The EU and EMU: Some Reflections*, *ECB Legal Working Paper Series n. 10*; December 2009.

and mechanisms designed to manage and at same time to solve the Crisis, for example: the European Stability Mechanism (MES), that establishes a permanent emergency fund which entered in force in September 2012 and the Fiscal Compact, agreed in March 2012, that mainly increases budgetary discipline <sup>(6)</sup>.

## 2. The Limits of the Treaties of Maastricht and Lisbon

The legal instruments before mentioned, that do not exhaust all the means devised by the EU in tackling the Crisis, show the fundamental weakness of the economic and legal framework of the Euro and of the Euro zone as defined in the Maastricht Treaty and substantially not changed in the Lisbon Treaty <sup>(7)</sup>. These European agreements have not even addressed the possibility of an economic Crisis such as the one we have at this moment and have not, in fact, considered the institution of a mechanism able to prevent an economic situation of such gravity as the one in progress. This approach reflects, in reality, the Maastricht philosophy, strongly influenced by the Bundes-

bank model, the German Central Bank, which argues that single currency was based on the idea that it was necessary to limit as far as possible the interference of EU institutions in the field of economic policy.

‘Maastricht’ specifically recognized the EMU as the only mechanism able to control the trend of inflation, as its restraint was considered, by ‘the founding fathers’, to be the essential condition for Euro countries to maintain the equilibrium of their respective balance of payments <sup>(8)</sup> and at the same time the comply with the macro economic criteria and parameters fixed in the article 121 par. 1, 122 par. 2 e 123 par. 5 of that Treaty.

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6. () These new treaties raise interesting questions with particular reference to their compatibility with the EU law. On this specific point see G. PERONI, *La Crisi dell'Euro: limiti e rimedi dell'Unione economica e monetaria*, Milano, 2012, pp. 151-185; ID., *Il Trattato di Lisbona e la crisi dell'Euro: considerazioni critiche*, in *Il Diritto dell'Unione europea*, 2011, pp. 971-998 G.L. TOSATO, *L'integrazione europea ai tempi dell'euro*, in *Rivista di diritto internazionale*, 2012, pp. 681-703; G. BONVICINI, F. BRUGNOLI (ed. by), *Il fiscal compact*, Roma, 2012; B. DE WITTE, *The European Treaty Amendment for the Creation of a Financial Stability Mechanism*, in *European Policy Analysis*, June 2011.

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7. () For a general analysis of the contents of the Lisbon Treaty, see M. C. BARUFFI (ed. by), *Dalla costituzione europea al trattato di Lisbona*, Padova, 2008; F. BASANINI, G. TIBERI (ed. by), *Le nuove istituzioni europee: commento al trattato di Lisbona*, Bologna, 2010; P. CRAIG, *The Lisbon Treaty: law, politics and treaty reform*, Oxford-New York, 2010; J. C. PIRIS, *The Lisbon Treaty: a legal and political analysis*, Cambridge, 2010; C. ZANGHÌ, L. PANELLA (ed. by) *Il trattato di Lisbona tra conferme e novità*, Torino, 2010.

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8. () The balance of payments is a statistical statement that systematically summarizes, for a specific time period, the economic transactions of an economy with the rest of the world. With reference to the conceptual framework of the balance of payments accounts and the international investment position and national accounts see IMF, *Balance of Payments Manual*, Washington, 2012, pp. 6-20.

In synthesis, the Monetary Union was built on the unbelievably naïve assumption that there would be no crises. But, if the EMU, thanks to the monetary action of European Central Bank, was able to dominate inflation during the last ten years, the excessive deficit procedure and the Stability and Growth Pact (SGP) have not succeeded in maintaining budgetary discipline during that period.

As earlier mentioned, this model has not been modified by the recent Lisbon Treaty. On the contrary, in the light of the effects of the current Crisis, there should be at senior European level economic plans to directly stimulate the growth in employment, especially among the young, the sector of the European population most affected by the Crisis. This has been highlighted on several occasions by the EU Commission in their official economic reports and forecasts <sup>(9)</sup>.

But, as we know economic and fiscal policies are not included within the competence of the European Union, they remain firmly in the ‘hands’

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9. () EUROPEAN COMMISSION, *European Economic Forecast*, Spring 2012, pp. 86-87, p. 104, p. 116; EUROPEAN COMMISSION, *European Economic Forecast*, Autumn 2011, pp. 63-68, p. 99.

of the States (see Articles 120-121 TFEU). At the same time, the Euro countries are unable to finance plans to stimulate their economy because on one hand, they do not have enough resources and on the other hand, they could be running the risk of breaking the rules of Maastricht and the provisions of the SPG. Besides, the Euro States are not allowed to devalue their currency in order to balance their books and to give new stimulus to their economy, as monetary policy is by now, as we know, in the responsibility of the European Union (see art. 3 par. 1, lett. c TFEU).

In my opinion, in the light of what is happening, it is clear that is not longer possible to maintain a single monetary policy with largely decentralized fiscal and economic policies. The Euro States and in particular the PIIGS have been unable to ensure the high degree of self responsibility and sound policies necessary not to undermine the stability of the common currency. The case of Greece is, probably, the most significant example <sup>(10)</sup>.

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10.() See J. MANOLOPOULOS, *Greece’s “odious” debt: the looting of the Hellenic Republic by the Euro, the Greeks, the political elite and the investment community*, London, 2011.

Robert Mundell, the winner of the Nobel Prize for economics and ‘father’ of the theory of ‘optimum economic areas’, <sup>(11)</sup> maintains that in order to realize a such a monetary area there must be a full free movement of goods and capitals, a system of fixed exchange rates and an economic policy not separated by monetary policy. Not one of these elements has been fully realized inside the European common market <sup>(12)</sup>.

For all these reasons, it is essential to revise the existing EU treaties in order to ensure that politicians are directly responsible to European citizens for the economic and political choices that the EU must adopt in order to solve the current Crisis, which has been compared, by many economic ob-

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11. () See R. MUNDELL, *A Theory of Optimum Currency Areas*, in *American Economic Review*, 1961, pp. 657-665.

12.() With reference to the limits of the European internal market see J. GRONDEN, *The Internal Market, The State and Public Private Arrangements in The Light of European Law*, in *Legal Issues of Economic Integration*, 2006, pp.105-137; P. NEBBIA, *Internal Market and the Harmonization of European Contract Law*, in *European Union Law for Twenty First Century: Rethinking The New Legal Order*, 2004, pp. 89-101; G. DAVIES, *Nationality Discrimination in The European Internal Market*, The Hague, 2003.

servers, with the Crisis of 1929<sup>(13)</sup>. This is a longer term solution, probably the most effective, but which will take time to come into being while the Crisis also demands quick answers.

### 3. The Role of the European Central Bank in front of the Crisis

Within the framework described a central and decisive role in managing the Crisis has been carried out by the European Central Bank<sup>(14)</sup>, whose main task is to maintain the Euro's purchasing power and thus price stability in the Euro area (see art. 3, par. 3 TEU), a concept on which the Treaty focuses in various provisions<sup>(15)</sup>. This approach has not been modified with the Lisbon

Treaty even if there have been a few but really significant changes to some rules relating to the ECB.

First of all with art. 13 par. 1 of the European Union Treaty, the ECB has been incorporated into the group of EU institutions. This is most important because in this way the European Central Bank is not longer considered, as in the past, an 'external body' to the European Union. It becomes a vital organ perfectly inserted within the EU with the consequence that the rules of the treaties governing all the EU institutions must now apply to the Euro tower. But, the Lisbon, it has not taken the opportunity of solving the question concerning the legal personality of the Euro tower viz: if it has or not international legal personality in the international community. This aspect is closely linked to the unsolved problem of the role of ECB and EU within the International Monetary Fund (IMF), where, as we know, the European Union is not one of its members, but it is 'represented' by the governments of its single States. It should

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13. () See K. GALBRAITH, *Il grande crollo*, Milano, 2006; C. P. KINDLEBERGER, *La grande depressione nel mondo 1929-1939*, Milano, 1982; M. ALMUNIA, A. S. BÉNÉTRIX, B. EICHENGREEN, K.H. O'ROURKE, G. RUA, *From Great Depression to Great Credit Crisis: Similarities, Differences and Lessons*, Cambridge MA, National Bureau of Economic Research, Inc, 2009; P. KRUGMAN, *The Return of Depression Economics and the Crisis of 2008*, New York, 2009; G. SAPELLI, *La crisi economica mondiale: dieci considerazioni*, Torino, 2008.

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14. () See C. ZILIOLI, M. SELMAYR, *La Banca Centrale Europea*, Milano, 2007; T. PADOA SCHIOPPA, *L'euro e la sua banca centrale. L'Unione dopo l'unione*, Bologna, 2004; C. GIANNINI, *L'età delle banche centrali. Forme e governo della moneta fiduciaria in un prospettiva istituzionalista*, Bologna, 2004; D. J. HOWARTH, P. H. LOEDEL, *The European central bank: The new European leviathan*, New York, 2003; J. DE HAAN, *The European central bank: credibility, transparency and centralization*, Cambridge, 2005; J. HAROLD, *Making The European monetary union: The role of the Committee of Central bank governors and the origins of the European central bank*, London, 2012.

15. () Price stability is mentioned in Articles 119 par. 2 and 3 TFEU; Article 127 par. 1 TFEU and in Article 2 par. 1 of the Statute of the ESCB and ECB. Price stability is also one of the convergence criteria for the adoption of the Euro (see Article 140 par. 1 TFEU).

be noted the IMF is the international organization created by Bretton Woods conference in 1944 to specifically deal with monetary matters, in order to guarantee the stability of the different currencies and the economic and financial support to its members in case of liquidity crisis. For these reasons, the IMF is the first and the most important economic and monetary 'forum where the international representation of the Euro area should naturally be foreseen'.<sup>(16)</sup>

Secondly, with the Lisbon treaty we see a reinforcement of the independence of the Euro tower,

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16. () See S. CAFARO, *The Missing Voice of the Euro: Legal, Technical and Political Obstacles to the External Representation of Euro Area*, in *Il Diritto dell'Unione europea*, 2011, pp. 895 – 913. For the Author, many are the reasons which explain the limited development of the external dimension of the EMU above all with reference to the IMF. First of all we have to consider that Euro area states have not played a proactive role for fear that a single voice could reduce national positions and priorities and decrease their role in external policies. Secondly, the IMF action covers both monetary as well as economic profiles while in the EU the economic policy is still run by Member States, conversely monetary policy falls within exclusive competence of the European Union. Thirdly, the IMF does not foresee in its Statute (see art. II) the possibility that an economic regional organization can become an its member.

for which the ECB, in its conduct of monetary policy, is not allowed to receive any commitment or order from any political body whatsoever (see art. 130, 131 and 282 TFEU). It is this form of independence that most distinguishes the European Central Bank from the others EU institutions like the EU Parliament, the EU Council, the European Council and the Commission, all of which play a political role. Particularly, we note with interest the introduction of a new procedure for the selection of members of the ECB's executive board who in the future will be appointed by the European Council by a qualified majority rather than unanimity. In this way members of the Board would not need the support of all States of the Euro zone, as happened in the past.

The changes concerning the ECB continue to produce the effect of strengthening the Euro tower in the framework of EU system without changing its mission: to ensure price stability and a low rate of inflation<sup>(17)</sup>. These aims constitute the so called

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17. () The mandate of ECB is essentially confined to the maintenance of price stability. Contrary to the U.S. Federal Reserve, for example, the ECB is not committed to support growth or employment.

European economic 'constitution'<sup>(18)</sup> that finds its legal basis essentially in the articles 3 TEU and 119 TFEU<sup>(19)</sup>.

But even with the Lisbon Treaty the State members have still not taken the chance to consider the negative impact that the pursuit of price stability can produce on economic growth when inflation figures do not act as a reliable index for the future growth of prices<sup>(20)</sup>. Despite this, the ECB has played and is still playing a central role in solving the Crisis of sovereign debt.

The ECB has had to react strongly to unprecedented threats to monetary stability in the Euro area.

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18. () See I. PERNICE, F. C. MAYER, *La Costituzione integrata dell'Europa*, in G. ZAGREBELSKY (ed. by), *Diritti e Costituzione nell'Unione Europea*, Roma, 2003, p. 43 ss.; F. SNYDER, *EMU Revisited. Are We Making a Constitution? What Constitution are we Making?*, Firenze, Istituto Universitario Europeo, WP Law, 6/1998.

19. () See S. GIUBBONI, *Diritti sociali e mercato. La dimensione sociale dell'integrazione europea*, Bologna, 2003, p. 27; M. P. CHITI, *Diritto amministrativo europeo*, Milano, 1999, p. 138; G. DELLA CANANEA, *L'Unione europea: un ordinamento composito*, Bari-Roma, 2003, p. 61.

20. () See G. LA MALFA, *L'Europa legata. I rischi dell'Euro*, Milano, 2000, pp. 92-93.

Firstly the ECB, in full consistency of its mandate reduced its key policy interest rate rapidly between October 2008 and May 2009, from 4, 25% to 1%. In other words, the Euro tower reduced its policy rate faster than any euro area country has ever done in recent history <sup>(21)</sup>.

Secondly, the European Central Bank took additional non standard measures to ensure that its interest rate decisions were transmitted effectively to the 'real economy' despite the volatilities of the financial markets. Its idea is to give support to banks who that cannot easily access the money markets or other sources of finance and so have difficulty in providing credit to firms, companies and individuals. Consequently in the autumn of the last year the ECB, in order to enhance the provisions of liquidity to the banking system, decided to introduce two very long term refinancing operations (LRTO) <sup>(22)</sup> with a maturity of three years

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21. () *The Role of the Central Bank and Euro Area Governments in Times of Crisis*. Speech by Peter Praet, Member of the Executive Board of the ECB at the German Federal Ministry of Finance, Berlin 19 April 2012.

22. () W.H Buiters and E. Rahbari (see *The ECB as Lender of Last Resort for Sovereigns in the Euro Area*, in *CEPr Discussion paper Seires*, n. 8974, May 2012, p. 1 ss) argue that the ECB 'has been acting as lender of last resort

which were conducted in December 2011 and in February 2012. The extraordinary long maturity of these operations gave above all banks a wider horizon for their liquidity program.

In addition to these measures, the ECB adopted other resolutions in order to address the severe tensions in the financial market. The most important was the controversial decision to purchase the PIIGS bonds 'to ensure... liquidity in those markets segments which are dysfunctional'<sup>(23)</sup>. This would appear to contravene European Union legislation which clearly prohibits any monetiza-

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sort for the sovereigns of the euro system since it started its outright purchases of euro area periphery sovereign debt under the securities market programme (SMP) in May 2010. The scale of its interventions as LoLR for sovereigns has grown steadily since then and its range of instruments has expanded. We interpret the longer term refinancing operations (LTROs) of December 2011 and February 2012 as being as much about acting, indirectly, as LoLR for the Spanish and Italian sovereigns by facilitating the purchase of their debt by domestic banks in the primary issue market as about dealing with a liquidity crunch for Euro area banks'.

23. () See J. C. TRICHET, *The ECB's Response to the Recent Tensions in Financial Markets*, speech at the 38<sup>th</sup> Economic conference of the Oesterreichische Nationalbank, Vienna, 31 May 2010, [www.ecb.int/press/key/date720107html/sp100531-2.en.html](http://www.ecb.int/press/key/date720107html/sp100531-2.en.html).

tion and bail-out options. Specifically Article 123 of the TFEU (repeated in Article 21 of the Statute of the ESCB and the ECB) forbids any form of monetary financing of deficits or public debt, precisely the direct acquisition of debt instruments of EU Members States by ECB or national central banks, while Article 124 rules out privileged access to financial institutions by the public sector and the Article 125, with the "no-bail-out clause", precludes EU institutions and any one member State becoming liable for the financial liabilities of another State of the Euro area, with the one exception concerning 'mutual financial guarantees for the joint execution of a specific project' <sup>(24)</sup>. Thus excludes any form of financial and economic solidarity between EU member States.

The above mentioned EU primary rules are based on clear and sound economic principles and are an essential part of the 'budgetary code' of the Union and beyond their literal wording are the expression of the responsibility of each member

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24. () The above mentioned three prohibitions are linked with the obligation of Member States under article 126 TFEU to avoid excessive deficits and with correlated Stability and Growth Pact.

State for its own public finance. <sup>(25)</sup> In particular, there is an implicit reference to the risk of monetisation of sovereign debt that would inevitably lead to higher inflation and an instability of the prices, with ineluctable costs to economic growth. According to the ‘founding fathers’ of the Maastricht Treaty the financial transfers between Euro member States would create significant ‘moral hazard effects’ <sup>(26)</sup> in the beneficiary countries and so the possibility of encouraging opportunistic behaviour, <sup>(27)</sup> with the further consequence of

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25. () The States have to finance themselves, if necessary, on the market and at the conditions set by the Market. The Market is the ‘Judge’ of their financial health. A Member state must borrow on the financial markets in the same way as, and in competition with, other borrowers, including large corporations. In this sense see M. TOWNSED, *The Euro and EMU. An Historical Institutional and Economic Description*, London, 2007, p. 108.

26. () According to G. MANKIW, *Principles of Economics*, Thompson South Western, 2007, p. 484, moral hazard is ‘the tendency of a person or entity that is imperfectly monitored to engage in undesirable behaviour.’

27. () This could be the risk if the ECB guarantees that money will always be obtainable to pay out sovereign bond holders, it could lead governments to issue too much debt. On this specific point see P. DE GRAUWE, *Only a More...*, cit., p. 3.

undermining the economic stability of the whole European Monetary Union.

In synthesis, the ECB cannot purchase government bonds on the primary market as it cannot buy the debt of insolvent governments. But, the articles aforementioned do not forbid the purchase of governmental bonds on the secondary market; the market place for the bonds that are already issued in the primary market and where the re-selling of government bonds is possible.

This was the solution adopted by the ECB for reducing the spread between the PIIGS government bonds and the German bunds, that we know are used as an economic benchmark because Germany is generally considered the State with the strongest economy within the Eurozone. *Inter alia*, in order to avoid a corresponding increase of the monetary mass, the ECB decided to sterilize its purchases by the use of the deposit facility opened to banks with the Central banks of the Euro system.

Last September 2012 this kind of monetary operation was confirmed by Mario Draghi, the President of ECB, during his speech to the members of

the EU Parliament. <sup>(28)</sup> On that occasion, Draghi said that Euro tower would continue to purchase of governments bonds until the tensions on the financial market were reduced and at the same time he declared that the purchase of government bonds for up to three years is not a monetary aid to the member States because it is a too short loan to be classified as ‘money creation’.

This kind of operation was strongly criticized by the Bundesbank and by the German members of the Euro tower’s executive board <sup>(29)</sup> because, in their opinion, it could create inflation and monetization of debts and thus favour the so called ‘moral hazard’ between States, undermining the principle of ‘*Stabilitätsgemeinschaft*’ a fundamental value that for German Constitutional Court is in particular embedded in the above described no bail - out clause. An evolution of the European Monetary Union contrary to this binding profile

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28. () See European Parliament Bulletin Session 10-13 September 2012.

29. () The climax of the above mentioned conflict within the ECB was reached in September 2011 with the controversial resignation of Jürgen Stark, the German member of the Executive Board of ECB.

could, according to German judges, justify the withdrawal of Germany from the Union <sup>(30)</sup>.

In any case, what is really significant here is the ECB's decision to take an extraordinary action in the light of exceptional circumstances in the European Union's hour of need. In this sense, the ECB's action, in my opinion, is consistent with the aims expressed in the Article 3 par. 3 TEU ('The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability') and the objectives set out in the article 136 TFEU. This rule allows for the Members of the Euro zone to adopt measures 'to strengthen the coordination and surveillance of their budgetary discipline' and to 'set out economic policy guidelines for them' both 'in order to ensure the proper functioning of economic and monetary union' (art. 136 TFEU par.1). In this view, it is possible, for me, to affirm that a slight rise of inflation, as a possible effect of ECB purchasing PIIGS bond on the secondary market can be considered acceptable if it is use-

ful in preserving the stability of the EMU and the future of the European Union and its integration process.

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30. () See *Bundesverfassungsgericht*, 12 October 2003, II, 5 e, in A. OPPENHEIMER (ed by), *The Relationship between European Community Law and National Law: The Cases*, Cambridge, 1994, p. 569.

## 4. Conclusions

The strong activism that has characterized up until now the action of European Central Bank since the beginning of the Crisis is a direct consequence of the political vacuum that has arisen within the European Union and of institutional and policy failures in the Euro area. During these years we have seen on the one hand, the proliferation above all of meetings of European Council and Ecofin and on the other hand, the introduction of new mechanisms and new organisms without reaching a final solution to the Crisis. In this framework, the ECB has developed a crucial and essential role by providing the monetary answers that the financial markets were expecting: in particular to be reassured about the reimbursement of PIIGS bonds. In the meantime, the European Central Bank has conditioned its support to the States by insisting on the adoption of stringent fiscal measures such as the famous letter to the Italian Government on 5 August 2011 signed by Trichet and Draghi testifies<sup>(31)</sup>.

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31. () The text of the above mentioned letter is published on *Corriere della Sera*, September 29, 2011, p. 3.

The use of the conditionality's method is moreover confirmed by the recent treaties on the European Mechanism of Stability and by the Fiscal Compact. In the new juridical framework designed by those treaties (international agreements external to the EU system and characterized in their functioning by the intergovernmental method) the ECB plays a fundamental role (see e.g. Article 4, par. 4 and Article 5 par. 5 lett. g) in the granting of approval of financial aid to States in difficulty. This is done in collaboration with the European Commission while the European Parliament is left to play a minimal role. In this way, the whole question of democratic legitimacy of the financial decisions taken by EMS, ECB and other European technocratic organism arises.

The European Central Bank has become the controller of the National Governments in the management of their political economy especially when the latter have shown that they are not being able to manage the effects of the Crisis. In this view, the ECB has partially changed its nature and is no longer only a technocratic institution but is

now the central hub of European economy policy making. Therefore it is clear that the Crisis of the Euro is not only due to the lack of coordination of the economic policies of the Euro States but in particular is the consequence of the absence of a centre of fiscal policy at European level that cannot be represented by the before mentioned EMS<sup>(32)</sup> that is the EU answer to the ECB's decision to formally decline the role of lender of last resort in the government of the bonds market.

Only the transfer of the fiscal policy from individual States to European Union will probably solve the Crisis of the Euro.

In my opinion, the action of the ECB on the financial markets by its different monetary instruments can only serve to limit the negative effects of the Crisis, but it will never be able to solve this dramatic phenomenon definitively because financial markets are waiting for a political answer on the future of the Euro.

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32. () The EMS will never have the necessary credibility to stop the speculative attacks because it cannot guarantee that the liquidity will always available to pay out sovereign bond holders, in fact only a Central bank can create unlimited amounts of money can provide such guarantee.

The choice for European States and which must be formally democratically embraced by European citizens remains the one identified by Aristide Briand “unite or perish”.

We have no more time to lose, it is time to act.

# 9. THE EURO CRISIS, INSTITUTIONAL CHANGE AND POLITICAL CONSTRAINTS

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# 1. Introduction

Prior to the eruption of the crises, most discussions on EMU's legitimacy and sustainability considered the impact of (the lack of) European political integration as exogenous to the process of monetary integration and governance. They also centred on spillovers from the monetary side to the economic side of EMU<sup>1</sup>.

The academic and policy debates during EMU's first decade of existence (see for instance Enderlein, 2006) focused on the fact that EMU's functioning – basically limited to a one-size-fits-all monetary policy – triggered spillover effects across various policy areas. Those spillovers, which run from the monetary side to the economic side of EMU, could affect its legitimacy and therefore its sustainability. Some authors (notably De Grauwe, 2006; 2009; 2011) consistently argued that EMU could not survive without a political union since the Eurozone had fewer explicit compensation mechanisms than the United States (no automatic

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1. I wish to thank Bruno De Witte, Adrienne Héritier, Felix Roth and other participants in the EUDO conference for valuable comments and discussions.

fiscal transfers, lower labour mobility and wage flexibility, and less integrated financial markets).

Yet, on the one hand, there are endogenous legitimising mechanisms at work – a wider output legitimisation of EMU, provided by the EMU *cum* EU governance framework – that can contribute to a collective acceptance of EMU's redistributive implications. Such expected endogenous effects of the monetary integration process (some of which are political in nature) could partly compensate the non-satisfaction of the traditional Optimum Currency Area (OCA) criteria, making EMU sustainable.<sup>2</sup>

On the other hand, the joint impact of the financial and economic crisis and the sovereign debt crisis

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2. The traditional OCA theory states that the condition for a country to surrender its monetary autonomy and to join a monetary union is that the (essentially microeconomic) efficiency gains outweigh the macroeconomic costs of participation. These depend on the characteristics of the country wishing to join a monetary union. OCA theory tended to focus mainly on stabilisation policies (the macroeconomic costs) of a monetary union, namely the loss of the exchange rate as an adjustment mechanism. See Torres (2009b).

made it plain that member states had insufficiently accounted for negative (systemic) spillovers not from the monetary to the economic sphere but vice versa: from the economic part of the union to its monetary side.<sup>3</sup> This has been repeatedly stressed by the ECB, in those very terms, since 2009/10. In sum, EMU's spillover effects across various policy areas run both from the monetary side, with its one-size-fits-all monetary policy, to the economic side of the union and also from the economic side, where there has been insufficient (fiscal and economic) policy coordination and structural reforms to prevent major macroeconomic imbalances, to the monetary side of the union.

The ensuing section proceeds to analyse the nature of EMU's spillover effects across various policy areas: how the negative (systemic) spillovers from the economic to the monetary sphere of EMU exposed a further-reaching need for enhanced economic governance and its redistributive implica-

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3. Competitiveness and fiscal imbalances (very much associated with the fragility of the banking system) were in part due to the lack of EU mechanisms to enforce fiscal sustainability and to address financial regulation, aggravated by the fact that financial markets almost did not distinguish between Eurozone sovereigns until 2010.

tions. Section 3 interprets the variety of steps that have been taken towards enhanced governance and reinforced cooperation in terms of endogenous political institutions, as explained by the convergence of preferences in the framework of the experiences of incomplete open-ended mechanisms. Section 4 discusses how the crisis affected EMU's legitimacy and the sustainability of various policy strategies within EMU, pointing to the importance of the strategic role of the ECB and of the wider EU regulatory/governance framework. Section 5 addresses the domestic dimensions associated with EU endogenous political changes, namely whether multi-level governance contributes to more efficient and legitimate national responses to the crisis, through the creation of better incentives and a higher degree of politicisation of EU constraints, respectively. Section 6 concludes.

## 2. New EU governance constraints and new institutions and policies

The negative spillovers from the economic to the monetary sphere of EMU highlighted the constraints of economic governance in the Eurozone and revived the debate on political integration, namely how to refound EMU's economic side to make it sustainable. Whether such a quantum leap in political integration in the Eurozone takes the form of (can be termed) enhanced economic governance, some form of *gouvernement économique* (Jabko, 2011) or a much stronger degree of political integration depends on the convergence of preferences on EMU's open questions and on the evolution of and on the institutional and political responses to the sovereign debt crisis.

As a consequence, the question of the collective acceptance of EMU's redistributive implications became different in nature and also more acute, with monetary policy and various quasi-fiscal measures such as the ECB's Securities Markets Programme (SMP), Long Term Refinancing Operations (LTRO) and Outright Monetary Transac-

tions (OMT) as well as various EU-IMF adjustment programmes subject to conditionality partially and temporarily addressing the causes of the built-in macroeconomic imbalances and of their negative spillover effects onto the monetary side.

The two crises, especially the sovereign debt crisis, exposed a further-reaching need for enhanced economic governance – a re-founding of EMU's economic side – in the EU and particularly so in the Eurozone, where interdependencies are larger. EMU's sustainability came to depend on a further pooling of sovereignty.<sup>4</sup> The sovereign debt crisis added urgency regarding increased European economic cooperation in order to address the causes (competitiveness differentials between member states and budgetary disequilibria) as to impede

4. As put by former ECB President Trichet (2011): “in a union with a single monetary policy and 17 different fiscal and economic policies, a ‘quantum leap’ in economic governance is necessary to ensure that the degree of economic union is fully commensurate to the already achieved monetary union” (see also Schuknecht et al., 2011).

spillovers into the monetary sphere, in particular in the Eurozone.

Most, if not all, member states came to accept stronger fiscal coordination anchored on Germany, like monetary policy in the asymmetric phase of the European Monetary System (EMS) and to address competitiveness issues (structural reform) given the built-up macroeconomic imbalances. There has been a relatively wide consensus among a large part of the European polity (as witnessed by the activism of various EU institutions and national governments, European Parliament (EP) resolutions and national parliaments' ratifications) regarding additional measures, mechanisms and institutions, which were deemed necessary (Trichet, 2011, De Grauwe, 2011) and expected to be put into practice as the crisis continued to unfold in 2012, putting at risk the functioning and existence of EMU.

In the process, the Lisbon Strategy did not only lose its transitory character, with economic coordination continuing under the Integrated Guidelines (IG) and the Europe 2020 Strategy from 2010 onwards, but the Euro Plus Pact and the 'fiscal compact' also introduced a more explicit mone-

tary union dimension. Structural reform was also part of the formal EU/IMF (Greece, Ireland and Portugal) or informal ECB (Italy and Spain) conditionality programmes. The 'fiscal compact', an intergovernmental legal framework, subsequently became the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (TSCG), which was signed on 2 March 2012 and entered into force in January 2013 for the member states that had completed ratification by 2012.

This enhanced economic governance, namely the economic governance reform package proposed by the Commission and which entered into force in December 2011, dubbed the 'six pack', and the Euro Plus Pact adopted by the European Council in March 2011, went some way in strengthening economic and fiscal governance in line with the needs for a well-functioning monetary union. Progress was made notably in strengthening both the preventive arm and the corrective arm of the Stability and Growth Pact (SGP) and with a view to impeding macroeconomic imbalances and fostering structural reforms.<sup>5</sup> The TSCG in the

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5. Surveillance of macroeconomic imbalances under the

Economic and Monetary Union, envisaged to be incorporated into the treaties of the Union, features stronger coordination of economic policies in areas of common interest. This illustrates the perceived need to address those questions at the European level. Likewise, the adoption of various European Parliament resolutions on EMU *cum* EU governance subsequent to the outbreak of the financial crisis in 2008 and the evolution to the sovereign debt crisis since 2010 are good examples of the perception of the need (and the will) to respond in terms of European governance.

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macroeconomic imbalance procedure (MIP) forms part of the European semester, which takes an integrated and forward looking approach to the Union's economic policy challenges, namely regarding fiscal sustainability, competitiveness, financial market stability and economic growth. The first alert mechanism report with a scoreboard of indicators was issued in February 2012 by the European Commission (COM(2012) 68 final).

### 3. Endogenous political institutions: completing the economic side of EMU

Most Eurozone countries have consistently evidenced some degree of openness to political integration (shown by Eurobarometer surveys and political declarations) but not necessarily agreement on a political quantum leap forward. Euro bonds, fiscal transfers, a European monetary fund and even more so the creation of a transfer union, have been resisted on the grounds of asymmetry since such a process would first require a common or highly coordinated fiscal policy or a European government accountable to the European parliament, i.e., a much stronger degree of sovereignty sharing among EU (or EMU) countries.

Independently of how a crisis of the magnitude of the sovereign debt crisis affects the sustainability of EMU, a (albeit slow) convergence of preferences in the economic and social areas contributes to facilitating the collective acceptance of its redistributive consequences in the absence of political union. It thereby contributes if not to the compliance with the traditional optimum currency area

criteria at least to reducing EMU's heterogeneity costs and to making it sustainable.

In any case, with the crisis, economic (labour mobility, wage flexibility, financial market integration) and/or political/institutional adjustment mechanisms (public insurance mechanisms) or the coordination of a number of policies, such as social policy, have been, with the exception of market restrictions due to perceived risks, evolving in the direction of more integration.

Such dynamism is consistent with EMU as an evolutionary process, as presented by Padoan (2002). It is also consistent with the evolution of the European monetary integration process as explained by the convergence of preferences in the framework of the experiences of incomplete open-ended mechanisms, such as the EMS and EMU (Torres, 2011), and by the endogenous responses of institutions, especially in times of crises.

The 2008/09 financial crisis and the subsequent 2010-12 sovereign debt crisis have come to affect the way monetary policy is implemented and perceived. Judging from the responses (albeit hesitant and taken under the constant pressure of events) it appears that the crises have been leading to a convergence of preferences among member states on the need to tackle some of the issues that either had remained unresolved at Maastricht and/or which had then been perceived clearly beyond the scope of monetary policy and institutions.

In fact, a variety of steps that have been taken towards enhanced governance and reinforced cooperation in economic and even in social policies reflect the recognition that the interplay of monetary policy with EU wider governance and coordinated action is essential for a successful response to the crisis.<sup>6</sup> The need for action will tend to build upon the economic governance reform package, the 'six-pack' (including the reinforced SGP, the national budgetary frameworks and the new Excessive Imbalance Procedure), the Europe

6. The reluctance of the ECB to take relief actions that might blur responsibilities between monetary policy and fiscal policy (of member state responsibility), contributed to keeping up the pressure.

2020 Strategy and further structural reforms as envisaged in the Euro Plus Pact and the new EU financial institutional architecture. In fact, this is already happening both in terms of institutions (TSCG) and policy implementation (MPI) and bailout programmes.

Notwithstanding this apparent convergence of preferences, significant divergences were displayed within countries and their respective governments let alone their political establishments, interest groups and networks and within the ESCB and the ECB. Beyond the reached consensus, approaches have remained divergent and old divisions, which had impeded a more complete institution than EMU, came to the surface, giving the idea of apparently insurmountable divergences. And, yet, multi-level governance is moving and incremental institutional change is taking place.<sup>7</sup> Such a process may also benefit from some form of throughput legitimacy (a type of legitimacy in general associated with government *with* the people – see Schmidt, 2012, and Risse and Kleine, 2007) and greater responsiveness to EMU

*cum* EU governance, which together constitute a bridge between the input-legitimate act of EMU's creation and the (procedural) phase of internalisation and implementation of its objectives.

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7. See Salines et al. (2011) for a classification of institutional changes occurred in EMU from its inception until 2010.

## 4. EMU's legitimacy and sustainability

Monetary policy spillovers to other policy areas, the concern most frequently discussed in the literature before the crisis, seem not to have much affected EMU's legitimacy. Prior to the crisis, between 1998 and 2007, support for EMU (based on Eurobarometer evidence, reported in Torres, 2009b) was overall rather stable and even increased in countries that experienced slow growth and/or difficulties of adjustment. That fact suggests the existence of some endogenous legitimising mechanisms in normal times.<sup>8</sup>

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8. One should note here that, between 1998 and 2007 (leaving therefore aside the effects of the financial, economic and sovereign debt crises), support for EMU (Eurobarometer) increased in countries that experienced slow growth (Germany) and/or difficulties of adjustment (Portugal), suggesting the existence of some endogenous legitimising mechanisms in normal times. Since 2008, the EU broader regulatory (EMU *cum* EU governance) model has tried to encompass events and has enlarged in scope. However, trust in European and in national institutions has decreased substantially. Surveys also indicate that, on average, in the Eurozone more than four out of five citizens are increasingly in favour of greater policy coordination between countries to overcome the sovereign debt crisis. Such support has grown continuously since January 2009 (Economic

EMU's sustainability was called into question thereafter, when negative externalities from the economic side of the Union started to visibly affect monetary policy at a very fast pace. Since 2008, the EU broader regulatory (EMU *cum* EU governance) model has sought to account for events and has enlarged in scope. The fact that it tended to lag behind them became a problem as those events proved to be of a never seen magnitude since EMU was created or even since the end of the Bretton Woods system. Since the outbreak of the crises, trust in European and in national institutions has decreased substantially. Both the 2008/09 financial crisis and the 2010-12 sovereign debt crisis also had a negative impact on European citizens' trust in the ECB, although to a lesser extent than on national institutions, other EU institutions and other central banks, such as

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Governance in the EU, Standard Eurobarometer surveys 74 and 75, published in January and August 2011, respectively). See also Roth et al. (2011) and Roth et al. (2012), according to whom "the crisis has hardly dented popular support for the euro", and Roth (this volume) for evidence and a thorough analysis.

the Federal Reserve and the Bank of England.<sup>9</sup> In a situation characterised by a high level of economic, social and political uncertainty it is hardly surprising that trust should be negatively affected. Surveys (Standard Eurobarometer surveys 74 and 75) also indicate that, on average, in the Eurozone there is a large majority (which has grown continuously since January 2009) in favour of further broadening the EU regulatory (EMU *cum* EU governance) model through greater policy coordination between countries to overcome the sovereign debt crisis. It remains to be seen whether European politicians and policy makers will rise to the challenge and will be able to implement both the necessary domestic reforms and EU coordinated

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9. Reported in Chart 2 of "Central Banks", The Economist, 17 February 2011, based on Bank of England, GfK NOP, European Commission, Eurobarometer and Gallup surveys. It should also be noted that although trust in four EU institutions, the European Parliament, the ECB, the European Commission and the Council of the European Union (ranking the EP systematically the highest and the Council systematically the lowest and the European Commission and the European Central Bank in the middle), fell with the crises it is on average still significantly higher than trust in national institutions.

action at a higher level of integration to overcome the crisis.

A quantum leap forward in European integration approved through a ratification process would benefit from input legitimacy. In the case of incremental institutional changes, multi-level governance may only be legitimised through rather complex channels of responsiveness, rather than through traditional or even weaker forms of accountability that involve other organisational actors in the EU governance system besides the EP. This fact then implies the pursuit of innovative ways (such as the way in which the monetary dialogue between the EP and the ECB has evolved since EMU's inception) of seeking both throughput legitimacy (which one may term wider input legitimacy and which is in any event more compatible with the complex channels of responsiveness) and (narrow and wider) forms of output legitimacy for EMU (Torres, 2013).

#### 4.1 4.1. The Strategic Role of the ECB: filling in an incomplete contract

As far as the (narrow) output legitimacy of EMU is concerned, the role of the ECB has been crucial and highly visible in addressing the 2008/09 global financial crisis. The ECB provided the necessary liquidity to stabilise the markets and shielded the Eurozone economies from destabilising exchange rate movements (which, at the time, further complicated the capacity of non-Eurozone member states to respond to the crisis).

The ECB's actions proved however insufficient and the financial crisis transformed into a fiscal and sovereign debt crisis, affecting primarily Greece, Ireland and Portugal, which needed strong additional support from the ECB as well as EU and IMF financial support provided on the basis of an agreement on an economic adjustment programme. Notwithstanding, access to ECB-provided liquidity proved essential for Ireland to buy the time required to implement the programme. The same is true, although to a lesser extent, for Greece and Portugal and for Spain and Italy. The

ECB had to directly engage in the purchase of government bonds in the secondary market to respond to the crisis. Given that there were no intergovernmental funds in place nor were they operational to buy government bonds or simply not sufficient for countries such as Italy and Spain in Summer 2011, the ECB was the only European institution that could step in to avert major credit incidents. For the same reason, it also engaged in the building up of new institutions such as (the modalities of) a EU banking union and agreed to take on supervisory powers. Moreover, in August and September 2012 the ECB announced that it would impose strict conditionality on member states, that is, governments would have to “stand ready to activate the EFSF/ESM in the bond market with strict and effective conditionality in line with the established guidelines” (ECB, 2012a) upon OMTs in secondary sovereign bond markets, aiming “at safeguarding an appropriate monetary policy transmission and the singleness of the monetary policy” (ECB, 2012b). OMTs substitute the SMP in order to address the severe malfunctioning in the price formation process in the bond markets of euro area countries (which may hinder the effective working of monetary policy). Such

purchases and other ECB rescue actions throughout the sovereign debt crisis, namely the lowering of the creditworthiness requirement for the collateral that banks had to offer for their refinancing credit, have triggered controversy and may have contributed to diminishing trust in the ECB and therefore to lowering EMU's output legitimacy.

In any case, building on its strategic role and its sense of mission as a lonely institution (Padoa-Schioppa, 2000: 37; Dyson, 2009; Jabko, 2009: 401) in a new incomplete political construct such as EMU, the ECB will remain the Eurozone's ultimate lender of last resort in one way or another. This fact liaises EMU's narrow output legitimacy with its wider output legitimacy with consequences for EMU's sustainability.

A move by Eurozone governments (through an intergovernmental pact among Eurozone members like the TSCG or a future treaty revision) to improve Eurozone (or EU) fiscal governance and increase political integration provides the conditions for the ECB to act and provide the necessary liquidity to facilitate fiscal and economic adjustment programmes in most Eurozone countries. Conversely, such a move only happens through

pressure (conditionality) from the ECB in the terms in which it can exert pressure over Eurozone governments: proclaiming its treaty-based independence and holding back its supportive action until governments take the necessary political steps in their domain to solve the crisis. In fact, the ECB has been acting strategically in a consistent way throughout the sovereign debt crisis, namely with its support for the European Parliament, against the position of the Council on the approval of the six-pack or in letters with specific policy recommendations to the Italian and Spanish governments in Summer 2011, in which it made interventions in secondary debt markets conditional upon domestic reforms. The ECB's various statements have voiced its resistance against pressure from Eurozone governments for it to act as a lender of last resort while it has signalled its readiness to act in areas of its responsibility provided Eurozone governments were to assume their (fiscal consolidation and economic reform) responsibilities.

The ECB has therefore strategically engaged in conditioning reform in some Eurozone member states, notably Italy and Spain and arguably France

(not to mention the countries under the supervision of the Troika, of which the ECB is part), gaining in this way the support of other members, such as Germany, for some of its more controversial (with potential significant redistributive effects) policies aimed at sustaining EMU.

As stressed in Torres (2013), the ECB has been acting strategically because of the perceived threat to its independence from an incomplete EMU (on its economic side). It has sought to derive its legitimacy not only from delivering price (and financial) stability but also from acting as a guardian of EMU objectives, doing "whatever it takes to preserve the euro". In that sense, it has aimed at guaranteeing what may be termed its foremost objective: the sustainability of EMU as such. This implicit objective has led the Bank to engage in exceptional policies, beyond standard monetary tools, and wider economic policy debates, pushing for "a gradual and structured effort to complete EMU" (Draghi, 2012).

## 4.2 The wider EU regulatory model

Since its inception, EMU was expected to affect a number of other policy areas. EMU being an open-ended compromise (Torres, 2011), it was therefore also expected that appropriate mechanisms and institutions would need to be created, thereby building on endogenous political institutions.

The wider EU regulatory model includes various, more or less institutionalised, common goals in the macroeconomic area, financial market stability and the need to address the fragility of the banking system but also areas such as labour market and social policy reform, climate change and energy efficiency and security, migration and external trade. An appropriate – necessarily multi-level – EU regulatory model can thus affect EMU's legitimacy (the acceptance of its redistributive spillover effects) and sustainability (the prevention and correction of negative externalities from the economic side affecting monetary policy spillover effects) through an increased openness to EU political integration and convergence of preferences. Such multi-level EU regulatory model en-

compasses European coordinated action (through common agreed upon principles), together with market and peer pressure. It further enhances the wider EMU *cum* EU governance framework in the Eurozone. Finally, the capacity to influence global governance in the areas of financial market regulation, climate change, energy security and world trade is also conditioned by EMU's external dimension.

The success of these apparently convergent objectives depends on their acceptance and on delivery, as several of those reforms and institutions are either still to be enacted or still not fully implemented. However, they seem to mobilise common long-term interests (as there has been a relative consensus among, at least, Eurozone members and EU institutions in approving them at an extraordinary pace), even at the expense of possible short-run political conflicts (both internal to member states, enacting reforms, and also among members states and between them and EU institutions, which tend, as in other key historical occasions referred above, to be bypassed by intergovernmental, or even bilateral, cooperation). These wider political goals feed back into the acceptance

of EMU's redistributive consequences, therefore into EMU's legitimacy, but also into the avoidance of spillover effects that run from the economic side of the union to its monetary side, making the monetary union more sustainable.

The expected endogenous effects of the monetary integration process, some of which are political in nature, partly compensate for the non-satisfaction of the traditional OCA criteria. They thereby contribute to EMU's legitimacy and sustainability (Torres, 2011). These endogenous political institutions reflect and contribute to a convergence of preferences – that also translated into the development of new linkages between EMU and other EU policies – and, necessarily, the consideration (not without controversy and potentially disrupting tensions) of a more active stance on European integration, thereby fostering support for EMU.

This is despite the fact that there is not always an explicit (institutionalised) or obvious policy link between EMU and those policy areas (social, economic, financial, environmental, political) and sometimes, arguably, even some political decoupling between monetary and political in-

tegration.<sup>10</sup> One should however not underestimate those links. On the one hand, they seem to amount to endogenous legitimising mechanisms, which in the absence of political union are necessary to sustain EMU.<sup>11</sup> On the other hand, they function as prevention and correction mechanisms of spillover effects from the economic side that affect monetary policy.

The wider EMU *cum* EU multi-level regulatory model, including various more or less institutionalised common goals and policy areas, has contributed to the acceptance of the redistributive spillover effects of EMU. With the 2008/09 global financial crisis *cum* the sovereign debt crisis, which started in 2010, policy links between EMU

and those other policy areas became especially important in terms of EMU legitimacy and sustainability. The endogenous legitimising mechanisms and the prevention and correction mechanisms of spillover effects from the economic side that affect monetary policy, provided for by incremental institutional change and accelerated by market and peer pressure and ECB strategic behaviour, contribute indirectly and directly to the delivery of EMU's narrow and wider goals and to its sustainability.

For Jabko (2011: 54), the elaboration of an economic governance framework for the European Union will take long and it will require a major reshuffling of power and economic resources among the member states and EU institutions. In fact, the process has already been taking place for a while, mostly since 2008/9 and through institutional incremental changes, which attempt to avoid a 'major' re-arrangement and re-distribution among the member states and EU institutions. The elaboration of the economic governance framework will certainly continue, as by the end of 2012 it had not yet provided a convincing answer to the challenges facing both the EMU's

institutional architecture and Eurozone member states' economies.

Depending on the path of institutional reforms, from minor adjustments, dealing with better surveillance and enforcement mechanisms, to a re-founding of EMU (namely its economic side), the sovereign debt crisis could become a source of new input legitimacy for the process of economic and monetary integration and the wider process of political integration.

In this sense, the steps that have been taken or are envisaged in favour of enhanced economic governance are an open-ended process, associated with a new equilibrium between EU institutions and member states. While such a response is compatible with the notion of incremental changes and new equilibria resulting from an institutional endogenous response to the financial and sovereign debt crises, as explained by rational choice institutionalism, it is also compatible with the surge of a broader impetus for institutional reform nurtured during the crises period. In fact, while institutional reforms have a built-in bias towards incremental change (Salines et al., 2011) the current experience of having reached the limits of the in-

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10. Hodson (2009) argues that both the Constitutional Treaty and the Lisbon Treaty effectively decoupled monetary and political integration issues. However, the two processes may have *de facto* linked up again with the resulting external (market) pressure in the crises, forcing the creation of new institutions and an increased level of policy coordination and political integration in order to sustain EMU and European integration as such.

11. This interpretation is compatible with evidence that overall support for EMU between 1998 and 2007 (Eurobarometer) has remained relatively stable in the Eurozone, in spite of the as high-perceived impact of the euro changeover on price rises (Deroose et al., 2007).

stitutional framework with respect to dealing with the level of policy interdependence (but, as in the case of the previous EMS learning experience in turbulent periods, maintaining in place immaterial structures such as codes of conduct and institutional commitment) may well push for more complete reforms towards substantially increased economic and political integration.

## 5. A higher degree of politicisation of EU constraints: domestic dimensions

The negative externalities, rooted in insufficient coordination of fiscal and economic policies and lack of domestic reforms, which led to the sovereign debt crisis, are now being dealt with by means of adjustment programmes subject to conditionality. The conditionality attached to those adjustment programmes reflects, on the one hand, supply side preoccupations, that is, the appropriate and legitimate incentives to induce reforms that sustain EMU and member states' access to financial markets. On the other hand, it depicts a demand aspect of the problem, as citizens increasingly call for ownership of reforms that condition their everyday lives. The previously agreed upon common objectives of fiscal (SGP) and of economic and social (Lisbon and Europe 2020 Strategies) governance, which were not internalised by most EU countries, have, with the sovereign debt crisis, come to encompass increasingly salient political and distributional issues. This fact contributes to a much higher degree of politicisation of

EU constraints.<sup>12</sup> Such an increased politicisation contributes in turn to EMU's legitimacy. It may well contribute to its efficiency as far as domestic reforms (and EMU's sustainability) are concerned. The reason is that a wider and more participated debate within better informed (of the challenges in question) domestic electorates may lead to better internalisation of nationally-compatible objectives and better implementation of domestic reforms.

The fact that there was neither market pressure (since financial markets failed to differentiate between the sustainability of public debt and external imbalances among participants) nor binding and enforceable rules (Lisbon Strategy and the SGP), however, may have contributed to the pro-

12. As discussed in Torres (2013), there is an optimal degree of politicisation, which parallels Rogoff's (1985) optimal degree of commitment as a means of dealing with credibility constraints. Increased politicisation may enhance legitimacy, since a democratic polity requires contestation for political leadership and over policies. See Follesdal and Hix (2006).

crastination of some of those reforms. The same is true for the announced (and various times voted in national and European elections) objectives to which various governments and political parties had subscribed and that were poorly implemented. This fact contributed to a poor democratic performance and to the lack of trust of citizens in national and European institutions (in this order, according to Eurobarometer polls) and, in the most affected countries, in national political structures. The crises turned the fact more transparent that some domestic policies were not only inconsistent with the stated objectives of the respective governments but that they were also unsustainable. They evidenced that that unsustainability was putting at stake the very functioning of EMU as well as the respective welfare states and quality of life of current and future generations. As a result of the identification of those negative spillovers from the economic to the monetary side of the union, the conditionality of the adjustment programmes for bailed out countries has come to encompass (structural) reform in the economic areas.

The failure of financial markets to differentiate among participants in terms of the sustainability

of public debt and external imbalances, together with the inexistence of an effective EU-sponsored mechanism of economic monitoring, attenuated market pressure on national governments to improve fundamentals (Argyrou and Kontonikas, 2011: 40). One should also add that the lack of market pressure also relaxed the pressure for enacting better institutional EU governance frameworks of economic monitoring and new coordination mechanisms, aggravating further real divergence within the Eurozone.

However, since the beginning of the crises, institutional change in the EU – the completion of EMU (of its economic pillar) with new governance mechanisms – does play a role in shaping new common rules that are accepted by a majority of member states and eventually by a majority of the European population.<sup>13</sup> Increasingly new common rules have become the continuous subject of multi-level political negotiation, al-

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13. Re-distributional issues further complicate the above-referred different domestic implications of EMU governance responses (incremental institutional changes) to the sovereign debt crisis, namely the *Transfer-Union* question, an issue which had been avoided in the (incomplete) Maastricht blueprint and in the run up to EMU.

lowing for greater participation (a fact especially potentiated by the European Parliament's role as co-legislator in the ordinary legislative procedure) of many different actors. The multi-level political negotiation process is taking place through a multitude of different channels, including inter-governmental treaties and the possibility of treaty changes (together with referenda and/or changes in national constitutions that might be necessary in some member states), and the ordinary legislative procedure (as in the case of most of the 'six-pack' legislation).

With the prospect of a higher level of political integration for a limited number of countries within the Union – the Eurozone and a number of other EU member states, like the Euro Plus Pact and the TSCG in the Economic and Monetary Union –, questions of variable geometry or flexible integration are bound to arise, as they did in the run-up to EMU. In this case, the discussions about the type of economic union that is necessary to sustain EMU, involving increased coordination and/or centralisation of fiscal, financial and other economic and social policies in the Eurozone tend to raise the political relevance (as compared to the

early and mid-nineties) of the EU-wide debate, given the felt negative effects of the lack of domestic reforms *cum* the lack of EU policy coordination in those areas.

From a domestic perspective, the above-referred new EU governance mechanisms already exert an important influence and conditionality (through the availability of financial funds) on implementing the reforms that for the most part had been adhered to by most member states' political systems (governments, oppositions and even social partners) in the 1990s and gradually, under the Lisbon process, during the first ten years of EMU. What on the one hand may be branded as unduly (undemocratic) market and/or EU (institutions' and/or partners') imposition of reforms in some member states may on the other hand be taken by domestic polities as an opportunity to overcome unduly (and also undemocratic) blocking of the pursuit of the common good in favour of vested interests and/or myopic (as non-sustainable) short-term and/or electoral concerns.

With market pressure, the domestic political and policy process gains transparency.<sup>14</sup> The vague references to European restrictions in national political debates transform into rather concrete constraints. Those are better understood by all citizens and give rise to clearer policy options, and the opacity of the domestic political and policy processes gives way to more easily discernable alternatives. Still, in the face of economic and political uncertainty and amidst the gradual but hesitant and/or insufficiently coordinated EU intergovernmental action, namely the building up of new mechanisms and institutions through multi-level political negotiation, it is difficult to say whether such a process in the end results in a national and European consensus for reform (both at the domestic levels and at the EU level) or if it leads to political and social disaggregation.

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14. Market pressure and also peer pressure rose with the transformation of the global financial and economic crisis into the sovereign debt crisis. It implies that the Europe 2020 Strategy (or any extensions of it for the Eurozone and some other EU member states such as the Euro Plus Pact), although continuing under the same soft method of coordination, might bring about different results. See Schmieding et al. (2011) for some preliminary evidence.

European institution-building, with more efficient and transparent bodies and even transnational political parties, may be a way of reinforcing the democratic quality of the European integration process (and its reach), namely the link between participation and "responsible representation" of the voters and the guarantee that the existing social structures remain open and accessible to pressures from below. It can thus enhance both efficiency and legitimacy.

On the efficiency side, the challenges of the creation of EMU may have worked as mechanisms for economic stabilisation. The current challenges of responding to the sovereign debt crisis through the completion of the economic side of EMU can furthermore foster structural reform and long-term development. Moreover, a multi-level political negotiation process may render policy-making more efficient by allowing for a continuous confrontation of positions at various levels of government, making it possible and easier to converge to an acceptable (for all and at the various levels of government) common position.

On the legitimacy side, the responses to those challenges, together with evolving governance in

the EU, imply a more clearly perceived need for democratic control of EU and national institutions. By making it clear that national political systems are unable to deal with the inherent coordination and reform challenges without sharing sovereignty, the crises may also contribute to fostering the debate on the democratic quality of EU governance at various levels, starting at the national level. It follows that national parliaments, the European Parliament and European citizens in general, may all become more aware of the need for more democratic control. This need applies to new European institutions (like the different rescue funds and intergovernmental treaties) but also to the need for regaining democratic control over national governments and institutions (including supranational but also intergovernmental institutions, as illustrated by the innovative process of economic dialogue in the case of the European Parliament), which have become more unaccountable through the process of globalization and, in

some but not in all instances, the process of European integration.<sup>15</sup> One can then say that irrespective of explicit transfers of national sovereignty to the Union level (at the time of which the question of democracy is discussed both Europe-wide and at the level of each member state, in some cases in conjunction with a referendum), EU governance and incremental institutional changes contribute to bringing in new forms of participation, through the interaction of different institutions and citizens in a multi-level political negotiation process. One of those examples is member state commitment to implement domestic reforms as part of a coordination effort. This has been done under the Open Method of Coordination in the Lisbon and Europe 2020 strategies but was extended to other policy areas of the national remit by the Euro Plus Pact and the TSCG in EMU, which comprise a majority of EU member states.

Furthermore, access to all those new common mechanisms and institutions goes along with the (albeit at times hesitant) pursuit of institutional reform and of the achievement of the objectives of the Union as laid down in Article 3 of the Treaty on European Union, namely sustainable development based on balanced economic growth and price stability, a competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. In that perspective, the frictions created by the need for member states to finally internalise previously (at the inception of EMU) accepted objectives and a higher degree of politicisation of EU constraints are an opportunity for the EU to collectively address some of the main problems that are also unresolved in other parts of the world, (see Sachs' diagnosis of the US, 2012).

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15. In regard to the centralisation of monetary policy in the Eurozone, with the exception of Germany, there has been an increase of accountability or at least in responsiveness and in any case of transparency. The same is true for various policies under the ordinary legislative procedure.

## 6. Conclusion

During EMU's first decade, the lack of national reforms in some member states and the incapacity of financial markets do distinguish between Eurozone sovereigns paved the way for increasing intra-EMU macroeconomic imbalances. At the same time, EMU's incompleteness meant that its governance institutions were unable to encompass increasing policy interdependence, let alone capable of dealing with the 2008/09 global financial crisis and the sovereign debt crisis in 2010-12. In response to the first crisis, the EU moved towards increased coordinated (albeit not sufficient) financial supervision. As a response to the second crisis, new mechanisms of economic governance and stronger fiscal and macroeconomic surveillance mechanisms have been established in an incremental way in an attempt to sustain EMU and, eventually, prepare a leap forward in terms of fiscal and political integration.

What presently stands most in the way of a leap forward to increased European political integration, at least in the Eurozone, is the question of potential large-scale redistribution, which ex-

plains why re-distributional issues were in the end avoided in the Maastricht blueprint. The redistribution question is however endogenous to the process of domestic internalisation of EMU objectives and to the capacity of member states to enact enduring political and economic reforms. This is because, on the one hand, for net-beneficiary member states it may only be politically feasible to undertake painful reforms if there is some more visible immediate reward and, on the other hand, for net-contributor member states it may only be acceptable if the causes of the problem are addressed.

The challenges posed by the European integration process determine a continuously evolving system of governance in the EU because of the more clearly perceived need for democratic control of its new institutions and of the way in which policies are formulated. Furthermore, national political systems and, consequently, intergovernmental cooperation typically lag behind global market developments. This is even more so at the time of crisis, which is characterised by dysfunctional in-

stitutional relations. The effectiveness of EU policies and the quality of democracy in the process of European integration can however be enhanced through the direct interaction of institutions (the European Parliament, national parliaments, the Council of the EU, the European Council, national governments, the European Commission, the ECB) at different levels of government and with civil society. The modes of governance that characterise mostly the economic side of EMU (under construction to complete EMU) interact continuously with the (normal) functioning but also with the developing roles of the existing supranational institutions. Such a multi-level process and continuous interaction allow for a better internalisation at the domestic level of various common objectives, which were accepted by all Eurozone member states but whose implementation tends to be hindered by national political systems. It thereby presents a solution to the problem of sequential decision-making stressed by Collignon (2010), as multi-level governance may help structure the politicisation of national debates towards common-interest European public goods.

The faster implementation of the reforms, already agreed by the member states at the inception of EMU and facilitated by incremental institutional change, contributes to making an institutional leap forward to complete EMU more likely. In the case of the creation of a supranational institution with regulatory (of nationally/socially *a priori* non-salient and non-distributional) characteristics such as the incomplete EMU (namely without a fiscal union) agreed at Maastricht, no significant re-distributional issues had been at stake. With the sovereign debt crisis, such redistribution does or may take place through public debt bailouts, debt restructuring and the sharing of fiscal responsibilities via Eurobonds, strong ECB support, and/or the creation of a fiscal or transfer union on a scale not compatible with only incremental institutional changes. That is why while the success of domestic reforms hinges upon institutional change at the European level the latter one also depends on (it is endogenous to) the capacity of member states to implement reforms and coordinate policies with each other.

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# 10. LA PRISE D'AUTORITÉ DE LA BANQUE CENTRALE EUROPÉENNE ET LES DANGERS DÉMOCRATIQUES DE LA NOUVELLE GOUVERNANCE ÉCONOMIQUE DANS L'UNION EUROPÉENNE

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# 1. Introduction

La difficulté des responsables politiques européens à s'accorder pour régler la crise de la zone euro a renforcé le rôle et le pouvoir de la Banque centrale européenne (BCE)<sup>1</sup>. Impliquée aux côtés de la Commission européenne et du Fonds monétaire international (FMI) au sein de la Troïka dans la définition des «memorandums of understanding» des pays sous assistance financière, la BCE a également lancé des interventions dites non conventionnelles en vue de venir en aide au secteur bancaire. La conditionnalité sociale qu'elle impose en contrepartie de son intervention sur les marchés de la dette secondaires pour les pays ayant des difficultés à se financer sur les marchés des capitaux n'est pas neutre politiquement et impose une remise en cause profonde des frontières nationales des États sociaux. La contradiction entre un rôle politique assumé par la BCE et son refus de s'ériger

en sauveur de dernier ressort en finançant directement les gouvernements s'explique par les statuts de la BCE et son objectif principal qui consiste à maintenir la stabilité des prix.

La «méthode communautaire» a parfois été présentée comme une pièce centrale d'un modèle européen *sui generis* à vocation fédérale. En revanche, s'inspirant de plusieurs principes du modèle ordolibéral allemand, le traité de Maastricht avait introduit le dispositif conduisant à l'UEM, en tant que pilier spécifique et échappant à la méthode communautaire. Depuis l'application du traité de Lisbonne, le Conseil européen est une institution à part entière de l'Union. La Commission répond à ses demandes de durcissement du pacte de stabilité et de croissance en déposant des propositions reposant sur la «méthode communautaire».

Les modifications introduites dans la gouvernance économique mettent ainsi en évidence les failles d'un modèle d'Union économique et monétaire initialement mal conçu dont sont renforcés les mauvais fondamentaux après l'adoption du

«paquet législatif», le *Six Pack* dans l'euro jargon, sur la gouvernance économique. Suivant la demande de la BCE de passer de la «Fédération monétaire» à la «Fédération budgétaire», le Parlement européen a durci le bras armé du pacte de stabilité et de croissance ainsi que le mécanisme de surveillance et de sanctions pour les pays de la zone euro. Mais cela ne suffit pas, les propositions déposées le 23 novembre 2011, le *Two Pack*, renforcent le contrôle par des instances européennes sur les budgets nationaux. Dans la conception allemande, il s'agit de renforcer les règles et les sanctions, et, pour rassurer les marchés, ces réformes doivent être coulées dans le marbre des traités.

Soutenue par les Pays-Bas et la Finlande, l'Allemagne impose sa vision de l'Union européenne comme «Union de stabilité», basée sur une stricte orthodoxie monétaire et budgétaire. Elle pèse sur les décisions du «gouvernement composé» de l'Union, constitué du Conseil européen, de la Commission européenne et du Conseil ECOFIN/Eurogroupe tandis que la Banque centrale européenne se transforme en «arbitre de dernier ressort» de cet exécutif composite. Il s'agit moins de renforcer l'intégration européenne

1. Ce paper qui avait été initialement préparé pour la «EUDO Dissemination Conference» a fait l'objet d'une publication en novembre 2012 sur le site web de l'Observatoire social européen. Ce Paper reflète les opinions de l'auteur, lesquelles ne sont pas nécessairement celles de l'Observatoire social européen.

que de s'accorder sur l'avènement technocratique d'une «Union de la culpabilité et des sanctions». L'approfondissement de cette Union impliquerait de lui ajouter une Union bancaire s'inspirant du modèle fédéral des États-Unis d'Amérique sur la base des traités existants alors que l'ampleur du changement mériterait une discussion plus large et surtout le consentement des Européens.

Les économistes dénoncent le refus de la BCE à assumer pleinement son rôle de «prêteur en dernier ressort», un rôle traditionnellement exercé par les Banques centrales initialement à l'égard des banques privées et que la BCE devrait étendre au sauvetage des États, comme le font d'autres Banques centrales nationales. La première partie de ce paper revient sur les statuts de la BCE, des statuts d'inspiration allemande qui ont inscrit le monétarisme comme principale boussole de la politique monétaire européenne. La seconde partie se penche sur le consensus européen sur la croissance par la compétitivité et le rôle de la BCE invoquant sa mission comme justification d'un plaidoyer rigoureux en faveur des réformes structurelles. La troisième présente le rôle politique de plus en plus affirmé de la BCE et sa prise d'autorité

au sein du «gouvernement composé» de l'Union européenne.

## 2. La BCE: un pilier spécifique

Au moment de négocier le Traité de Maastricht qui précise les conditions de la création de la monnaie unique, l'indépendance de la future Banque centrale européenne en gestation a été accordée comme la contrepartie de l'abandon du Deutsch Mark par Helmut Kohl, chancelier allemand. Organe indépendant qu'aucune révision des traités ultérieurs à celui de Maastricht ne viendra entamer, la BCE est la quasi-copie conforme de la Bundesbank. Son indépendance à l'égard des autres institutions est présentée comme la garantie d'une politique anti-inflationniste qu'aucune révision des traités ultérieurs à celui de Maastricht n'amènera. Louée par les uns, cette indépendance avait également été analysée pendant les années 90 comme le symbole du «déficit démocratique» de la construction européenne par l'abandon de la politique monétaire à une structure technocratique telle la BCE <sup>(2)</sup>. L'économiste américain, Jo-

2. Entre autres, A. Busch, L. Gormley et J. de Haan, «The democratic deficit of the European Central Bank», *European Law Review*, 1996, Vol. 21, n° 1, pp. 95-112. Philippe C. Schmitter «How to democratize the European Union... and why bother?» Lanham, MD; Oxford: Rowman & Lit-

seph Stiglitz avait mis en évidence le fait que la politique monétaire était «un déterminant-clé de la performance macro-économique de l'économie» et avait considéré que «[l]e fait que ce déterminant-clé de ce qui arrive dans la société -cette action-clé collective- devrait être soustraite au contrôle de responsables démocratiquement élus devrait au moins poser questions» <sup>(3)</sup>. D'autres avaient souligné le fait qu'en l'absence de compétences au niveau de l'Union dans le domaine des politiques macro-économiques, aucune institution politique ne pourrait être tenue pour responsable si l'UEM conduisait à une propagation injuste des coûts et des avantages entre les régions, les États mem-

3. tlefield, 2000 et Paul Magnette «Democracy in the European Union: why and how to combine representation and Participation?» in Stijn Smismans (ed), *Civil Society and Legitimate European Governance*, Cheltenham: Edward Elgar, p. 23-41, 2006.

3. «Monetary policy is a key determinant of the economy's macroeconomic performance (...). That this key determinant of what happens to society – this key collective action – should be so removed from control of the democratically elected officials should at least raise questions». J. Stiglitz, J. «Central Banking in a Democratic Society». *De Economist*, 146 (2), 1998 pp. 199-226.

bres ou même les différents secteurs industriels. Dans la conception française, un «gouvernement économique» devait contrebalancer le pouvoir de la Banque centrale européenne, seule institution supranationale/fédérale dans le dispositif de l'UEM <sup>(4)</sup>. Selon cette vue, la dépolitisation de la politique monétaire devait être compensée par un rôle accru des chefs d'État et de gouvernement. L'opposition persistante entre la France et l'Allemagne quant au rôle de la BCE en tant que prêteur de dernier ressort révèle la profondeur de l'antagonisme initial. Ce rôle n'est simplement pas prévu par le traité de Maastricht <sup>(5)</sup>. Jusqu'ici, les dirigeants allemands s'en sont toujours tenus à leur doctrine ordo-libérale selon laquelle l'État définit le cadre juridico-institutionnel permet-

4. Boyer R. et Dehove M. «Du gouvernement économique au gouvernement tout court», *Critique internationale* n°11, avril 2001

5. Dès 1992, parmi les nombreuses critiques adressées à l'indépendance de la Banque centrale, Michel Aglietta avait soulevé la question de prêteur en dernier ressort. Selon lui, «Il ne suffit pas de passer le rôle de prêteur de dernier ressort sous silence pour résoudre la question». Aglietta M. «L'indépendance des banques centrales : Leçons pour la banque centrale européenne» In: *Revue d'économie financière*. N°22, 1992. *L'indépendance des Banques centrales*. pp. 37-56.

tant à l'économie de fonctionner. Cette conception repose sur l'indépendance de la Banque centrale, le maintien de la stabilité des prix et la rigueur budgétaire. Cette approche est théorisée dans la «Constitution économique». Selon cette doctrine, «*toute Constitution devrait respecter les interdépendances entre un système de libre concurrence, de libertés publiques et d'État de droit – plus encore, elle devrait s'investir à protéger cet équilibre précieux contre toute «ingérence politique»*» (6).

La «méthode communautaire» a parfois été présentée comme une pièce centrale d'un modèle européen *sui generis* à vocation fédérale (7). En

6. Joerges C. «*La constitution économique européenne en processus et en procès*», *Revue internationale de Droit économique*, PP 245-284, 2006

7. La «méthode communautaire» s'applique dans le processus décisionnel de l'Union européenne entre les institutions formant le «triangle institutionnel», à savoir la Commission européenne, le Conseil des Ministres et le Parlement européen. Selon cette méthode, il revient à la Commission européenne qui détient le monopole de l'initiative législative de présenter les propositions à la base de la future législation européenne. Adoptée par le Conseil et le Parlement qui sont les deux co-législateurs dans les cas prévus par les traités, celle-ci prend la forme soit d'une directive (dont le contenu doit être transposé dans les législations nationales) soit d'un règlement (directement applicable dans les Etats membres). La

revanche, s'inspirant de plusieurs principes du modèle ordo-libéral allemand au premier rang desquels l'indépendance de la Banque centrale, le traité de Maastricht a introduit le dispositif conduisant à l'UEM, en tant que pilier spécifique et échappant à la méthode communautaire (8). Si, depuis l'application du traité de Lisbonne, l'association du Parlement européen en tant que co-législateur des règles de la discipline budgétaire est juridiquement possible, l'euro est une monnaie sans État et sans souverain, gérée par une Banque

«méthode communautaire» implique le plus souvent le vote à la majorité qualifiée au sein du Conseil mais dans les domaines les plus sensibles dont la fiscalité et plusieurs aspects des rares dispositions sociales (l'essentiel des compétences sociales relève du niveau national), le Conseil statue à l'unanimité. On parle de monopole «quasi exclusif» du droit d'initiative de la Commission dans la mesure où le Conseil et le Parlement peuvent lui demander de déposer une proposition. Il faut également ajouter le Conseil européen, élevé en institution de l'Union par le traité de Lisbonne, dont les conclusions sont de plus en plus explicites dans les demandes adressées à la Commission.

8. Cette indépendance se justifie dans la conception ordolibérale par le fait que «*le pouvoir politique ne peut être souverain en matière monétaire et demandeur de crédit*». E. Dehay, «La justification ordolibérale de l'indépendance des banques centrales», *Revue française d'économie*, Volume 10, n° 1, 1995.

centrale dont l'indépendance est élevée à un statut quasi constitutionnel. Il en résulte que toute modification de sa conception nécessite la révision des traités européens et l'ensemble des ratifications nationales quand, par exemple, une décision du Congrès américain ou du Parlement allemand suffit (9). Cela signifie que l'indépendance de la BCE n'a pas d'équivalent dans le monde.

L'appréhension de la BCE en tant qu'entité technocratique supranationale mais quasi fédérale par comparaison à la Banque centrale des États-Unis d'Amérique, la Federal Reserve (FED), tient au fait que le Conseil des gouverneurs de la BCE,

9. En 1957, la Bundesbank succède à la Bank deutscher Länder (BdL), créée en 1948 par les Alliés. Selon l'article 12 de la Loi sur la Deutsche Bundesbank, l'institut d'émission allemand n'a pas d'instruction à recevoir du gouvernement fédéral. Cette indépendance inscrite dans la loi a doté la Bundesbank de l'autonomie nécessaire pour assumer sa tâche d'assurer la sauvegarde de la monnaie. Elle aussi inscrite à l'article 3 du Bundesbank Act de 1957. En 1992, l'article 88 de la Loi fondamentale a été modifié de manière à permettre le transfert des compétences de la Bundesbank à la BCE, indépendante et dont l'objectif principal est d'assurer la stabilité des prix. Cela signifie qu'en Allemagne, la stabilité des prix et l'indépendance de la Banque centrale n'ont acquis une valeur constitutionnelle que le jour de l'entrée en vigueur du traité de Maastricht.

son principal organe, prend ses décisions monétaires à la majorité. Cependant, les Banques centrales nationales dans l'UEM disposent de plus de pouvoirs que les banques des entités fédérées aux États-Unis. Dans l'UEM, celles-ci assurent avec la BCE le fonctionnement du système des paiements. Mais surtout, dans plusieurs États membres, les banques centrales nationales sont responsables de la supervision bancaire et du contrôle prudentiel. Tel est l'enjeu de la future Union bancaire, une étape que les institutions européennes proposent de franchir sur la base du renforcement des compétences de la BCE à partir de l'article 127 § 6 du traité alors que les changements concernés qui proposent de rapprocher le fonctionnement de la BCE de celui de la FED comportent une mutation institutionnelle non négligeable qui nécessiterait à tout le moins d'être présentée pour ce qu'elle est <sup>(10)</sup>.

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10. «Comme aux États-Unis, la fédéralisation de la résolution des défaillances bancaires doit comporter tous les instruments nécessaires: une harmonisation intégrale des règles, évidemment, mais également un ensemble d'outils opérationnels tels que la recapitalisation, la restructuration, le démantèlement, le transfert des actifs et passifs vers des institutions solides et la capacité d'intervenir pour gérer les banques en difficulté». Christian Noyer, Gouverneur de la Banque

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de France, «*La prochaine étape pour la zone euro est l'Union financière*», Wall Street Journal, 12 juin 2012.

## 2.1 Quelle responsabilité démocratique pour la BCE?

Le dispositif institutionnel initial de l'UEM constitue un pilier singulier dans les traités européens. Dans cette configuration, aucun rôle significatif n'était initialement prévu pour le Parlement européen en dehors d'une consultation, non obligatoire, notamment en vue de la nomination du président de la BCE et des membres du Directoire. Dans la pratique, le Parlement européen n'aura d'autre solution pour tenter de s'inscrire en tant qu'acteur politique de l'Union économique et monétaire que de greffer certaines des pratiques prévalant entre le Congrès nord-américain et la Fed pour «demander à la BCE de rendre des comptes». Pour justifier cette innovation, le Parlement mobilise alors l'argument qu'il est «la seule institution depositaire d'une légitimité démocratique» au niveau de l'UE. Surtout, il s'agissait pour les députés de se démarquer du modèle allemand d'une banque centrale indépendante responsable devant le «public» qui n'est pas envisageable en l'absence d'une véritable opinion publique européenne <sup>(11)</sup>.

11. Jabko N. « Expertise et politique à l'âge de l'euro : la Banque centrale européenne sur le terrain de la

Dans la conception ordo-libérale allemande, la gestion de la monnaie relève d'un «principe civique» et l'indépendance de la Banque centrale se justifie par rapport à ce principe difficilement transposable au niveau de la zone euro <sup>(12)</sup>. Si la FED est statutairement indépendante, le président de la Réserve fédérale est «responsable» devant le Congrès (accountability) qui peut modifier les responsabilités de la FED par la loi. Ainsi, l'indépendance de la FED peut mieux être décrite comme une «indépendance à l'intérieur du gouvernement» plutôt qu'une «indépendance du gouvernement». Concrètement, le président de la BCE se présente quatre fois par an devant la Commission économique et monétaire du Parlement européen et présente à la plénière son rapport annuel. La BCE publie également depuis janvier 1999 un rapport mensuel, principal élément de communication de la politique monétaire de la BCE. Si la BCE a accédé à certaines demandes du PE, un point important de l'analogie avec la FED n'a pu être acquis, à savoir la publication des procès-verbaux des réunions du Conseil des gouver-

12. démocratie », Revue française de science politique, Année 2001, vol.51, n° 6, p 914.

12. Cf. Note 7, Ibidem, p. 44.

neurs, un sujet jugé politiquement sensible étant donné le caractère multinational de la BCE <sup>(13)</sup>. Plus encore, la BCE s'est montrée inflexible dans la défense de son mandat principal, la lutte contre l'inflation, et a repoussé les tentatives d'intégrer les missions dites «secondaires», à savoir la croissance et l'emploi.

## 2.2 La transformation de la BCE en une institution de l'Union

À la suite de l'entrée en vigueur du traité de Lisbonne, la BCE est transformée en une institution de l'Union mais ses missions ainsi que son statut ne figurent pas dans le cadre institutionnel, le traité sur l'union européenne (TUE), mais bien dans le traité sur le fonctionnement de l'Union (TFUE). Il s'agit d'un élément fondamental que n'avait pas modifié le traité constitutionnel ni son avatar, le traité de Lisbonne <sup>(14)</sup>. L'article 127 du TFUE con-

13. Cf. Note 10, Ibidem, p. 923.

14. Selon Elmar Brok, ancien président du groupe PPE et représentant de ce groupe durant les travaux de la Convention européenne, l'enceinte qui avait préparé en 2002-2003 le traité constitutionnel, «L'indépendance de la Banque centrale européenne est expressément garantie

sacre son objectif prioritaire : le maintien de la stabilité des prix. La BCE conserve ses spécificités initiales au premier rang desquelles figure son indépendance.

La BCE continue de se distinguer de la plupart des grandes banques centrales et principalement la FED, à plusieurs niveaux. Si le mandat de la FED met sur un même plan «le plein emploi, la stabilité des prix et la modération des taux d'intérêt à long terme», l'objectif principal de la BCE est la stabilité des prix, un objectif qui figure également

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par le troisième paragraphe de l'article 29, que ce soit dans l'exercice de ses pouvoirs (par exemple le pouvoir de décision en matière de politique financière) ou en ce qui concerne ses finances (par exemple l'utilisation des réserves de devises). En outre, la Constitution européenne reprend expressément la priorité de la stabilité des prix définie dans le Traité de Maastricht comme objectif de la politique monétaire et de changes (article 29 paragraphe 2, 2ème phrase). En revanche, des objectifs de politique sociale ou de politique de l'emploi ne sont pas prévus dans ce domaine; la politique monétaire demeure avant tout subordonnée à la priorité de la stabilité des prix (article III-69, paragraphe 2)». *«La Constitution européenne et le cadre de la politique économique, monétaire et financière»*, Elmar BROK - Martin SELMAYR, article publié en 2004 sur le site web du Forum franco-allemand, [http://www.leforum.de/artman/publish/article\\_179.shtml](http://www.leforum.de/artman/publish/article_179.shtml)

parmi les objectifs de l'Union européenne dans son ensemble. Selon le critère établi en 2003, il s'agit de maintenir le taux d'inflation «inférieur à mais proche de 2%» à moyen terme. La BCE se distingue de la plupart des grandes banques centrales qui ont entre 1 et 3 % pour cible d'inflation (Canada, Australie, Nouvelle Zélande) tandis que la FED ne s'est jamais fixée un tel objectif <sup>(15)</sup>.

L'article 127 s'inspire des statuts de la Bundesbank de 1957 mais avec une nuance. Là où le statut de la Bundesbank prévoit «la sauvegarde de la monnaie» et le «soutien au gouvernement fédéral», l'objectif assigné à la BCE est «la stabilité des prix» et un «soutien aux politiques économiques générales de l'Union».

Selon l'article 127 du traité sur le fonctionnement de l'Union, «*L'objectif principal du Système européen de banques centrales, ci-après dénommé "SEBC", est de maintenir la stabilité des prix. Sans préjudice de l'objectif de stabilité des prix, le SEBC*

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15. Au Canada, la Banque centrale et le gouvernement fixent ensemble une fourchette d'inflation tandis qu'aux Etats-Unis, la FED développe une «politique de communication». Ainsi, le 12 janvier 2012, elle a annoncé une cible d'inflation de 2 %.

*apporte son soutien aux politiques économiques générales dans l'Union, en vue de contribuer à la réalisation des objectifs de l'Union, tels que définis à l'article 3 du traité sur l'Union européenne....»*. L'article 3 du TUE définit ce que l'on peut considérer comme «les politiques générales». Selon cet article, l'Union «*œuvre pour le développement durable de l'Europe fondé sur une croissance économique équilibrée et sur la stabilité des prix, une économie sociale de marché hautement compétitive, qui tend au plein emploi et au progrès social, et un niveau élevé de protection et d'amélioration de la qualité de l'environnement...»*.

La transformation de la BCE en une institution de l'Union ne sera pas sans conséquences sur la définition tant des réponses en matière de gouvernance qu'en matière d'approfondissement de l'Union, limité à la finalisation de l'UEM par une plus grande fédéralisation consistant à lui greffer une Union budgétaire et une Union bancaire.

## 2.3 Le passage de la fédération monétaire à la fédération budgétaire

L'Union économique et monétaire est un projet élitiste «top-down», conçu à la base par des banquiers centraux réunis au sein du comité Delors (1989). Après l'entrée en vigueur du traité de Lisbonne, le président du Conseil européen, Herman Van Rompuy, nouvelle figure institutionnelle, avait identifié l'économie comme thème principal de son mandat. Il avait également innové en proposant des réunions thématiques du Conseil européen mais surtout c'est au niveau des chefs d'État et de gouvernement de la zone euro que s'est produite une grande créativité institutionnelle avec l'adoption d'une déclaration des Chefs d'État et de gouvernement de la zone euro en marge du Conseil européen des 25 et 26 mars 2010<sup>(16)</sup>. Sur cette base, la mise en place d'un «groupe de travail sur la gouvernance économique», ci-après le Groupe Van Rompuy, est décidée. Outre les Ministres des affaires économiques et financières des 27, le groupe comprend également le président de

16. Déclaration des Chefs d'État et de gouvernement de la zone euro, 25 mars 2010.

l'Eurogroupe, le Commissaire en charge des affaires économiques et financières et le président de la Banque centrale européenne.

L'objectif de ce groupe n'était pas d'évaluer le fonctionnement de l'UEM près de 20 ans après sa création ni d'en apprécier la pertinence au XXI<sup>ème</sup> siècle. Il faut rappeler qu'en 2009, les institutions européennes avaient été frappées d'amnésie et, plutôt qu'au sauvetage des banques et aux mesures prises pour soutenir l'économie en période de crise, elles avaient attribué l'accroissement de l'endettement des États à la violation des règles du Pacte de stabilité (et de croissance). Or, l'accroissement de l'endettement de deux pays respectant la stricte discipline budgétaire avant l'éclatement de la crise bancaire (Espagne et Portugal) était dû aux défaillances des systèmes de surveillance des dettes privées et à l'apparition de bulles immobilières. Sur la base de ce diagnostic erroné, qui n'était valable que dans le cas grec, il s'est rapidement confirmé au sein du groupe Van Rompuy qu'il n'était pas question de toucher au logiciel de l'UEM. Malgré ses imperfections, il s'agissait au contraire d'en confirmer les principes et d'en accroître la dis-

cipline en l'étendant au domaine budgétaire et aux politiques macro-économiques.

Pour le président de la BCE, la nouvelle gouvernance est nécessaire car «*Nous sommes une fédération monétaire. Nous avons maintenant besoin d'avoir l'équivalent d'une fédération budgétaire en termes de contrôle et de surveillance de l'application des politiques en matière de finance publique*»<sup>(17)</sup>. En juin 2010, le président de la Commission européenne évoquait à propos de la gouvernance économique une véritable «révolution silencieuse»<sup>(18)</sup>. En septembre 2010, le communiqué

17. Trichet au «Monde» : «*Nous avons besoin d'une fédération budgétaire*». Le Monde, 31 mai 2010, [http://www.lemonde.fr/economie/article/2010/05/31/trichet-au-monde-nous-avons-besoin-d-une-federation-budgetaire\\_1365339\\_3234.html](http://www.lemonde.fr/economie/article/2010/05/31/trichet-au-monde-nous-avons-besoin-d-une-federation-budgetaire_1365339_3234.html)

18. Jose Manuel Barroso, président de la Commission européenne : «*La conclusione del Consiglio europeo - ha concluso - contiene passi piccoli, ma che a volte sono i piu' importanti. E' una rivoluzione silenziosa, una governance economica piu' forte fatta a piccoli passi*». Una governance accettata «in linea di principio » dagli Stati membri e che «ora va attuata», 18 juin 2010, [http://www.asca.it/newsUE\\_\\_BARROSO\\_\\_POTERE\\_\\_SORVEGLIANZA\\_\\_SU\\_\\_CONTI\\_\\_PIU\\_\\_RIGIDO\\_\\_ORA\\_\\_ATTUARLO-924834-ORA-.html](http://www.asca.it/newsUE__BARROSO__POTERE__SORVEGLIANZA__SU__CONTI__PIU__RIGIDO__ORA__ATTUARLO-924834-ORA-.html)

de la Commission européenne définissait le paquet des six textes législatifs, le *Six Pack*, comme «le plus important renforcement de la gouvernance économique de l'UE et de la zone euro depuis le lancement de l'union économique et monétaire»<sup>(19)</sup>.

### Gouvernance économique : quelques innovations

Les propositions du *Six Pack* prennent la forme de cinq règlements et d'une directive. Elles renforcent les mécanismes de surveillance budgétaire et de sanction en y intégrant l'évolution de la dette en plus de l'évolution du déficit. Il s'agit d'une première innovation. Le durcissement du Pacte est complété d'une procédure permettant l'adoption de sanctions spécifiques pour les États membres de la zone euro. Deuxièmement, la Commission propose d'instaurer un système de surveillance des politiques macroéconomiques en ajoutant un nouveau volet au Pacte de stabilité et de croissance comportant la mise en place d'une procédure pour

19. «Gouvernance économique de l'UE: la Commission présente un ensemble complet de propositions législatives», IP/10/1199, 29 septembre 2010.

déséquilibre macro-économique excessif pouvant, elle aussi, conduire à l'adoption de sanctions financières pour les pays de la zone euro. Sur le plan institutionnel, elle innove en proposant un vote à la «majorité inversée» pour l'imposition des sanctions. En clair, une sanction sera considérée comme adoptée à moins que le Conseil ne la rejette à la majorité qualifiée. Il s'agit en fait de l'introduction d'une «majorité qualifiée de blocage» en ce que si les États membres ne s'opposent pas à la proposition de la Commission en statuant à la majorité qualifiée, celle-ci est réputée adoptée. Cette procédure revient à rendre les sanctions quasi automatiques. Enfin, une directive sur les exigences applicables aux cadres budgétaires nationaux est également proposée afin de compléter la réforme du pacte.

### Avis de la BCE : un degré d'automatisation des sanctions jugé insuffisant

Dans son avis sur la gouvernance économique, la BCE, qui n'exclut pas une révision ultérieure des traités, se disait préoccupée par le fait que les propositions de la Commission n'assuraient pas

un degré d'automatisme suffisant<sup>(20)</sup>. Mais par rapport à la situation actuelle, elle appréciait que la Commission présente au Conseil des propositions et non des recommandations mais aussi l'introduction du «vote à la majorité inversée». Outre la difficulté que comporte l'introduction du vote à la majorité inversée<sup>(21)</sup>, l'on pouvait se demander si la nouvelle gouvernance était compatible, par exemple, avec l'article 126 du TFUE définissant la procédure concernant les déficits excessifs et les décisions de la CIG-2003-2004 que n'avait pas remis en cause le traité de Lisbonne.

20. Avis de la Banque centrale du 16 février 2011 sur la réforme de la gouvernance économique dans l'Union européenne, OJ C 150 du 20 mai 2011, pt. 7, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2011:150:0001:0041:FR:PDF>

21. Le président du Conseil européen, Herman Van Rompuy, a reconnu que la majorité inversée ne pouvait s'appliquer en début de procédure car cela nécessiterait une révision des traités au travers de la convocation d'une convention européenne. Cf. «European economic governance and the new institutional balance» - Speech by President Herman VAN ROMPUY at the 10th anniversary of the Association of Former Members of the European Parliament, 04 mai 2011, page 4, [http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/ec/121869.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/121869.pdf)

L'article 121 du TFUE portant sur les grandes orientations de politiques économiques et la surveillance multilatérale peut être soumis au même questionnement, le TFUE ne reconnaissant à la Commission européenne qu'un droit de recommandation et non pas un droit de proposition.

## 2.4 La conclusion d'«accords rapides»: risque d'accroissement du déficit de légitimité de l'Union

La BCE avait été suivie par le Parlement européen dans le durcissement devant conduire à une plus grande automaticité des sanctions financières en cas de non-respect de la discipline budgétaire. Au Parlement européen, les six rapporteurs avaient remis leur rapport en janvier 2011. Ceux-ci avaient été adoptés par la Commission des affaires économiques et monétaires le 19 avril suivant. Pour les propositions relevant de la procédure législative ordinaire (ancienne codécision), cela impliquait la recherche d'un accord à un «stade précoce» du processus législatif et une seule lecture parlementaire. Le 20 avril 2011, les députés de la commission des affaires économiques et monétaires

avaient décidé d'entamer les négociations sur la base de ces rapports et de débiter le jour même un premier trilogue. Cette décision a été adoptée par 26 voix contre 14, reflétant les tensions apparues au moment de l'approbation des six rapports parlementaires. Malgré l'ampleur des enjeux, ces négociations n'auront aucune visibilité. Le Parlement européen avait pourtant déjà reconnu «*l'absence potentielle de transparence et de légitimité démocratique*» dans les «*accords rapides*» (22).

Le texte relatif aux modalités de l'application de la procédure législative ordinaire n'envisage le recours à ce procédé que pour des textes techniques. La réforme du Pacte de stabilité est pourtant un dossier politique par excellence en ce qu'elle porte sur le pacte quasi constitutionnel de la gouvernance économique. Face au consensus des Chefs d'État ou de gouvernement au sein du Conseil européen, le processus d'adoption du *Six Pack* comporte le risque d'être interprété comme la tyrannie d'une majorité disparate au sein du Parlement

22. «*La construction d'un parlement: 50 ans d'histoire du Parlement européen. 1958-2008. Office des publications officielles des Communautés européennes*», Collection «50ème anniversaire du Parlement européen», 2009. Cf. p. 184 sur les «accords rapides».

européen, loin de refléter un choix mûrement réfléchi, assumé et compatible avec le kaléidoscope des réalités et identités politiques nationales. Les tendances les plus fédéralistes au sein du Parlement européen avaient suivi les demandes de la BCE malgré les résistances de certains des Ministres des finances au sein du Conseil des Affaires économiques et financières (Ecofin) (23).

Il reste que le *Six Pack* est adopté en deux votes mais dans le cadre d'une lecture unique (première lecture), les négociations en trilogue étant organisées entre ces deux votes. La même méthode est en cours d'application pour l'adoption des deux propositions de la Commission, présentées en novembre 2011, le *Two Pack*. Ces propositions répondent, elles aussi, aux demandes du Conseil

23. En novembre 2011, les 5 règlements du *Six Pack* sont cependant adoptés à l'unanimité des membres du Conseil Ecofin. Dans une déclaration, l'Autriche considère que la codification du Semestre européen et que le règlement sur la prévention des déséquilibres macroéconomiques n'entraîne pas de nouvelles obligations légales. Elle précise que «*les articles proposés ne prévoient notamment pas la possibilité de sanctions en cas de non réalisation des objectifs et mesures arrêtés au titre de la stratégie Europe 2020 dans les programmes nationaux de réforme*». DOC 16001/11 ADD 1 REV 2 <http://register.consilium.europa.eu/pdf/fr/11/st16/st16001-ad01re02.fr11.pdf>

européen mais en coulant ces propositions dans deux propositions de règlements, la Commission recourt à nouveau de manière radicale à la «méthode communautaire» afin d'accroître ses prérogatives dans le contrôle des budgets nationaux.

Enfin, les propos tenus sur le *Six Pack* par le président de la Commission européenne en février 2012 lors d'un séminaire organisé sur la méthode communautaire sont éloquentes «*À ma connaissance, le transfert de compétences et de pouvoirs du niveau national vers le niveau supranational prévu sur les plans économique et financier par ce train de mesures dit «Six Pack», est unique au monde. Ce sont les faits. Je tiens à le souligner car s'il y a résistance, c'est précisément parce qu'il y a mouvement. C'est parce que l'intégration progresse qu'on entend beaucoup parler de résistance*»<sup>(24)</sup>.

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24. Séminaire sur la méthode communautaire, organisé par *Notre Europe* et le Bureau des conseillers de politique européenne (BEPA), 28 février 2012, Speech président Barroso, p. 42, [http://www.notre-europe.eu/media/SyntheseMethodeCommunautaire\\_Mai2012.pdf](http://www.notre-europe.eu/media/SyntheseMethodeCommunautaire_Mai2012.pdf)

### 3. Le consensus européen sur la croissance et la compétitivité par les réformes structurelles

Le rapport Delors sur l'Union économique et monétaire fut présenté en avril 1989. La monnaie unique y est présentée comme le prolongement du marché intérieur mais aussi comme un instrument devant permettre à l'Union européenne d'être un acteur de la mondialisation en ce que, selon les termes du moment, la mise en place de l'UEM «donnerait à la Communauté plus de poids dans les négociations internationales et renforcerait son aptitude à influencer les relations économiques entre les pays industrialisés et les pays en développement»<sup>(25)</sup>. En décembre 1993, soit quelques jours après l'entrée en vigueur du traité de Maastricht, la Commission publie son rapport «Croissance, compétitivité emploi». La compétitivité fait l'objet d'une

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25. Comité pour l'Etude de l'Union économique et monétaire, «Rapport sur l'union économique et monétaire dans la Communauté européenne», avril 1989, point 35, [http://www.cvce.eu/content/publication/2001/11/22/725f74fb-841b-4452-a428-39e7a703f35f/publishable\\_fr.pdf](http://www.cvce.eu/content/publication/2001/11/22/725f74fb-841b-4452-a428-39e7a703f35f/publishable_fr.pdf)

lourde charge par l'économiste Paul Krugman. Qualifiant la compétitivité de dangereuse obsession, Krugman réfutait la comparaison d'un État à une entreprise et la mesure de la compétitivité d'une nation à l'aune de sa balance commerciale et donc de ses performances à l'exportation<sup>(26)</sup>. Près de 20 ans plus tard, c'est la notion de compétitivité étendue à toute l'Union européenne, appréhendée de manière fictive comme un tout économique, qui est plus que jamais une dangereuse obsession. Le consensus européen sur le fait de créer de la croissance par la compétitivité avait été réaffirmé en 2000 par le Conseil européen de Lisbonne. Le consensus européen prévalent alors consiste à transformer l'Union européenne en l'économie «la plus compétitive du monde».

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26. P. Krugman, «*Competitiveness: a dangerous obsession*», Foreign Affairs, March/April 1994 (volume 73, number 2).

Fondé sur la modernisation de l'économie européenne par les «réformes structurelles», ce consensus est alors suffisamment large entre les États membres de l'UE pour laisser l'illusion de la coexistence de modèles économiques et sociaux hétérogènes mais appelés à davantage de convergence dans le cadre du «modèle social européen», tel qu'identifié par le Conseil européen de mars 2002. Cela impliquera sur le plan institutionnel la mise en place du Conseil compétitivité en 2002. Issu de la fusion des anciens Conseils Marché intérieur, Industrie et Recherche, selon le site web, le Conseil compétitivité «joue un rôle horizontal et veille à ce qu'une approche intégrée soit mise en œuvre pour renforcer la compétitivité et la croissance en Europe». Ce Conseil est à l'origine du «mieux légiférer» et de la tendance au retrait des textes législatifs y compris dans le domaine social.

### 3.1 La vision de la compétitivité de la BCE

S'agissant de la croissance, la conception de la BCE s'appuie sur des politiques dites de l'offre, à savoir basées sur les «réformes structurelles» (suppression des rigidités du marché de l'emploi, etc.) permettant d'augmenter la compétitivité. Otmar

Issing, ancien membre de la Bundesbank et alors membre du directoire de la BCE («économiste en chef» jusqu'au 31 mai 2006) en avait fait la démonstration en juin 2001 dans un article publié en réponse aux pressions exercées sur la BCE pour qu'elle assouplisse sa politique monétaire : *«Il est donc important de s'entendre clairement sur ce que la politique monétaire peut et ne peut pas apporter à la croissance européenne, afin que d'autres réformes, indispensables, ne soient pas négligées, même si elles sont malaisées, politiquement (...). Les sévères entraves structurelles des marchés du travail nationaux de la zone euro conduisent à des taux de chômage élevés et intolérables dans de nombreux pays. La législation réglementant les salaires minimaux et la protection de l'emploi ont de puissants effets négatifs»* (27). Selon les mêmes principes, il se prononcera quelques années plus tard contre les euro-obligations au motif qu'une obligation commune «serait le premier pas sur la-

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27. Issing O. «Politique monétaire et croissance européenne», Project Syndicate, 18 juin 2001. Article disponible à l'adresse suivante: <http://www.project-syndicate.org/commentary/monetary-policy-and-european-growth/french>

*penne glissante des sauvetages financiers, donc vers la fin de la zone euro comme zone de stabilité»* (28).

En 2003, l'arrivée de Jean-Claude Trichet, un français à la tête de la Banque centrale européenne n'avait pas provoqué le changement craint par les Allemands (29). Dans la pratique, Jean-Claude Trichet a prolongé le soutien de la BCE au contrôle des politiques de réformes structurelles. Pour le président de la BCE, «La politique monétaire de la BCE a également son rôle à jouer en soutenant la mise en œuvre des réformes structurelles. Une politique monétaire crédible axée sur le maintien

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28. Issing O. « Contre les obligations européennes communes », Project Syndicate, 9 juillet 2009. Article disponible à l'adresse suivante: <http://www.project-syndicate.org/commentary/ban-the-common-bond/french>

29. «Un Allemand à la BCE», Paul Fabra, *Les Échos* des 19 et 20 septembre 2003. Jean-Claude Trichet est qualifié « allemand », car bien qu'énarque et français, il est proche dans sa pratique sinon de l'ordo-libéralisme du moins de la doctrine allemande de la Bundesbank qui en découle largement. Paul Fabra rappelle que dans les années 1990, certains allemands craignaient de voir l'institution européenne tomber dans les mains d'un énarque français. En effet, la pratique économique d'énarques en particulier et de la France en général, était perçue comme étant aux antipodes de l'ordo-libéralisme.

de la stabilité des prix à moyen terme contribue à la stabilité de l'environnement économique. Un environnement macroéconomique stable permet de mieux discerner les domaines où les réformes sont nécessaires et rend plus perceptibles les avantages qui en découlent, contribuant ainsi à leur acceptation» (30). De plus en plus, le discours de la BCE porte sur les salaires et la remise en cause de l'indexation des salaires. Ainsi, le 10 janvier 2008, Jean-Claude Trichet avait critiqué l'indexation des salaires, responsable d'une spirale inflationniste. Début février 2011, le «couple» franco-allemand avait mis sur la table un «pacte pour la compétitivité» demandant notamment, outre l'inscription d'une règle d'or budgétaire dans les Constitutions nationales, la suppression de l'indexation automatique des salaires. Cette proposition n'apparaît plus en tant que telle dans le texte qui sera adopté en mars 2011 sous le nom de «Pacte pour l'euro plus», un pacte destiné à doper la compétitivité européenne et lui permettre de renouer avec la croissance. En matière de compétitivité, le pacte stipule notamment que les pays «adopteront,

30. «Structural reforms in Europe», Jean-Claude Trichet, *Speech by Jean-Claude Trichet, President of the ECB OECD Forum, Paris, 22 May 2006.*

dans le respect des traditions de dialogue social, des mesures destinées à assurer que l'évolution des coûts salariaux reste en ligne avec la productivité». À cette fin, les gouvernements «passeront en revue la fixation des salaires et, si nécessaire, le degré de centralisation du processus de négociation collective et les mécanismes d'indexation». Dans le cadre du Semestre européen, la Commission européenne évalue les engagements avancés par tous les États participants et formule des recommandations à chaque pays, avalisées par le Conseil européen et formellement adoptées par le Conseil Ecofin.

Les différentes formations du Conseil ont procédé à l'évaluation de la mise en œuvre du second Semestre européen et l'impact des recommandations spécifiques formulées aux États membres sur la base de l'examen annuel de la croissance, le rapport élaboré par la Commission européenne et inaugurant chaque Semestre européen. Les divergences portent non pas sur l'objectif, la croissance par la compétitivité sur lequel le consensus européen demeure intact malgré la crise et les changements politiques nationaux, mais bien sur la répartition des tâches entre le Conseil de l'emploi et des affaires sociales (EPSCO) et le

Conseil des affaires économiques et financières (ECOFIN). Le débat est quelque peu surréaliste car pour les États qui ne sont pas sous «assistance financière», la question porte sur le principe de «se conformer ou expliquer» introduit par le Six Pack dans le cadre du mal nommé «Dialogue macroéconomique» (31). Selon ce principe, issu de la gouvernance des entreprises, «le Conseil est censé, en principe, suivre les recommandations et propositions de la Commission ou expliquer publiquement sa position». Selon les rapports des différents comités du Conseil Emploi et affaires sociales (Comité de la Protection sociale et Comité de l'emploi), cette pratique a considérablement renforcé le rôle de la Commission. Des zones d'ombre demeurent quant à la rédaction des recommandations spécifiques par pays. Mais sur le plan de la gouvernance, la note de la présidence chypriote (32) met bien en évidence la suprématie des procé-

31. Article 2 bis ter 2), Règlement (UE) n° 1175/2011 du Parlement européen et du Conseil du 16 novembre 2011 modifiant le règlement (CE) n° 1466/97 du Conseil relatif au renforcement de la surveillance des positions budgétaires ainsi que de la surveillance et de la coordination des politiques économiques *Journal officiel L 306 du 23 novembre 2011 p. 0012 – 0024.*

32. European Semester 2012 - Lessons learned, Note

dures du Pacte de stabilité et de croissance sur celle de la stratégie économique de l'UE (Europe 2020) et souligne l'importance de la procédure pour déséquilibres macro-économiques (PDM) qui n'est pas encore effective. Rappelons que cette procédure peut également conduire à l'imposition de sanctions quasi automatiques. Basé sur un tableau de bord composé de dix indicateurs économiques, financiers et structurels forgés pour la détection précoce de déséquilibres macro-économiques apparaissant dans les États membres, un premier rapport sur le Mécanisme d'alerte européen a placé en février 2012 douze États sous surveillance (France, Royaume-Uni, Italie, Espagne, Belgique, Finlande, Slovaquie, Chypre, Bulgarie, Danemark, Hongrie et Suède). Cette procédure modifie considérablement la répartition des compétences entre l'Union et les États membres dans la mesure où elle porte sur l'évaluation de la concrétisation des engagements des États membres dans le cadre du *Pacte pour l'euro plus* qui portent sur les compétences sociales nationales. Cette évaluation peut aboutir au déclenchement d'une PDM et donc conduire *in fine* à l'imposition de sanctions aux-

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from the presidency, 1st October 2012, <http://register.consilium.europa.eu/pdf/en/12/st14/st14210.en12.pdf>

quelles un État ne pourrait s'opposer, le cas échéant, qu'en réunissant en sa faveur une «majorité de blocage», l'État concerné par la procédure ne prenant pas part à ce vote.

### 3.2 La BCE opte de manière résolue pour le modèle allemand à la Hartz

Le président de la Banque centrale européenne, Mario Draghi, avait également remis la question des réformes structurelles à l'ordre du jour en précisant le 25 avril 2012 devant la Commission des affaires économiques et financières du Parlement européen qu'il s'agit des réformes qui «*heurtent de larges intérêts et qui font mal*», mais qui «*facilitent l'entrepreneuriat, l'établissement de nouvelles entreprises et la création d'emplois*».

Le Bulletin mensuel de la BCE du mois d'août 2012 ne laisse pas l'ombre d'un doute sur le maintien du cap initial, à savoir le renforcement de la compétitivité qui conduira à la croissance mais au préalable des «réformes structurelles» sont nécessaires. Selon ce Bulletin, «*des réformes des marchés des produits en vue de renforcer la compétitivité et la création de marchés du travail efficaces et*

*flexibles constituent des conditions préalables à la correction des déséquilibres existants et à la réalisation d'une croissance robuste et durable*»<sup>(33)</sup>. Enfin et malgré l'absence de compétences de l'Union dans les politiques salariales, le rapport 2012 de la BCE sur les politiques structurelles, publié le 9 octobre 2012, est consacré aux «*marchés du travail dans la zone euro face à la crise*»<sup>(34)</sup>. Sans surprise, les réformes souhaitées sont celles introduites par les lois Hartz en Allemagne, citées à deux reprises dans le rapport, et celles portant sur la flexibilité dans les négociations salariales et réduisant les protections «excessives» de l'emploi, introduites en Grèce, au Portugal et Irlande ou en Espagne et en Italie. Il s'agit, pour les trois premiers, de pays de la zone euro sous assistance financière et placés sous le contrôle de la Troïka, et pour les deux derniers, de ceux pour lesquels la BCE est intervenue sur les marchés secondaires au cours de l'été 2011, deux précisions que ne mentionne pas le rapport. Les réformes souhaitées par la BCE sont explic-

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33. Bulletin mensuel de la BCE du mois d'août 2012. Editorial, page 7.

34. «*Euro area labour markets and the crisis*», ECB, 9 October 2012, p.10, <http://www.ecb.europa.eu/pub/pdf/other/euroarealabourmarketsandthecrisis201210en.pdf?6404370b82a1b6c9b18397323311253f>

tées dans ses «principales conclusions de politique» («Main policy conclusions») dont la teneur évoque des recommandations de nature politique (Cf. Encadré 1.)

**Encadré 1. Les principales conclusions de politique de la BCE ( <sup>35</sup> )**

*« La rigidité des salaires à la baisse empêche de restaurer la compétitivité (et donc l'emploi), en particulier dans les pays de la zone euro qui avaient accumulé des déséquilibres externes avant la crise.*

*En la présence d'un taux de chômage élevé, la priorité devrait être de rendre les salaires réactifs (flexibles) aux conditions du marché du travail, de manière à faciliter la nécessaire réallocation sectorielle de l'emploi, fondement des créations d'emplois et de la réduction du chômage.*

*(...) En outre, dans un contexte de déséquilibre croissant sur le marché du travail, une différenciation accrue des salaires entre les différents types de travailleurs et d'emplois est nécessaire pour contribuer à une bonne adéquation entre l'offre et la demande de travail, et serait de plus particulièrement bénéfique à certains des groupes les plus touchés par la crise.*

*(...) Les politiques actives de lutte contre le chômage (active labour market policies, ALMPs) devraient faciliter le retour au travail des jeunes et des salariés les moins qualifiés, y compris au moyen de politiques de formation, de combler le fossé entre les compétences des chômeurs et celles demandées par les entreprises, en particulier dans les pays les plus touchés par des baisses irréversibles d'effectifs dans certains secteurs.*

*De telles politiques devraient également contribuer à accroître la pression à la baisse sur les salaires exercée par les chômeurs et à limiter la baisse de la production potentielle qui résulterait d'une hausse du chômage structurel».*

35. Ibidem, p. 9 et 10.

## 4. Le rôle politique de plus en plus affirmé de la BCE: de l'indépendance à l'ingérence

Depuis l'exportation de la crise des subprimes en Europe, la BCE a mené des interventions dites non conventionnelles pour soutenir le secteur bancaire. Par la suite, elle a conduit des interventions de rachats de dettes souveraines sur le marché secondaire. Rien n'interdit à la BCE d'intervenir sur le «marché secondaire» de la dette mais la Bundesbank s'y oppose en ce que cela violerait la «clause de non-renflouement» introduite par le traité de Maastricht. Cette clause, l'article 125 du traité, interdit à l'Union et ses États membres de garantir les engagements publics des États membres. Il faut préciser que les achats de dettes ou des prêts aux autres États membres par les États membres ne sont pas interdits. Telle est la philosophie de la Facilité de stabilité financière européenne (EFSE, European financial stability facility selon l'acronyme anglais souvent appelé fonds européen de stabilité financière alors que son fonctionnement est basé sur des prêts levés par l'EFSS et prêtés à l'État qui en fait la demande). Ces prêts sont

cependant assortis d'une stricte conditionnalité. Quant à la BCE, l'article 123 du traité, lui interdit d'accorder des découverts et autres crédits aux institutions publiques tout comme l'achat direct de leur dette. Le traité interdit à la BCE d'être le prêteur en dernier ressort pour les États membres de la zone euro, un rôle que remplissent aussi bien la FED que la Banque d'Angleterre. Si le traité est opposé au rachat par la BCE de la dette d'un État au moment de son émission (marché primaire de la dette), il n'en va pas de même sur le marché secondaire (opérations dites d'open market). Le 10 mai 2010, la BCE avait entrepris de racheter directement sur le marché secondaire des titres privés et des titres publics en lançant un «Programme s'adressant aux marchés des titres» (Securities Markets Programme). La BCE achète des bons du trésor des États membres après leur mise en circulation. En septembre 2011, la démission de Jürgen Stark, le «chef économiste de la BCE», avait été interprétée comme un désaveu de la politique mo-

nétaire de la BCE, considérée comme n'étant plus en ligne avec les principes et les traditions de la Bundesbank. Cette démission faisait suite à celle d'Axel Weber, qui avait décidé le 11 février 2011 de quitter la présidence de la Bundesbank en raison de son opposition au programme de rachats d'obligations de la BCE.

Il convient de rappeler que pour intervenir sur le marché secondaire de la dette durant l'été 2011, la BCE avait imposé une «stricte conditionnalité» dans des lettres secrètes envoyées aux dirigeants des gouvernements alors concernés. La lettre envoyée au gouvernement italien était cosignée par le président de la BCE, Jean-Claude Trichet, et son successeur, Mario Draghi. Si cela avait déclenché des réactions courroucées en Italie, de son côté Mario Rajoy, le vainqueur des élections législatives espagnoles avait clairement annoncé en décembre 2011 qu'il s'inspirerait de la lettre du président de la BCE <sup>(36)</sup>.

36. « Rajoy usará la carta del BCE para justificar sus reformas », El País, 7 décembre 2011, [http://economia.elpais.com/economia/2011/12/07/actualidad/1323246781\\_850215.html](http://economia.elpais.com/economia/2011/12/07/actualidad/1323246781_850215.html)

Selon la lettre adressée au gouvernement italien, publiée dans la presse italienne et française, «*Une réforme constitutionnelle visant à durcir la législation fiscale serait également appropriée*»<sup>(37)</sup>. Suite à l'enquête réalisée par le Médiateur européen à la demande d'un avocat espagnol, l'on sait que la lettre adressée au gouvernement espagnol n'exigeait pas l'intégration d'une «règle d'or» dans la Constitution espagnole, ce qui fut pourtant fait début septembre 2011 contre l'avis des syndicats

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37. La lettre comportait également un programme de baisse des salaires des fonctionnaires, de privatisations à marche rapide des services publics locaux, de modification du droit du travail (flexibilisation des procédures de licenciement, privilégier les accords négociés au niveau de l'entreprise aux conventions sectorielles négociées à l'échelon national. Traduite en français dans l'article « L'incroyable diktat de Trichet à Berlusconi », Challenges, 29 septembre 2011. <http://www.challenges.fr/economie/20110929.CHA4869/l-incroyable-diktat-de-trichet-a-berlusconi.html> En juillet 2012, la Cour constitutionnelle italienne a déclaré illégale la décision du gouvernement Berlusconi de privatiser les services publics locaux. L'article 4 du décret-loi n° 138 est contraire au résultat du référendum organisé en juin 2011 à l'issue duquel les Italiens avaient massivement rejeté la privatisation de l'eau. Le décret Berlusconi ainsi que les amendements introduits ultérieurement par le gouvernement Monti sont déclarés inconstitutionnels. Décision n° 199 du 20 juillet 2012.

qui demandaient l'organisation d'un référendum sur ce sujet. Mais le contenu de la lettre ne sera pas diffusé au médiateur. Selon *El País*, «*la BCE lui en a refusé l'accès, arguant qu'une telle divulgation porterait préjudice à l'intérêt public en ce qui concerne la politique économique et monétaire de l'Union européenne ou d'un État membre*»<sup>(38)</sup>. Il faut également préciser que le gouvernement espagnol avait également adopté, le 10 février 2012 une réforme complète du marché du travail. Adoptée par décret, et donc sans consultation des syndicats ni de l'opposition parlementaire, la réforme est dénoncée dans la rue et fait l'objet d'un recours devant la Cour constitutionnelle le 5 octobre 2012 au motif qu'elle viole les droits sociaux et syndicaux garantis par la Constitution espagnole<sup>(39)</sup>.

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38. «El BCE confirma que no exigió a Zapatero modificar la Constitución española », *El País*, 31 julio 2012, [http://economia.elpais.com/economia/2012/07/31/actualidad/1343733093\\_601304.html](http://economia.elpais.com/economia/2012/07/31/actualidad/1343733093_601304.html)

39. «PSOE e IU llevan juntos al Tribunal Constitucional la reforma laboral», *El País*, 5 octubre 2012, [http://politica.elpais.com/politica/2012/10/05/actualidad/1349428952\\_767618.html](http://politica.elpais.com/politica/2012/10/05/actualidad/1349428952_767618.html)

#### 4.1 Le traité budgétaire comme préalable à la poursuite des interventions non conventionnelles de la BCE

Alors gouverneur de la Banque d'Italie, Mario Draghi qui est aussi un ancien banquier de Goldman Sachs, considère en avril 2011 qu'il est primordial que «*les pays concernés transposent pleinement les nouvelles règles et procédures dans leur propre cadre budgétaire, ce qui implique de procéder aux adaptations législatives appropriées. La mise en œuvre à l'échelon national constituera une étape cruciale. En effet, l'un des principaux avantages qu'offre l'adhésion à l'UE réside dans la possibilité pour les pays aux institutions plus faibles d'internaliser plus aisément les structures et les actions requises pour parvenir à la stabilité et à la croissance durable*»<sup>(40)</sup>. Mario Draghi est par la suite désigné en tant que successeur de Jean-

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40. «L'Union Economique et Monétaire au lendemain de la crise», Mario Draghi, Gouverneur de la Banque d'Italie, in *L'Euro, les investisseurs et la gouvernance*. Actes du séminaire en hommage à Tommaso Padoa-Schioppa, Bruxelles, 4 avril 2011, p. 26, [http://www.notre-europe.eu/uploads/tx\\_publication/Actes-Euro\\_\\_investisseurs\\_et\\_gouvernance-FR-web\\_01.pdf](http://www.notre-europe.eu/uploads/tx_publication/Actes-Euro__investisseurs_et_gouvernance-FR-web_01.pdf)

Claude Trichet par le Conseil européen des 23 et 24 juin 2011. Lors de son audition par la Commission des affaires économiques et financières le 15 juin 2011, il défend la politique de rigueur de la BCE à l'égard de l'inflation. Il souligne que la BCE n'a pas perdu son indépendance et qu'elle ne dépasse pas son mandat, puisqu'elle n'entre pas «dans le domaine politique» (41).

On le sait, la Chancelière allemande avait fait du Pacte budgétaire la condition de son soutien au traité établissant le Mécanisme européen de stabilité (MES), ce qui est moins connu est qu'il s'agissait également d'une condition de la BCE en préalable à la poursuite de ses interventions non conventionnelles, à savoir le lancement de sa seconde opération de LTRO (Long Term Refinancing Operation) fin février 2012 (42). La BCE alloue alors 529 Md € sous forme de prêt à 3 ans, à 800 banques à un taux réduit de 1%. Avec la première

opération de LTRO sur trois ans du 21 décembre 2011, un montant de 1000 milliards d'euros a ainsi été injecté dans le système bancaire. La première opération avait pour objectif de diminuer le risque d'une crise de liquidité et de faillite bancaire, ce qui avait rassuré «les marchés» quant à la survie de l'euro, mais après la seconde opération le répis fut de courte durée en raison de l'approfondissement de la crise grecque et des doutes sur la solvabilité de l'Espagne.

Lors d'une interview au *Wall Street Journal* quelques jours avant le lancement de la seconde LTRO, l'homme qui est incontestablement le plus puissant d'Europe, le président de la BCE, n'avait pas hésité à déclarer que le «modèle social européen était déjà mort» (43). Il présente le pacte budgétaire comme un moyen permettant aux gouvernements européens de commencer à «se libérer de la souveraineté nationale». Il considère alors le traité budgétaire comme «une réalisation politique majeure, car c'est le premier pas vers une union budgétaire». Selon le président de la BCE, «Il s'agit d'un traité par lequel les pays perdent une part de souveraineté nationale dans le but d'accepter

*des règles budgétaires communes qui sont particulièrement contraignantes, d'accepter la surveillance et d'accepter d'avoir ces règles inscrites dans leur Constitution afin qu'elles ne soient pas faciles à changer. Donc, c'est le début*». Devant la commission des affaires économiques et monétaires du Parlement européen, Mario Draghi, le président de la BCE avait estimé en mai 2012 que la «clarification de la vision de l'euro» par les responsables européens sera leur «meilleure contribution à la croissance» (44).

Dans le contexte français, le refus du traité budgétaire par Europe Écologie-Les Verts (EELV) conduit à une double controverse. Le Conseil fédéral du parti qui participe au gouvernement Ayrault, s'est prononcé contre la ratification du traité budgétaire mais en faveur du vote de la loi organique qui transpose l'esprit du traité (la règle d'or) dans la législation nationale. L'autre élément de controverse dans ce contexte est la contradiction du groupe des Verts/ALE au niveau européen. À la suite de l'audition d'experts début de l'année 2012, le groupe s'était initialement prononcé contre

41. Mario Draghi, candidat recommandé à la présidence de la BCE, 15 juin 2011, <http://www.europarl.europa.eu/news/fr/pressroom/content/20110614IPR21328/html/Mario-Draghi-candidat-recommand%C3%A9-%C3%A0-la-pr%C3%A9sidence-de-la-BCE>

42. «Un traité inutile mais nécessaire», Philippe Maystadt, 20 avril 2012, *Le Vif*, p. 50.

43. Q&A: ECB President Mario Draghi, 23 February 2012

44. «Clarifier la vision» de l'avenir de l'Euro? La Libre Belgique, 31 mai 2012.

le projet de traité budgétaire, le 9 février 2012, notamment en raison de l'incertitude juridique de la majorité inversée, prévue par le projet d'article 7 du traité <sup>(45)</sup>. Il reste que le processus de ratification du traité budgétaire et des différents instruments/procédures a également suscité des interrogations parmi les Etats membres (Cf. Encadré 2).

Autre particularité, en Belgique, la procédure de ratification de la décision du Conseil européen modifiant l'article 136 du TFUE est considérée, à l'instar des autres traités européens, comme relevant d'un accord mixte. Il requiert par conséquent la ratification des sept assemblées parlementaires belges (le Sénat a ratifié le 10 mai et la Chambre le 14 juin, la notification de la ratification date du 16 juillet 2012) mais le gouvernement belge a considéré que le traité MES n'était pas un traité

45. Selon un de ces experts, «Introducing the provisions of Article 7 of the Draft into the Treaty by formal amendment would be possible, but imply reshuffling the system of Article 126 TFEU considerably». (...) «Neither Article 126(14) nor Article 136(1) lit. a), together with Article 121(6) TFEU, empower the Council to give binding force to proposals or recommendations of the Commission or otherwise to reverse the decision-making rules for the Council in Article 126 TFEU». Ingolf Pernice, «International Agreement on a reinforced Economic Union. Legal Opinion», 2012, p. 13.

de la même nature, ce qui a simplifié la procédure d'approbation de ce traité, ratifié par les deux seules branches du Parlement fédéral (le Sénat le 7 juin 2012 et la Chambre le 14 juin suivant). Le traité budgétaire doit quant à lui être ratifié par les sept assemblées parlementaires concernées.

On notera que le Conseil constitutionnel français considère bien que la mise en place de la «majorité inversée» (article 7 du traité sur la stabilité, la coordination et la gouvernance, TSCG) est une innovation qui comporte «un simple engagement à appliquer une règle de majorité plus contraignante que celle prévue par le droit de l'Union européenne dans le cadre de l'engagement de la procédure concernant les déficits excessifs» <sup>(46)</sup>. Le Conseil d'Etat néerlandais avait quant à lui considéré que le traité budgétaire contient une procédure décisionnelle, la majorité qualifiée inversée, différente de celle inscrite à l'article 126 du traité sur le fonctionnement de l'Union européenne (procédure pour déficit excessif) <sup>(47)</sup>.

46. Décision n° 2012-653 DC du Conseil constitutionnel du 9 août 2012, point 34.

47. Avis du 9 avril 2012, publié le 25 juin suivant avec la réaction du gouvernement néerlandais. [http://www.raadvanstate.nl/adviezen/zoeken\\_in\\_adviezen/](http://www.raadvanstate.nl/adviezen/zoeken_in_adviezen/)

### **Encadré 2. Ratifications: quelques particularités**

*Après son adoption au Sénat le 12 juillet 2012, le traité budgétaire européen a été ratifié le 19 juillet 2012 par la Chambre des députés italiens à une très large majorité vu l'accord des principaux partis. La Chambre des députés l'a adopté avec 380 "oui", 59 "non" et 36 abstentions, conformément aux souhaits du gouvernement qui voulait en finir avec le processus de ratification avant la pause estivale début août. Seul le parti populiste de la Ligue du Nord, ex-allié du gouvernement de Silvio Berlusconi a voté contre, tandis que l'Italie des Valeurs (IDV, gauche) s'est abstenue. Les députés ont également approuvé le mécanisme européen de stabilité (MES), par 325 voix pour, 53 contre et 36 abstentions. Au 19 juillet 2012, l'Italie est le douzième pays européen à avoir approuvé le Pacte budgétaire et le huitième de la zone euro. Il faut rappeler que la procédure de révision de la Constitution italienne en vue d'y intégrer une règle d'or budgétaire avait été finalisée le 17 avril 2012.*

*En Allemagne, le président allemand avait décidé d'attendre l'arrêt de la Cour constitutionnelle, prévu pour le 12 septembre 2012 avant de signer les traités (Cf. supra).*

*En France, le Conseil constitutionnel avait été saisi par le président français, François Hollande pour vérifier la conformité du traité budgétaire avec la constitution française et savoir s'il fallait ou non la modifier pour adopter la règle d'or. Début août 2012, le Conseil constitutionnel a répondu par la négative. Cela implique que la ratification du traité budgétaire nécessite le vote d'une loi du Parlement français tandis que la transcription de la « règle d'or » requiert une loi organique. Une révision de la Constitution aurait pu impliquer l'organisation d'un référendum.*

*Il faut également signaler un recours introduit par la Cour suprême irlandaise début août 2012 devant la Cour de justice de Luxembourg pour vérifier la validité de la décision du Conseil européen de modifier l'article 136 du traité sur le fonctionnement de l'Union. Le 31 juillet, cette Cour avait jugé compatibles le traité budgétaire et le traité MES avec la Constitution irlandaise permettant ainsi la validation de la ratifications de ces deux traités. S'agissant du traité MES, la Cour suprême irlandaise pose également à la Cour de justice la question de savoir si, dans l'hypothèse où la décision de revoir le traité est considérée comme valide, le droit d'un État membre à conclure et ratifier un accord international tel que le traité MES est lié à l'entrée en vigueur de cette décision. Les 27 sont tenus de ratifier cette décision. Début novembre 2012, trois ratifications n'ont pas été notifiées au Conseil (Pologne, République tchèque et Royaume-Uni). La Cour de Luxembourg a organisé une audition sur le recours irlandais le 23 octobre 2012. Sa décision devrait être connue fin de l'année 2012 (Affaire 370/12, Pringle). Entre-temps, le traité MES, qui est entré en vigueur le 27 septembre 2012, a été ratifié par l'ensemble des États membres de la zone euro (le 4 octobre 2012 étant la date de la notification du dernier État, l'Estonie).*

*Autre particularité, en Belgique, la procédure de ratification de la décision du Conseil européen modifiant l'article 136 du TFUE est considérée, à l'instar des autres traités européens, comme relevant d'un accord mixte. Il requiert par conséquent la ratification des sept assemblées parlementaires belges (le Sénat a ratifié le 10 mai et la Chambre le 14 juin, la notification de la ratification date du 16 juillet 2012) mais le gouvernement belge a considéré que le traité MES n'était pas un traité de la même nature, ce qui a simplifié la procédure d'approbation de ce traité, ratifié par les deux seules branches du Parlement fédéral (le Sénat le 7 juin 2012 et la Chambre le 14 juin suivant). Le traité budgétaire doit quant à lui être ratifié par les sept assemblées parlementaires concernées.*

## 4.2 Des traités contestés compatibles avec l'indépendance de la BCE

En Allemagne, le traité budgétaire et le traité MES étaient contestés par plusieurs plaintes déposées devant la Cour constitutionnelle allemande. L'Europe et les marchés financiers étaient par conséquent suspendus aux décisions de la Cour. Le 12 septembre 2012, la Cour a rejeté les recours en disant un «oui mais». Elle pose comme condition la limitation de la participation financière de l'Allemagne à 190 milliards d'euros et le respect des prérogatives du Parlement allemand. Tout accroissement de la dotation du MES devra être approuvé par le Parlement. La Cour pose une autre limite, à savoir que la BCE ne pourra pas financer le MES, ce qui signifie que la Cour refuse l'octroi d'une licence bancaire au MES. De manière éloquente, la Cour considère que ce traité ne remet pas en cause «l'indépendance de la BCE», ni «l'engagement des États membres d'observer une stricte discipline budgétaire» (48). S'agissant du

48. "Applications for the issue of temporary injunctions to prevent the ratification of the ESM Treaty and the Fiscal Compact unsuccessful for the most part", Federal

traité budgétaire, elle considère qu'il ne «viole» pas la responsabilité du Bundestag. L'argument répondant à la contestation de sa durée illimitée est remarquable: puisqu'il s'agit d'un traité international «*la démission du traité par un accord mutuel est toujours possible*» et «*le retrait unilatéral est possible en cas d'un changement fondamental des circonstances qui étaient pertinentes à propos de la conclusion du traité*». Il faut ici rappeler que la résolution du Parlement européen du 2 février 2012 insistait «*pour que les parties prenantes respectent entièrement leur engagement d'intégrer, au plus tard dans un délai de cinq ans, le traité sur la stabilité, la coordination et la gouvernance dans les traités de l'Union et demand[ait] qu'à cette occasion, on s'attaque aux dernières faiblesses restantes du traité de Lisbonne*» (point 9).

Selon l'article 16 du traité budgétaire, «*Dans un délai de cinq ans maximum à compter de la date d'entrée en vigueur du présent traité, sur la base d'une évaluation de l'expérience acquise lors de sa mise en œuvre, les mesures nécessaires sont prises conformément au traité sur l'Union européenne*

Constitutional Court, Press release no. 67/2012 of 12 September 2012, <http://www.bundesverfassungsgericht.de/en/press/bvg12-067en.html>

et au traité sur le fonctionnement de l'Union européenne, afin d'intégrer le contenu du présent traité dans le cadre juridique de l'Union européenne». Le cadre juridique laisse entendre une révision des traités mais aussi l'adoption de la législation dite secondaire. Ce qui est déjà le cas du *Six Pack* et bientôt du *Two Pack* (Cf. Encadré 3.). Reste bien entendu la question de la majorité inversée. L'introduction du vote à la majorité inversée avait été âprement défendue par les pays du Benelux, «*l'objectif étant d'éviter que les grands pays ne puissent s'allier pour éviter d'être mis en procédure de déficit excessif par leurs pairs*» comme ce fut le cas en 2003 quand l'Allemagne et la France avaient abouti *de facto* à la suspension du Pacte. Selon le Premier Ministre Luxembourgeois, la majorité inversée est un «engagement politique» dans la mesure où elle n'est pas prévue dans les traités actuels (49). Sollicité par le groupe parlementaire européen de la Gauche unitaire européenne, selon cet autre juriste, la majorité inversée est illégale (50). Selon cette analyse, l'élargissement de la prise de décision

49. Europaforum, <http://www.europaforum.public.lu/fr/actualites/2012/01/chd-jc-traite/index.html>

50. Andreas Fischer-Lescano : «*Le Traité Fiscal et le droit européen* », Avis juridique. Bremen, 7 septembre 2012.

via la règle de la majorité inversée peut intervenir que dans le cadre d'une révision du traité. Ce constat vaut autant pour la «majorité inversée» du traité budgétaire que celle introduite par le *Six Pack*. Différentes propositions de recours sont suggérées. La voie est étroite car aucune des institutions de l'Union ne s'est opposée à des pratiques plus que «très limite» dans un système qui se dit promouvoir les valeurs de la démocratie et de l'État de droit.

### **Encadré 3. Le Two Pack**

*En novembre 2011, la Commission européenne avait proposé un nouveau renforcement du Pacte de stabilité en présentant deux règlements, le Two Pack, renforçant le Pacte de stabilité qui venait juste d'être révisé (Le Six Pack entrera en vigueur le 13 décembre 2012). La première de ces propositions porte sur un renforcement du suivi et de l'évaluation des projets de plans budgétaires des États membres de la zone euro et, plus particulièrement, de ceux faisant l'objet d'une procédure de déficit excessif et la seconde sur le renforcement de la surveillance des États membres de la zone euro confrontés à de graves perturbations financières ou sollicitant une assistance financière.*

*Le premier s'inscrit dans la logique de l'inscription dans la législation nationale de freins à l'endettement. La proposition initiale de la Commission demandait une telle inscription de préférence au niveau constitutionnel<sup>(51)</sup>. Le traité budgétaire aussi mais le contrôle de légalité de cette inscription, pour lequel un accord n'avait été trouvé qu'après la signature du traité, pourra être vérifiée par la Cour de justice<sup>(52)</sup>. Evidemment, un règlement qui est un acte juridique directement applicable ne peut réviser directement les constitutions nationales. Même le traité budgétaire ne parvient pas à cet objectif. Le texte du Parlement européen prévoit une inscription de son principe dans la législation nationale.*

*Selon la résolution du Parlement, « Les États membres adoptent des règles budgétaires chiffrées, qui inscrivent dans le processus budgétaire national l'objectif budgétaire à moyen terme au sens de l'article 2 bis du règlement (CE) n° 1466/97; ces règles comprennent également la définition des circonstances*

51. «Les États membres adoptent des règles budgétaires chiffrées concernant le solde budgétaire, qui inscrivent dans le processus budgétaire national l'objectif budgétaire à moyen terme au sens de l'article 2 bis du règlement (CE) n° 1466/97. Ces règles s'appliquent aux administrations publiques dans leur ensemble et revêtent un caractère contraignant, de préférence constitutionnel », article 4 premier alinéa, COM (2011) 821, 23 novembre 2011.

52. Le Procès-verbal de signature du traité sur la stabilité, la coordination et la gouvernance au sein de l'Union économique et monétaire, 2 mars 2012.

*exceptionnelles et récessions économiques graves qui peuvent amener à s'écarter temporairement de l'objectif budgétaire à moyen terme ou de la trajectoire d'ajustement qui doit conduire à la réalisation de cet objectif, pour autant que cet écart ne mette pas en danger la viabilité budgétaire à moyen terme, conformément aux dispositions des articles 5 et 6 du règlement (CE) n° 1466/97. Ces règles devraient inclure un mécanisme qui est déclenché en cas d'écart significatif par rapport à l'objectif budgétaire à moyen terme ou à la trajectoire d'ajustement qui doit conduire à la réalisation de cet objectif, afin d'assurer un retour rapide à l'objectif à moyen terme. Ces règles s'appliquent aux administrations publiques dans leur ensemble et revêtent un caractère contraignant ou leur respect et leur application sans réserve sont du moins garantis dans le cadre de tout le processus budgétaire national.»<sup>(53)</sup>.*

*Le vote à la majorité inversée est présent dans le règlement sur le renforcement de la surveillance des États membres de la zone euro confrontés à de graves perturbations financières ou sollicitant une assistance financière. Par exemple, selon les amendements du Parlement européen, « La Commission, en liaison avec la BCE et, le cas échéant, le FMI, examine avec l'État membre concerné les modifications et les mises à jour qu'il pourrait être nécessaire d'apporter à son programme d'ajustement afin de tenir dûment compte, entre autres, de toute disparité significative entre les prévisions macroéconomiques et les chiffres obtenus, y compris les éventuelles conséquences liées au programme d'ajustement, des retombées négatives et des chocs macroéconomiques et financiers. La Commission, décide des éventuelles modifications à apporter au programme d'ajustement macroéconomique. Le Conseil peut, dans un délai de dix jours suivant l'adoption de cette décision, l'abroger par un vote à la majorité qualifiée. » La Commission pourrait modifier le programme d'ajustement d'un pays en difficulté et le Conseil n'aurait qu'un délai de dix jours pour abroger par un vote à la majorité qualifiée la décision de la Commission européenne<sup>(54)</sup>. Il faudrait donc que le Conseil soit en mesure d'opposer une majorité de blocage en cas de désaccord avec les modifications proposées. Il s'agissait là d'une demande de la BCE<sup>(55)</sup>.*

53. Amendement 46 Proposition de règlement Article 4 - paragraphe 1, Amendements du Parlement européen, adoptés le 13 juin 2012, à la proposition de règlement établissant des dispositions communes pour le suivi et l'évaluation des projets de plans budgétaires et pour la correction des déficits excessifs dans les États membres de la zone euro, <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=FR&reference=P7-TA-2012-243>

54. Amendement 46 Proposition de règlement Article 6 – paragraphe 4, « Amendements du Parlement européen, adoptés le 13 juin 2012, à la proposition de règlement relatif au renforcement de la surveillance économique et budgétaire des États membres connaissant ou risquant de connaître de sérieuses difficultés du point de vue de leur stabilité financière au sein de la zone euro », <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=FR&reference=P7-TA-2012-242>

55. Dans son avis sur le Two Pack, la Banque centrale européenne considère que « l'article 6, paragraphe 5 du règlement proposé relatif au procédure de surveillance, constitue un cas critique dans lequel il est recommandé d'employer la règle du vote à la majorité qualifiée inversée », Avis de la Banque centrale européenne du 7 mars 2012 sur le renforcement de la gouvernance économique dans la zone euro, Journal officiel de l'Union européenne, C 141, 17 mai 2012, p. 11, [http://www.ecb.int/ecb/legal/pdf/c\\_14120120517fr00070024.pdf](http://www.ecb.int/ecb/legal/pdf/c_14120120517fr00070024.pdf)

*Le 13 juin 2012, le Parlement européen a adopté des amendements à la proposition de règlement relatif au renforcement de la surveillance économique et budgétaire des États membres connaissant ou risquant de connaître de sérieuses difficultés du point de vue de leur stabilité financière au sein de la zone - par 501 voix pour, 138 voix contre et 36 abstentions (Rapport Ferreira). Des amendements à la proposition de règlement relatif au renforcement de la surveillance économique et budgétaire des États membres connaissant ou risquant de connaître de sérieuses difficultés du point de vue de leur stabilité financière au sein de la zone ont été adoptés le même jour par 471 voix pour, 97 voix contre et 78 abstentions (Rapport Gauzès). Ces questions ont été renvoyées pour réexamen à la commission compétente et le vote sur les résolutions législatives a été reporté à une séance ultérieure. Les députés européens ne s'en sont pas tenus aux projets de règlements initiaux en ajoutant de nombreux éléments aux deux textes. Selon les propos d'Olli Rehn, « Une bonne partie des amendements du PE se réfère à la future feuille de route sur la réforme de l'UEM par les quatre présidents »<sup>(56)</sup>. Il s'agit du premier rapport élaboré par les quatre représentants du « gouvernement composé de l'Union » à savoir les présidents du Conseil européen, de la Commission européenne, de l'Eurogroupe et de la BCE. Il reste que c'est sur la base des deux résolutions du PE qu'a été organisé un premier trilogue le 11 juillet 2012. Un autre a été organisé en septembre 2012. Le communiqué du Conseil des ministres des affaires économiques et financières du 9 octobre 2012 fait état en fin de communiqué dans une rubrique « other business » du fait que le Conseil a été informé par la présidence (chypriote) du développement concernant notamment les propositions sur la « gouvernance économique dans la zone euro ».*

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56. Europolitique, 10 juillet 2012.

### 4.3 L'agenda institutionnel de la BCE : la défense d'une monnaie irréversible au nom de la survie de l'euro

Face à la poursuite de la dégradation des conditions d'accès aux marchés de plusieurs pays tels l'Espagne et l'Italie y compris après le Conseil européen de juin 2012, nombreux sont ceux qui parient sur la disparition de l'euro en dépit de la multiplication des discours sur «l'irréversibilité de l'euro» par les dirigeants des institutions européennes au premier rang desquels figure le président de la Banque centrale européenne, Mario Draghi. Celui-ci avait annoncé le 26 juillet qu'il ferait tout son possible pour sauver l'euro en précisant qu'il n'agirait que dans les limites de son mandat.

En réponse à l'opposition du président de la Bundesbank à de nouvelles interventions de la BCE sur le marché obligataire secondaire, Mario Draghi écrit dans la presse allemande que bien que n'ayant pas un «rôle politique», la BCE est une institution de l'Union <sup>(57)</sup>. Le président de la

57. «Les États membres adoptent des règles budgétaires chiffrées concernant le solde budgétaire, qui inscrivent

Bundesbank, Jens Weidmann, s'était opposé à de nouvelles interventions de la BCE sur le marché secondaire au motif qu'elle droguerait les États. Parallèlement, Jens Asmussen, membre allemand du directoire de la BCE, s'employait le 27 août 2012 à rassurer la Bundesbank en posant comme préalable à tout achat d'obligations émises par les pays en difficulté l'implication du Fonds monétaire international (FMI) dans la conception de leurs programmes de réforme. Dans son message aux Allemands, le président de la BCE plante cependant les limites aux futurs développements de l'Union en considérant que «ceux qui proclament que seule une fédération complète peut-être soutenable mettent la barre trop haut». Selon le président de la BCE, «ce dont nous avons besoin est d'un effort graduel et structurel pour compléter l'UEM. Cela donnerait à l'euro les fondations stables qu'il mérite». Devant la commission des affaires économiques et monétaires du Parlement européen, Mario

*dans le processus budgétaire national l'objectif budgétaire à moyen terme au sens de l'article 2 bis du règlement (CE) n° 1466/97. Ces règles s'appliquent aux administrations publiques dans leur ensemble et revêtent un caractère contraignant, de préférence constitutionnel», article 4 premier alinéa, COM (2011) 821, 23 novembre 2011*

Draghi, le président de la BCE avait appelé en mai 2012 les responsables européens à la «clarification de la vision de l'euro» <sup>(58)</sup>. D'ailleurs, comme il avait été associé à la task force sur la gouvernance économique de l'année 2010, le président de la BCE est l'un des quatre présidents chargés de rédiger rapport intérimaire sur le renforcement véritable de l'Union économique et monétaire.

En plus de son rôle actif dans la préparation du futur *design* de l'Union économique et monétaire, la «communication» de Mario Draghi est attendue et décryptée par les marchés. Début septembre 2012, Mario Draghi annonçait que l'intervention de la BCE (Outright Monetary Transactions, OMTs) sera *illimitée* et se fera en concertation avec le fonds d'assistance européenne (EFSF/MES), ce qui nécessite que les futurs États bénéficiaires (au premier rang desquels l'Espagne mais aussi l'Italie et Chypre) en fassent la demande avec la «conditionnalité» que cela impliquerait.

Mario Draghi souhaite également l'implication du Fonds monétaire international (FMI) pour la définition des conditions spécifiques appli-

58. «Clarifier la vision» de l'avenir de l'Euro ? La Libre Belgique, 31 mai 2012.

quées aux pays concernés et le suivi de leur programme d'ajustement. Les deux conditions posées par l'Allemagne sont donc remplies, la BCE agit dans les limites de son mandat et l'association du FMI est souhaitée. Enfin, la BCE pourrait suspendre le programme si la conditionnalité n'était pas respectée. Concrètement, il s'agit d'éviter l'aléa moral, ou l'abandon des «réformes» à la suite de l'intervention de la BCE et de la détente sur les taux obligataires qu'elle induit. Après l'été 2011, Silvio Berlusconi avait été fustigé pour son manque de détermination par Angela Merkel et Nicolas Sarkozy. Le Premier ministre italien s'était en fait montré hésitant à respecter les conditions fixées par la BCE. Cela avait conduit à son remplacement par Mario Monti à la tête d'un gouvernement technique.

Dans les faits, cette «conditionnalité» est non seulement dissuasive, les pays concernés durcissant leur politiques d'austérité dans l'espoir de ne pas devoir recourir à l'assistance européenne, elle est également inadaptée à la situation des différents pays victimes de la spéculation financière. S'agissant de l'Espagne, l'adoption d'un

plan de sauvetage du secteur bancaire fait l'objet d'un accord au sein des ministres des finances de l'eurogroupe le 10 juillet 2012 mais en échange de conditions financières pour les banques et de la promesse de nouvelles mesures d'austérité, perçues comme une «thérapie de choc» dans la presse espagnole qui voit dans le fait que l'Espagne doive se plier aux recommandations de la Commission la transformation de ces dernières en de véritables exigences <sup>(59)</sup>.

Enfin, les milieux financiers allemands craignent quant à eux que les éventuelles interventions de la BCE sur le marché secondaire de la dette souveraine ne contribuent à alimenter l'inflation. Le président de la BCE se déplace à Berlin pour rencontrer les membres de la Fédération des industries allemandes (DBI) le 25 septembre 2012. Mario Draghi inscrit le cadre d'action de l'Outright Monetary Transactions (OMTs) de la BCE dans les limites de son mandat de maintien de la stabilité des prix. Selon Mario Draghi, la fragmentation des marchés financiers dans la zone euro traduit des craintes infondées au sujet de l'avenir de la zone euro. Il rappelle que les opérations de la

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59. *El País*,

BCE interviendront «seulement sur le marché secondaire, ce qui assure que l'argent passerait aux investisseurs disposant de bons souverains et pas aux gouvernements» <sup>(60)</sup>.

#### 4.4 Le renforcement du rôle de la Commission européenne

La Déclaration des chefs d'État de la zone euro des 28 et 29 juin 2012 affirme qu'il «est impératif de briser le cercle vicieux qui existe entre les Banques et les États». Elle demande à la Commission de présenter une proposition de règlement, fondée sur l'article 127 § 6 du traité sur le fonctionnement de l'Union européenne <sup>(61)</sup>. L'Espagne venait de demander l'assistance européenne pour son secteur bancaire. Un montant de 100 milliards d'euros devait être fourni via le Fonds d'assistance financière (EFSF). Par la suite, le MES serait autorisé, après d'une décision ordinaire, donc sans révision du traité MES, à recapitaliser directement les banques. Mais à la condition de réaliser au préalable l'Union bancaire. Il s'agit en fait de compléter l'UEM et de renforcer les prérogatives

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de la BCE sans passer par une réforme hautement risquée des traités. Cependant, la concrétisation d'une Union bancaire fixée au 1er janvier 2013 comme préalable au soutien direct des banques par le MES semble elle aussi compromise en raison de l'opposition de l'Allemagne, de la Finlande et des Pays-Bas, trois des plus grands partisans de la ligne dure de la discipline budgétaire. Dans une déclaration conjointe diffusée le 27 septembre 2012, les Ministres des Finances de ces trois pays sont ni plus ni moins revenus sur leurs engagements du Conseil européen de juin 2012<sup>(62)</sup>. Ces trois pays veulent exclure du soutien aux banques par le MES, celles déjà en difficulté avant son entrée en vigueur.

Le 18 octobre 2012, la chancelière allemande présente au Parlement allemand sa proposition de doter l'Union européenne d'un droit de rejet des budgets nationaux ne respectant pas la discipline budgétaire : *«Nous pensons, et je le dis au nom de l'ensemble du gouvernement allemand, que nous pourrions faire un pas en avant en accordant à l'Europe un véritable droit d'ingérence sur les budgets nationaux quand ils ne respectent pas*

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*les limites fixées pour la stabilité et la croissance»* (63). La chancelière identifie pour cette tâche le Commissaire en charge des affaires économiques et financières. Dans un article publié par la suite dans *Der Spiegel*, Mario Draghi soutient le renforcement de ce «super commissaire». Ces propositions s'inscrivent dans le droit fil des idées de l'ancien président de la BCE, Jean-Claude Trichet qui avait imaginé lors de la réception du Prix Charlemagne début juin 2011 que *«les autorités européennes aient le droit d'opposer leur veto à certaines décisions de politique économique nationale. Cette compétence pourrait en particulier concerner les principaux postes de dépenses budgétaires et les facteurs déterminants pour la compétitivité du pays»* (64).

Il faut rappeler qu'en septembre 2011, la proposition des ministres des finances néerlandais et finlandais avait identifié la Commission européenne comme locus du gouvernement économique. Ils proposent alors de renforcer le pouvoir du Commissaire en charge des affaires économiques et financières, Olli Rehn, promu par la suite vice-

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président de la Commission européenne, et suggèrent en outre l'exclusion de la zone euro des États fautifs. Cette dernière proposition n'avait pas reçu de traduction dans les deux propositions de règlement de la Commission durcissant encore le Pacte de stabilité (*Two Pack*). Pour les pays en difficulté ou sous surveillance, le *Two Pack* prévoit un nouveau renforcement considérable des prérogatives de la Commission européenne. Dans ce schéma, afin d'éviter qu'un pays ne tarde à demander l'assistance financière du FESF (et par la suite du MES), la Commission pourrait recommander au Conseil qu'un pays en difficulté financière et posant un risque pour la zone euro demande officiellement une aide financière. Les pays sous assistance financière devraient conclure un programme d'ajustement devant permettre le retour du pays sur les marchés financiers. Ces programmes seraient l'équivalent des programmes d'ajustement économiques pour les pays actuellement sous assistance financière dans le cadre du mécanisme européen de stabilisation financière. Les États concernés seraient soumis à une surveillance renforcée de la Commission en liaison avec la BCE, et le cas échéant du FMI.

Les conclusions du Conseil européen des 18 et 19 octobre 2012, invitent «*les législateurs à parvenir à un accord en vue de l'adoption du paquet législatif relatif à la surveillance budgétaire (le «Two-Pack») au plus tard à la fin de 2012.*» Le *Two Pack* est en cours d'adoption dans la plus grande discrétion alors même que le FMI qui basait ses calculs de croissance sur une hypothèse d'impact limité des mesures d'austérité revient sur cette conception fondée sur ce que les économistes appellent les «effets multiplicateurs»<sup>(65)</sup>. Le FMI préconise donc non pas l'abandon des politiques d'austérité mais bien d'accorder plus de temps aux pays dits de la périphérie. Selon cette étude du FMI, l'austérité réduit davantage que prévu l'activité économique et donc les rentrées fiscales, provoquant en fait un creusement du déficit. De longue date, de nombreux économistes, prix Nobel d'économie outre-Atlantique, ou se disant «atterrés» en France et ailleurs, dénoncent le caractère nocif des politiques d'austérité en période de crise et démontrent que le seul effet de ces politiques, qui aggravent la situation économique, est d'augmenter la pauvreté.

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## Perspectives

Sans projet au-delà de la discipline et de l'austérité budgétaire, l'Union se dote à partir de la zone euro d'instruments s'inspirant des méthodes du FMI en version dure. En dotant l'Union européenne d'un instrument s'apparentant à une organisation internationale dépourvue de contrôle démocratique, le traité MES pose sous un angle nouveau la question de la légitimité de l'élaboration et de la mise en œuvre de procédures produisant une hybridation entre le droit international et le droit européen<sup>(66)</sup>. Les modifications introduites par le traité budgétaire sont également le fruit de la transformation du rôle de la BCE, une institution dont la prise d'autorité et le rôle tant de concepteur que d'arbitre en dernier ressort de l'UEM ne cessent de croître dans les processus en cours.

Dans les faits, le renforcement du gouvernement économique implique une plus grande intrusion dans les décisions budgétaires nationales ainsi qu'une adaptation des cadres juridiques nationaux de manière à les rendre conformes aux règles européennes. Avec les limitations à l'action des

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66. *Can International Organisations Be Democratic? A skeptic's view*

gouvernements nationaux qu'elles impliquent, il s'agit de la parfaite illustration de l'action d'une «Fédération coercitive» au sein de laquelle les lois fédérales limitent les pouvoirs des entités fédérées. On peut y apercevoir l'approfondissement du rêve hayekien du fédéralisme interétatique en parfaite adéquation avec les principes de l'ordo-libéralisme allemand<sup>(67)</sup>.

Tout ceci conforte l'idée que l'horizon du projet européen ne peut aller au-delà de l'intégration économique et monétaire. Le pilier quasi fédéral de l'Union monétaire était censé coexister avec la définition au niveau national, et selon les préférences nationales, des politiques sociales et redistributives. Les aspects coercitifs du pacte de stabilité, réformé et en cours de révision, ainsi que le traité budgétaire, en cours de ratification, concernent principalement les États membres de la zone euro. Ces instruments visent le durcissement d'une approche punitive en cas de non accomplissement de «réformes structurelles» ciblant ouvertement et sans plus aucun tabou des éléments centraux des modèles sociaux nationaux.

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67. *TheNew Commonwealth Quarterly, Vol. Individualism and Economic Order,*

Le président du Conseil européen, Herman Van Rompuy, dénonce «*la tendance à perdre le sens de l'urgence des réformes*» et que «*cela ne devait pas arriver*» (68). Son remède: «*Nous devons continuer à réformer nos économies, les rendre plus compétitives, leur permettre de créer plus d'emplois*». Dans ce contexte, il avait resserré les grands thèmes du Conseil européen d'octobre 2012, à savoir «*la discussion de plans concrets pour une Union économique et monétaire sans cesse plus étroite, ce que cela signifie pour les banques, pour les budgets nationaux, pour les contribuables et pour les électeurs*».

La question de la légitimité semble venir à l'ordre du jour alors que tout ce qui a été entrepris jusqu'ici n'a pas fait l'objet d'un argumentaire ouvert au débat et à la contestation. Dans les pays sous assistance financière, l'encerclement des Parlements nationaux au moment de l'adoption des programmes d'austérité exprime autant un désespoir démocratique qu'un rejet des réformes imposées par la Troïka au nom du paradigme monétariste. L'octroi de délais supplémentaires à la Grèce et à l'Espagne ne changera rien tant le «déficit par les

résultats» des réformes en cours et annoncées est évident.

Construire la nouvelle gouvernance économique par le droit (*Six Pack*) et la renforcer (*Two Pack*) en restreignant davantage encore les prérogatives nationales comporte un danger, celui d'imposer des règles venues d'un «en haut» européen sur lequel les opinions publiques nationales n'ont pas prise. La question de la légitimité de la Commission européenne, une institution non élue, pour imposer des sanctions et s'immiscer dans la confection des budgets nationaux reste entière (69).

Pour être qualifié de démocratique, un système politique doit être réversible. Ainsi que l'avait analysé Karl Popper, cela suppose qu'il soit possible de le modifier. Selon sa conception, «*[l]a démocratie n'est rien d'autre qu'un système de protection contre la dictature*» (70). Qu'il s'agisse du traité budgétaire ou de l'avènement du «gouvernement économique composé», l'Union européenne demeure plus que jamais confrontée au défi de l'irréversibilité de choix idéologiques lourds de conséquences et dont on ne peut que redouter les

dégâts politiques et sociaux tant niveau national qu'europpéen.

Récemment, le président de la BCE a appelé à la constitution d'un «espace public européen» tout en avertissant que: «*Les citoyens de l'Union ont besoin d'un accord de base, que dans une Union économique et monétaire, certains modèles économiques ne sont plus possibles. En d'autres mots, on a besoin d'un nouveau consensus sur les politiques économiques qui rendra vigueur au modèle social européen et l'adaptera pour le 21<sup>ème</sup> siècle*» (71).

L'Union européenne est peut-être au bord d'une «falaise démocratique» en raison du fossé qui semble devenir un gouffre abyssal entre les élites et les opinions publiques européennes et de la rigidification d'un cadre qui rend quasi impraticables les nombreuses alternatives aux politiques d'austérité, basées sur une vision de l'avenir dans lequel le concept de «compétitivité» n'a plus la priorité.

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# SECTION IV: THE EURO CRISIS AT THE NATIONAL LEVEL

# 11. THE EURO CRISIS AND NEW DIMENSIONS OF CONTESTATION IN NATIONAL POLITICS

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# 1. Introduction

The double 2012 elections in Greece brought a political earthquake that shook the party system. Electoral volatility exploded, the number of effective parties increased and the party system found itself divided not along the traditional left-right lines but along the lines of a new division, being in favour or against the EU/IMF bailout agreement. This paper argues that this division did not appear in a political vacuum, but it developed on the basis of pre-existing divisions capturing the underdog ethnocentric culture versus the cosmopolitan approach. This dimension was capitalized by smaller parties to capture the vote of globalization losers (Kriesi et. al. 2008) but its mobilization effect was rather insignificant. The crisis created the unique circumstances that allowed a marginalized issue dimension to dominate the political scene and to mobilize voters to the same or even greater extent than the until then dominant left-right dimension.

The paper is divided into five sections. The first section discusses the development of the Greek party system from 1981 onwards in terms of dominant political dimensions of contestation and the

emergence of the bailout dimension. The second section discusses the rise of the “other dimension” referring to the slow but consistent development of the ethnocentric versus cosmopolitanism political division. In this section are also hypothesis formulated about the issue evolution and the overlapping of the ethnocentric versus cosmopolitanism and the EU/IMF bailout dimensions. The third section describes the data used and the methods employed in this study. The fourth section elaborates on the results and the final section provides a discussion on the findings.

## 2. The Greek party system and the emergence of the bailout dimension

As in most European democracies the left-right dimension is perceived as the main dividing line in Greece. As it endurs in society, it determines voting behaviour and can explain the divisions within the party system (Lyrintzis 2005: 244). Indicative of the prominence of the left-right division since 1981 is the dominance of the two large Greek parties, PASOK and New Democracies, which have been alternating in single party governments, with a short break in 1989, until the seminal 2012 elections (Pappas 2003). PASOK that spend twenty two years in government since 1981 was founded in 1974 becoming the personification of social democratic programmatic trajectories in Greece. New Democracy was also founded in the same year presenting a mixture of conservative and Christian Democratic policies.

The two major Greek parties incorporated in their organization characteristics of cartel (Katz and Mair 1995, Koole 1996) and catch-all parties (Gemenis and Nezi 2012). Using state funding, me-

dia regulation and manipulation of the electoral system on the one hand (Papatheodorou and Machin 2003), they attracted candidates purely on the bases of the size of their political clientele, instead of ideology (Pappas 2009). In this way both parties consolidated their dominance strategically absorbing potential political forces in the spectrum between them and in the extremes. New Democracy was more successful at it as it managed to completely absorb the extreme right until the late 1990s (Pappas and Dinas 2006). PASOK occupied the centre-left side of the spectrum as the extreme left was dominated by a small pole of leftist and communist parties.

Under these conditions, there was not enough space left for political parties to compete in terms of left-right. The survival of small new parties could only depend on redirecting the political competition on more innovative issues (de Vries and Hobolt 2012). Apart from the parties belonging to the left pole, the only small party that sur-

vived for more than one legislative period was the far right populist LAOS. This New Democracy splinter party founded in 2000 introduced new politics issues opening the door for a new dimension of party competition. Gemenis and Dinas (2010: 189) demonstrate the emergence of a new cleavage with high polarization among Greek parties including issues such as: nationalism, immigration, morality and civil liberties. In this cleavage parties belonging to the ideological centre of the left-right dimension are found on the progressive/cosmopolitan extreme while parties on the extremes of the left-right dimension are found on the ethno-centric/authoritarian extreme.

Halkiopoulou et. al (2012) further defined the emerging division demonstrating that it is actually two different dimensions: on the one hand 'progressive/authoritarian', incorporating issues on ethnic and cultural nationalism and moral issues where extreme left parties are found on the progressive end and LAOS is found on the authoritarian side. On the other hand there is a dimension of 'cosmopolitan/ethnocentric' that incorporates territorial and economic nationalism where all extreme parties cluster on the ethnocentric side

while all mainstream parties on the cosmopolitan side. Despite the existence of this dimension it did not appear as significant until the debt and budget deficit crisis took over the Greek political debate.

Prime minister Papandreou's announcement on April 23<sup>rd</sup> 2010 that he had asked for the activation of the bilateral European Union and International Monetary Fund aid package came unexpectedly to the masses considering the October 2009 election was won by PASOK under the promise of a 3 billion euro stimulus package (Gemenis 2010: 360). In fact in the beginning the electorate was expecting the country to get out of the crisis quickly and with minimal costs. Following Papandreou's request the 'troika' (namely representatives of three international institutions: the European Commission, the European Central Bank and the International Monetary Fund) negotiated a bailout agreement which imposed severe budget cuts. The dilemma for political parties then was clear: should they support the bailout agreement as an international commitment of Greece or should they oppose it considering the popular dissatisfaction it would cause?

Gemenis and Nezi (2012) argue that the choice made by political parties was dictated neither by consensus nor by ideological constraints. It was purely a strategic choice, even though different parties chose different goals. Vote-seeking parties opposed government bills implementing the bailout agreement considering the public uproar that these new policies would bring. Office-seeking parties tried to increase their credibility by becoming more responsible and trustworthy in order to attain government portfolios. Policy seeking parties did not have the opportunity to negotiate the bill, bringing it to a shape they believed more appropriate for the needs of Greece.

The four key economic bills, the one investiture vote for the Papademos government and the two elections allowed some Greek political parties to change their position in and out of government and in and out of parliament, thus to change their goals and consequently their strategic choices. Table 1 below shows the tactics followed by the main political parties across the four bills and the one investiture vote covering the period from the first memorandum in May 2010 until the third Memorandum in November 2012. For almost

every strategic choice parties had MP losses (eg PASOK, ND, LAOS and Democratic Left). Some MPs decided to resign the party whip and follow their own conscience or in other words to try a personal instead of a party strategy. Initially these defections resulted in splinter groups<sup>1</sup>.

The content of the bailout agreements as negotiated with the 'troika' were in line with neoliberal ideology. In a nutshell the first memorandum included a series of liberal reform requested by the 'troika' in order to ensure short term financial liquidity necessary for the country not to default on its debts. These reforms were far from social democratic traditions represented in the Greek parliament by the very party that negotiated them, PASOK. In this way, the government being elected on the basis of a large stimulus package (Gemenis

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1. Two examples: 1. Bakoyannis left ND to found Democratic Alliance in November 2010 only to resolve it and return to New Democracy after the party's failure to enter the parliament in May 2012 election. Samaras negotiated with Bakoyannis for her to lead the nationwide list of New Democracy, and thus secure a place in the parliament. 2. As a result of voting against the PASOK Party line for the second memorandum ex-minister Katseli was expelled from PASOK and founded the short-lived Social Agreement party. The May 2012 election did not offer a parliament entry to this party.

Table 1: Party lines regarding the bailout agreement legislation.

	Memorandum 1 (May 2010)	Midterm fiscal Plan (June 2011)	Investiture Vote for Papademos Government (November 2011)	Memorandum 2 (February 2012)	Memorandum 3 (November 2012)
PASOK	Yes	Yes	Yes	Yes	Yes
ND	No	No	Yes	Yes	Yes
SYRIZA	No	No	No	No	No
KKE	No	No	No	No	No
LAOS	Yes	No	Yes	Not present	n/a
Democratic Left	n/a	No	No	No	Abstain
Independent Greeks	n/a	n/a	n/a	n/a	No
Golden Dawn	n/a	n/a	n/a	n/a	No

2012), ended up going against its ideology and its programmatic positions.

The main opposition party, New Democracy, came from the Christian Democratic/ Conservative traditions. In economic left-right terms liberal reforms were not undesirable by the party. However, what dominated was, on the one hand the strong focus on national identity of the newly

elected leader, Samaras, (Nezi, Sotiropoulos and Toka 2010) and the strategic consideration of not get the blame for the government choice. As retrospective evaluations of the economy are expected to negatively impact the electoral performance of the incumbent (Nezi 2012) Samaras avoided associating his party with unpopular government choices. This approach towards the bailout agreements changed once New Democracy became the

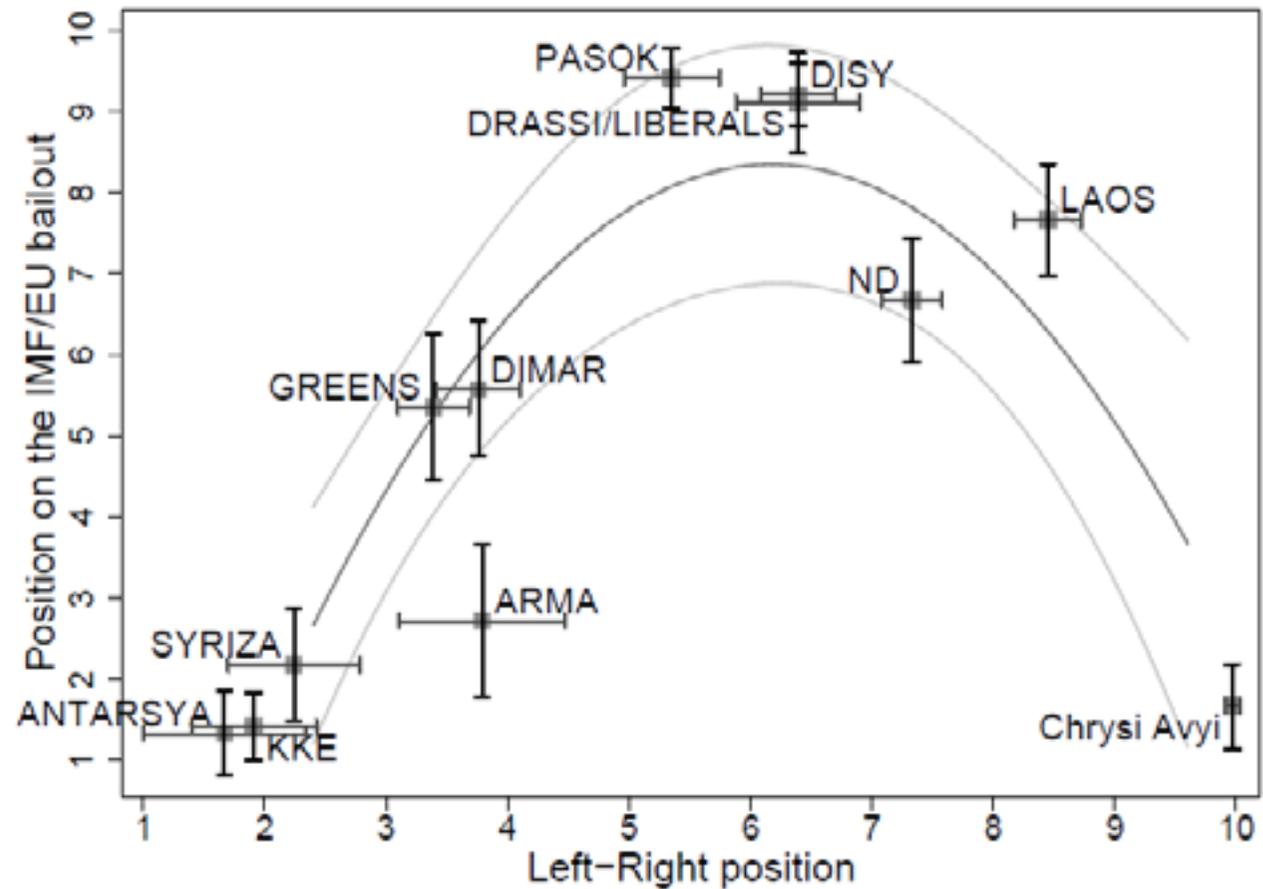
first party in the parliament after the June 2012 elections, allowing Samaras to become prime minister leading a tripartite coalition. This change brought the party closer to its expected liberal position on the economic left-right scale.

The main parties of the left pole, KKE and SYRIZA, remained true to their left wing positions by not supporting the bailout agreements on the ba-

sis of the unpopular budget cuts and deeply neo-liberal policies. SYRIZA's splinter group, Democratic Left<sup>2</sup>, was more moderate than SYRIZA itself and became part of the tripartite government headed by Samaras in June 2012. Thus, although in the beginning it opposed the bailout agreements on ideological basis and potentially vote-seeking considerations, in 2012 became office seeking and although not openly supporting, it tolerated the bailout agreement. LAOS, the populist right wing party, showed a office-seeking approach. Although it is mainly associates with ethnic values (Georgiadou 2008) putting the 'nation' first in every policy decision (Karatzaferis 2010) LAOS chose to present itself as a responsible party in times of crises, a trustworthy coalition partner. This strategy led to the participation of LAOS in the Papademos care-take government with one minister, one deputy-minister and two junior ministers. This success was short-lived as the double 2012 election did not allow LAOS to enter the parliament. Its voters did not appreciate the party's change of values and policies.

2. Founded June 27<sup>th</sup> 2010 as a protest against SYRIZA anti-EU ideological turn

Figure 1: Left-right and IMF/EU bailout positions of Greek Parties in 2011



Source: Gemenis and Nezi 2012

As we mentioned above, the party lines were broken many times in each of these legislative attempts. The MPs resigning the whip either formed splinter groups or switched parties. These changes may reflect ideological differences within the parties that the cartel system was until then suppressing or a personal strategy of the MP to survive the electoral results of the crisis. In any case the crisis became the catalyst of change. The left-right division became less important and the competition in the two elections of 2012 polarized between the two extremes of a new dimension: the IMF/EU bailout dimension.

Figure 1 shows the positions of political parties on the dominant two dimensional space as it developed after the first bailout agreements. It is taken from the Gemenis and Nezi (2012) technical report of the expert survey run in that year introducing for the first time the bailout dimension. It places all the relevant parties at the time showing also inter-coder reliability intervals. It is clear that more moderate parties on the left-right dimension are supporting a bailout agreement with the participation of IMF/EU while the parties located in the extremes

are against the bailout agreements preferring a ethno-centric solution to the crisis. This rule has of course exceptions. LAOS Democratic Left (DIMAR in the Figure) and the Greens are more pro bailout than it would be expected considering their position towards the edges of the left-right dimension. New Democracy is also a floating party at the 2011 period, that is neither for not against the bailout, trying not to sound too extreme as to lose credibility neither to be too supportive as to get the blame for the economic meltdown of the country.

### 3. The rise of the “other dimension”

The pro- and anti-bailout dimension did not appear in a political vacuum. Previous studies have shown that apart from the dominant left-right division in Greece, there was an emerging new politics dimension that was structured along the lines of centrism vs. radicalism. Gemenis and Dinas (2010) show that the Greek party system was distinguished along the lines of this new dimension between the centripetal political forces on the one hand and the extreme right and left parties on the other. Using an innovative way of coding party manifestos they captured the Greek political space in the 2004 European election based on three dimensions one of which was ‘Cultural Identity’. It included issues concerning the cultural identity of the EU such as nationalism, immigration, ethical issues, and civil liberties. The ‘European’ extreme was populated by PASOK and SYRIZA (or rather its predecessor party SYN) closely followed by New Democracy. The ‘national’ extreme represented the ‘underdog culture’ (Diamandouros 1993) occupied by LAOS and KKE. Although not claiming to measure post-materialism the authors

are convinced they capture party positions on the ‘libertarian-authoritarian’ division.

Similar findings were reported by Halkiopoulou et. al (2012), who identified a new cleavage in Greek politics between mainstream and radical parties. This study further refines the content of this ‘centrism vs. radicalism’ division by disconnecting the ‘libertarian-authoritarian’ division, which they accept to follow the same lines as the left-right division, from the ‘nationalism vs. internationalism’ division. Radical parties of both sides of the left-right spectrum embrace nationalist ideals. This nationalism leads them to a euroscepticism, together with a mixture of self-rule and national self-determination. Radical left and radical right parties embrace a similar stance on economic and territorial nationalism, but they are different when it comes to ethnic and cultural nationalism, hence their difference in the ‘libertarian-authoritarian’ division.

Based on this analysis we hypothesize:

*Hypothesis 1: The bailout dimension of contestation is the evolution of the pre-existing ethno-centric vs. cosmopolitan dimension*

*Hypothesis 2: Parties that after having chosen a position on the old ethno-centric vs. cosmopolitan dimension switched sides as it transformed itself into the bailout dimension, were punished electorally.*

This ethno-centric protectionist ‘underdog’ culture incorporates an ideological framework combining economic nationalism and a territorial integrity which leads to positions very hostile to the EU. This combination of ideologies is not a Greek phenomenon. De Vries and Edwards (2009) showed that radical parties across Europe both from the right and the left can adopt nationalist positions that effectively swing citizens opinions against European integration. This behaviour of small challenger parties is well documented by theories of issue evolution and manipulation. These show that ‘political losers’ in the party system can advance their position by introducing a

new issue dimension. The theory of ‘issue evolution’ by Carmines and Stimson’s (1986, 1989) argues that party-losers that do not stand real chances of gaining office promote conflict on new issue dimensions. This is a strategic choice that can only be successful if the issue is salient and if voters are aware of position differences and decide to behave electorally on the basis of the new polarization. De Vries and Hobolt 2012 show that these strategies are common also in European multiparty systems especially among those small challenger parties.

The cartel party system of Greece is a hybrid between a multi party and a two party system that especially promotes entrepreneurial strategies. As the two cartel parties occupy the central space and monopolize the 80-90% of the popular vote since the early 1980s, small parties have huge incentives to introduce dimensional conflict. De Vries and Hobolt (2012: 257) showed that challenger parties are in general those holding losing positions on the dominant dimension of political competition. The promotion of divisions such as the ‘authoritarian-libertarian’ or the ‘nationalism-cosmopolitanism’ divisions shifts the competition towards

the side of values and allows breathing space for the losing parties of the left-right dimension. These issue entrepreneurial strategies normally do not result into large scale realignments within the system, but they influence voters alignments and, at the end of the day election outcomes. Thus it is a matter of electoral survival for small challenger parties at the fringes of the party system to mobilize new issues, even if they only appeal to a small cohort of voters (Hug, 2001; Kitschelt, 1988).

The new bailout political division appeared suddenly, because of the external to the party system events of the crisis. Focusing on the dimensionality of this political division, De Vries and Marks (2012) would ask: *Is this dimensionality rooted in fundamental social conflicts or is it simply being founded in strategic considerations of party competition?* They define the strategic approach to dimensionality as a politicization of ‘a previously non-salient event, policy issue, or societal conflict and attempt to gear up public attention over this controversy’ (De Vries and Marks, 2012: 187). Greek political parties embraced the new bailout conflict seeing it as an opportunity to fulfil their goals. They positioned themselves strategically ex-

pecting that this time the public will not only perceive their difference to the mainstream parties, but it will also care about this difference, fulfilling the basic assumption for large scale mobilization (Carmines and Stimson, 1989: 161). The pro-anti bailout dimensionality was, thus, initially founded in strategic considerations of party competition with clear cut goals of either vote- office- or policy- seeking nature (Gemenis and Nezi, 2012). This was a clear case of a top-down case of dimensionality.

Their definition of a sociological approach to dimensionality requires political parties as programmatic organizations that mobilize and are responsive to ideologically self-selected activists and leaders as well as to voters. These voters are expected to have durable social characteristics, leading them to identify with certain political parties and not with others (De Vries and Marks, 2012: 186).

We argue that this ethno-centric vs. cosmopolitan dimension was initially a strategic choice of radical parties in the two extremes of the left-right spectrum, but the crisis created the conditions for a fully fledged –fundamental social conflict touch-

ing upon the very financial survival of several societal groups. As the 2012 elections despite their tremendous impact on the Greek party system, are only one point in time we hypothesize that we are finding ourselves in a transition period moving from strategic to sociological approach of a dimension of conflict. The financial crisis will work as the catalyst event that transforms a strategic policy division into a political cleavage. Based on this analysis we can now hypothesize that:

*Hypothesis 3: Voters in the 2012 May and June elections mobilized on the basis of the new ethno-centric vs. cosmopolitan dimension*

## 4. Data and Methods

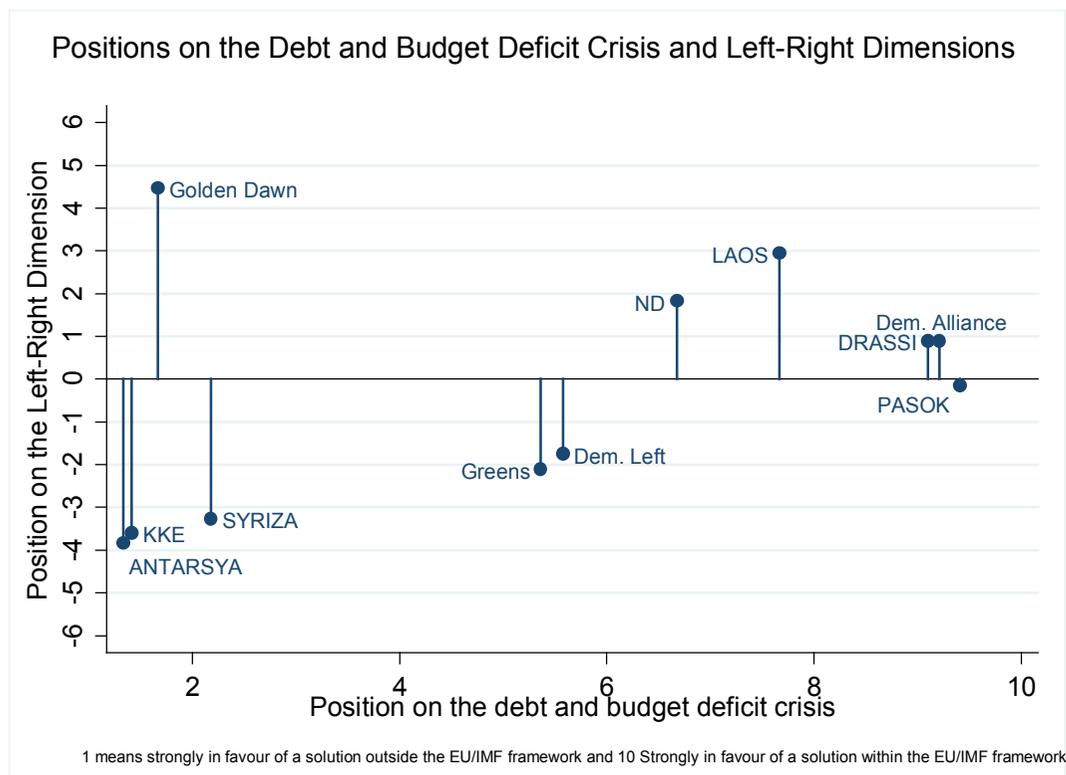
In order to test the hypothesis this paper uses data from different sources measuring party positions. Specifically we use expert coding data from the EU Profiler (2009) as an indication of the positions of political parties around the time of the 2009 European elections. Party positions on 2011 are taken from the Gemenis and Nezi (2012) expert survey. Finally party positions at the time of the two 2012 elections are taken by the 'Choose for Greece' (2012) voting advice application, which adopted an innovative coding system increasing intra-coder reliability. As these data use distinct scales we did not attempt to standardize them. Thus we need to focus on the clustering of political parties and their ranking within a scale. Absolute positions cannot be compared.

We place political parties on three dimensions: 1. European Union 2. Foreign Policy and 3. IMF/EU Bailout. In this way we try to identify whether the bailout dimension of contestation is following along the lines of the pre-existing ethno-centric vs. cosmopolitan dimension. In conjunction with these data we use electoral results from the last

four Greek elections in order to identify voter mobilization on the left-right and ethno-centric vs. cosmopolitan dimension of contestation.

## 5. Results

Figure 1: Positions on the Debt and Budget Crisis in 2011 (Source Expert Survey)



In the first part of the results we focus on the content and morphology of the bailout dimension of contestation. Figure one gives on the x axis the positions of political parties in 2011 (source: Gemenis and Nezi 2012) given their left-right position on the y axis. There are two clear clusters in the figure. On the one extreme “strongly in favour of a solution outside the EU/IMF framework” there are left wing ANTARSYA, KKE, SYRIZA and extreme right wing Golden Dawn. On the other extreme “strongly in favour of a solution within the EU/IMF framework we can find liberal DRASSI and Democratic Alliance (short-lived splinter group from New Democracy) as well as socio-democratic PASOK. Around the middle of the scale find themselves the Greens and Dem. Alliance (on the anti EU/IMF solution side) and ND and LAOS (on the pro EU/IMF solution side).

Figure 2: Positions on the Debt and Budget Crisis in 2012 (Source VAA)

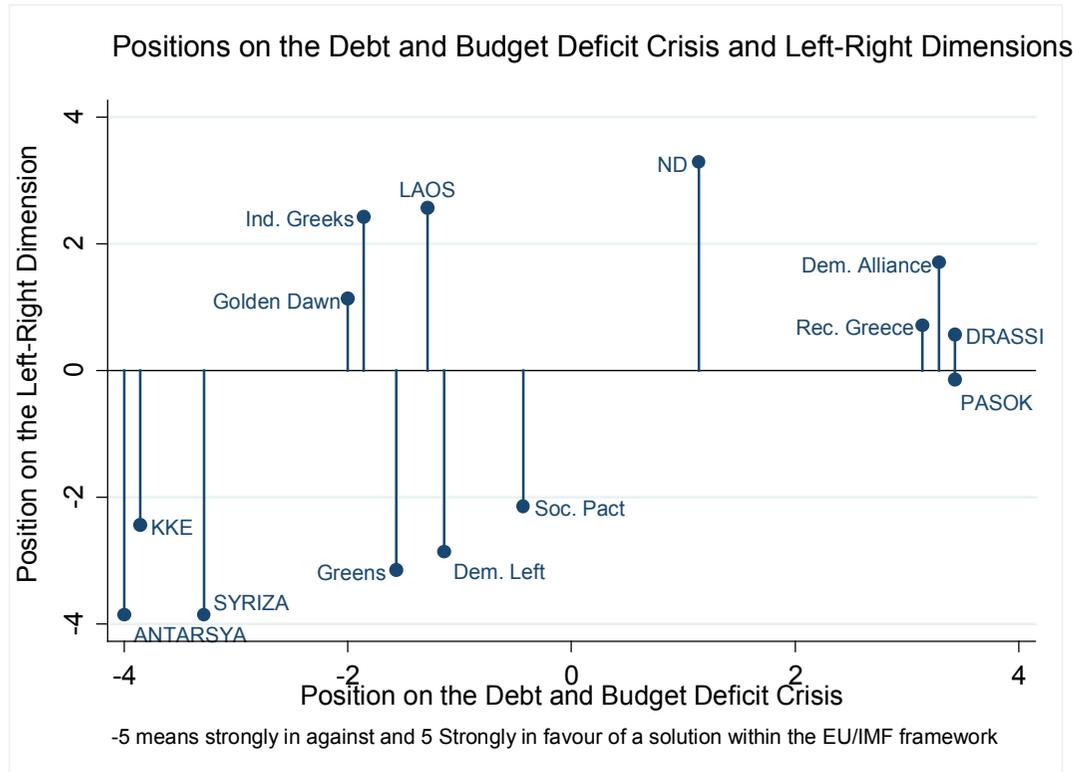


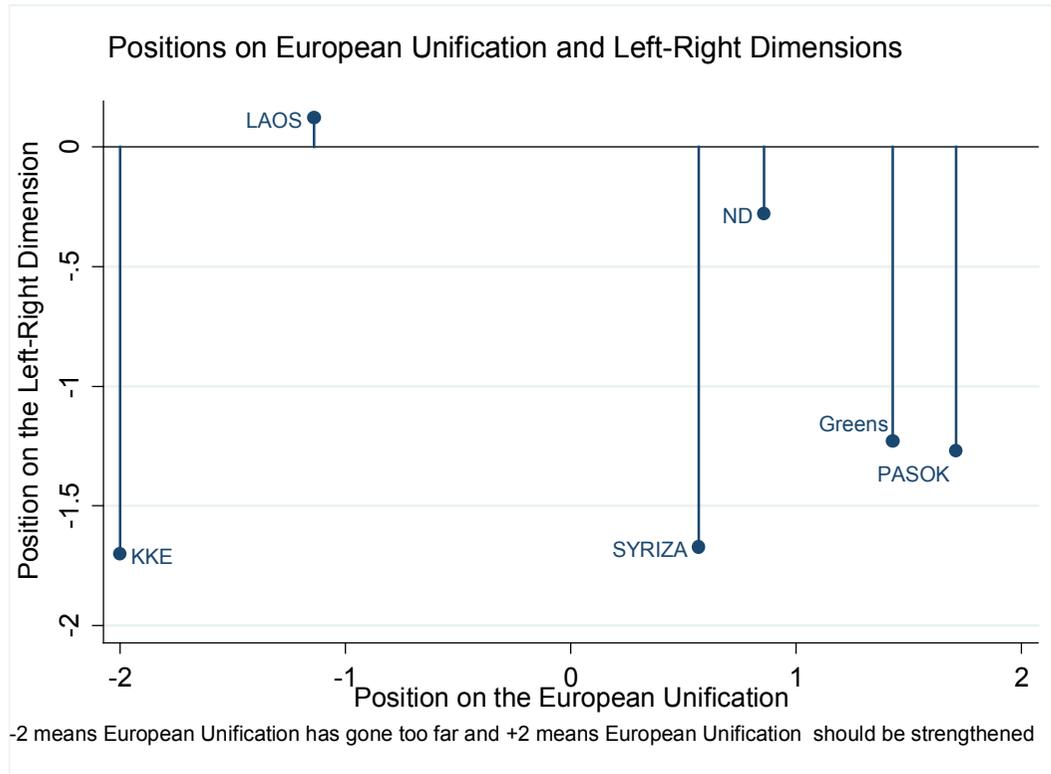
Figure two presents the results on the same dimension from 2012 as they were measured by the

‘Choose for Greece’ VAA coding. As this dimension is a scale produced by 14 items there is more

dispersion. We find however similar patterns. On the anti-EU/IMF solution extreme of the scale are left wing ANTARSYA, KKE, SYRIZA followed by the extreme right wing Golden Dawn and the populist New Democracy splinter group Independent Greeks. Nearer the centre of the scale are the Greens, LAOS, Dem. Left and Social Pact (short-lived PASOK splinter group). Crossing to the pro-EU/IMF solution side of the dimension New Democracy is found near the centre, while the extreme pro-EU/IMF solution cluster consists as before of liberal DRASSI, Democratic Alliance, and PASOK with the addition of a short-lived liberal party (Reconstruct Greece).

In order for this dimension to be an evolution of the pre-existing ethno-centric vs. cosmopolitan dimension, a similar clustering must be in place on the two other indicative dimensions: Foreign policy and EU integration/membership. Parties positioning themselves as opposing the EU/IMF solution to the crisis should position themselves as ethno-centric and anti-EU, while the opposite must be true for the parties choosing a pro-EU/IMF solution to the crisis. They are expected to be more cosmopolitan and pro-EU.

Figure 3: Positions on the European Union in 2009 (Source: EU Profiler)



Figures 3 to 6 show the position of political parties on the EU dimension (unification and membership) in 2009, 2011 and 2012 taken from our three data sources. Figure three presents the positioning of political parties on the European Unification issue prior to the 2009 European election, when only few suspected the crisis to come. On the positive extreme of the scale (European Unification should be strengthened) are clustered PASOK and the Greens as well as New Democracy and SYRIZA a bit closer to the centre of the scale. The negative extreme of the scale (European Unification has gone too far) finds KKE and LAOS clustered close together even though they come from opposite sides of the left-right scale.

Figure 4: Positions on the European Union in 2011 (Source: Expert Survey)

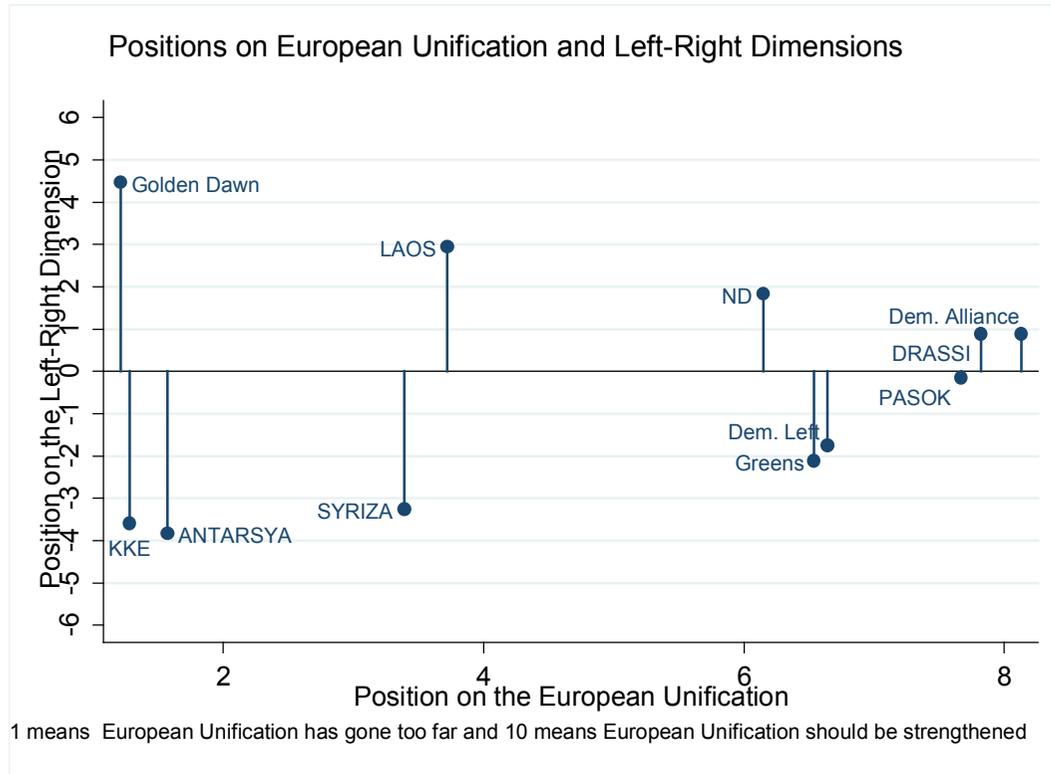


Figure 4 presents the same scale for 2011. More parties have become relevant as the crisis is taking its course. We find again PASOK and the Greens on the pro European Unification extreme of the scale. DRASSI and Dem. Alliance, the two liberal parties, join PASOK and New Democracy keeps its position closer to the centre of the scale. An important entry in the party system is the case of Democratic Left, which spitted off SYRIZA in June 2010 and placed itself on the positive extreme of the scale. It is clear that Dem. Left includes all pro EU forces of SYRIZA, as SYRIZA now moves his position to the anti- European Unification side of the scale. SYRIZA and LAOS are moderately anti European Unification, and the extreme is again occupied by KKE, joined now with ANTARSYA and Golden Dawn that have become politically relevant due to the crisis.

Figure 5: Positions on the European Union in 2012 (Source: VAA)

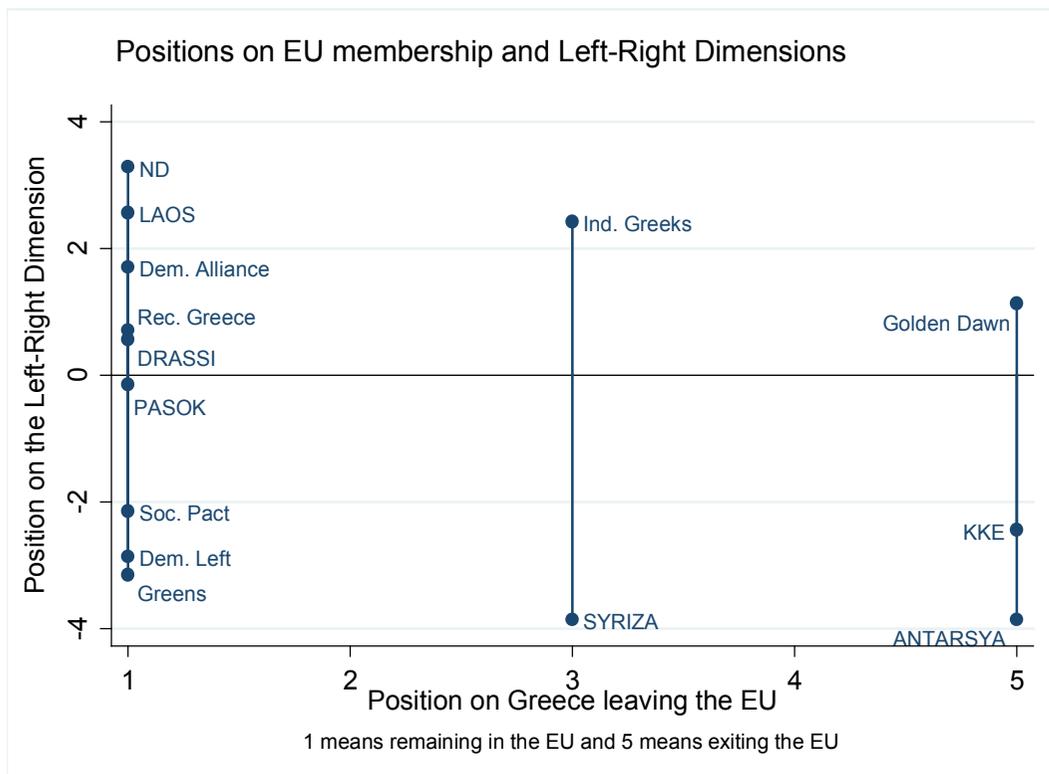


Figure 5 takes a different stance, presenting this time the question whether Greece should remain in or leave the European Union. The figure shows the positions of political parties at the time of the May and June 2012 elections. The positive extreme of the scale finds clustered all parties previously showing pro-EU positions (PASOK, the Greens, New Democracy, DRASSI, Democratic Left, and Democratic Alliance). Additional parties to the cluster are the new entries Social Pact (short-lived PASOK splinter group) and Reconstruct Greece (short-lived liberal party), and LAOS that now has switched sides on the EU issue. LAOS is in 2011 member of the Papademos government and is trying to present itself as a trustworthy government partner. It has put its office-seeking considerations ahead of its vote-seeking considerations. This is the case of a party described by Hypothesis 2. A party that after having chosen a position on the old ethno-centric vs. cosmopolitan dimension switched sides as it transformed itself into the bail-out dimension (see also Figure 1). We expect thus to see that LAOS is punished electorally. SYRIZA and Independent Greeks are placed in the neither/no position avoiding to truly shaping an opinion.

We now move our attention to another aspect of the ethno-centric vs. cosmopolitan dimension, foreign policy. Figures 6 and 7, show two different foreign policy questions, one for 2009 and one for 2011. Unfortunately the data could not provide the same question across time. The 2009 EU Profiler data offer a question on whether the EU has helped Greece to achieve its foreign policy goals. We expect this question to be a mixture of a pro-anti EU indicator and a ethno-centric/cosmopolitan indicator. Indeed in Figure 6 there is a similar pattern as in the other 2009 EU position Figure (3). We find PASOK and the Greens clustered on the positive extreme of the scale (*EU has helped Greece to achieve its foreign policy goals*). New Democracy follows on the positive side of the scale but closer to the centre. SYRIZA is ambivalent in the middle of the scale (neither/nor) demonstrating perhaps the ideological struggle between its two fractions that came to split into two parties in 2010. On the negative side of the scale we find KKE (*EU has not helped Greece*) and more moderately placed LAOS.

Figure 6: Positions on Foreign Policy 2009 (Source: EU Profiler)

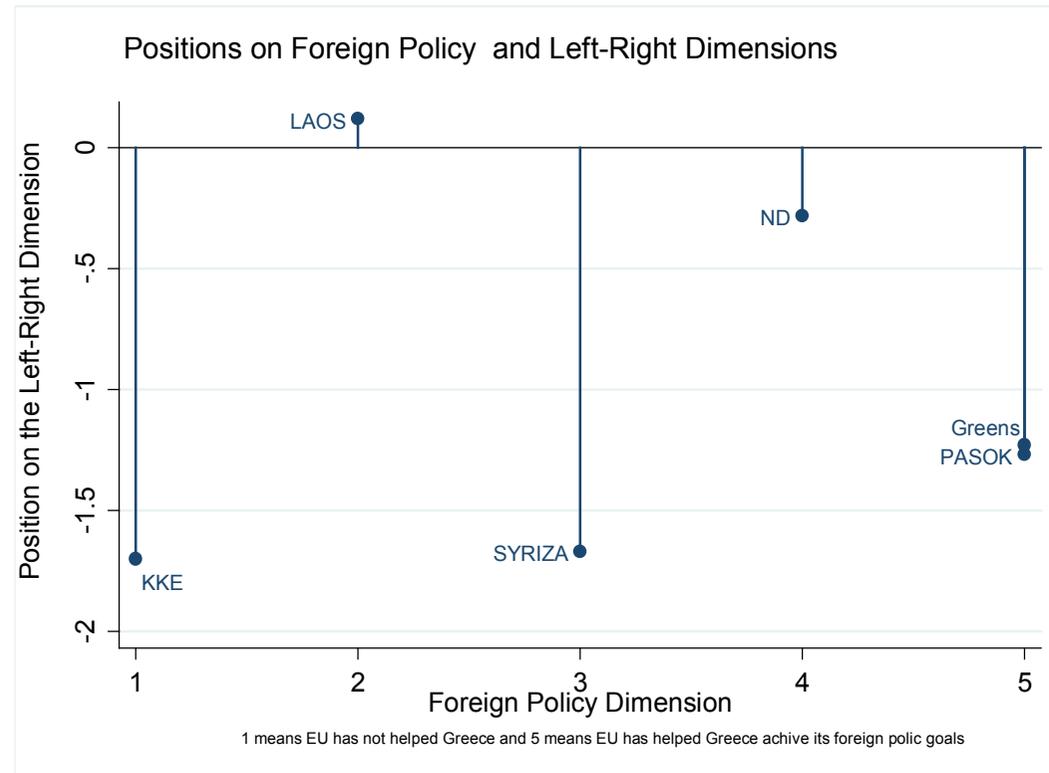


Figure 7: Positions on Foreign Policy 2011 (Source: Expert Survey)

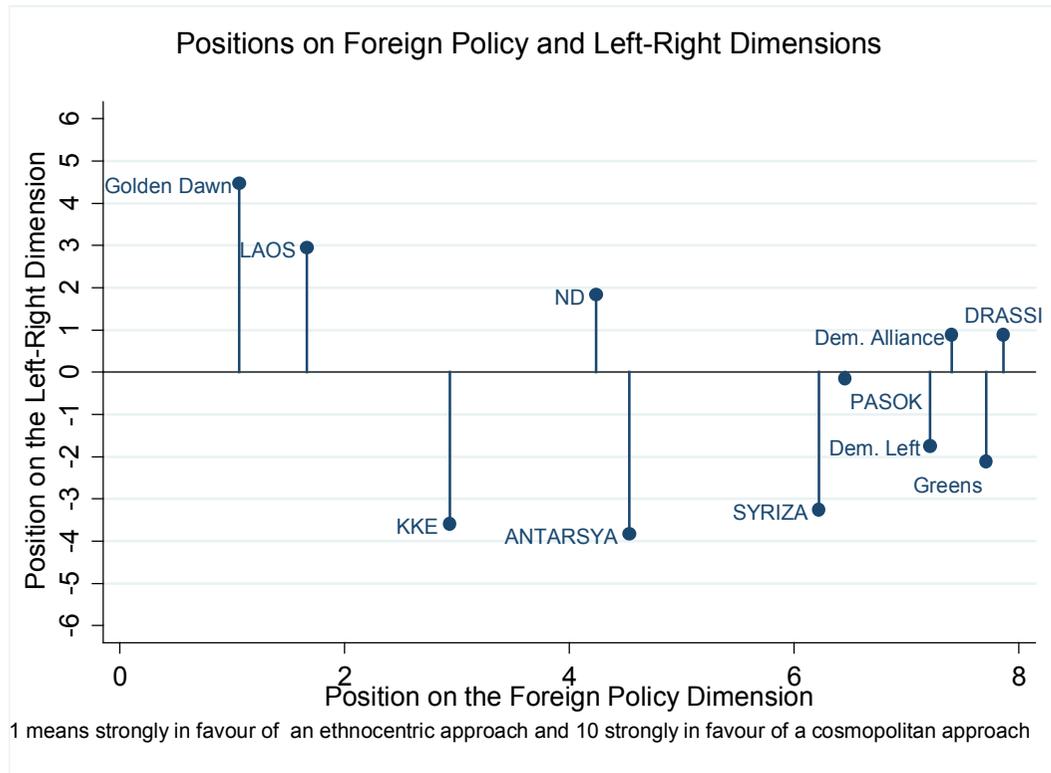


Figure 7 shows a different foreign policy approach placing parties on a dimension ethnocentric versus cosmopolitan foreign policy approach. Although the wording is different, practically this scale measures the same concept. As we see for 2011 political parties have similar placements as in Figure 6 but also as on the EU dimension (see Figures 3-5). On the cosmopolitan extreme of the scale we find again PASOK and the Greens, accompanied as expected with the liberal forces DRASSI and Democratic Alliance and the SYRIZA splinter group, Democratic Left. At the time we find also SYRIZA placed moderately on the cosmopolitan side while extreme left ANTARSYA and main opposition party New Democracy are found in the middle of the scale. On the ethnocentric approach Golden Dawn and LAOS are on the extreme of the scale, while KKE because of its communist internationalist past is more moderately ethnocentric.

Based on these placements we can be sure that to an extent the bailout dimension is the evolution of the pre-existing ethno-centric vs. cosmopolitan dimension (Hypothesis 1). We find consistently PASOK, and the small liberal parties DRASSI Re-

construct Greece and Democratic Alliance consistently on the pro-bailout side, as well as the pro-EU and cosmopolitan side. New Democracy has placed itself on the positive side but rather close to the centre of the spectrum both on the EU/ethnocentric-cosmopolitan dimensions as well as on the bailout dimensions. We should keep in mind that from 2009 until 2012 we are focusing on a more conservative period of New Democracy, focusing rather on national pride. The other extreme of anti-bailout is consistently populated by parties like KKE, ANTARSYA, SYRIZA, Golden Dawn and Independent Greeks. All but SYRIZA are consistently placed also on the anti-ethnocentric side. This shows that political parties have not invented their positions on the bailout agreement but they relied on pre-existing ideological positioning on the EU/ethnocentric-cosmopolitan division.

We have however two deviant cases: SYRIZA and LAOS. SYRIZA was undergoing a period of ideological redefinition that coincided with the outbreak of the crisis. After the June 2010 split of the party that resulted in the creation of Democratic Left, SYRIZA embarked on a journey of radicalization until the June 2012 election. Thus what we

see depicted here is the slow but sure trajectory of SYRIZA from a moderate cosmopolitan position to a moderate ethnocentric position. This positional change is not empty of vote-seeking considerations. It is a strategic choice that was greatly rewarded making SYRIZA the main opposition party after the June 2012 election.

LAOS on the other hand, despite being placed on the anti-EU/ethnocentric side of dimension it chose to support the Papademos government and put forward its office seeking considerations. Thus it is placed in 2011 on the pro EU/IMF solution (Figure 1). Despite its swift change in the 2012 election, showing again an anti EU/IMF solution preference (Figure 2), LAOS was electorally punished. In fact it failed to gain a seat in parliament in either the May or the June 2012 elections. We see, thus, that switching sides is did not always have the same results. Parties that after having chosen a position on the old ethno-centric vs. cosmopolitan dimension switched sides as it transformed itself into the bailout/ EU/IMF solution dimension where only electorally punished if they moved from ethnocentric to cosmopolitan and not the other way around. The reason here is not

ideological, but represents the cost of unpopular reforms. Political parties on the cosmopolitan side had to bear the weight of budget cuts and structural changes and for that reason they were punished electorally. Thus hypothesis 2 is only conditionally accepted.

Our last hypothesis argues that voters in the 2012 May and June elections mobilized on the basis of the new ethno-centric vs. cosmopolitan dimension. Based on the above analysis of the ethnocentric versus cosmopolitan approach we divided political parties into two blocks. Table 2 shows the traditional Left/Right division as well as the division into an ethnocentric block and a cosmopolitan block. The ethnocentric block consists of the parties clustering themselves on the negative side of the EU, foreign policy and EU/IMF bailout scales. The cosmopolitan block consists of the parties clustering on the positive side of the EU, foreign policy and EU/IMF bailout scales. Based on the party categorization of Table 2 we move then to calculate the electoral share of each block in the elections from September 2007 onwards (Table 3). The results show us that the left-right division is still dominant. The electorate is divid-

ing almost in half between the left and the right block in every election. The ethnocentric-cosmopolitan divide however behaves in a very different way. Although it manages to mobilize 17% of the voters in 2007 and 18.1% in 2009 the vast majority remains on the cosmopolitan side of the cleavage. We find though that an explosion of this division's relevance happens in the 2012 May and June elections, where the voters divide themselves in half in the same way they do for the left-right divide. This confirms our third hypothesis showing that there as a significant mobilization of the population in terms of the ethnocentric versus cosmopolitan division.

Table 2: Party Blocks

Left/Right Division		Nationalist/Cosmopolitan Division	
Left Block	Right Block	Ethno-centric Block	Cosmopolitan Block
PASOK	ND	SYRIZA	PASOK
KKE	LAOS	KKE	ND
SYRIZA	Dem. Alliance	ANTARSYA	Dem. Alliance
ANTARSYA	Rec. Greece	Ind. Greeks	Dem. Left
Dem. Left	Golden Dawn	Golden Dawn	Greens
Soc. Pact	DRASSI		LAOS
Greens	Ind. Greeks		DRASSI
			Rec. Greece

Table 3: Election Results by Party Blocks

	Left/Right Division		Nationalist/Cosmopolitan Division	
	Left Block	Right Block	Ethno-centric Block	Cosmopolitan Block
September 2007	52.34	45.64	16.99	80.99
October 2009	58.57	39.85	18.06	79.91
May 2012	49.63	45.82	44.98	51.66
June 2012	51.2	47.26	46.21	52.25

## 6. Conclusion

The literature shows that entrepreneur parties are more likely to be small parties with nothing to lose (De Vries and Hobolt, 2012). The case of Greece presents a unique case in point where a secondary dimension used by smaller challenger parties crossed the boundaries of being a “challenger issue” and became not only a “mainstream issue” but the main dimension of contestation producing a government on the one side of it and the main opposition on the other. The secondary dimension of ethnocentric versus cosmopolitan was transformed through the major event of the Greek crisis into the bailout EU/IMF dimension. This increased the people who cared about this political issue, and forced many more people to incorporate it in their considerations and make it relevant to vote choices. Ultimately it was this dimension that affected the aggregate electoral choices and electoral outcome for the 2012 elections. This underlying political division became a cleavage once the citizens mobilized along these lines. Government and opposition were until the euro crisis competing along the left-right lines, while the crisis brought the old government and

opposition parties on the one side of the centrism vs. radicalism cleavage giving way to a radical, nation-centric, anti-European party to become the main opposition party.

From the perspective of spatial voting theory as Enelow and Hinich (1984) put it in a situation like this voters should be more likely to vote for a party that is closer on that dimension, all other things being equal. The open question for research remains open: How did citizens shift their voting criteria from considerations on the left-right dimensions to considerations on the bailout IMF/EU dimension? In other words, when do ‘challenger issues’ become ‘mainstream issues’? Another consideration for future research is to disentangle the party positions on the IMF/EU bailout dimension and the voting behaviour around this division from the effect of government and opposition. Parties with governing potential chose to support the IMF/EU bailout agreement and they were electorally punished, while those who chose to oppose it gained significant shares of votes. The question remains to what extent this alignment is

based on a simple anti-government feeling or if it has deeper roots in the ideological ethnocentric vs. cosmopolitan dimension, as this paper claims.

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# 12. CAN FISCAL COUNCILS ENHANCE THE ROLE OF NATIONAL PARLIAMENTS IN THE EUROPEAN UNION? A COMPARATIVE ANALYSIS<sup>1</sup>

*Cristina Fasone & Elena Griglio*



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Her main fields of research concern national and regional parliaments in the European decision-making process (on which she has recently authored: "Interparliamentary Cooperation and Democratic Representation in the European Union, in S. Kröger, D. Friedrich (eds.), *Democracy and Representation in the EU*, London, Palgrave MacMillan, 2012, p. 41-58), transnational judicial "dialogue", and parliaments and forms of government in comparative perspective. On this latter topic, in particular on the relationship between parliamentary committee systems and forms of government, she wrote her Ph.D. thesis and then her monograph (*Sistemi di commissioni parlamentari e forme di governo*, Padova, Cedam, 2012). In order to broaden her knowledge about parliaments she was intern at the European

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1. Although this is the result of a joint work of the two authors, Cristina Fasone drafted Sections 1, 3 and 4, while Elena Griglio drafted Sections 2, 5 and the figures. The conclusions have been jointly drafted by the two authors. We would like to thank Giacomo Delledonne, Prof. Sergio Fabbrini, Prof. Nicola Lupo, Dr. Aleksandra Maatsch, Prof. Andrea Manzella, Prof. Yves Mény, and Dr. Riccardo Pelizzo for their comments. The usual disclaimers apply.

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# 1. Introduction

Fiscal Councils, as technical bodies in charge of monitoring and assessing the compliance with budgetary, fiscal or even macroeconomic indicators and acting independently from political (and thus fiscal) authorities,<sup>2</sup> have been established since the 1960s, albeit in a minority of countries.<sup>3</sup>

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2. According to the set of 'Principles for Independent Fiscal Institutions' drafted within the OECD framework in 2012, Fiscal Councils are 'publicly funded independent bodies under the statutory authority of the executive or the legislature which provide non-partisan oversight and analysis of, and/or advice on, fiscal policy and performance'.

3. The most notable example being perhaps the U.S. Congressional Budget Office, in operation since 1975: see Nooree Lee (2008), *Congressional Budget and Impoundment Control Act of 1974, Reconsidered*, in *Briefing Paper no 34*, Harvard Law School, University of Harvard, p. 1 ff. and Philip G. Joyce (2011), *The Congressional Budget Office: Honest Numbers, Powers, and Policy Making*, Washington D.C., Georgetown University Press, p. 207 ff. In Europe, most Fiscal Councils have been established since 2009, thus in connection with the financial crisis. See OECD, *Parliamentary Budget Officials and Independent Fiscal Institutions*, 4th annual meeting, Background document no 3 for the Session on Discussion on Draft Principles for Independent Fiscal Institutions, Paris, 23-24 February 2012, p. 2.

Although scholars and international and supranational organisations have always underlined the importance of such institutions for having sound public accounts and sustainable growth, it was only in the new century that the financial and the Euro crises gave the most significant input for the setting up of Fiscal Councils, in particular in the European Union (EU) Member States.<sup>4</sup>

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4. See Lars Calmfors (2011), *What should Fiscal Councils do?*, CESifo Working Paper No. 3382, March 2011, available at: [www.cesifo.org/wp](http://www.cesifo.org/wp) and Sergio Fabbrini (2012), *I quattro doveri della politica verso i cittadini*, in *Il Sole24Ore*, 19 September, p. 1. As for the position of the International Monetary Fund, see Anthony Annett *et al.* (2005), *Reforming the Stability and Growth Pact*, in *IMF Policy Discussion Paper*, 05/2, available at: <http://www.imf.org/external/pubs/ft/pdp/2005/pdp02.pdf>, and Manmohan S. Kumar and Teresa Ter-Minassian, eds. (2007), *Promoting Fiscal Discipline*, Washington D.C., International Monetary Fund; the OECD recommended the establishment of Fiscal Councils in several *Economic Surveys by Country*, available at: <http://www.oecd.org/eco/surveys>; in the EU the European Central Bank and the European Commission have always supported the setting up of such institutions: see, for example, European Central Bank (2010), *Reinforcing Economic Governance in the Euro Area*, 10 June, p. 7 ff., and European Commission (2010), *Enhancing Economic Policy*

In the last few years both national governments and EU institutions have made the establishment of Fiscal Councils in the Member States compulsory. Indeed, Fiscal Councils have been identified as one of the tools for limiting the growth of public deficits and debts, favouring the adoption of more responsible and technically-meditated political decisions.

To date, the literature has mainly focused on the impact of Fiscal Councils for maintaining tight fiscal discipline and on the effectiveness of their role as 'watchdogs', examining their independence from the fiscal authorities, namely, the parliament and the executive. However, this debate seems vitiated by the bias of treating these two branches of government as though they undertook the same role within the budgetary and fiscal decision-making process. Instead, a more careful look at the relevant national discipline reveals that, in parliamentary forms of governments, such as those of most EU Member States, the national parliaments are usually less influential on fiscal decisions and less equipped with information on

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*Coordination for Stability, Growth and Jobs – Tools for Stronger EU Economic Governance*, COM(2010) 367/2, Brussels.

fiscal policy than the executives.<sup>5</sup> This evidence is further strengthened by the fact that the European measures of the new economic governance, urging tighter fiscal discipline, in principle reduce the room that national parliaments have for manoeuvre and, instead, increase the degree of inter-governmentalism of the decision-making process.<sup>6</sup>

Moreover, the position of Fiscal Councils needs to be framed within the particular context of the EU and of its Member States, in which national parliaments have normally been considered as the ‘latecomers’ or the ‘losers’ of the European integration process.<sup>7</sup> Since the Treaties of Maastricht and

Amsterdam, and most evidently since the Treaty of Lisbon, however, national parliaments have gradually experienced an upgrade of their role in the EU. National parliaments have constantly transformed and adapted themselves, from their marginalisation,<sup>8</sup> then Europeanisation,<sup>9</sup> and finally to their rehabilitation and strengthening in the EU.<sup>10</sup> The establishment of Fiscal Councils, independent of, but accountable to, parliaments, can possibly enhance the role of parliamentary institutions in the European framework and in the economic governance. Fiscal Councils can provide parliaments with a further source of information, independent from the executive, whose

legitimacy relies on the technical competence and the merit of its members. By monitoring the executive on the grounds of the financial effects of its policy options, by providing macroeconomic forecasts, and by making the results of their analyses publicly available, Fiscal Councils are not only able to improve the credibility and the transparency of fiscal decisions, but they can also re-inforce parliamentary *ex ante* scrutiny and oversight on budgetary matters, and, ultimately, the weight of the parliaments in European economic governance. In other words, depending on the constitutional system and on the political culture of the Member State concerned, an independent Fiscal Council can also affect the parliament-executive relationship, in terms of inter-institutional balance and in terms of the outcomes of the current euro-national fiscal procedures.

Thus, set within the present debate on the changing role of national parliaments in the EU, the paper is intended to examine, by means of a comparative analysis, the setting up of Fiscal Councils under the perspective of national representative assemblies, and tries to answer the following research question: To what extent and under what conditions can Fiscal Councils contribute to im-

5. See, for example, Riccardo Pelizzo *et al* (2005), *The Role of Parliaments in the Budget Process*, Washington DC, World Bank Institute.

6. On the ‘new wave’ of inter-governmentalism brought by the new economic governance, see Paolo Ponzano (2011), *Méthode intergouvernementale ou méthode communautaire: une querelle sans intérêt?*, in *Les Brefs de Notre Europe*, n. 23, p. 2-3, Uwe Puetter (2012), *Europe’s deliberative intergovernmentalism: the role of the Council and European Council in EU economic governance*, in *Journal of European Public Policy*, vol. 19, n. 2, p. 161-178, and Sergio Fabbrini (2013), *Intergovernmentalism and Its Outcomes: The Implications of the Euro Crisis on the European Union*, in *LUISS School of Government Working Paper Series*, n. 1, forthcoming.

7. The expressions ‘losers’ and ‘latecomers’ referred to

national parliament in the EU are taken from Andreas Maurer & Wolfgang Wessels, eds. (2001), *National Parliaments on their Ways to Europe. Losers or Latecomers?*, Baden Baden, Nomos Verlag.

8. See Philipp Kiiver (2006), *The National Parliaments in the European Union: a Critical View on EU Constitution building*, The Hague, Kluwer Law International, p. 15 ff.

9. See, for example, Katrin Auel (2005), *Introduction: The Europeanization of Parliamentary Democracy*, in *Journal of Legislative Studies*, vol. 11, n. 3-4, p. 303-318.

10. On the rehabilitation, in prospects, of national Parliaments in the EU, see John O’Brennan & Tapio Raunio, eds. (2007), *National Parliaments within the enlarged European Union: from Victims of Integration to Competitive Actors?*, London-New York, Routledge.

prove the position of national parliaments within the framework of the European economic governance, in particular in their relationship with national executives?

In the end, the establishment of a re-inforced cooperation between the parliament and the Fiscal Council can contribute to strengthen the independence of the latter and to promote a more effective implementation of fiscal rules.

The paper is devised as follows. Section 2 considers the crucial feature of the independence of Fiscal Councils, to be assessed differently when looking at the parliaments or at the executives; Section 3 refers to the theoretical framework of the paper, the tension between the marginalisation and the enhancement of national parliaments in the EU, and how it is affected by the setting up of Fiscal Councils; Section 4 analyses how the European measures, either those in force or those whose adoption has been almost completed, can connect Fiscal Councils to national parliaments; Section 5 analyses the setting up of Fiscal Councils in five case-studies, Belgium, France, Germany, Italy and the UK, selected upon the basis of the institutional architecture in the national systems, of the rela-

tionship between the Fiscal Council and the parliament, and of the moment of creation of independent fiscal agencies. Finally, Section 6 tries to draw the first conclusions about the effects of the establishment of Fiscal Councils on the position and the powers of national parliaments in the EU.

## 2. Fiscal Councils... Independent from the Government or from the Parliament?

In describing the institutional features that Fiscal Councils, across countries, have in common, the literature has usually cast its attention on those fundamental rules which tend to grant such institutions a consistent degree of autonomy from the political bodies and non-partisanship. In particular, what has been clearly pointed out is that the mandate of the Councils must satisfy several criteria,<sup>11</sup> concerning the nature of the agency's mandate (which should be 'unambiguous and achievable, and the delegated responsibility should have an economic rationale'), the way in which the Council fulfils its tasks (it must be granted complete autonomy in carrying out its mission), and, above all, its relationship with the political sphere (which should make the Council fully independent of the governing institutions). The pre-requisite of the independence from po-

11. See Robert Hagemann (2010), *Improving Fiscal Performance through Fiscal Councils*, in *OECD - Economic Department Working Paper* n. 829, 9 December, available at: [www.oecd.org/Working\\_Papers](http://www.oecd.org/Working_Papers), p. 14; Lars Calmfors (2011), *What should Fiscal Councils do?*, cit., p. 16 ff.

litical influence, in its turn, has been reflected in a variety of rules (the so-called 'firewalls'), investing: the autonomy from politics in the Council's appointment of members and staffing (which can be evaluated by looking at the nature of the appointees, at who makes the appointment, at the relationship of the appointees from politics and at the staffing rules and procedures);<sup>12</sup> the formal influence exercised by the agency in the budget and fiscal process (in this field, what should be taken into consideration is the nature of the agency's mandate, its policy objectives and its area of activities, its influence on government activity and

12. Lars Calmfors (2011), *The Role of Independent Fiscal Policy Institutions*, in *CESifo Working Paper* n. 3367, February 2011, available at: [www.cesifo-group.org/wp](http://www.cesifo-group.org/wp), p. 19-20; Lars Calmfors (2011), *What Should Fiscal Councils Do?*, cit., p. 16 has insisted on the possibility of achieving the independence of a Fiscal Council through: appointment procedures that seek to guarantee professionalism and the ground for appointment; long and non-renewable periods of office for the institution's decision-making body; restrictions on the government's freedom to fire the members of the institution's decision-making body.

its formal role in the budget process carried out by the parliament); the Council's funding (which is supposed to grant the agency its own revenues and degree of autonomy in the management of its accounts), and the accountability rules (investing, above all, the 'collective' accountability of the Council in the face of the government and of the parliament).<sup>13</sup>

Most investigations of the functional and structural features which should characterise all Fiscal Councils are based upon a basic assumption: that a Council can potentially contribute to improved fiscal performance only if it is granted effective independence from both the government and the parliament. The main reason behind the creation of such an agency is, in fact, to be found in the opportunity to limit the political influence regarding the technical aspects of fiscal-policy formulation or monitoring, and to provide for macroeconomic forecasts free of any significant bias which, in their turn, may contribute to improve the transparen-

13. According to Lars Calmfors (*Ibidem*), 'a council which is not held accountable in the short run may risk its independence in the long run', as it may get into conflict with the government which may then want to restrict its independence or reformulate its tasks.

cy of fiscal decisions and to increase the public awareness of the budgetary performance.<sup>14</sup> In other terms, the creation of a Fiscal Council is justified by the decision to delegate some aspects of fiscal policy to an unelected, but accountable, body, thus creating an antidote to deficit bias;<sup>15</sup> this does not imply a delegation of authority - with regard to the fiscal policy - to the fiscal agency, whose mandate is usually limited to the analysis and assessment of fiscal developments and policies.<sup>16</sup>

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14. Among other, see Robert Hagemann (2010), *Improving Fiscal Performance through Fiscal Councils*, cit., p. 10-11; Xavier Debrun & Manmohan S. Kumar (2007), *The Discipline-Enhancing Role of Fiscal Institutions: Theory and Empirical Evidence*, in J. Ayuso-i-Casals, S. Deroose, E. Flores & L. Moulin (eds.), *European Economy - Economic Papers*, n. 275, April 2007, p. 32, and Tatiana Kirsanova, Campbell Leith & Simon Wren-Lewis (2007), *Optimal Debt Policy, and an Institutional Proposal to Help its Implementation*, ivi, p. 288 ff. Among the Italian literature, see Daniele Cabras (2012), *Un Fiscal Council in Parlamento*, in [Federalismi.it](http://Federalismi.it), 17 October.

15. Xavier Debrun & Manmohan S. Kumar (2007), *Fiscal Rules, Fiscal Councils and All that: Commitment Devices, Signaling Tools or Smokescreens?*, in *IMF Working Papers Series*, 29 March, p. 479 ff., available at: [www.ssrn.com](http://www.ssrn.com).

16. Xavier Debrun, David Hauner & Manmohan S. Kumar (2007), *The Role for Fiscal Agencies*, in M.S. Kumar, T.T. Minassian (eds.), cit., p. 107.

For these reasons, the so-called ‘independence’ factor is considered to be the necessary premise for enabling the agency to affect fiscal-policy choices, and, according to part of the literature, to contribute to improved fiscal performances.<sup>17</sup> There are two ways to endow a Fiscal Council with effective independence:<sup>18</sup> by building up a solid reputation for impartial and competent analysis; and by setting up formal rules which protect the Council from external interference. As the first solution, based upon the technical reputation of the agency, is likely to take time, the second option is the one most often adopted when first establishing a Fiscal Council.

The above-described approach, which clearly interprets the interaction of Fiscal Councils-elected bodies as a possible *vulnus* in the guarantee of the agency’s independence and seems to find widespread favour in the literature, would need more cautious reflection. There is no doubt that any agency in charge of evaluating fiscal-policy formulation and implementation requires full autonomy

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17. Xavier Debrun & Manmohan S. Kumar (2007), *Fiscal Rules, Fiscal Councils*, cit., p. 485 ff.

18. Lars Calmfors (2011), *What should Fiscal Councils do?*, cit., p. 13.

from the subject in charge of the policy-making process in parliamentary forms of government, *i.e.*, the government: an adequate level of separation between the two institutions would turn the monitoring mechanism into a self-control activity devoid of real utility. This observation, however, cannot be completely applied to the relationship between Fiscal Councils and parliaments. From the functional point of view, the fiscal policy-making does not fall completely within the domain of the legislative body, which, in this field, is usually invested with more control than decision-making power. At the same time, from a structural point of view, it is unequivocal that the parliament does not embody a single political position, as is the case of the government, but, through the confrontation between the majority and the opposition, is able to offer those democratic checks and balances which represent, in themselves, a guarantee of independence.<sup>19</sup>

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19. See Petr Hedbávný, Ondřej Schneider, Jan Zápál (2005), *A Fiscal Rule that Has Teeth: a Suggestion for a ‘Fiscal Sustainability Council’ Underpinned by the Financial Markets*, in *CESifo Working Paper* n. 1499, July, p. 17 ff., available at: [www.ssrn.com](http://www.ssrn.com). The authors, in fact, propose the creation, at the European Union level, of a Fiscal Sustainability Council (FSC) in order to contrib-

For all these reasons, the present paper embraces a different approach to the relationship between Fiscal Councils and representative assemblies, based upon the idea that such interaction would not invalidate the fulfilment of the Fiscal Council's mandate, but would, instead, enrich the overall functioning of the *ex ante* and *ex post* scrutiny<sup>20</sup> circuit.<sup>21</sup> This perspective implies that the pre-requisite of the Fiscal Council's independence should

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ute to solve the bias of national governments excessive deficits. To work properly, the FSC 'must be independent from regular political-cycle considerations, *i.e.*, it must be shielded from member countries' national governments'. This remark does not prevent the authors from considering as recommended a close relationship between the FSC and the national Parliaments of the EU, which for instance should select and appoint FSC members.

20. In the present paper we use 'oversight' and 'ex post scrutiny' as synonym, when describing the control put in place by Parliaments on the implementation of the Executive's policies.
21. Many Fiscal Councils exercise, at the same time, both a forecasting and a monitoring activity, which respectively occupy the *ex ante* and the *ex post* stage. As observed by John Kay (2010), *A fiscal watchdog has no need of a crystal ball*, in *The Financial Times*, 22 September, 'governments cannot be relied on both to set targets and to monitor compliance with these targets'; as a consequence, the job which Fiscal Councils have, or should have, 'is therefore more akin to audit than to forecasting'.

instead be described in terms of co-operation and mutual support between the agency and the parliament. In this regard, it can be argued that Fiscal Councils, particularly when they have strong ties with parliaments, can re-inforce the position of the latter – traditionally seen as weak actors – in national decision-making processes dealing with the EU and fiscal matters (Section 3).

The soundness of such a thesis is assessed by considering two different levels of analysis as relevant. First of all, attention is brought to the European norms concerning the establishment of fiscal agencies, evaluating whether the functional and structural requirements concerning the creation of such bodies take (and in what ways) the relationship with the parliament into consideration (Section 4).

Secondly, some national experiences are deepened, with the purpose of empirically assessing what the (formal and informal) interaction between the existing (and the forthcoming) Fiscal Councils and respective legislatures actually is (Section 5). In order to isolate the different factors which influence such a relationship, five national cases have been selected, representing, re-

spectively: two Fiscal Councils established long before the present the economic and financial crisis, and characterised by a solid relationship with the executive (Germany and Belgium); the United Kingdom's Office for Budget Responsibility, a fiscal agency created during the Eurozone crisis (but formally not as an adaptation to EU law) which is closely-related both to the parliament and to the government; and two newly-established fiscal institutions (Italy and France), created in order to comply with the EU requirements.

With the purpose of evaluating the relationship linking such fiscal institutions with the legislative branch, four elements are taken into account in considering national experiences: the role exercised by the parliament in the appointment procedures; the capacity of the Fiscal Council to interact with the legislative process carried out at parliamentary level, and the procedures accompanying the submission and discussion of the agency's fiscal reports within the representative assemblies; the dependence of the Council's funding on a decision to be taken at parliamentary level; and the accountability rules which assure an evaluation of the elected assemblies with regard to the Fiscal Council's activity.

### 3. National Parliaments in the European Union: Marginalisation, Europeanisation, Revival?

Since the inception of the European Communities (EC), national parliaments have not fulfilled a primary role in the integration process. They have not been placed in the position in which they have real weight and actually count: when they were directly represented in the Parliamentary Assembly of the EC, this inter-parliamentary institution was simply a consultative body; after the first election of the European Parliament (EP) and, at least, until the 1990s, national parliaments were kept apart from the new decision-making powers assigned to the 'Assembly for Europe'.<sup>22</sup> National legislatures could prove to be effectively influential only

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22. The expression here is drawn from David Marquand (1979), *Parliament for Europe*, London, Jonathan Cape, p. 64-66, who advocated for the EP's direct elections and empowerment. Yves Mény (2011), *Can Europe be Democratic? Is it Feasible? Is it Necessary? Is the Present Situation Sustainable?*, in *Fordham International Law Journal*, vol. 34, n. 5, p. 1297, affirms that the EP 'plays a role that many national Parliaments could envy'.

at the moment of voting the authorisation to ratify European treaties and their revisions.<sup>23</sup>

However, in the early 1990s, it was argued that the position of national parliaments in the EU was extremely weak.<sup>24</sup> Because of the principles of supremacy and of direct effect, the laws at first approved by national parliaments can be superseded by European norms,<sup>25</sup> provided that they

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23. This was the case of the veto opposed by the French *Assemblée Nationale* to the Treaty on the European Defence Community in 1954. Such veto led to the failure of the project of a European Defence Community in the years to come.

24. For instance, before the Treaty of Maastricht was drafted, at the end of 1991, Joseph H.H. Weiler (1991), *The Transformation of Europe*, in *The Yale Law Journal*, vol. 100, n. 8, Symposium: International Law, p. 2430, affirmed that 'the executive branches of the Member States often act together as a binding legislator outside the decisive control of any parliamentary chamber'.

25. See the 'Factortame saga' and its impact on the UK principle of parliamentary sovereignty: in particular the decision of the Court of Justice on *The Queen v Secretary*

fall within the remit of the EU. Moreover, when European legislative acts were enacted, the parliaments in the Member States 'could not have second thoughts or control their content at the national, implementing level', nor was a 'tight ex ante control by national Parliaments on the activities of ministers in Community fora'<sup>26</sup> effectively in place at that time. However, some parliaments were (and possibly are) less marginal than others: an exception was, for instance, the Danish parliament.<sup>27</sup> Its model of binding mandate to the executive before the adoption of decisions in the Council of Ministers of the EC has inspired sev-

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*of State for Transport, ex parte: Factortame Ltd and others*, Case C-213/89 of 19 June 1990, ECR I-2433; the subsequent decision of the House of Lords of 11 October 1990, 2 LLR 365 and the following decision of the Court of Justice, Case C-221/89 of 25 July 1991, ECR I-3905.

26. See Joseph H.H. Weiler, *The Transformation of Europe*, cit., p. 2430.

27. Françoise Mendel (1980), *The Role of Parliament in Foreign Affairs in Denmark*, in A. Cassese (ed.) *Parliamentary Control over Foreign Policy*, Verlag-New York, Springer, p. 53-57 and, more recently, Finn Laursen (2001), *The Danish Folketing and Its European Affairs Committee: Strong Players in the National Policy Cycle*, in: A. Maurer & W. Wessels (eds.), *National Parliaments on their Ways to Europe. Losers or Latecomers?*, cit., p. 99-116.

eral other parliaments, although this mechanism was not exactly replicated in other Member States.

It is widely-acknowledged that parliaments are probably the most adaptable institutions to the changes in constitutional arrangements.<sup>28</sup> In spite of the century-old thesis of their institutional decline,<sup>29</sup> not only do parliaments exist in any democratic system, within or beyond the national level of government,<sup>30</sup> but they have also been able to undertake a variety of functions that has never been matched by any other institutions,<sup>31</sup> thus re-

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28. On the factors that favour and limit the institutional change, see Douglass C. North (1990), *Institutions, Institutional Change and Economic Performance*, Cambridge, Cambridge University Press, p. 27 ff.

29. See James Bryce (1921), *Modern democracies*, vol. II, New York, Macmillan, p. 367.

30. The Inter-parliamentary Union, the international organization of Parliaments established in 1889, is composed of 190 member Parliaments, of the United Nations Member States, plus 10 associate members, which are regional or supranational Parliaments. See <http://www.ipu.org>.

31. See Charles H. McIlwain (1947), *Constitutionalism Ancient and Modern*, Ithaca, NY, Cornell University Press, rev. ed., p. 93 ff. and Phillip Norton (2010), *La nature du contrôle parlementaire*, in *Pouvoirs*, n. 134, p. 5. Parliaments have acted as courts, as comptrollers and as legislators and, under exceptional circumstances, such as

inventing themselves at any time. With regard to the participation of national parliaments in the EU, again, a never-ending process of institutional adaptation has taken place, particularly when, after 1979, the parliaments lost their physical link-age to European institutions through the European Parliament.<sup>32</sup> This process, which has been described as ‘Europeanisation’, can be understood as a reaction to the national parliaments’ self-perception of ‘marginalisation’ in the European decision-making process.<sup>33</sup>

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revolutions, also as executive authorities. Recently, even an ‘international networking function’ has been recognised to national Parliaments: see Tapio Raunio (2012), *From the Margins of European Integration to the Guardians of the Treaties? The Role of National Parliaments in the EU*, in: S. Kröger & D. Friedrich, *The Challenge of Democratic Representation in the European Union*, London, Palgrave MacMillan, p. 180.

32. See Phillip Norton (1996), *Introduction: Adapting to European Integration*, in P. Norton (ed.) *National Parliaments and the European Union*, London, Routledge, p. 1-11.

33. See Katrin Auel (2005), *Introduction: The Europeanization of Parliamentary Democracy*, cit.; Robert Ladrech (2010), *The Europeanisation of National Politics*, London, Palgrave Macmillan; Tapio Raunio & Matti Wiberg (2010), *How to Measure the Europeanisation of National Legislature?*, in *Scandinavian Political Studies*, vol. 33, n. 1, p. 74-92; Astrid Spreitzer (2011), *Measuring the Euro-*

Thus, the ‘Europeanisation’ of national parliaments, on the one hand, entails a form of emulation of the most active legislatures – for example, the Danish *Folketing* and the UK House of Commons and House of Lords; interestingly enough, in two traditionally Eurosceptic countries – for what concerns, for instance, the relationship between the parliament and the government in EU matters (conferral of a mandate, scrutiny of European documents for addressing the executive’s conduct in the EU, and introduction of parliamentary scrutiny reserve). Although, in principle, leading to a sort of convergence with regard to the model of parliamentary participation in EU affairs, in practice, ‘Europeanisation’ can also determine differentiation amongst national systems. On the other hand, this phenomenon results in the attempt pursued by each parliament, strictly under the national perspective, to adapt its proce-

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*peanisation of national parliaments*, paper presented at the International Workshop ‘Changing Modes of Parliamentary Representation’, organized by IPSA RCLS and RECON WP3, 14-15 October, Prague; and Ulrich Sedelmeier (2012), *Europeanisation*, in: E. Jones, A. Menon & S. Weatherill, (eds.) *The Oxford Handbook of the European Union*, Oxford, Oxford University Press, p. 825-839.

dures and organisation to the EU decision-making process in the most suitable way to control and influence it. Throughout this adaptation process, the procedures and the organisation adopted could also differ a great deal from one parliament to another, taking the institutional, the political and the social features of the Member State concerned into account. This implies, for example, the choice of the shape and the composition of the parliamentary committee on European affairs or the preference for the schedule of parliamentary business that best accommodate the schedule of the European legislative process with the needs of the national context.<sup>34</sup> Parliaments can be more or

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34. There is one further dimension of 'Europeanisation', concerning the impact of European Union on national policies, that is not analysed here, since the present paper, although focused on fiscal and budgetary policies, is intended to examine the setting up of Fiscal Councils in terms of institutional balance and of possible strengthening of national Parliaments rather than dealing with the effects of national Fiscal Councils on the actual implementation of those policies. On the 'Europeanisation' of national policies, see Adrienne Héritier, Dieter Kerwer, Christoph Knill, Dirk Lehmkuhl, Michael Teutsch & Cécile Douillet (2010), *Differential Europe: The European Union Impact on National Policy-making*, Lanham, MD, Rowman & Littlefield, and Sylvain Brouard *et al.*, eds. (2012), *The Europeanization of*

less successful in their 'Europeanisation', depending on national constraints: thus, different levels of parliamentary 'Europeanisation' do exist.

These two dimensions of the 'Europeanisation' of national parliaments, *i.e.*, emulation and differentiation, both inherent to this process of adaptation, have been consolidated, while a gradual re-habilitation of the role of national parliaments in the EU has been fostered by the revisions of the Treaties, under the pressure of addressing the democratic problems of the European architecture.<sup>35</sup> Two Declarations (n. 13 and 14) annexed to the Treaty of Maastricht (1993), firstly, and the protocols on the role of national parliaments and on the application of the principle of subsidiarity and proportionality annexed to the Treaty of Amsterdam (1999), subsequently, provided for the first recognition – by European sources of law – of the involvement of national parliaments

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*Domestic Legislatures: The Empirical Implications of the Delors' Myth in Nine Countries*, New York, Springer.

35. See, for example, the decision of the German Constitutional Court on the Treaty of Maastricht of 12 October 1993, Cases 2 BvR 2134/92, 2 BvR 2159/92, when it was stressed that 'the German Federal Parliament must retain functions and powers of substantial importance'.

in EU procedures, albeit indirectly, through their relationship with national executives. A few years later, national parliaments directly participated in the procedure for drafting European Treaties, although this procedure, 'the convention method', was not codified at that time: compared to the other components (national governments, the EP, the Court of Justice, *etc.*) of the Conventions in charge of elaborating a first draft of the EU Charter of Fundamental Rights and Freedoms and of the Constitutional Treaty, MPs were the largest component, although possibly not the most prominent in terms of decision-making capacity, even considering the amendments pushed forward by the subsequent inter-governmental conferences.<sup>36</sup>

The failed Constitutional Treaty and finally the Treaty of Lisbon, in particular, seemed to support

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36. See Bruno de Witte (2005), *European Treaty Revision: a Case of Multilevel Constitutionalism*, in: I. Pernice & J. Zemanek (eds.), *A Constitution for Europe: The IGC, the Ratification Process and Beyond*, Baden Baden, Nomos, Verlag, p. 59-76 and Florence Deloche-Gaudez (2007), *La convention européenne sur l'avenir de l'Europe: ruptures et continuités*, in: G. Amato, H. Bribosia & B. De Witte (eds.) *Genèse et destinée de la Constitution européenne: commentaire du traité établissant une constitution pour l'Europe à la lumière des travaux préparatoires et perspectives d'avenir*, Bruxelles, Bruylant, p. 47-86.

an effective revival of the role of national parliaments in the EU compared to the past.<sup>37</sup> Many provisions of the Treaties, as modified by the Treaty of Lisbon, are promising in terms of the national parliaments' redemption from their previous marginalisation, starting from Article 12 TEU and from Protocols 1 and 2. For instance, national parliaments now receive a direct flow of information, documents and draft legislative acts from the European Commission (Protocol 1, Articles 49 TEU and 352 TFEU), control the compliance of legislative proposals with the principle of subsidi-

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37. See Paolo Ridola (2006), *The parliamentarisation of the institutional structure of the European Union between representative democracy and participatory democracy*, in H.-J. Blanke & S. Mangiameli (eds.), *Governing Europe Under a Constitution*, Heildeberg-New York, Springer, p. 415 ff.; Marta Cartabia (2007), *Prospects for national parliaments in EU affairs - What should and could be saved in the case of non-ratification?*, in G. Amato, H. Bribosia and B. de Witte (eds.), *Genèse et destinée de la Constitution européenne*, cit., p. 1081-1104; Gavin Barrett (2008) 'The King is dead, long live the King': *The Recasting by the Treaty of Lisbon of the Provisions of the Constitutional Treaty concerning National Parliaments*, *European Law Review*, vol. 33, n. 1, p. 66-84; and Andrea Manzella (2009) *The Role of Parliaments in the Democratic Life of the Union*, in: S. Micossi & G. L. Tosato (eds.) *The European Union in the 21<sup>st</sup> century. Perspectives from the Lisbon Treaty* (Brussels: CEPS), p. 257-270.

arity, can challenge the validity of legislative acts before the Court of Justice through their governments (Protocol 2),<sup>38</sup> participate in the revision of

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38. Maybe the participation of national Parliaments in the early warning mechanism has been the subject of most contributions on legislatures in the EU after the Treaty of Lisbon, since the procedure raises several issues (individual-collective participation of national Parliaments, their role *vis-à-vis* national Executives, the Commission and the European Parliament, the conditions and the suitability for triggering the thresholds of the so-called 'yellow and orange cards'). However, the assessment given to the early warning mechanism in terms of national Parliaments' empowerment in the EU varies a lot: Pieter De Wilde (2012), *Why the Early Warning Mechanism does not Alleviate the Democratic Deficit*, in *OPAL Online Paper* n. 6, p. 6, considers the mechanism as useless; by contrast, some others, such as Ian Cooper (2006), *The Watchdogs of Subsidiarity: National Parliaments and the Logic of Arguing in the EU*, in *Journal of Common Market Studies*, vol. 44, n. 2, p. 281-304, presents it in very positive terms; finally, others (see Philipp Kiiver (2012), *The Early Warning System for the Principle of Subsidiarity: Constitutional Theory and Empirical Reality*, London, Routledge, p. 71 ff. and Federico Fabbrini & Katarzyna Granat (2013), 'Yellow Card, but Not Foul': *The Role of the National Parliaments Under the Subsidiarity Protocol and the Commission Proposal for an EU Regulation on the Right to Strike*, in *Common Market Law Review*, vol. 50, p. 115-144, forthcoming), although recognising the revolutionary significance of the mechanism, argue that enabling political bodies, such as Parliaments, to carry out a legal control on the

the Treaties (Article 48 TEU), can veto the use of the '*passerelle* clause' (Article 48.7 TEU) and the adoption of European measures in family matters which have transnational implications (Article 81.3 TFEU), are involved in the political monitoring of Europol and in the evaluation of Eurojust (Articles 12 TEU and 85 and 88 TFEU), and also take part in the inter-parliamentary co-operation with the EP (Article 12 TEU and Protocol 1).

Thus, Europeanisation and the strengthening of national parliaments have progressed side by side, and the two main features of Europeanisation, differentiation and emulation, are still the two sides of the same coin. On the one hand, although European Treaty provisions set a common framework for the national parliaments of all the Member States, national implementation has achieved different results. For example, in Germany, under

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compliance with the principle of subsidiarity could be problematical in practice. However, as for the institutional influence of national parliaments in the EU, it should be mentioned that the first yellow card raised by national legislatures ever, on the draft regulation on the right to take collective action in the field of the freedom of establishment and of the freedom to provide services, led to the withdrawal of the proposal on the part on the Commission in September 2012.

the auspices of the Federal Constitutional Court, the *Bundestag* and the *Bundesrat* have been significantly strengthened by the enactment (on the input of the constitutional jurisprudence) of a series of measures which enable them to delay or even to block the participation of the national government in EU decision-making procedures (even up to the point of threatening to block the entire decision-making process, and not just for Germany), whenever the parliamentary assent is lacking.<sup>39</sup> By the same token, in the UK, the ap-

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39. This has been the position taken by the German Constitutional Court, in particular, in its judgment of 30 June 2009 on the Treaty of Lisbon (2 BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08 and 2 BvR 182/09). See the Special Issue of the *German Law Journal* on *The Lisbon Judgment of the Federal Constitutional Court*, vol. 10, n. 8, 2009; Arndt Wonka (2010), *Accountability Without Politics? The Contribution of Parliaments to Democratic Control of EU Politics in the German Constitutional Court's Lisbon Ruling*, and Ulrike Liebert (2010), *More Democracy in the European Union?! Mixed Messages from the German Lisbon Ruling*, in: A. Fischer-Lescano, Ch. Joerges & A. Wonka (eds.), *The German Constitutional Court's Lisbon Ruling: Legal and Political-Science Perspectives*, ZERP Discussion Paper 1/2010, Zentrum Für Europäische Rechtspolitik, Universität Bremen, respectively, p. 55 ff. and p. 71 ff; Matthias Wendel (2011), *Lisbon Before the Courts: Comparative Perspectives*, in *European Constitutional*

proval of the European Union Act 2011 has led to the conferral of veto powers to the UK parliament (in addition to those already introduced by the Treaties), in particular to the House of Commons, as well as some clauses that provide for the combination of passing legislation or motions by the parliament and of the positive result of a referendum in order for the executive to take action at EU level.<sup>40</sup>

On the other hand, on the part of other national parliaments, the will to emulate the position of the 'most protected' legislatures, with regard to the prerogatives acknowledged at national level for the participation in the EU decision-making process, induced the adoption of provisions which resemble – as much as possible – those in place in the 'leading Parliaments'.<sup>41</sup> Indeed, a clear trend

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*Law Review*, vol. 7, n. 1, p. 96-137; and Christian Calliess (2012), *The Future of the Eurozone and the Role of the German Constitutional Court*, in *Yearbook of European Law*, vol. 31, n. 1, p. 402-415.

40. See Paul Craig (2011), *The European Union Act 2011: Locks, Limits and Legality*, in *Common Market Law Review*, vol. 48, n. 6, p. 1915-1944.

41. This was the case of Spain and of the approval of Law no 24/2009 and the case of Italy, which has recently enacted Law no 234/2012.

can be identified among the national parliaments: the process of European integration and particularly the revisions obtained by means of the Treaty of Lisbon have promoted the re-inforcement of the parliamentary function which deals with the *ex ante* scrutiny and with the oversight, at the expense of other functions, *in primis* the legislative one, which has been increasingly absorbed by the EU legislators.<sup>42</sup>

Is the picture of the progressive emancipation of national parliaments in the EU overturned by the present reform of the economic governance? The hypothesis of the national parliaments' regression towards marginalisation appears to be taken for granted, because of the constraints placed upon the budgetary authority of national parliaments, which disallow them from stepping in directly at EU level during the Euro-national fiscal procedures. The only opportunity for the direct involve-

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42. See Olivier Costa O., Eric Kerrouche & Paul Magnette (2004), *Le temps du parlementarisme désenchanté*, in: O. Costa, E. Kerrouche & P. Magnette (eds.), *Vers un renouveau du parlementarisme en Europe?*, Brussels, ULB, p. 17, and Cristina Fasone (2011) *Gli effetti del Trattato di Lisbona sulla funzione di controllo parlamentare*, in *Rivista italiana di diritto pubblico comunitario*, n. 2, p. 353-391

ment of national legislatures, according to the new measures, is provided by the setting up of a 'conference of representatives of the relevant committees of the European Parliament and representatives of the relevant committees of national Parliaments in order to discuss budgetary policies and other issues covered by' the Treaty on Stability, Co-ordination and Governance in the economic and monetary Union (TSCG).<sup>43</sup> Although it has become increasingly important,<sup>44</sup> the formula of the inter-parliamentary co-operation does not entail the conferral of decision-making powers to legislatures, nor does it guarantee their effective influence.

Once more, the ability of national parliaments to institutional adaptation is challenged: they have to follow the deadlines of the European Semester, the substantial standards fixed at EU level

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43. See Article 13 TSCG, which refers to Protocol 1 on the role of national Parliament in the European Union annexed to the Treaty of Lisbon.

44. See Andrea Manzella (2012), *Is the EP Legitimate as a Parliamentary Body in EU Multi-tier Governance?*, in *Challenges of Multi-tier Governance in the EU*, Workshop organised by the Policy Department of the EP on Citizens' Rights and Constitutional Affairs, Brussels, 4 October.

on the budget and on macroeconomic indicators, and the European-driven balanced-budget clause when passing legislation.<sup>45</sup> The impairment of the position of the national parliaments is potentially much more serious than that triggered by the establishment of the Economic and Monetary Union and by the first version of the Stability and Growth Pact (SGP) in the 1990s. As shown by the soft implementation of the first SGP (Section 4), the role of national fiscal authorities, including parliaments, was limitedly affected, since they were not bound, as they are now, to negotiate the content of the budgetary and fiscal decisions with the EU institutions, and nor was the budget cycle shaped through a Euro-national process.

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45. As underlined by Giacomo DelleDonne (2012), *Financial Constitutions in the EU: From the Political to the Legal Constitutions?*, in *STALS Research Paper*, n. 5, p. 4, the (preferable) constitutionalisation of the balanced budget clause seems to cause a 'shift from a (prevailing) political to a (would-be) legal notion of financial constitutions', thus implying a diminished role for political institutions, in particular for Parliaments, in favor of judicial or more technical actors (according to the existing tension between political and legal constitutionalism: see Richard Bellamy (2007), *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy*, Cambridge, Cambridge University Press, p. 1-12.

However, at present, the national executives room for manoeuvre has also been limited by the new European measures, in a much more severe way compared to the former SGP, particularly because of the semi-automatic implementation of the system of warnings and sanctions.<sup>46</sup> The institutional balance between fiscal authorities, namely, the parliaments and the governments, is likely to change in the light of the new economic governance mechanisms, although the 'losers' and the 'winners' are not the same everywhere. Again, the features of the national constitutional systems are extremely significant, as the case of Germany and of its federal parliament shows. The disclosure and the transmission to the *Bundestag* of the information gained by the executive in this field, in particular in the EU, and the power of the parliament to bind the position of the executive concerning the most significant decisions on fiscal policy

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46. See Nicola Lupo (2012), *La revisione costituzionale della disciplina di bilancio e il sistema delle fonti*, in V. Lippolis (ed.), *Costituzione e pareggio di bilancio, Il Filangieri - Quaderno 2011*, Napoli, Jovene, p. 89-144 and Elena Griglio (2012), *Parliamentary oversight of national budgets: recent trends in EU Member States*, paper presented on the occasion of the Tenth Workshop of Parliamentary Scholars and Parliamentarians, 28-29 July, Wroxtton College, UK.

within European institutions and summits, have been made mandatory by the German Constitutional Court in order to preserve the link between democratic representation and the legitimacy of financial decisions.<sup>47</sup> At the same time, even at European level, some prospective tools have been introduced in order to enhance the position of the national parliaments: perhaps the most important of them is the Fiscal Council. The effectiveness of the parliamentary action on these matters depends on the ability of each national parliament to ‘exploit’ the independent source of information

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47. See, for example, the latest judgment of the federal Constitutional Court of Germany issued on 12 September 2012 (2 BvR 1390/12, 2 BvR 1421/12, 2 BvR 1438/12, 2 BvR 1439/12, 2 BvR 1440/12, 2 BvE 6/12, anticipated by other judgments of 7 September 2011, of 27 February 2012 and of 19 July 2012), on the constitutionality of the ESM and the TSCG. See also Antje von Ungern-Sternberg (2012), *Parliaments - Fig Leaf or Heartbeat of Democracy? German Federal Constitutional Court (Judgment of 7 September 2011 - European Rescue Package)*, in *European Constitutional Law Review*, vol. 8, n. 2, p. 304-322; Daniel Thym (2012), *The German Constitutional Court – or: the Emperor’s New Clothes*, and Peter L. Lindseth (2012), *Karlsruhe Capitulates? Hardly – Understanding the ESM Ruling of September 12*, both published in *EutopiaLaw*, on 17 September 2012, available at: [www.eutopialaw.com](http://www.eutopialaw.com).

of the Fiscal Council and to establish a mutually co-operative relationship.

As has been argued, if the financial and fiscal crisis in the European Union is, indeed, a crisis of democracy,<sup>48</sup> assessing whether national parliaments are further limited as fiscal authorities or whether they can instead contribute to the new European economic governance mechanisms, thus finding a new impetus in the mutual co-operation with Fiscal Councils, appears crucial.<sup>49</sup>

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48. See Miguel Poiars Maduro (2012), *A New Governance for the European Union and the Euro: Democracy and Justice*, RSCAS Policy Paper 2012/11, p. 3 ff., and Christian Joerges (2012), *A European Union of, by and for the citizens. How can Europe provide better possibilities for the participation of its citizens?*, Contribution to the European Parliament – Committee on Constitutional Affairs – Hearing on citizen participation, 18 September 2012.

49. Miguel Poiars Maduro, Bruno de Witte & Mattias Kumm (2012), *The Euro Crisis and the Democratic Governance of the Euro: Legal and Political Issues of a Fiscal Crisis*, in M. Poiars Maduro, B. de Witte & M. Kumm (eds.) *The Democratic Governance of the Euro*, RSCAS Policy Paper 2012/08, p. 3 stress the fact that the fundamental problem deals with ‘the democratic quality of the euro governance’.

## 4. Fiscal Councils and National Parliaments in the Economic Governance: The European Union Framework

The need to face the financial crisis and the failure of the system built up on the 1997 SGP (EU Regulations n 1466 and 1467/1997), has created the urgent need of the introduction of stricter rules for controlling compliance with the new economic regulatory framework, limiting the ‘connivance’ amongst Member States in the event of a violation of fiscal standards. Such a result has been pursued by:

- empowering the Commission as the general guardian of compliance with fiscal rules and against macroeconomic imbalances and making the adoption of warnings and sanctions semi-automatic;
- strengthening the judicial control on fiscal rules. On the one hand, the Court of Justice of the European Union, which adopted a very cautious position when dealt with the misapplication of the previous Stability and Growth Pact,<sup>50</sup>

50. See the judgment of the Court of Justice in the Case

has become entitled to judge on the correct introduction of the balanced-budget clause (and possibly also of its enforcement) in the national legal systems,<sup>51</sup> according to Articles 3(2) and 8

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C-27/04 of 13 July 2004, *Commission v Council*, ECR I-06649, and the comments by the *Common Market Law Review* editorial board (2004), *Whither the Stability and Growth Pact?*, in *Common Market Law Review*, vol. 41, n. 5, p. 1193; Dimitrios Doukas (2005), *The Frailty of the Stability and Growth Pact and the ECJ: Much ado about Nothing?*, in *Legal Issues of Economic Integration*, vol. 32, p. 293; Barbara Dutzler and Angelika Hable (2005), *The European Court of Justice and the Stability and Growth Pact – Just the Beginning?*, in *European Integration online Papers*, vol. 9, n. 5, <http://eiop.or.at/eiop/texte/2005-005a.htm>; Guido Rivosecchi (2007), *L'indirizzo politico finanziario tra Costituzione italiana e vincoli europei*, Padova, Cedam, 2007, p. 410 ff. The reform of the Stability and Growth Pact by Regulations n. 1055 and 1056/2005 has not substantially changed the picture: see Jean Victor Louis (2006), *The Review of the Stability and Growth Pact*, in *Common Market Law Review*, vol. 43, n. 1, p. 85.

51. See Bruno de Witte (2012), *European Stability Mechanism and Treaty on Stability, Coordination and Govern-*

TSCG. On the other hand, after the (preferable) constitutionalisation of the balanced-budget clause, the jurisdiction of Constitutional Courts has been extended, too; and by

- introducing, by means of Fiscal Councils, a more technical control on the compliance with new provisions on the part of national executives.<sup>52</sup>

Thus, although Fiscal Councils were already in function in 11 Member States in 2011,<sup>53</sup> it was only at the apex of the financial and of the fiscal crises that the EU has made the establishment of Fiscal Councils in national systems mandatory.

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*ance: Role of the EU Institutions and Consistency with EU Legal Order*, in *Challenges of Multi-tier Governance in the EU*, Workshop organized by the Policy Department of the EP on Citizens' Rights and Constitutional Affairs, Brussels, 4 October.

52. See Giacomo Delle Donne (2012), *Financial Constitutions in the EU: From the Political to the Legal Constitution?*, cit., p. 5.

53. The Member States where Fiscal Councils operated before the reform of the economic governance are: Austria, Belgium, Denmark, Germany, Ireland, The Netherlands, Portugal, Slovak Republic, Slovenia, Sweden, and the United Kingdom.

All Member States are now bound to the duty to set up this independent institution.<sup>54</sup>

From the functional point of view, the ‘mandate’ of Fiscal Councils on the part of the EU is quite broad, since only the drafting of macroeconomic forecasts and plans can ‘escape’ from their ‘jurisdiction’, depending on the choice of each Member State, which can split tasks amongst different institutions or concentrate them on the Fiscal Council as well. According to Directive 2011/85/UE, on the requirements for the budgetary frameworks of the Member States, this institution is to be in charge of the independent, effective and timely monitoring of country-specific fiscal rules and ‘to enhance the transparency of elements of

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54. See Paul Craig (2012), *The Stability, Coordination and Governance Treaty: Principles, Politics and Pragmatism*, in *European Law Review*, n 37, p. 236. Also the UK, although it is not part of the TSCG and it is not subject to the provisions of Directive 2011/85EU regarding Fiscal Councils, seems bound to guarantee the operation of such institution (which is already in function in the UK under the name of Office for Budget Responsibility). Indeed, according to the European Commission Communication COM (2012) 342, the existence of a Fiscal Council has to put in relation with the functioning of the correction mechanism in case of deviation from the medium-term objective, which concerns also the UK.

the budget process (Article 2.2, lit. f)’. The TSCG, an international agreement signed by all Member States except the UK and the Czech Republic on 2 March 2012, and which entered into force on 1 January 2013, establishes a link between the functioning of the correction mechanism and the Fiscal Councils (Article 3.2). Indeed, Fiscal Councils are held responsible at national level for monitoring the compliance of the Member State concerned with the balanced-budget clause and with the convergence towards the country-specific medium-term objective. It is evident that Fiscal Councils are not deemed to be decision-making authorities and that, in any event, they could not endanger or ‘compete with’ national parliaments. However, what remains unsolved in the TSCG with regard to Fiscal Councils is whether the Court of Justice is entitled, according to Article 8 TSCG, to review also issues related to these bodies. With regard to the wording of Article 8(1) TSCG, which simply mentions Article 3(2) TSCG, the jurisdiction of the Court of Justice, relying on Article 273 TFEU, in principle also seems to affect the correct establishment of Fiscal Councils and probably their functioning.

According to the TSCG, the Commission has provided a set of common principles for Fiscal Councils, by defining their ‘core functions’ (Principle 7, Annex to the Communication of the Commission of June 2012 (COM (2012) 342). They have to oversee the appropriate functioning of the correction mechanism in each Member State, in case of deviation from the medium-term objective. In particular, Fiscal Councils are responsible for controlling at national level whether the circumstances which might warrant the activation of the correction mechanism occur; whether the correction mechanism, when activated, is correctly implemented in the Member State; and whether the escape clauses, under special conditions (for example, in order to face natural disasters), are properly used. Thus, Fiscal Councils are entitled to carry out both the *ex ante* and the *ex post* control on budgetary matters. However, what is more important is the power which, according to the Communication, has to be acknowledged to Fiscal Councils: their recommendations *bind* the Member States. Indeed, if the latter do not comply with the assessment of the relevant Fiscal Council, the Member States must ‘explain publicly why they are not following’ them. Although the Com-

munication is not formally binding on the Member States, the fact that it contains the common principles on the correction mechanisms seems to recognise a specific legal value to Principle 7, which cannot be neglected.

With regard to the structural features of Fiscal Councils, their setting up has to fit within 'the already existing institutional setting and the country-specific administrative structure (Article 3.2 TSCG)'. In terms of the prospective impact of Fiscal Councils on national parliaments, the reference to the existing institutional setting appears extremely important. Not only must effective Fiscal Councils be set up in ways which are consistent with the institutional arrangements, the legal culture and the tradition of the state concerned, regardless of benchmarks provided by other countries, but the establishment of the Fiscal Councils must not jeopardise the position of national parliaments. Thus they can maintain or even strengthen the role of the parliaments.

Moreover, the basic structural requirement introduced by the EU for Fiscal Councils is their 'functional autonomy' *vis-à-vis* the budgetary authorities of the Member States (Article 6, Directive

2011/85 CE). If, looking at the wording of the new measures, it seems that the requirement of 'functional autonomy' is possibly less demanding than that posed by other European norms for supervisory authorities and for establishing the condition of the 'complete independence'.<sup>55</sup> However, it has to be taken into account that the Court of Justice has already sanctioned some Member States, and in particular Germany, on this issue, interpreting the independence of supervisory authorities in strict terms, aiming to protect them against any political pressure.<sup>56</sup>

In detail, the list of the conditions for guaranteeing the functional autonomy of Fiscal Councils are contained in the Communication on national fiscal correction mechanisms (COM (2012) 342) and are about to be codified in one of the draft regulations of the 'two-pack', the proposal on common provisions for monitoring and assessing

55. See, for example, Article 28 of the Directive 95/46 EC of 24 October 1995, on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

56. See the decisions of the Court of Justice in *Commission v Germany*, Case C-424/07 of 3 December 2009, ECR I-11431, and *Commission v. Germany*, Case C-518/07 of 9 March 2010, ECR I-1885.

draft budgetary plans and ensuring the correction of the excessive deficit of the Member States in the euro area (COM (2011) 821).<sup>57</sup>

'A statutory regime grounded in law'. Fiscal Councils can be regulated not only at constitutional, but also at statutory, level, given the broad meaning assigned to the word 'law' in the European Union.<sup>58</sup> However, it can be argued that, aiming at protecting the independence and even the existence of Fiscal Councils, the strongest guarantee would have consisted in having their basic discipline contained in the Constitution or in an organic law.<sup>59</sup>

57. For the time being, after long negotiations, the Council and the European Parliament have just reached a compromise at the first reading on this draft Regulation, originally presented on 23 November 2011. If the amendments of the EP of 13 June 2012 had been accepted by the Council, the ties between national Parliaments and Fiscal Councils would have been much stronger in terms of accountability than in the current final text.

58. See Alexander H. Türk (2006), *Concept of Legislation in European Community Law: A Comparative Perspective*, Alphen, Kluwer Law International, p. 11 ff. and Mark Dawson (2011), *New Governance and the Transformation of European Law: Coordinating EU Social Law and Policy*, Cambridge, Cambridge University Press, p. 92 ff.

59. On the importance of having Fiscal Councils regulated

‘Freedom from interference’, which involves the autonomy of the Fiscal Councils from instructions imposed by other institutions and the possibility of disclosing information both promptly and whenever it is deemed necessary.

‘Nomination procedures based on experience and competence’, which underlines the technical nature of Fiscal Councils, whose members are selected upon the basis of their merit and expertise with the participation of the parliaments in the appointment procedure.

‘Adequacy of resources and information’, according to which the size of the staff and the stock of financial resources is to be proportionate to the scope of the mandate attributed to Fiscal Councils.

Although the legal acts examined do not explicitly bind Member States to set up Fiscal Councils within the executive or within the parliament,

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preferably at constitutional level, see Daniele Franco (2011), *Comments on ‘The Role of Fiscal Policy Councils in Theory’ by Xavier Debrun*, Presentation held at the Conference on ‘Fiscal Policy Councils: Why do we need them and what makes them effective’, Vienna, 31 January 2011, available at: <http://www.staatsschuldenausschuss.at/en>.

given that it is taken for granted that Fiscal Councils are independent institutions, they do, however, intend to emphasise that these bodies enjoy a special relationship with parliaments. On the one hand, national legislation is requested to introduce the most suitable tools for making Fiscal Councils accountable to parliaments; on the other, national measures have to prevent any ‘unwarranted interference’ on the part of the Fiscal Councils’ mandate with that of the fiscal authorities (or *vice versa*), which might limit the prerogative of national parliaments. The new European measures design Fiscal Councils which are able to provide national parliaments with independent information, to make the budgetary process and the approval of fiscal decisions more transparent and understandable, and to enhance parliamentary scrutiny and oversight on the complex Euro-national decision-making process. With this regard, looking at the European framework, Fiscal Councils can be deemed to support national parliaments in facing the risk of a ‘new marginalisation’ within the economic governance.

The real arrangement of the relationship between Fiscal Councils and parliaments, however, is

strongly influenced by the national legal system and by the duties posed upon the Member States to implement the new provisions. Indeed, a possible differentiation in the relationship between the parliaments and the Fiscal Councils across the EU countries is likely to emerge not simply because of the different constitutional architecture and identity of the Member States, but also because a multi-speed Europe does exist when looking at the EU economic governance.<sup>60</sup> Given the fact that some measures are addressed to all the Member States, others to all the Member States, with the exception of Czech Republic and the UK, others to 23 countries,<sup>61</sup> and finally others only to the countries of the Eurozone, different legal and eco-

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60. See Nicolas de Sadeleer (2012), *The New Architecture Of The European Economic Governance: A Leviathan Or A Flat-Footed Colossus?*, in *Maastricht Journal of European and Comparative Law*, vol. 19, n. 3, p. 380-381; J.-C. Piris (2012), *The Future of Europe: Towards a Two-Speed EU?*, Cambridge, Cambridge University Press, p. 106 ff.; Dirk Leuffen, Berthold Rittberger & Franck Schimmlenning (2013), *Differentiated Integration. Explaining Variation in the European Union*, London, Palgrave MacMillan, p. 142-183.

61. Indeed, all the Member States have been committed to comply with the Europe Plus Pact agreed by the European Council on 25 March 2011, except Sweden, Hungary, Czech Republic and the UK.

conomic constraints can produce a further differentiation in the reaction of national parliaments, in the tasks assigned to Fiscal Councils and in their reciprocal relationship. Moreover, as the seriousness of the fiscal crisis also varies across countries – *i.e.*, there are debtors and creditors countries – a single and common model of Fiscal Council in the EU cannot be easily found at present, although the EU measures encourage a sort of convergence towards independent fiscal institutions accountable to parliaments.

## 5. Assessing the Relationship between Fiscal Councils and Representative Assemblies at National Level

The comparison of selected case studies is based upon the assumption that the relationship between Fiscal Councils and their respective parliaments is influenced by two main factors: the economic, political and legal context in which the fiscal institutions have been established; the capacity of the legislature to develop a budgetary and financial scrutiny autonomously of the performance of the executive. These two factors will be separately considered in the following sub-sections.

### 5.1 The Influence of the Economic, Political and Legal Context on the Role and the Position of Fiscal Councils

As briefly explained in Section 2, the five national Fiscal Councils considered in the present contribution have been established in very different economic, political and legal contexts. This external

factor seems to have influenced the rules concerning the overall position of the independent body in the relationship with the other institutional bodies, and in particular with the executive and the legislative branches.

#### 5.1.1 The Long-established Fiscal Councils: the German and Belgian Cases

Germany and Belgium experienced the creation of fiscal agencies long before the current economic and financial crisis. In particular, the German Council of Economic Experts was set up by law in 1963 as an academic body which could serve public- and economically-relevant institutions in making informed judgements on questions of economic policy. The two Belgian fiscal institutions, the High Council on Finance and the National Auditing Office, were set up respectively in 1936 and in 1994, but their aptitude for acting as

fiscal councils has gradually grown with the evolution of the Belgian constitutional system over the last few decades.<sup>62</sup> In particular, two processes have impacted upon the role of the above-mentioned organisms: the regionalisation of the Belgian state, which began at the end of the 1980s and formally concluded with the constitutional reform of 1994, when the country became a federal state with three Regions and three Communities,<sup>63</sup> and

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62. The Council was created with the Royal Decree of 31 January 1936 whose purpose was to unify within a single advisory body the different consultative committees created within the Minister of Finance. The Council, which after the second World War ceased to function, was rediscovered at the end of the 1960s, thanks to the Royal Decree n. 17 dated 23 May 1967, and was then periodically reformed in order to adjust it to the emerging institutional needs and reduce the risk of political interference. With the reform of 1981, in particular, the area of intervention of the Council, originally referred to the fiscal, economic and financial policy-making, was extended also the budgetary decision-making. See Henry C. Wallich (1968), *The American Council of Economic Advisers and the German Sachverstaendigenrat. A Study in the Economics of Advice*, in *The Quarterly Journal of Economics*, vol. 82, n. 3, p. 349 ff.

63. The regionalisation of the Belgian State created the premises for the reform of the High Council of Finance, occurred in 1989 with the aim of entrusting the Council with the task to monitor the fiscal policy of regional governments and to formulate medium-term financial

the entry of Belgium into the European Monetary Union, which meant that it had to respect the Maastricht targets.<sup>64</sup>

Both in Germany and in Belgium, the above-mentioned fiscal agencies are clear examples of government-centred institutions; this feature emerges from the rules concerning the internal structure of the body, and, in particular, from those concerning the appointment procedures.

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objectives for the federated entities. See Aloïs Van de Voorde & Georges Stienlet (1995), *Le Budget de l'État dans la Belgique fédérale*, 5e éd., Bruxelles, CEPES, *passim*.

64. The establishment of the European Monetary Union urged the creation, in 1994, of the National Accounts Institute (law of 21 December), as an independent body which could exercise a general oversight of budget and test the reliability of the economic statistics and macro-economic forecasts upon which the budget was based. See Henri Bogaert, Ludovic Dobbelaere, Bart Hertveld & Igor Lebrun (2006), *Fiscal Councils, Independent Forecasts and the Budgetary Process: Lessons From the Belgian Case*, Federal Planning Bureau, Working paper n. 4-06, p. 1-2, available at: [www.plan.be](http://www.plan.be) (also published by Igor Lebrun (2007), *Fiscal councils, independent forecasts and the budgetary process: lessons from the Belgian case*, in: J. Ayuso-i-Casals, S. Deroose, E. Flores & L. Moulin, *European Economy - Economic Papers*, n. 275, April, p. 337 ff.)

The German Council of Economic Experts is endowed with complete independence in the performance of its work (it is only bound by the mandate set forth in the Act on the Appointment of a Council of Experts on Economic Development, dated 14 August 1963), but the agency's main institutional point of reference is to be found in the government. According to Article 7 of the Appointment Act, the five members of the Council of Economic Experts are selected among specialists in the field of economic theory and economic policy,<sup>65</sup> and are appointed by the Federal President on recommendation of the Federal government.<sup>66</sup>

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65. The independence of the agency from other institutional bodies is guaranteed also by the rules banning the appointment of members exercising institutional duties or in a position of conflict of interest disciplined by Article 1.3 of the Act on the Appointment of a Council of Experts on Economic Development.

66. Their mandate lasts five years and they can be reappointed; in order to assure full independence to the advisory body, the Federal Government must hear the members of the Council of Experts before nominating a new member; the Chairperson is chosen by the Council among one of its members for three years. See Norbert Kämper (1989), *Der Sachverständigenrat zur Begutachtung der Gesamtwirtschaftlichen Entwicklung*, Berlin, Duncker & Humblot.

The Belgian National Accounts Institute (NAI) is a compound institution, whose duties are delegated to three associated institutions<sup>67</sup> and whose multifaceted composition<sup>68</sup> is meant to represent at the same time the institutions associated and the Belgian linguistic groups.<sup>69</sup> The High Council

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67. The Statistics Belgium (collecting the data to be used for the production of statistics), the National Bank of Belgium (responsible of the production of statistics for the national and regional accounts, the foreign trade statistics, the financial accounts) and the Federal Planning Bureau (in charge of the short-term macroeconomic forecasts); these last two institutions are jointly responsible for the general governmental account.

68. The most significant decisions, in fact, are adopted by the board of directors, composed of seven members, four appointed in compliance with the law and the other three members (the General Secretary of the Ministry for economic affairs, who represents the Minister and is in charge of the Chair of the Board; the Governor of the National Bank of Belgium, the Administrator and the Director of the National Institute of statistics) appointed by the King (Article 113 of the law of 21 December 1994).

69. The mandate of the board's members lasts four years and re-appointment is permitted. According to Article 115 of the law of 21 December 1994, moreover, a Counselling committee, composed of representatives of the Federal Government, of the National economic or fiscal agencies and of the regional Governments, appointed by the King (for the Federal level), is in charge of address-

ing every year some recommendations to the Board of Directors in order to ameliorate the fulfilment of the Council's duties.<sup>70</sup> is, instead, composed of the Plenary Council,<sup>71</sup> of two sections and a Working group on ageing. Its membership reflects its close relationship with the government.<sup>72</sup>

Both the NAI and the High Council of Finance, therefore, tend to find their institutional referent not only in the Federal government, but also in the governments of the other federated entities. The result is thus a plurality of institutional interlocutors, which makes political intervention quite difficult, as the credibility of all the institutions involved is at stake.

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ing every year some recommendations to the Board of Directors in order to ameliorate the fulfilment of the Council's duties.

70. As disciplined by the *Arrêté royal* of the 3 April 2006.

71. The Plenary Council is chaired by the Minister of Finance, it includes two vice-Presidents appointed by the Minister of Finance and by the Minister of Budget and is composed of 24 experts in economic and budgetary subjects, representing either the Federal Government or the regional Governments and appointed on five-years renewable terms by the King.

72. The Secretariat of the Council is ruled by officials of the Federal Ministry of Finance.

### 5.1.2 The British Office for Budget Responsibility: A Recent Fiscal Council Created on a Voluntary Basis

If the German and Belgian fiscal independent bodies can be inscribed within the government-oriented agencies, a different model is given by the British Office for Budget Responsibility, created in 2010 and disciplined by the Budget Responsibility and National Audit Act 2011, as an independent agency entitled to provide authoritative analysis of UK's public finance.

Endowed with a high degree of autonomy from other institutions,<sup>73</sup> the Office's independence op-

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73. The Office's independence in performing its mandate is in particular guaranteed by the fact that the agency is subject only to its statutory duties and to the guidance of the Charter for budget responsibility, presented by Government to Parliament pursuant to Section 1 of the Budget Responsibility and National Audit Act 2011 and related to the formulation and implementation of the fiscal policy and of the policy for the management of national debt. HM Treasury (2011), Charter for Budget Responsibility, April 2011, available at: [http://budgetresponsibility.independent.gov.uk/wordpress/docs/charter\\_budget\\_responsibility040411.pdf](http://budgetresponsibility.independent.gov.uk/wordpress/docs/charter_budget_responsibility040411.pdf)

erates in particular with regard to the government,<sup>74</sup> but it does not prevent it from maintaining strong ties with the parliament. The first tie comes from the internal composition of the body: the Chair of the Office (according to Schedule 1 of the Budget Responsibility and National Audit Act 2011), in fact, is appointed by the Chancellor of Exchequer, but with the consent of the Treasury Committee of the House of Commons (HoC); a further two members are appointed by the Chancellor of Exchequer, but after consultation with the Chair and with the consent of the Treasury Commit-

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74. A specific Memorandum of Understanding, published in April 2011, for instance, sets out the agreed working relationship between the Office, HM Revenue and Customs, the Department for Work and Pensions, and HM Treasury (Office for Budget Responsibility - HM Treasury (2011), *Memorandum of Understanding between Office for Budget Responsibility, HM Treasury, Department for Works and Pensions and HM Revenues & Customs*, April, available at: [http://86.54.44.148/wordpress/docs/obr\\_memorandum040411.pdf](http://86.54.44.148/wordpress/docs/obr_memorandum040411.pdf)). As part of the Office's commitment to transparency, moreover, the institutional website of the agency publishes, among other information, also the list of contacts held by Office members with ministers, special advisers, private offices and opposition MP's. Available at: <http://budgetresponsibility.independent.gov.uk/transparency/disclosures>.

tee of the HoC;<sup>75</sup> these three members constitute a committee, known as the Budget Responsibility Committee. The rest of the Office (not fewer than two members) are nominated by the Office and appointed by the Chancellor of Exchequer; these members constitute a committee which is known as a non-executive committee. This composition assures the Treasury Committee control of at least three of the Office's members, of which one acts as Chair. It is important to underline that only the three members appointed with the consent of the Treasury committee are members of the executive committee of the Office – the Budget Responsibility Committee – to whom the exercise of most of the relevant assessment duties is reserved, as disciplined by Section 4 (3) and (4) of the Act; the Non-executive committee, in contrast, must review the way in which the Office's duties are performed.

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75. The consent of the HoC Treasury Committee is not required for the appointment in some cases, disciplined by par. 3 (1) of Section 1 of the Budget Responsibility and National Audit Act 2011.

### 5.1.3 The 'Latest' Fiscal Councils, Established in Italy and in France in order to comply with EU Obligations

If the Office for Budget Responsibility can be considered an example of a Fiscal Council centred both on the Parliament and on the government, the last two fiscal institutions created by EU Member States – the Italian Parliamentary Budget Office and the French High Council of Public Finances – reveal an even stronger relationship with the legislative branch.

In particular, the Italian Parliamentary Budget Office represents a unique example (at least in Europe) of Fiscal Council strongly parliamentary-centred. The new agency was formally introduced by Article 5, Section 1, (f) of the Constitutional Law no 1/2012 in April 2012<sup>76</sup> as an indepen-

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76. The reform introduced in the Italian Constitution the balanced budget rule; for further details, see Antonio Brancasi (2012), *L'introduzione del principio del cd. pareggio di bilancio: un esempio di revisione affrettata della Costituzione*, in *Quaderni costituzionali*, n. 1, p. 108 ff. and Daniele Cabras (2012), *Il pareggio di bilancio in Costituzione: una regola importante per la stabilizzazione della finanza pubblica*, ivi, p. 111 ff.; Renzo Dickmann

dent body to be created *by the Chambers*, with due respect of their constitutional autonomy; and entitled to analyse and assess the public-finance trends and to monitor the respect of budgetary rules.<sup>77</sup> The Office's internal composition and or-

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(2012), *Legislazione di spesa ed equilibrio di bilancio tra legittimità costituzionale e legittimità europea*, 16 May, in [Federalismi.it](http://www.federalismi.it); Paola Bilancia (2012), *Note critiche sul cd. 'pareggio di bilancio'*, in *Rivista AIC*, 17 April, available at: [www.associazionedeicostituzionalisti.it](http://www.associazionedeicostituzionalisti.it)); Nicola Lupo (2012), *La revisione costituzionale della disciplina di bilancio e il sistema delle fonti*, cit., p. 89 ff. and Tania Groppi, Irene Spigno & Nicola Vizioli (2012), *The Constitutional Consequences of the Financial Crisis in Italy*, available at: [www.astrid.eu](http://www.astrid.eu). The Italian Fiscal Institution could be therefore classified within the fiscal agencies with a solid, constitutional basis and a defined area of intervention, due to the fact that, at the same time, it enjoys a constitutional status and it operates with a fiscal rule set on a constitutional basis. See Daniele Franco (2011), *Comments on 'The Role of Fiscal Policy Councils in Theory'*, cit., 31 January. On the importance that fiscal rules have in order to make the model based on the advisory role of Fiscal Councils really work, see also Chiara Goretti (2012), *Pareggio di bilancio e credibilità della politica fiscale: il ruolo del fiscal council nella riforma costituzionale italiana*, 20 January, available at: [www.astrid-online.it](http://www.astrid-online.it).

77. According to Paolo De Ioanna (2012), *La nuova cornice costituzionale apre nuove dinamiche tra le forze politiche e nella cornice delle interpretazioni, economiche e giuridiche, dei fenomeni di finanza pubblica*, Presenta-

organisation have recently been disciplined by the re-enforced law no 243/2012 of 24 December 2012; Art. 16 of the law, in particular, provides that the Council is made up of three members appointed upon the basis of common agreements by the Chairs of the two Houses within a list of ten persons drawn up by competent parliamentary committees (upon the basis of agreements adopted by a two-thirds majority) from the experts in public finances. Also from the point of view of the Office's staff and funding,<sup>78</sup> the newly-established Italian Fiscal Council reveals itself to be firmly rooted in the parliamentary administration.

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tion held at the Conference 'La nuova governance fiscale europea. Fiscal Compact, cornice europea e modifiche costituzionali in Italia' - Rome, Luiss Guido Carli, 9 November) the reasons behind the creation of the Independent Fiscal Body are to be found not only in the drives coming from the European Union, but also in the increasing unsatisfaction of politicians for the low level of transparency of the budgetary and fiscal policy-making and in their ambition to participate in a less critical way to such decisional process. See also Daniele Cabras (2012), *Un Fiscal Council in Parlamento*, in [Federalismi.it](http://www.federalismi.it), 17 October.

78. See, in particular, Articles 17 and 19 of the Law n. 243/2012.

France has also recently provided for the implementation of the Fiscal Compact through the *Loi organique* no. 2012-1403 of 17 December 2012 on the planning and governance of public finances,<sup>79</sup> which (Art. 11), among other things, disciplines the establishment of the High Council of Public Finances, an independent body set by the *Cour des comptes*, chaired by the President of the accounts authority and composed of ten members, of which four are judges of the *Cour des comptes* and four are members appointed by the relevant representatives of the two Houses.<sup>80</sup> The peculiarity of the

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79. Following the Decision of the *Conseil constitutionnel* n. 2012-653 DC of the 9 August 2012 (on which see Rino Casella (2012), *Il Consiglio costituzionale francese e il trattato sul Fiscal compact*, 26 October, available at: [www.forumcostituzionale.it](http://www.forumcostituzionale.it)), the French strategy can be defined as an example of a 'minimal' adaptation to the TSCG (on this point, see Henri Sterdyniak (2012), *Gouvernance des finances publiques: du Pacte budgétaire à la loi organique*, 15 October, available at: <http://www.ofce.sciences-po.fr/blog/?p=2637>), based on the recourse not to a constitutional law, but rather on a re-enforced law, as the *loi organique*.

80. Before being formally approved, the French *loi organique* was submitted – in compliance with the procedure of Articles 46 (5) and 61 (1) of the French Constitution – to the *Conseil constitutionnel* for an assessment of its conformity to the Constitution. With the Decision n. 2012-568 of the 13 December 2012, the *Conseil*, among

French model is, therefore, given by the strong interaction provided not only with the parliament but also with the *Cour des comptes*, thus widening the classic dichotomy between government-centred and parliament-centred institutions (which had already been affected, but not fully overcome, by the hybrid Office for Budget responsibility).<sup>81</sup>

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others, judged as being unconstitutional the provisions (Articles 11. 1 and 11.3) binding the appointment of the four judges selected by the *Cour de comptes* and of the single member nominated by the President of the *Conseil économique, social et environnemental* to an 'audition publique par les commissions des finances et les commissions des affaires sociales de l'Assemblée nationale et du Sénat' (par. 39). The decision was motivated on the basis of the principle of the separation of powers. The same procedural obligation was instead 'saved' by the *Conseil* in the part referred to the appointment of the four members in representation of the two Chambers, but the provision was judged as not having the legal status of 'organique' rule (par. 40).

81. On the atypical nature of the French *Haut Conseil aux finances publiques*, which can be assimilated neither to the model of parliamentary Fiscal Councils (as the Congressional Budget Office in the USA), nor to the fiscal agencies derived from the government, see Samuel-Frédéric Servière (2012), *Haut Conseil des finances publiques: les propositions de la Fondation iFRAP*, 13 September, available at: [www.ifrap.org](http://www.ifrap.org).

This comparative overview reveals how, in the European context, it is only the 'last generation' Fiscal Councils that are imagined from the structural point of view as having a solid and direct relationship with the parliament. A partial justification of this general trend can be found in the newly-emerged need to conform to EU requirements, which clearly force the setting up of a more direct contact in between national legislatures and fiscal agencies.

Notwithstanding these formal institutional aspects, one could expect the crisis to have encouraged the research of a democratic legitimation for the mandate of Fiscal Councils based upon the development of a direct channel of interaction with national parliaments.

## 5.2 The Relationship 'Fiscal Councils - Parliaments' and its Interaction with the Parliamentary Scrutiny and Oversight Function on the Budgetary and Fiscal Matters

A second potential factor which influences the interaction established by national parliaments with Fiscal Councils can be found in the capacity of the legislature itself to structure and autonomously develop budgetary and financial scrutiny of the activity of their government.

To isolate this factor, it necessary to consider the main features of the most relevant models of parliamentary budget scrutiny. Given that the parliamentary oversight of budgets is mainly carried out at committee level,<sup>82</sup> it is important to distinguish

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82. In the budgetary oversight, the availability of a proactive and powerful committee becomes strategic for assuring a constant parliamentary watch over governmental expenses. Committee involvement in the budget, in fact, tends to favour the prevalence of technical engagement over political posturing, while the opposite happens when the subject involved is the House, which

between two different types of committee expertise in the budget sector. The first type is that of specialised budget committees operating during *ex ante* scrutiny, whose task is mainly that of analysing and of approving the governmental draft budget. The second type is that of *ex post* scrutiny committees, which finds its most relevant example in the Public Accounts Committees (PAC) of the Commonwealth system. The modern PACs represent specialised audit committees which interact closely with the supreme auditor and are entitled to scrutinise governmental accounts.

These two types of committee expertise do not always come together: as is evidenced by comparative studies,<sup>83</sup> the so called ‘Westminster system,’

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rather tends to linger on broad criticism. On this point, see Warren Krafchik & Joachim Wehner (2004), *Legislatures and Budget Oversight: Best Practices*, Paper presented at the Open Forum held in Almaty on 8 April, <http://www.pmg.org.za/docs/2005/050404oversight.pdf>, p. 7 and Joachim Wehner (2006), *Legislative institutions and fiscal policy*, in *PSPE working papers*, n. 08, Department of Government, London School of Economics and Political Science, London, UK, p. 17 ff.

83. As explained by Joachim Wehner (2005), Legislative arrangements for financial scrutiny: Explaining cross-national variation, in R. Pelizzo, R. Stapenhurst & D. Olson (eds.), *The Role of Parliaments in the Budget*

which characterises Commonwealth parliaments, represents a combination of low *ex ante* capacity (also due to the absence of the involvement of *ex ante* committees) and a highly-developed *ex post* capacity.<sup>84</sup> The opposite occurs in parliaments outside the Commonwealth, such as the French parliament, where the oversight of budget is carried out by standing committees charged, at the same time, both with the legislative power with regard to the approval of the budget and with the scrutiny of its execution.<sup>85</sup> The oversight archi-

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Process, Washington DC, World Bank Institute, p. 13, the differences in the legislatures’ approach to budget cycle and budget issues are explained by a number of variables, including not only the parliamentary or presidential nature of the system of government, but also the internal design of parliamentary powers to amend the budget, the party political dynamics, the legislative budget research capacity, the access to relevant information, and so forth.

84. Edward Davey (2000), Making MPs work for our money: reforming Parliament’s role in budget scrutiny, in Centre for Reform Paper n. 19, London, Centre for Reform.

85. Such committees are endowed with dedicated procedures and parliamentary tools, including the assignment of a specific oversight mission to a *rapporteur special*, the assignment of cross-sectional controls to the whole of the *rapporteurs speciaux*, the development of cross-sectional oversight mission, coordinated by the Chair

lecture adopted (either based upon a specialised committee or upon legislative committees also entitled to perform budgetary scrutiny) does not seem to influence either the intensity or the de-

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of the committee and/or by the *rapporteur general*. The Finance committee of the National Assembly, in particular, exercises the oversight function mainly through the *Mission d’évaluation et de contrôle* (MEC), whose main task is to interrogate political and administrative officials on the management of their resources and to inquiry on sectorial public policies, using the variety of parliamentary tools disciplined by Articles 57, 59 and 60 of the LOLF, including the dispatch of questionnaires to government officials, *in loco* controls and hearings. Apart from the scrutiny activity carried out in standing committees, the French model (as the Italian one) is characterised also by the intervention of the assembly in the budgetary oversight, which, through the approval of the *loi de règlement*, is given an important chance of judging governmental budgetary performances. These two profiles of the oversight function occur at different institutional stages: in particular, the committee oversight occupies the stage of the budget execution; the assembly control, instead, is limited to the final stage of the budget execution. For further details, see Paul Amselek (1998), *Le budget de l’État et le parlement sous la V République*, in *Revue du Droit Public*, n. 5-6, p. 1449; Irène Bouhadana (2007), *Les commissions des finances des assemblées parlementaires en France: origines, évolutions et enjeux*, Paris, LDGJ, p. 273 ff.; Aurélien Baudu (2010), *Contribution à l’étude des pouvoirs budgétaires du Parlement en France: éclairage historique et perspectives d’évolution*, Paris, Dalloz.

gree of the parliamentary scrutiny function: this is confirmed by the fact that not only in the UK, but also in France, the parliament has eventually developed a well-structured scrutiny architecture, which enables daily control of the governmental budgetary policy. In Belgium,<sup>86</sup> Germany,<sup>87</sup> and

86. The Budget and Finance Committee of the Chamber of representatives mostly depends on the budgetary information and data provided by the government for assessing its performances; also in the approval of the *lois des comptes*, which definitely consolidates the budget of the previous year, the role of the assembly is often limited to a mere ratification of what proposed by the government. During the budget execution, this latter has in fact many possibilities to modify its original proposals, adjusting budgetary provisions to incoming institutional needs; these variations must be submitted to Parliament, which can take the initiative to interrogate the government on the budget execution.

87. In Germany the scrutiny of budget execution and budgetary management is carried out by the *Bundestag* mainly basing on the activity of a specific subcommittee created within the Budget committee and known as Auditing committee. The Auditing committee is closely linked to three independent specialised bodies provided by the Federal law (the 'Financing Body'; the 'Confidential Committee'; the 'Financial Market Body') and is directly supported by the Federal Court of Audit. The cooperation with these independent agencies contributes to fill in some of the most striking gaps of the *ex post* scrutiny activity of the budget committee: also due to the absence of dedicated budgetary oversight tools, the

Italy,<sup>88</sup> too, parliamentary oversight is carried out

committee, in fact, does not get involved in the review of the economic assumptions used by the government in the budget drafting and does not extend its intervention to the scrutiny of specific government programs. See M. Schattenmann (2009), *The Secretariat of the Budget Committee of the German Bundestag*, Prepared for the Meeting of OECD Parliamentary Budget Officials – Rome, 26-27 February, available at: <http://www.oecd.org/dataoecd/52/28/42466837.pdf>.

88. The intervention of the parliament in the budgetary and fiscal policy-making has not fully evolved yet from its original focus on the governmental expenses' authorisation perspective (see Elisabetta De Giorgi & Luca Verzichelli (2008), *Still a Difficult Budgetary Process? The Government, the Legislature and the Finance Bill*, in *South European Society & Politics*, vol. 13, n. 1, p. 87 ff.), which found in the 'dualistic' scheme of the Financial law its main expression (see Andrea Manzella (2003), *Il Parlamento*, Bologna, Il Mulino, p. 344). This fact, in its turn, has inhibited the development of a 'real' model of budgetary and fiscal oversight, which is only one symptom of the general unsatisfactory development of the control function in the Italian parliamentary tradition (see Andrea Manzella (2001), *La funzione di controllo*, in Associazione italiana dei costituzionalisti, *Annuario 2000. Il Parlamento*, Atti del XV Convegno annuale, Firenze, 12-13-14 October 2000, Padova, Cedam, p. 213). The lack of a mature approach to budgetary and fiscal oversight is confirmed by the absence of dedicated budgetary scrutiny tools, at least for what concerns the budget execution stage: the control carried out at this stage, in fact, is developed by parliamentary

by hybrid committees involved both in the *ex ante*

bodies and parliamentarians through the ordinary and generic control tools and procedures disciplined by the two Rules of procedure. The only 'typical' budgetary oversight tool is represented by the assembly's approval (in line with the French experience) of the *rendiconto*, which nevertheless in the Italian experience has never given the legislature the opportunity of an effective control of budgetary trends; in any case, such a control tool invests the final stage of budget execution (Carlo Chiappinelli (2009), *La evoluzione del sistema dei controlli e la relazione sul rendiconto generale dello Stato*, in *Rivista della Corte dei conti*, n. 2, p. 256 ff.). On the most recent attempts to invert the relationship between the *ex ante* and the *ex post* budgetary scrutiny function by limiting the content of the financial law as to reduce the parliamentary bargaining on the governmental proposals, see Guido Rivosecchi (2007), *I poteri ispettivi e il controllo parlamentare dal question time alle Commissioni di inchiesta*, in E. Gianfrancesco & N. Lupo (eds.), *Le regole del diritto parlamentare nella dialettica tra maggioranza e opposizione*, Roma, LUP, p. 181; Nicola Lupo (2009), *Le sessioni di bilancio, ieri e oggi*, in G.. Carboni (ed.), *La funzione finanziaria del Parlamento. Un confronto tra Italia e Gran Bretagna*, Torino, Giappichelli, p. 36 ff.; Daniele Cabras (2010), *I poteri di informazione e controllo del Parlamento in materia di contabilità e finanza pubblica alla luce della legge 31 dicembre 2009, n. 196*, 30 April, available at: [www.forumcostituzionale.it](http://www.forumcostituzionale.it); Chiara Goretti & Luca Rizzuto (2011), *Il ruolo del Parlamento italiano nella decisione di bilancio: evoluzione recente e confronto con gli altri paesi*, in *Rivista di politica economica*, n. 1-3, p. 51-52.

stage and in the *ex post* scrutiny; however, these three parliamentary experiences have not yet developed specific budgetary-scrutiny tools and procedures. Probably as a result of this, the degree of the national parliament's involvement in the oversight of budget execution remains weak.<sup>89</sup>

Once the different features of the parliamentary oversight models have been clarified, it is possible to consider the basic characteristics of the interaction between the national legislature and the fiscal agency, by focusing on the functional profiles of this relationship, analysed according to the criteria presented in Section 2.

### 5.2.1 The German and Belgian Experiences as Two Examples of Weak Interaction between Fiscal Councils and Parliaments

In Germany and Belgium, the co-operation between the existing Fiscal Councils – classified, in Section 5.1., within the more general category of government-oriented agencies – and the legislative branch reveals itself to be extremely weak.

With regard to what concerns the German Council for Economic Experts, the main duty of this body consists of compiling and publishing an Annual Economic Report which is submitted to the Federal government by 15 of November every year.<sup>90</sup> Apart from the Annual Report, the Coun-

cil also prepares *ad hoc* special reports, depending on the mandate issued by the government, which usually refer to specific current problems.

The strictly advisory nature of the Council's duties, together with the narrowness of the formal powers attributed to it, are in line with the fundamental feature which characterises the Council's interaction with other institutional bodies, *i.e.*, its dependence on the government. The Council does not seem to develop direct contacts with the *Bundestag*, as most of this interaction is mediated by the intervention of the government.<sup>91</sup> This implies that the relationship between the Council of economic experts and the parliament is not a direct one, but is, instead, one which is constantly arbitrated (both from the procedural and from the substantial point of view) by the government.

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89. For a detailed comparison among the main models of parliamentary budgetary oversight and on their impact in terms of the intensity of the parliamentary scrutiny function, see Elena Griglio (2012), *Parliamentary oversight of national budgets. Recent trends in EU Member States*, Paper presented at the Tenth Workshop of Parliamentary Scholars and Parliamentarians, cit.

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90. According to Article 2 of the Appointment Act, in fact, in the Annual Report the Council of Experts draws the fundamental features of the current economic situation, pointing out its foreseeable developments and the possibility of avoiding or suppressing such developments, without, however, recommending any specific measures of economic and social policy. Each member of the Council is assured full autonomy in the preparation of the Report: according to Article 3 of the Appointment Act, in fact, if a minority differs on specific questions, it

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has the right to express its disagreement in the Report.

91. Article 6 of the Appointment Act provides that the Annual Report is promptly submitted by the Federal Government to the legislative bodies and is published by the Council at the same time. Within eight weeks the Federal Government presents its comments on the report to the legislative bodies. In this statement, the Federal Government presents the conclusions to which it has come with regard to economy policy.

The filtering role of the Federal government in the interaction between the Council of economic experts and the Federal parliament is to be found first of all in the presentation to the *Bundestag* and the *Bundesrat*, every January, of the Annual Economic Report, drafted by the Federal government itself.<sup>92</sup>

From the point of view of the funding, the Council is endowed with financial autonomy and its remuneration and expenses are borne directly by the Federal government.<sup>93</sup>

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92. The governmental Report, which among other things describes the government's economic and financial goals for the year as well as the fundamentals of its economic and financial policy, in its Part I includes detailed comments on the Annual Report of the German Council of Economic Experts. The reference to the Council's Report is formally provided by Article 2 of the West German Law to Promote Economic Stability and Growth, dated 8 June 1967.

93. In particular, according to Article 11 of the Appointment Act, the amount of the remuneration to be paid is determined jointly by the Federal Minister of Economics and Technology and the Federal Minister of the Interior. No intervention of the Federal parliament, in line with the 'governmental' nature of the body, is therefore provided by law in this relevant aspect of the Council's institutional profile.

Finally, the fact that the Council of economic experts is strongly centred on the executive branch influences the accountability rules, which make the Council responsible only to the government. The Appointment Act, also considered in its application over the decades, clearly gives the idea that the role of *political* advisor prevails over that of *scientific* advisor; this consideration has raised some criticism in the literature, supporting the idea of the Council of experts being seen as a 'parallel government'.<sup>94</sup>

In conclusion, the German Council for Economic Experts can be considered as a typical example of a 'governmental' Fiscal Council, which reveals only weak and indirect ties with the parliament; the possibility of the Council playing a strategic informative and advisory role with regard to the

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94. Uwe Andersen & Wichard Woyke (eds.) (2003), *Sachverständigenrat zur Begutachtung der gesamtwirtschaftlichen Entwicklung*, in *Handwörterbuch des politischen Systems der Bundesrepublik Deutschland*. 5., aktual. Aufl. Opladen: Leske+Budrich 2003. Lizenzausgabe Bonn: Bundeszentrale für politische Bildung, available at: <http://www.bpb.de/nachschlagen/lexika/handwoerterbuch-politisches-system/40367/sachverstaendigenrat-zur-begutachtung-der-gesamtwirtschaftlichen-entwicklung?p=all>.

parliament reveals itself to be quite weak, due to the constant intermediation of the government in the relationship between the Council and the legislative branch. The narrowness of the tasks attributed to the Council, which mainly exercises an advisory function on matters of economic and fiscal policies, are also attributed to the fact that the origin of the body dates back to a period in which the institutional space now recognised to the Fiscal Council was still lacking.

In Belgium, too, the government-centred nature of the NAI and of the High Council of Finance reflects itself also in the rules concerning the overall functioning of these two fiscal bodies.

Both Councils intervene in the fiscal and budgetary policy-making,<sup>95</sup> but the National Audit Of-

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95. The process starts in May when medium and long-term projections are presented by the government, followed, in June and July respectively by the recommendations of the High Council of Finance and by the release of provisional short-term macroeconomic forecasting exercised by the National Audit Office (adjourned in September). The federal budget is submitted to the Parliament in October; after the presentation of the new budget, an updated version of the Stability Programme is made public. The process ends in February, with the reassessment of the economic budget, and then in March, with

fice intervenes mainly in the *ex ante* stage, while the contribution of the High Council of Finance is focused both on the *ex ante* and on the *ex post* stage. In particular, the intervention of the NAI in the budgetary process is mainly due to the activity of the Federal Bureau for Planning,<sup>96</sup> whose most relevant task is related to the production of macroeconomic forecasts upon which the budget drafted by the Federal government is based;<sup>97</sup> however, the legislative chambers may also apply to the Bureau in order to assess policy measures

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the control of budget execution. See Igor Lebrun (2007), *Fiscal councils, independent forecasts and the budgetary process*, cit., p. 342 and 354.

96. For further details, see Aude Rousselot (2006), *Présentation du Centraal Planbureau néerlandais et du Bureau fédéral du Plan belge, Actualités du WRR néerlandais et de la Strategy Unit britannique*, in *Horizons stratégiques*, n. 2 p. 122 ff.

97. The Bureau, moreover, releases the medium-term economic outlook for the Belgian economy used by the government in order to elaborate the stability programme. The government does not seem to have a formal duty to take into account the Bureau's forecasts in the drafting of the budget; however, up to this moment, this is usually happened: a striking dissociation from the NAI's forecasts would in fact determine a loss of credibility for the government.

(which, however, can never end in policy recommendations).

The intervention of the High Council of Finance in the budgetary policy-making, in contrast, is bound to the publication of two annual reports (drafted by the Council's 'Public-sector borrowing requirement' section),<sup>98</sup> the first report refers to the *ex post* stage, the second to the *ex ante* stage.<sup>99</sup>

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98. For further details, see Paul Bernd Spahn (2007), *Intergovernmental Fiscal Relations, and Structural Problems of Federalism in Belgium*, Washington DC, International Monetary Fund, par. 56 ff., available at: [www.wiwi.uni-frankfurt.de](http://www.wiwi.uni-frankfurt.de).

99. The first report, released around March, presents a general assessment of past and present budgetary policies, in particular those implementing the budget and the stability programme; such report can be at times quite critical. The second report, presented in June/July, analyses the borrowing requirements of each government and makes recommendations concerning the respect both of short, medium and long-term fiscal targets and of budget balances (for general government, its sub-sectors and federated entities). The distinction between the two reports (and therefore between the intervention in the *ex ante* and in the *ex post* stage) reveals itself a bit blurred, also due to the fact that some changes in the timing of the stability programme have recently occurred.

The funding of the two bodies confirms their exclusive dependence on a decision of the government. In compliance with Article 118 of the Law of 21 December 1994, the NAI is financed by an annual grant from the Federation, to be included within the budget section of the Ministry for Economic Affairs.<sup>100</sup> With regard to the High Council of Finance, according to Article 13 of the *Arrêté royal* of the 3 April 2006, the agency's internal financial regulation (which can provide for the allocation of allowances and other forms of remuneration to the members of the Council, to staff members and to external advisors) is approved by the Ministry of Finances.

On the accountability side, the government-centred nature of the two institutions does not prevent them from enjoying full independence: both agencies, as public institutions, have ministers overseeing their activities and budgets, but, at the same time, mainly due to the specific nature of their tasks, they can also act on their own initiative.

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100. The secretariat of the Institute is covered by the official of the Ministry for economic affairs, in co-operation with the services of the National Bank of Belgium.

In conclusion, the twofold Belgian model of Fiscal Councils is characterised by its proximity to the executive branches at both national and regional level, which, however, has not prevented the two bodies from consolidating their independence. The impact of the two Councils on fiscal and budgetary policies is not, in fact, very formalised or transparent, and it seems to have waned after adoption of the euro, becoming more and more independent from government plans, also thanks to the growing interaction with Federated Entities and to the increased budget co-ordination between the Federal government and the Regional governments.<sup>101</sup>

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101. See Paul Van Rompuy (2008), *La coordination des politiques budgétaires en Belgique: 15 ans d'expérience du Conseil supérieur des Finances*, in M. Mignolet (ed.), *Le fédéralisme fiscal. Leçons de la théorie économique et expérience de 4 États fédéraux*, Brussels, De Boeck Université, n. 4, p. 33 ff. and Luc Coene & Geert Langenus (2011), Promoting fiscal discipline in a federal country: the mixed track record of Belgium's High Council of Finance, Presentation held at the Conference on 'Fiscal Policy Councils: Why do we need them and what makes them effective', Vienna, 31 January 2011, available at: [http://www.staatsschuldenausschuss.at/de/img/s23\\_langenus\\_tcm163-221976.pdf](http://www.staatsschuldenausschuss.at/de/img/s23_langenus_tcm163-221976.pdf).

### 5.2.2 *The Office for Budget Responsibility: a Fiscal Councils which Interacts both with the Government and with the Parliament*

The structural ties developed by the Office for Budget Responsibility with both the government and the parliament are confirmed by the functional links established by the Office with both branches.

In particular, with regard to the relationship with the legislative branch, the Office has shown a clear aptitude for serving as a source of information and analytical studies to parliamentary committees.<sup>102</sup>

The tasks attributed to the Office involve the agency in a general surveillance of public finances and budgetary policies; the nature of such activities implies that the government is constantly under the Councils' trial, which, in its turn, can serve the parliament with some relevant elements for politi-

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102. According to Section 8 (2) b) of the Act and to Section 16 (6) of Schedule 1 of the Act, in fact, every report prepared by the Office in pursuance of its duties must be laid before Parliament.

cal judgment. The Office has four main tasks: to produce forecasts for the economy and public finances; to judge the progress towards the government's fiscal targets; to assess the long-term sustainability of the public finances; and to scrutinise the Treasury's costing of budget measures. Each of these tasks is associated with specific publications which are made available to the parliament.<sup>103</sup>

Moreover, the agency is actively involved in parliamentary works as it has to answer parliamentary questions (especially those concerning its

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103. For instance, the *Economic and Fiscal Outlook* publication is produced twice a year by the Office and it incorporates both the five-year forecasts for the economy and public finances and the assessment of the government's progresses towards medium-term fiscal targets; the spring *Economic and Fiscal Outlook* publication incorporates the impact of tax and spending policy measures announced in the Budget Bill. Moreover, the *Fiscal sustainability report*, produced once a year, is meant to evaluate, for each category of spending and revenue, the long-term sustainability of the public finances. Finally, in the *Treasury's costing documents*, the Office scrutinises Treasury's costing of budget measures in order to test whether costing proposed by the government in the Treasury documents corresponds to reasonable estimates. See Office for Budget Responsibility, *Fiscal Sustainability Report*, published on 13 July 2011 and available at: <http://budgetresponsibility.independent.gov.uk/fiscal-sustainability-report-july-2011>.

forecasts) and has to give evidence to parliamentary committees (mainly with the Treasury Select Committee and linked to the reports produced by the Office in the exercise of its scrutiny function) through committee hearings. From the point of view of the funding, the agency interacts both with the Treasury and with the parliament.<sup>104</sup>

Finally, the Office's collective accountability<sup>105</sup> is assessed through two different types of control: the 'institutional' control made by both the Treasury and the parliament upon the basis of the Annual Report of the performance of the Office's tasks drafted in each financial year (Section 15 of the Schedule 1 of the Act); and the 'external' review exercised by the person or body appointed,

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104. See Sections 17 and 18 of Schedule 1 of the Act.

105. An individual accountability applicable to each Office member is moreover provided by Section 6 of the Schedule 1 of the Budget Responsibility and National Audit Act, which in particular disciplines the termination of appointment made by the Chancellor of the Exchequer in case of malpractice or misconduct of the appointee. Even if the law determines the cases justifying the anticipated termination of mandate, according to Section 6 (3) of Schedule 1 of the Act, the appointment of an Office member is not to be terminated without the consent of the Treasury Committee of the House of Commons.

at least once in every relevant five-year period, by the non-executive Committee in compliance with Section 16 of Schedule 1 of the Act and entrusted to review reports made in pursuance of the Office's duty.

In conclusion, the main features of the Office for Budget Responsibility can be found in the mixed nature of the agency (governmental and parliamentary) which, associated with a consolidated tradition of parliamentary oversight of budgetary and fiscal policies, enables the establishment of close interaction and co-operation between the parliament and the fiscal institution.

### 5.2.3 Towards the Development of New Models of Interaction between Fiscal Councils and Parliaments: The Recent Italian and French Reforms

If, up until the latest national reforms, the only European case of a parliament-centred fiscal agency was represented by the Hungarian Fiscal Council,<sup>106</sup> the new independent bodies created

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106. The Hungarian Fiscal Council was created in

in Italy and France seem to add some significant novelties to this comparative framework.

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2009 under the Act LXXV of 2008 on Cost-efficient State Management and Fiscal Responsibility. A detailed analysis of the background which accompanied the institution of the Hungarian Fiscal Council, of its functions and basic *modus operandi* is offered by George Kopits (2011), *Independent Fiscal Institutions: Developing Good Practices*, Presentation prepared for the 3rd Annual Meeting of OECD Parliamentary Budget Officials, Stockholm - Sweden, 28-29 April, available at: <http://www.oecd.org/governance/budgetingandpublicexpenditures/48089510.pdf>. Especially after the approval of Act CXCV of 2011 on the Economic Stability of Hungary, which assigned new tasks to the Council, the body has developed a strong and direct relationship with the General Assembly which emerges in particular in the parliamentary proceeding for the approval of the Act of the Central Budget: according to Art. 24 (3), in submitting the draft Act to the National Assembly, the government must follow the receipt of the comments of the Council; if the Council has communicated its disagreement by the deadline, the government shall again discuss the draft and submit the same to the National Assembly afterwards. For a concrete example of how the Council exercises this function, see the opinion of the Fiscal Council 'on the major characteristics of the budgetary and economic processes of Hungary in the period of January-September, 2012', adopted by the Resolution 11/2012.10.29. of the Fiscal Council of Hungary KVT-67/2012.

The recent approval of such reforms does not enable us to deepen the functional profiles of the relationship with the legislative branch (also due to the fact that the two bodies have not yet been installed). However, upon the basis of regulatory norms, it is possible to develop some reflections on their future interaction with legislative assemblies.

With regard to the Italian experience, it is important to underline that the parliamentary nature of the upcoming fiscal institution (created, as already mentioned in Section 5.1.3, 'by' the two Chambers) implicitly seems to encourage the parliament to develop strong bicameral synergies in the development of parliamentary budgetary oversight. Article 5, Section 4 of the Constitutional Law n. 1/2012, clearly states that the two Chambers, in compliance with their own rules of procedure, must exercise the oversight function on the public finance, with specific regard to the balance between expenditure and revenue, and to the quality and effectiveness of the spending of the public administration. If this provision apparently seems to enable the two Chambers to operate independently in the exercise of the oversight func-

tion, the presence of an internal office devoted to the analysis of the economic and financial data and trends will not be neutral for the strengthening of the overall involvement of the parliament in the budgetary and financial oversight.

This instrumental body will therefore serve as a research unit for the whole parliament, thus favouring the budgetary and fiscal specialisation of the latter in the exercise not only of the *ex post* scrutiny, but possibly also of the *ex ante* scrutiny. For these reasons, the well-functioning of such an organism will be crucial in order to ensure the effective respect of the new principle of the parliamentary responsibility on the financial and budgetary control, introduced by Article 5, Section 4 of Constitutional Law no. 1/2012.<sup>107</sup> In the long-term, as correctly observed,<sup>108</sup> budgetary control

107. On the prospective implementation of Article 5 of Constitutional Law no. 1/2012, see Giustino Lo Conte (2012), *L'organismo indipendente di monitoraggio della finanza pubblica*, in *Giornale di diritto amministrativo*, n. 10, p. 939 ff.

108. Raffaele Perna (2008), *Le procedure di bilancio, fra Governo e Parlamento, in una democrazia maggioritaria*, in *Il Filangieri, Quaderno 2007*, Il Parlamento del bicameralismo. Un decennio di riforme dei regolamenti delle Camere, 2008, p. 175.

based exclusively upon the voluntary behaviour of parliamentary bodies and actors does not seem able to offer structural solutions, given the institutional call for empowered budgetary information to be available to parliaments.

It is not easy to predict whether such an organism will have a decisive role in the improvement of the fiscal and budgetary governance, and, in particular, if it will contribute to shift the influence of the parliament from the budgetary decision-making stage to the *ex ante* and *ex post* stages. The lack of a solid tradition of co-operation between the parliament and the government both before the budget is approved and during its execution could, in fact, either compromise the success of the upcoming fiscal institution or make it strategic for assuring better governance for the whole sector.

Finally, the recent French reform introduced with the *loi organique relative à la programmation et à la gouvernance des finances publiques* created the *Haut Conseil des finances publiques* as an advisory body endowed with strong independence from fiscal authorities, but, at the same time, established its stable and prompt intervention at all relevant stages of the budgetary and financial decision-

making. In particular, the Council is required to formulate its advice on the governmental macro-economic and financial forecasting upon which the annual law for the public finances planning (*loi de programmation des finances publiques*) and the annual financial law (*loi des finances*)<sup>109</sup> are based. This advisory activity – formally disciplined as an autonomous function – will undoubtedly contribute to offer the parliament a strengthened technical informative basis and analytical capacity which will prove particularly useful for the re-inforcement of parliamentary *ex ante* scrutiny.

The possibility for parliamentary bodies to establish direct interaction with the Council is, moreover, explicitly recognised by Article 20 of the *loi organique* n. 2012-1403, which provides that the Chair of the *Haut Conseil* must be heard at any time on request of the committees of the National Assembly and of the Senate.<sup>110</sup>

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109. See Articles 12-17 of the *loi organique* n. 2012-1403.

110. The Decision n. 2012-568 of 13 December 2012 of the *Conseil constitutionnel* determined that the provision of Article 20 does not violate the Constitution, but at the same time does not share the legal status of ‘organique’ rule (par. 59)

Upon the basis of such premises, the likelihood that the *Haut Conseil des Finances* will operate as a functional interface for the parliament can be considered as a continuation of the more general trend directed towards a re-inforcement of the parliamentary involvement in the budgetary decision-making process.<sup>111</sup> This trend, launched by the approval of the *Loi organique relative aux lois de finances* in 2001, contributed to a significant renewal of the parliamentary scrutiny of the budget, characterised not only by the strengthening of parliamentary dedicated oversight tools,<sup>112</sup> but

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111. For an overview of this trend, see Aurélien Baudu (2010), *L’incertaine renaissance parlementaire en matière budgétaire et financière*, in *Revue du droit public et de la science politique en France et à l’étranger*, n. 5, p. 1423 ff.; Pauline Türk (2011), *Le contrôle parlementaire en France*, Paris, LGDJ, p. 176 ff.

112. In particular, the 2009 French modification of the National Assembly Rules of procedure (adopted after the Constitutional reform of 2008) which created the *Comité d’évaluation et de contrôle*, as well as the *Petit loi* approved by the French Parliament on 13 July 2011 (which introduced the ‘*Lois cadre*’ on the balance of public finances), can be interpreted as an attempt to favour a more structural control of the parliament on the budgetary and financial assets, anticipating the budget bill. See Jean Arthuis Le Seuil (2010), *La dégradation des finances publiques: la loi en échec, le contrôle et l’évaluation en recours*, in *Pouvoirs*, n. 3, p. 83 ff. and Laurence

also by the promotion of a new partnership with the court of auditors.<sup>113</sup> In this sense, the development of a constructive interaction between the independent body and the two representative assemblies can be said to be favoured by the long-established co-operation which, in the French tradition, has marked the relationship between the *Cour des comptes* and the parliament.<sup>114</sup>

The comparative overview presented in this section has revealed that the variety of parliamentary models of budgetary scrutiny is likewise accom-

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Baghestani (2011), *A propos de la loi tendant à renforcer les moyens du Parlement en matière de contrôle de l’action du Gouvernement et d’évaluation des politiques publiques*, in *Les Petites affiches, La Loi, Le Quotidien juridique*, n. 78, April, p. 3).

113. On this point, see Alain Lambert (2010), *Vers un modèle français de contrôle budgétaire*, in *Pouvoirs*, n. 134, p. 47-48.

114. On the origins of this inter-institutional co-operation, see Guy Carcassonne (1997), *Les relations de la Cour et du Parlement: ambiguïtés et difficultés*, in *Revue française de finances publiques*, n. 59, p. 131 ff. On the effects of the most recent reforms on the interaction between the parliament and the *Cour des Comptes*, see Michel-Pierre Prat & Cyril Janvier (2010), *La Cour des comptes, auxiliaire de la démocratie*, in *Pouvoirs*, n. 134, p. 97 ff., which defines the French Supreme Audit Authority an ‘auxiliaire de la démocratie’.

panied by a variety of patterns of interaction between the fiscal institution and the representative assemblies. The combination of these two factors does not always offer conclusive data on the existence of a direct relationship between the intensity of the parliamentary involvement in the budgetary scrutiny and the establishment of close co-operation with the fiscal agency. However, the British case confirms that, where parliament has matured a consolidated praxis in the scrutiny of the budget, interaction with the fiscal agency tends to evolve spontaneously. In other words, well-established parliamentary scrutiny will undoubtedly encourage such inter-institutional co-operation. But the existence of unstable parliamentary oversight of the budget does not preclude the fulfilment of this purpose; in this perspective, the Italian case will be strategic in proving the opposite thesis, confirming how a weak parliament (in the *ex post* scrutiny stage) can take advantage from the creation of a fiscal agency in the development of its oversight function.

## 6. Conclusions: The Setting-up of Fiscal Councils and its Implications on the Parliamentary Scrutiny in the new European Economic Governance

The current crisis, which the European Union Member States are also facing, has been regarded as both a financial and a democratic crisis at the same time.<sup>115</sup> It is primarily a crisis of the credibility and of the accountability of political institutions, and, in particular, of fiscal authorities for not having been able to comply with the basic standards of sound public accounts in a responsible way. Fiscal Councils are one of the tools provided by the European Union to counteract the present degeneration and to maintain fiscal responsibility in the long term.

Directive 2011/85/EU, the TSCG, the Communication from the Commission defining the common principles on national fiscal correction mechanisms (COM 2012) 342) and the draft reg-

ulation on common provisions for monitoring and assessing draft budgetary plans (COM (2011) 821) represent the legal basis for national, albeit European-oriented, Fiscal Councils, which now have to be established in every Member State. The setting up of Fiscal Councils, however, not only poses challenges to national institutions, but also offers remarkable opportunities, particularly for national parliaments.

Amongst the challenges to address, there is, for instance, the relationship between Fiscal Councils and the existing institutions, both at national and at European level. For example, especially in the light of the Commission Communication which entitles Fiscal Councils to perform even the *ex post* assessment, the powers of Fiscal Councils could clash with the existing prerogatives of Courts of

115. See Miguel Poiaras Maduro (2012), *A New Governance for the European Union and the Euro: Democracy and Justice*, cit., p. 3 ff.

Auditors, where established.<sup>116</sup> Moreover, according to some scholars, a clear link could be established between Fiscal Councils and Constitutional Courts, for instance, in Germany, after the adoption of the new national fiscal rules.<sup>117</sup> In addition, the relationship between the Fiscal Councils and the European Commission, both acting as ‘fiscal watchdogs,’ albeit at different levels of government, or the role of the Court of Justice of the European Union in evaluating the correct establishment of Fiscal Councils at national level, continue to remain unclear.

Another challenge derives from the difficulty of adapting the existing national Fiscal Councils, such as those examined in Section 5.2.1, to the re-

quirements established at European Union level. The notion of ‘functional autonomy’ or ‘independence’ is likely to be ‘filtered’ by the national constitutional tradition (again, the German case is particularly telling). In particular, the powers and the issue of the inter-institutional accountability of Fiscal Councils require some significant adaptations in the Member States. For instance, the Commission Communication assigns to Fiscal Councils the power to issue policy recommendations towards the national fiscal authority, which, in principle, is bound by them and has to justify publicly any deviation from the path laid down by the Fiscal Council. However, this power is provided in a minority of the existing Fiscal Councils in the European Union and is likely to produce significant effects in terms of the inter-institutional balance, thereby aiming at limiting the discretion of the fiscal authority, especially of the executive.

By contrast, perhaps the institution that will benefit most from the establishment of a Fiscal Council will be the parliament. Since both the Communication and the draft regulation state that Fiscal Councils are accountable to parliaments, the national solutions, like that of Germany, in which

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116. On the need to accommodate the activity of the new Fiscal Councils with existing institutions, especially the Court of Auditors, see Daria Perrotta (2012), *Il rafforzamento della vigilanza sui conti pubblici e l'evoluzione della fisionomia delle istituzioni fiscali indipendenti*, in *Le autonomie in cammino. Scritti dedicati a G.C. De Martin*, Padova, Cedam, p. 539-540.

117. According to Daniele Franco (2011), *Comments on ‘The Role of Fiscal Policy Councils in Theory’*, cit., ‘the new German fiscal rule implicitly defines a clear mandate for a possible German independent Fiscal Council: to provide the economic analysis on which the constitutional court can deliver its judgments.’

the Fiscal Council does not enjoy direct contact with the parliament can be problematical and will probably require some reforms.

The enhancement of the relationship between the parliaments and the Fiscal Councils would seem to be particularly coherent with the approach taken by the German Constitutional Court in preserving the role of the parliament when dealing with European Union affairs and budgetary matters, as well as with the general framework provided by the Treaty of Lisbon. Indeed, the special relationship enjoyed by the parliaments and the Fiscal Councils, according to the Communication and the draft regulation, seems also to reconcile the problematical disconnection between the Treaty of Lisbon, which places national parliaments at the centre of representative democracy in Europe and lets them participate directly in the European decision-making process, and the new European economic governance that only marginally or indirectly considers the national parliaments. The suspect 'new marginalisation' of the national parliaments, which the European measures adopted in the aftermath of the reform of the economic governance framework are likely to produce –

for example, the time-constraints imposed by the European semester and the European-driven balanced-budget clauses introduced at constitutional level – could be, at least partially, hindered by the setting up of Fiscal Councils which have strong ties with their legislatures.<sup>118</sup> Providing independent information, Fiscal Councils can improve the effectiveness of parliamentary scrutiny and oversight as well as the quality of the parliamentary output. In other words, thanks to the 'alliance' with Fiscal Councils, the position of parliaments towards the executives will be enhanced in the control on budgetary and fiscal matters at national level within the European Semester and within the procedures for the surveillance of the compliance with the medium-term objectives. Therefore, the mandatory creation of Fiscal Councils could possibly induce a further Europeanisation of national parliaments, which would reproduce the traditional tension between the emulation of the most developed national experiences of Fiscal Councils

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118. If, as pointed out by Philip Norton (2010), *La nature du contrôle parlementaire*, cit., p. 6, the perception of a possible 'decline' of parliaments conceals the multifunctional nature of legislative assemblies, such multitasking parliamentary identity can take great advantage from the co-operation with the Fiscal Councils.

(for example, the UK Office for Budget Responsibility) and differentiation. Indeed, differentiation reflects, on the one hand, the specificities of the institutional landscape of each Member State, its form of government, its political and economic culture, and the features of parliamentary oversight on budgetary matters; on the other, it is the result of the differentiated integration of Member States in the Economic and Monetary Union and of the diverse impact of the Euro crisis across the countries.

The development of a solid relationship between the parliaments and the Fiscal Councils does not seem to impair the respect of the independence of Fiscal Councils, as a basic condition for their effective performance. Notwithstanding the existing differences in the classification of the Fiscal Councils and in the interpretation of their role with regard to fiscal and budgetary policy-making, the literature has usually shared the idea that the main

threat affecting the role of Fiscal Councils is to be found in the difficult equilibrium ‘between Scylla and Charibdis’,<sup>119</sup> *i.e.*, between acting in full independence (and political irrelevance) and merely legitimising government plans. An ideal Fiscal Council is expected to steer a middle course.

These remarks explain why this paper adopts, as a starting-point, the idea that Fiscal Councils should be granted full independence from their governments, but not necessarily from their parliaments. The creation of co-operative patterns with the legislative branch represents a valuable target both from the point of view of the Fiscal Council (which is thus strengthened in its institutional role and can consolidate its capacity to interact with all political parties without becoming partisan), and from the point of view of the parliament itself (which can thus gain new sources of information and analytical data which will enable effective control of the activity of the government).<sup>120</sup> Strength-

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119. Luc Coene & Geert Langenus (2011), *Promoting fiscal discipline in a federal country*, *cit.*, p. 20.

120. On ‘the value that an independent budget capacity located in the legislature can have for expanding the legislature’s role in budgeting and for holding the executive accountable’, see Barry Anderson (2009), *The changing*

ening the relationship with the parliament would, therefore, offer Fiscal Councils the opportunity to be impartial without staying outside the political arena: if fiscal institutions ‘must work at the core of the democratic process and be fully owned’,<sup>121</sup> the relationship with the parliament reveals itself as a strategic one. Such a perspective – consisting in the promotion of procedures of direct interaction in between Fiscal Councils and their respective representative assemblies – constitutes a challenge, above all, for those Fiscal Councils which are loosely tied to respective parliaments.

The development of this idea has required us to widen our original plan of analysis, involving - in the comparative survey - a confrontation based not only upon the identity and role of the Fiscal

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*role of Parliament in the budget process*, in *OECD Journal on Budgeting*, vol.1, p. 3.

121. Daniele Franco (2011), Comments on ‘The Role of Fiscal Policy Councils in Theory’, *cit.*; Xavier Debrun (2011), *The Theory of Independent Fiscal Agencies: What Do We Have? What Do We Need? And Where Does This Leave Us*, Presentation held at the Conference on ‘Fiscal Policy Councils: Why do we need them and what makes them effective’, Vienna, 31 January 2011, available at: [http://www.staatsschuldenausschuss.at/en/img/s16\\_debrun\\_tcm164-221973.pdf](http://www.staatsschuldenausschuss.at/en/img/s16_debrun_tcm164-221973.pdf).

Councils, but also upon their relationship with the parliament, which is considered as a part of the budgetary and fiscal policy-making.

Interfacing these perspectives of analysis has enabled the traditional distinction between ‘government’ and ‘parliament’-centred Fiscal Councils to be enriched. The comparative survey has revealed that the relationship between these two bodies is sometimes entirely mediated by the government (as the case of Germany clearly reveals); in other contexts (the experience of Belgium is emblematic at this regard), the parliament is not considered as a due interlocutor for the fiscal authorities, whose main institutional reference is instead represented by the executive branches, at national or at regional level; the British Office for Budget Responsibility offers a good example of a Fiscal Council which, although closely-linked to the government, has developed close co-operation with the parliament; the forthcoming Italian Parliamentary Budget Office will add to the comparative framework a rather unique example of a Fiscal Council strongly centred in the parliament, both from the structural and from the functional point of view; finally, the creation of the French

*Haut Conseil de finances* will offer a new model of a fiscal agency which, mainly due to its structural ties with the *Cour de comptes*, is endowed with a strong external legitimation, but, at the same time, is supposed to act as a functional interface of the parliament.

Upon the basis of this multi-faceted framework, it is possible to affirm that the relationship between the Fiscal Councils and the parliaments tends to be shaped by two factors. The first factor is related to the influence exercised by the economic, political and legal context over the role and position of Fiscal Councils: in the European context; in fact, only the 'last generation' of Fiscal Councils are imagined, from the structural point of view, as having a solid and direct relationship with the parliament. If this trend is strongly conditioned by the newly-emerged need to meet EU requirements, the crisis itself seems to have encouraged the search for a stronger democratic legitimation for the mandate of Fiscal Councils based upon the

development of a privileged interaction with the national parliaments as the authentic exponents of popular legitimacy.

The second factor influencing the relationship between the parliament and the fiscal institution is instead to be found in its connection with the development of an autonomous capacity of the parliament to scrutinise the budget. The empirical data available reveal that the interaction between these two elements is a complex one: when the parliament is strong in the exercise of the budgetary scrutiny, close co-operation with the fiscal institution spontaneously tends to take place (see the British case);<sup>122</sup> but when this condition is not satisfied, the same result can, however, be obtained through formal legal provisions which encourage the creation of a direct connection between the Fiscal Councils and the representative assemblies (as in the recent Italian constitutional reform). In this latter hypothesis, the setting up of a fiscal authority can, therefore, affirm itself as an

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122. The legislature tends to be more interested in the informative and analytical support of the Fiscal Council when its daily activities involve the scrutiny of governmental choices and performances in the budgetary and fiscal policy field.

independent variable which can contribute to re-invigorate the parliamentary scrutiny function on budgetary and fiscal matters.

The above-mentioned consideration on the relationship between Fiscal Councils and national legislatures does not challenge the importance that the economic literature usually attributes to the creation of a fiscal institution as a useful measure capable of providing improved fiscal performance. In particular, it does not condition the possibility of Fiscal Councils promoting a more effective use of public resources,<sup>123</sup> but it should, instead, be interpreted as a warning that demonstrates that the implementation of such an objective is also dependent on the relationship that the Fiscal Council develops with all the institutions which have an impact on budgetary policy-making. To date, the literature has deeply investigated the correlation between the effectiveness of fiscal institutions and the various elements of the fiscal

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123. On the conditions influencing this result, see Lars Jonung & Martin Larch (2006), *Improving fiscal policy in the EU. The case for independent forecasts*, in *Economic Policy*, n. 47, July, p. 491 ff., who in particular underline how 'the establishment of an independent forecaster as such may not necessarily guarantee more caution in drawing up the budget' (p. 524).

framework, from the formal frameworks (such as the constitutional rules on excessive deficits) to the informal ones (for instance, the motivation of policy-makers).<sup>124</sup> All these features undoubtedly influence the design of fiscal institutions and their capacity to discourage deviations from desirable policies; but, if we want to make Fiscal Councils work effectively, it seems that the internal architecture of the form of government, in its general functioning and in its specific manifestations within budgetary and fiscal policy-making, should also be taken into consideration. Only by considering the overall interaction of such agencies with both the government and the parliament – in their role as bodies in charge of the political decision-making in the budgetary and fiscal field – can we establish the premises for a fiscal architecture capable of increasing the contribution of all the institutions involved.<sup>125</sup>

**Figure 1** - Features of the Fiscal Councils in the UK, Belgium and Germany with regard to the nature of parliamentary oversight of budget

	Nature of the parliamentary oversight of budget		Criteria for assessing the Council's independence (firewalls)			
	Type of parliamentary oversight of budget	Extension of parliamentary oversight of budget	Council's members appointment and staffing	Formal influence of the Council in the budget and fiscal process	Council's funding	Accountability rules (in face of the Government - of the Parliament)
<b>UK - Office for Budget Responsibility</b>	Parliamentary oversight of budget carried out by the Public Account Committee together with National Audit Office	Intense and consolidated parliamentary scrutiny	HoC's Treasury Committee must give its consent on the appointment (and termination of mandate) of three members of the Office	The government is constantly under the Councils' trial Aptitude of the Office for serving as a source of information and analytical studies to parliamentary committees	The Office depends from both the Treasury and the Parliament for its revenues as well as for the certification of its accounts (subject also to the validation of the Controller and Auditor General)	Collective accountability assessed: a) by institutional bodies (the Treasury; the parliament) every year, b) by an external reviewer (person or body appointed by the non-executive committee at least once in every relevant 5-year period

124. See, in particular, Xavier Debrun & Manmohan S. Kumar (2007), *The Discipline-Enhancing Role of Fiscal Institutions*, cit., p. 31 ff.

125. As observed by Andrea Manzella (2012), *Il governo democratico della crisi*, Presentation held at the 58th Conference on Administrative Studies - Varenna, 20-21 September, in fact, the entrustment of power on technical bodies does not bar the essence of politics, as the role of democratic institutions can in any case be safeguarded through the appointment procedures, the introduction of transparency duties for independent agencies and the development of cooperative patterns in between such agencies and political decision-makers.

<b>Belgium – National Accounts Institute and High Council on Finance</b>	The parliamentary oversight of budget involves both the Budget and Finance committee and the Assembly of the Chamber of representatives	Low-Medium development of budgetary oversight	NAI and HIC as ‘government-oriented’ agencies: relationship with both the Federal and the Regional governments) (plurality of institutional interlocutors)	- NAO intervenes mainly in the ex ante stage; HCF’s contribution is focused both on the ex ante and on the ex post stage.	NAI is financed by an annual grant from the Federation, inscribed within the budget section of the Ministry for economic affairs (art. 118 of the law 21st December 1994) According to art. 13 of the Arrêté royal of the 3rd April 2006, HIC adopts its own internal financial regulation, which is approved by the Ministry of finances.	Both agencies, as public institutions, have ministers overseeing their activity and budget; this does not prevent them from enjoying full independence (they respond to government requests, but at the same time can also act on their own initiative).
<b>Germany - Council for Economic Experts</b>	Parliamentary scrutiny of budget mainly carried out by the Budget committee of the Bundestag (and in particular by Auditing subcommittee) -	<u>Medium development of budgetary oversight</u>	The five members of the Council are selected among specialists in the field of economic theory and policy and appointed by the Federal President on the recommendation of the government.	The Council’s main duty is to compile the Annual Economic Report, presented to the Federal Government by November 15th, which in its turn submits it to legislative bodies. Within eight weeks the Federal government presents its comments on the report to the legislative bodies.	The Council is endowed with financial autonomy and its remuneration and expenses are borne directly by the Federal government	The government-centered nature of the body makes the Council responsible only in face of the government. The role of political advisor prevails over that of scientific advisor, thus supporting the idea of the Council of experts as a ‘parallel government’.

**Figure 2** - A comparison between the degree of the national Parliaments’ involvement in the budgetary oversight (ex post scrutiny) and their relationship with Fiscal councils

Country	Parliamentary involvement in the budgetary oversight (ex post scrutiny)	Reference institution of the Fiscal Council	Interaction Fiscal council -Parliament**
UK (Office for budget responsibility)	High involvement	parliament government	Intense

# 13. GOVERNING PORTUGAL IN HARD TIMES: INCUMBENTS, OPPOSITION AND INTERNATIONAL LENDERS

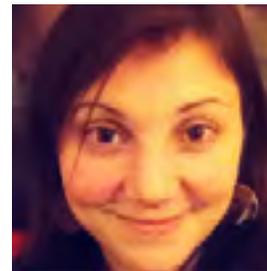
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# 1. Introduction

Following the banking collapse in the US and shortly after the beginning of the Greek sovereign debt crisis in the first quarter of 2010, Portugal was pin-pointed as a high-risk investment: demands for bonds issued by government shrank and the interest rate shot up. The Prime Minister (PM) José Sócrates kept insisting that the country would not have been bailed out on the grounds that the minority Socialist government was successfully approving austerity packages with the help of the main opposition party – the Social Democratic Party (PSD). However, in March 2011, the government proposed an additional fourth package that was rejected by all the opposition parties. This led to Sócrates' resignation and shortly after the international lenders were called in. In the election of June 2011, a centre-right coalition composed of the PSD and the CDS-PP obtained an absolute majority and started to implement a series of painful austerity measures, most of which were conditioned by the international lenders, provoking recession and social unrest. Despite their very liberal and, for many, unfair repercussions, the Socialist Party (PS) in opposition voted

in favour or abstained from voting on the most important packages during the first 15 months of the current legislature, finally shifting strategy and voting against the 2013 budget in November 2012.

This narrative implies several puzzles for researchers of Portuguese politics: why have first the PSD and then the PS supported unpopular and liberal measures for so long? What made them shift from support to opposition? More broadly, what impact has the crisis had on the Portuguese opposition's behaviour? Is there any difference among the opposition parties? How is their behaviour affected by the presence of a majority or minority government?

The Portuguese case gives a unique opportunity to address these questions. It offers an insight into the impact of the financial crisis on the opposition's behaviour with both a minority government – during which non-collaboration could have dramatic consequences – and a majority one – when such a choice rarely has major political or policy implications. It also enables us to study the effect

of additional external actors – that is, the European Union (EU) and later the European Central Bank (ECB) and the International Monetary Fund (IMF) – on the opposition's conduct. These actors constrain both the majority and opposition, but also represent the precious ally of political entrepreneurs who would like to push ahead with liberal measures – in our case, clearly in disagreement with both the moderate and radical left parties' programmes.

Our main argument is that the financial crisis, which jeopardizes national interest but also triggers extremely radical socio-economic measures, has an important effect on the opposition's behaviour. All taken together, consensus in parliament decreases with the onset of the crisis mainly because more salient and divisive socio-economic policies have to be approved. However, we also observe variations among parties; on the one hand the mainstream opposition parties are more consensual than they would be if the same policies were presented in normal times (as long as they do not see a golden opportunity to get in power themselves) and on the other hand, the radical parties are even more adversarial than usual. In

order to demonstrate these claims, we rely on qualitative process tracking of the Portuguese opposition's positions on key economic issues (including interviews with key political players) and on quantitative data on the voting behaviour of the parliamentary party groups before and after crisis (in the period 1995 to 2012).

## 2. Theoretical argument and hypotheses

Opposition parties are always exposed to two contrasting pressures: one towards conflict, which comes from the need to mark their position as different from that of the government in office, and one towards cooperation, which comes from the will to take part in decision-making and influence the policy outcome. With the financial crisis, this dilemma between conflict and cooperation has become even more crucial. Austerity measures are by their very nature unpopular and, in bad economic times, voters are more likely to withdraw their support of the government in office (Lewis-Beck 1988). Thus, the opposition parties have a choice between the need to cooperate with the majority to influence the direction of far-reaching socio-economic changes for the nation's sake and the opportunity to weaken a fragile government even further and possibly get into power at the successive election.

Little is said in the existing literature about the possible behaviour of the opposition parties in such a critical situation. Previous research suggests that the opposition's behaviour is likely to be

more adversarial on economic and social policies, since parties are expected to represent different socio-economic interests (Rose 1984, De Giorgi 2011). Furthermore, the saliency that parties give to different issues has an impact on their voting behaviour in parliament: low issue salience means scarce public attention and consequently fewer incentives for political parties to compete. However, the more a party (and its electorate) assigns relevance to an issue, the more costly it will be to behave consensually (Carammia and De Giorgi 2011, Mújica and Sánchez-Cuenca 2006, Stecker 2011). As the legislation presented by the governments in order to tackle the crisis is mainly related to socio-economic issues and innately salient, our first research hypothesis is that:

H1. Since the beginning of the crisis, the level of consensus between the government and opposition parties has decreased as the number of socio-economic and salient policies discussed in parliament has increased.

However, as pointed out in the existing literature, the nature of parties and the type of party competition constitute a crucial variable explaining the behaviour of the opposition in parliament (Duverger 1951, Sartori 1966, Flanagan 2001). In particular, the political parties proposing extreme societal changes, the so-called radical parties, are often permanently in opposition; while those with a more moderate stance, the mainstream parties, are usually in government. As Sartori eloquently notes, the former are more likely to act responsibly: 'An opposition which knows that it may be called to 'respond', i.e. which is oriented towards governing and has a reasonable chance to govern [...] is likely to behave responsibly, in a restrained and realistic fashion. On the other hand, a 'permanent opposition' which [...] knows it will not

be called on to respond, is likely to take the path of 'irresponsible opposition' (Sartori 1966, p. 35).

This difference between permanent and alternative opposition has implications for our research question, namely the impact of the crisis on the opposition behaviour: since the legislation presented by the governments to save their country from the economic crisis is of the highest national interests, we expect mainstream parties to feel 'responsible' and to cooperate with the government, although they would have opposed these policies under normal circumstances. Alternatively, radical opposition parties are expected to take advantage of the crisis to fight with the government and to be even more controversial than they had been before the crisis.

Thus, although we expect a general decrease in the level of consensus after the onset of the crisis (due to the rising number of salient and socio-economic policy decisions), we expect the net impact of the crisis on the opposition behaviour to vary from one party to another. Since the onset of the crisis, the mainstream parties which usually alternate in government in Portugal – the PS, the PSD and the CDS-PP –, are expected to behave

more consensually than they would have done for similar policies in other circumstances. We expect the contrary to be true for the radical left parties (the PCP, PEV and BE ). Therefore, our second hypothesis states that:

H2. Controlling for saliency and type of policies, after the onset of the crisis the mainstream opposition parties are more consensual than the radical parties.

In this turbulent period, there is one further intervening variable that cannot be ignored, namely the increasing influence of international actors on the economic policy issue. Indeed, with the bailout, the conditions set by the European Commission (EC), the ECB and the IMF for the loan forced the Portuguese government to make radical changes in their policies. Even before, however, the EC had pressed for public debt and deficit to be reduced as quickly as possible. As a consequence, there is a clear trend that is driven by the crisis: an increase in the European influence – a europeanisation – in many controversial sectors of social and eco-

conomic policy. Many scholars have already worked on the impact of euro-scepticism – and conversely of pro-European attitudes – on the government-opposition dynamics and party competition (Hooghe et al. 2004, Sitter 2001 and 2002, Szczerbiak and Taggart 2003). We thus expect the traditionally pro-European parties in opposition to be more likely to cooperate with the government when the socio-economic measures follow the European Union recommendations/orders (with or without the intervention of the IMF). Alternatively, we expect the more euro-sceptic parties in opposition to have fewer incentives to collaborate when the EU is influencing legislation.

H3: Pro-European parties in opposition are more likely to cooperate with the government on policies recommended by the European Union than euro-sceptic parties.

Obviously, this third hypothesis is related to the former as parties that are permanently out of government tend to be more euro-sceptic (Taggart 1998, Sitter 2001). Moreover, since it is hard to

combine euro-sceptic stances with government ambitions, euro-sceptic parties that want to become credible coalition partners frequently moderate their hostility to Europe (Conti and De Giorgi 2011, Costa Lobo and Magalhães 2011). Two different kinds of analysis – one based on interviews with the Portuguese MPs conducted at the beginning of the crisis in 2008, (Moury and De Sousa 2011), and the other based on the study of party manifestos in the period from 1995 to 2005 (Costa Lobo and Magalhães 2011) – indeed converge to show the two major parties, the PS and the PSD, have a very strong European attitude: virtually all their deputies think that EU membership is a good thing according to the responses given in 2008, and the clear majority of statements in both parties' manifestos are pro-European. On the other hand, it is not surprising that the manifestos of the radical left parties, which have never been in government, present strong anti-European stances. However, Moury and De Sousa observed an important distinction between the two extreme left parties: while a large majority of BE deputies finds that EU membership is a good thing (66.7%), less than one third (29%) of the CDU (PCP-PEV) deputies agree with this statement. Finally, the

CDS-PP is less Euro-enthusiastic than its centre-right partner: while the manifestos of both parties have been clearly pro-European since 1996, the CDS-PP 1995 manifesto (i.e. in the first electoral contest after the Maastricht treaty) showed strong Euro-sceptic positions. Similarly, a large majority of deputies from this party (87%) welcomes membership to the EU, but this percentage is lower than for the PSD (95.6%). Thus, if H3 is correct, after the crisis we should observe variation in the voting behaviour between the CDS-PP and the two other mainstream parties on the one hand and between the BE and the CDU on the other.

Our final hypothesis is related to the variation in time during the period of crisis. As stated above, austerity measures are by their very nature unpopular and so it is the government that is constrained to implement them. As a consequence, the main opposition parties have a better chance during the financial crisis of replacing the incumbents if new elections occur. So the more the government is in jeopardy and the better the prospect of winning office for the opposition parties should there be an election, the greater the opposition's incentives to challenge – rather than to support – the execu-

tive. In that sense, crisis leads to the instability of governments. This idea is consistent with the literature that economic and financial crises tend to lead to government instability and termination (Browne et al. 1986). Hence, our last research hypothesis is that, once the financial crisis has begun, the opposition behaves in a more adversarial way when the government's incumbency is at risk – for instance, when it lacks a majority of seats in parliament and/or its popularity declines – but in a more cooperative way when it is not – i.e., when elections have just been held.

H4. After the onset of the crisis, the opposition parties will be more adversarial when their possibilities to replace the government in office increase.

In the next two sections we test these four hypotheses first in light of process-tracking of the main events and bills approved in parliament since the start of the crisis, and second through a quantitative data analysis of the legislation passed before and after the crisis, in the period from 1995 to 2012.

### 3. A political overview of the crisis

#### Opposition's behaviour and narratives (2008-2012)

After the fall of the Lehman Brothers in September 2008, there was a dramatic slow-down in the Portuguese economy. Since exchange devaluation was not an option – unlike in the previous debt crises in the 1970s and 1980s –, the first measure taken by the first Sócrates government (a single-party majority government) was fiscal expansion. These counter-cyclical fiscal policies were taken in coordination with the EU's initial neo-Keynesian approach to the crisis (European Commission 2008). Those proposals received different answers in parliament, with all opposition parties voting against the 2009 budget, but in favour of its first amendment (with the exception of the PSD which voted against). Nonetheless, the reasons behind the negative votes of the various parties were very different: while the radical left parties criticised the PS for not going far enough, the PSD and CDS-PP considered the expansionary budget to be irresponsible.

During the second half of 2009, the Portuguese government had reported an estimated 2.6 % slump in GDP and a public deficit of 9.3 per cent in 2009. The European Council urged the country to rapidly engage in policies aimed at medium-term fiscal consolidation (European Council 2009), thus putting an end to the short cycle of fiscal expansion. In April 2010, the Greek government asked for financial assistance from the European Union to avoid bankruptcy, while the Portuguese government interest rates soared to their highest level since entry into the Euro. As the incumbent PS had lost the absolute majority in parliament, when a general election was called in September 2009, the new Socialist minority government urged the parliamentary opposition to help approve the budget for 2010. According to Portuguese economists, this budget, was not a real austerity plan: the new Lisbon international airport, high speed train lines and other considerable public investments were still on the agenda, as were other measures aimed at smoothing the negative effects of the crisis on economic output and

employment. Nevertheless, the freezing of public sector salaries and the plan to reduce state personnel carried the message to be heard by the markets and the EU leaders that the country was back on the track of fiscal consolidation. The left wing parties accused international financial speculators of robbing the country with the acquiescence of the government and rejected the bill. While blaming the previous Socialist governments (both Guterres and Sócrates) for getting the country into trouble, the PSD and the CDS abstained from voting and let the budget pass.

Just three days after the budget's approval, on March 12, the government went back to the parliament to ask for support for the Stability and Growth Programme (SGP) 2010-2013, before delivering it to the EU. Unlike the budget, the SGP was undoubtedly an austerity package composed of a wide set of hard fiscal measures on the revenue and expenditure sides. Both the CDS and the radical left-wing parties soon announced they would vote against. For the parliamentary left, the Portuguese governments had mistakenly followed the path of recessionary budget policies that not only would fail to solve the debt crisis but would also destroy the national economy, dismantle the

welfare state and increase social inequalities. The CDS, for its part, blamed the Socialist government for targeting the poor and most vulnerable instead of cutting the inefficiencies of the Leviathan and for lacking a strategy to lead the country back to growth. Despite sharing a similar discourse, the PSD (just before the election of its new leader Pedro Passos Coelho) decided to negotiate the first austerity package and abstained from voting. The argument invoked for abstaining from voting and letting the austerity package pass in parliament was that political stability was of greater national interest, especially after Fitch's downgrading of the Portuguese credit rating.

By the end of the first quarter of 2010, Portugal was boarding the Greek ship and starting to muddle through the storm of recessionary austerity packages, reports of negative growth, rising unemployment and poor fiscal behaviour, downgrading credit rates, and spiking yields. Despite an ever critical stance towards the government, the PSD negotiated two additional austerity packages with the PS and abstained from voting on them once in parliament (consequently letting them pass). Whenever talks with the government broke down, the President of the Republic, Aníbal Cava-

co Silva, pushed the PSD – the party he had led in the 1980s and 1990s – back to the negotiating table.

Such a cycle would eventually come to an end in early 2011, when the government lost support from all sides of the political spectrum, in particular from the President of the Republic. While the three initial packages of the Sócrates government had been sustained by the President (who probably wanted to avoid being accused of a potentially dangerous political crisis in the middle of the financial storm), Cavaco Silva's presidential reelection in January 2011 marked a turning point. In February, the President vetoed a decree-law approved by the government for the first time in five years of institutional cohabitation with the PS in government. His inauguration speech soon afterwards, on March 9, was regarded by many politicians and observers as a 'declaration of war' on the government. The scene was set for an institutional conflict between the PR and the government.

In the meanwhile, with 10-year bond yields consistently above 7 per cent, the government was forced to negotiate a fourth austerity package with the EU, which basically consisted of an amended

version of the SGP (Stability and Growth Pact) 2011-2014. According to the PSD (but vehemently denied by each of the 12 Socialists interviewed), the negotiations were conducted behind the backs of the parliamentary opposition and the President of the Republic.

While there was no formal need to approve this new version of the SGP in parliament, the Prime Minister declared he would resign if the opposition proposed a resolution against the programme and this received a majority vote in parliament. The programme, he said, was the only alternative to the bailout, and he was not available to govern under the supervision of the IMF. Rejecting the government package would therefore trigger a political crisis in the middle of a financial storm, and the opposition should be blamed accordingly. This behaviour made many observers conclude that the PM was keen to make the government fail before the bailout by also blaming the opposition parties for their lack of responsibility.

Despite the pressure of new rating downgrades, the President of the Republic did not take action to rescue the plan from rejection on the grounds that the Presidency had been prevented from using its

influence due to the lack of information given by the government on the new austerity package. The PSD voted against it and the Prime Minister immediately resigned. The eroded authority and credibility of the Socialists in managing the crisis, as well as the alleged negotiations of the fourth austerity package with the European authorities behind the backs of parliament, the President and the social partners, were the main arguments used by the PSD to explain its shift in voting behaviour and the rejection of the fourth and last austerity package of the PS executive. In the aftermath of these events, the caretaker government had no choice but to ask for the bailout on April 6, at the beginning of the electoral campaign.

The negotiating process was conducted by the government on behalf of the Portuguese Republic and a memorandum of understanding was signed in May by the lenders – the so called troika, composed of the EC, the ECB and the IMF – and the three mainstream parties: PS, PSD and CDS. This was a signal that, no matter which party was going to win the election, the new government would inevitably be constrained by the commitments to its international lenders. And to a lesser extent, the same was also true for the signing parties that

would be in opposition. By contrast, the radical parties (PCP, PEV and BE) claimed that the bailout was undemocratic and unnecessary and refused discussions with the troika.

At the general election held in June 2011, the electoral strategy of the PSD and CDS-PP to emphasise Sócrates' personal responsibility in the Portuguese crisis proved successful. The centre-right coalition obtained an absolute majority and the head of the PSD, Pedro Passos Coelho, became the new PM. As the agent of the troika, Coelho's government had to implement a series of painful austerity measures, provoking recession and social unrest. Once in opposition, the PS started to blame the government for ever worsening crisis, thus aligning its discourse with the more radical parties on the left. For the PS and the radical left parties, the centre-right coalition government went far beyond the agreement with the troika and its austerity measures – the usual mix of tax increases plus spending cuts in social benefits, pensions and public sector wages – were unfairly distributed and sharpened recessionary effects. Despite this common discourse and the actual 'irrelevance' of its voting choice in the current majority setting, the PS had been quite coopera-

tive on the major (and arguably more painful and inconsistent with their ideological background) policy packages proposed by the PSD/CDS coalition government until November 2012. While the three radical left parties constantly voted against the government packages, the PS abstained from voting on the 2012 budget – comprising tax increases and public sector wage cuts – and the new labour legislation, which introduced cuts in pay and holidays and the easing of restrictions on lay-offs and workers’ dismissals. In addition, the Socialists voted in favour of amending the legal regimes on the recapitalisation and consolidation of the banking sector with the help of the state and the privatisations of state owned enterprises. The need to act responsibly vis-à-vis an agreement to which they contributed unanimously was again given by the Socialist deputies we interviewed as the main reason behind their choices. However, a shift was observed in November 2012 when the PS refused to vote for the 2013 budget – blaming the government for its incompetence and stubborn insistence on austerity and failure to take action to foster economic growth. Table 1 summarises all the events mentioned so far.

Table 1. Main socio-economic policies passed and the behaviour of the opposition

	<b>Bill proposed</b>	<b>Opposition voting behaviour</b>
<b>Sócrates I</b>	19.10.2008 - Budget 2009 (Expansionary)	28.11.2008. All voted against
	21.01.2009. Law n. 10/2009. 1 <sup>st</sup> amendment to Budget. ‘Investment and Employment Initiative’ (IIE, Expansionary)	05.02.2009. All voted yes with exception of PSD which voted against
<b>Sócrates II</b>	26.01.2010 - Budget 2010 (Mild austerity)	12.03.2010. After an agreement with the PS, the PSD and the CDS abstained from voting and let it pass.
	15.03.2010 PEC I (Austerity package)	After an agreement with the PS, the PSD abstained from voting and let it pass (PEC I: 25.03.2010; PEC II: 30.05.2010; PEC III 30.10.2010).
	13.05.2010. PEC II (Austerity package)	
	29.09.2010. PEC III - Budget 2011 (Austerity package)	
	11.03.2011. PEC 4 (Austerity package)	23.03.2010. Resolutions rejecting the PEC 4 proposed and approved by all opposition parties in Parliament
<b>Passos Coelho</b>	28.07.2011 - Budget 2011: 2 <sup>nd</sup> amendment (Austerity)	06.08.2011. Favourable vote from PS. Radical left parties voted against
	17.10.2011 - Budget 2012 (Austerity)	29.11.2012. The PS abstained from voting and radical left parties voted against
	17.10.2011. Amendment budget. Austerity	
	23.11.2012 - Budget 2013 (Austerity)	All opposition parties voted against

## 4. Understanding the opposition's choices

As already stated, the narratives above offer several puzzles. What can explain first the PSD and then the PS support of unpopular government measures? What can justify a shift in the conduct of those parties at one given moment of time? And what reasons can be found for the variation among parties?

The answer to the first question lies in the extreme risk involved during the crisis, namely of default and bankruptcy – a matter of great national interest – for which the two major parties, the PS and the PSD, felt responsible even from the opposition benches (H2). While it is true that the Socialists and the centre-right parties had been ideologically close for decades, few of the bills just mentioned would have got the support of the major opposition parties in normal times. This is especially true for the PS with regard measures such as the privatisation of natural monopolies or the severe cuts in pensions and salaries. It thus seems that the PSD and PS had felt constrained by a certain sense of responsibility and, for the latter, by a

commitment to fulfil the agreement signed with the international lenders.

This sense of obligation was not shared by the radical left parties and the CDS-PP. As we said, our argument is that the former's exclusion from government might help explain their adversarial conduct even in these hard times (H2), but this distinction does not help explain the CDS-PP's controversial behaviour. In H3, we posit that, since most of the relevant socio-economic policies had been recommended by the European Union and, after the loan, required by the troika, the variation in the opposition parties' voting behaviour could also be explained by looking at their general attitude towards Europe (H3). As noted above, the PS and PSD are unequivocally pro-European as much as the CDU is euro-sceptic. The CDS-PP and the BE, for their part, are more ambiguous about Europe. The CDS-PP's ambiguity on the EU might thus explain why it was less consensual than its Social democratic ally, despite its ambition to again become a member of the government. Similarly, the pro-European stance of the PS and the PSD might

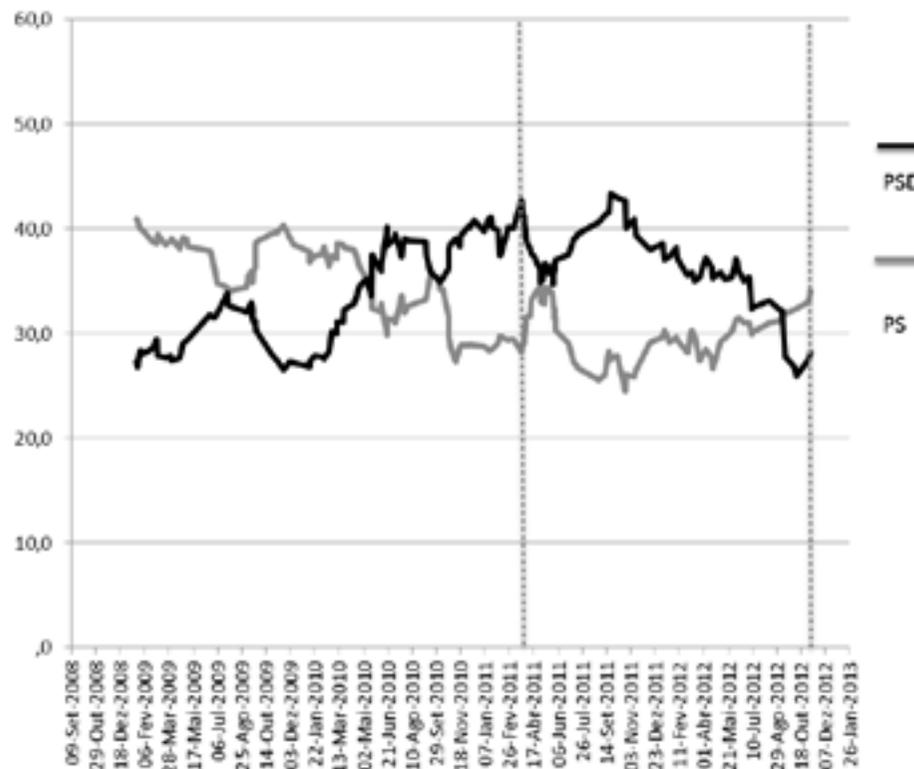
have contributed (together with their centrality in the political spectrum) to explaining their collaboration with the government on relevant and controversial socio-economic legislation: in particular, the PS collaboration with the troika and its support for the very liberal policies of PSD-CDS (even if not necessary). On the other hand, the euro-scepticism of the radical left parties sheds additional light on why they have almost systematically opposed the government's measures.

One last puzzle tabled by the Portuguese story has to do with the reason why, after three crucial abstentions, the PSD finally decided to vote in favour of a resolution against the fourth austerity package proposed by the Socialist government and why a similar shift was observed from the PS in November 2012. We hypothesise that these decisions were taken because the government incumbency was more at risk at the time of the two shifts than before (H4). Both the PS and the current PSD governments were (and are) intrinsically fragile: the former because it could not count on a majority of seats; and the second, supported by an absolute majority composed of the PSD and CDS-PP, because it revealed severe and repetitive intra-

coalition conflicts suggesting a possible fall of the government.

A look at the intentions of vote for the period from 2010 to 2012 (Figure 1) shows that both the PSD and the PS changed their voting behaviour from cooperative to conflictual when the electorate's voting intentions were in their favour. As Figure 1 shows, the voting intentions were in favour of the PS when the first two packages were voted upon and were almost even between the PS and PSD when the third one was approved; but the PSD had a clear edge when the fourth package was presented to the parliament. Supported by voting intention polls and probably under significant internal pressure from its party and the President of the Republic himself to force elections (Magalhães 2012), Passos Coelho chose to join the rest of the opposition parties in rejecting the additional package proposed by the PS. After that, Sócrates resigned and elections were actually called for June 2011. As Figure 1 shows, this move led to a significant decrease in its support so that the election results were actually quite vague.

Figure 1. Evolution of vote intention for the PS and PSD (March 2010 – January 2013)



Source: <http://margensdeerro.blogspot.pt> by Pedro Magalhães

Since the 2011 general election, a similar dynamic has been observed for the Socialist Party in opposition. After abstaining from voting for the major

socio-economic measures proposed by the centre-right government during the first 15 months of the current legislature, the PS decided to vote

against the government's proposal in November 2012 – a time when polls on voting intentions gave it an edge over the PSD, and the governing coalition was showing clear signs of internal conflict.

Therefore, a sense of responsibility and pro-European attitudes pushed the two larger parties to cooperate with the government even from the opposition benches, but this support had a limit: when a party can make the government fall and/or has a good chance to win in case of election, self-interest prevails.

Interviews with key players at the time of the crisis support this explanation. As a former PSD minister (and current advisor to the President) says when asked about what explains the decision to vote against the fourth austerity package in March 2011, 'if the opposition saw that the life expectancy of the government is long, then it will let the measures pass; if, on the contrary, (...)the opposition party sees an opportunity to get in power itself, obviously it will start to oppose the government measures'. A similar reasoning was made by a former Junior Minister from the PS: 'In Portugal, no

one accepts that the opposition, at the beginning of its mandate, starts by being against everything. There is the feeling that a party that aspires to government should adopt responsible behaviour. But there are also some political strategies at stake: now [January 2012, N/A] the opinion polls give the edge to the PS. As the crisis always brings governmental instability, the PS knows that it is just a matter of time before it is back in government.

## 5. Comparing Opposition in normal and hard times: quantitative data analysis

Although the qualitative data analysed so far tells us an interesting story, focus on the most important socio-economic policies might create a distorted view of the overall reality. We therefore decided to rely also on more quantitative data and analyse the opposition's voting behaviour on the final approval of the laws in parliament during five different governments: two Socialist minority governments – one during Portugal's 'golden years' of economic growth (Guterres I, 1995-1999) and the other in the period just after the onset of the financial crisis (Sócrates II, 2009-2011) –; two majority coalition governments (PSD and CDS-PP) – the first in relatively good economic times (Barroso II, 2002-2004) and the second just after the bailout (the current Passos Coelho, 2011-) –; and one single-party majority government, which was in charge before and after the beginning of the crisis (Sócrates I, 2005-2009). Following Leston-Bandeira (2004), we excluded from our dataset laws dealing with administrative reorganisation (reordenamento administrativo) that represent a

huge proportion of the legislation passed (around one third) and are usually very consensual.

### The dependent variable

Among the several observable activities that political actors might put in practice in the law-making arena, we opted to concentrate on voting behaviour and chose the consensual voting of the opposition in parliament as our dependent variable. In order to measure the level of consensus shown by the Portuguese opposition during the five selected governments, we will refer to the favourable voting behaviour during the final stage of the law-making process. As there are no available data on roll call votes in the Portuguese parliament, the information examined only refers to the parliamentary party groups' voting choice on all the approved laws, during the five governments under analysis. As a result, the voting options – yes, no, abstention – are always considered for the whole group; and the analysis below will try to determine a given political party's propensity to

choose one of these three voting options. Moreover, we also built an index of consensus given by the sum of non-contrary votes (yes and abstention) divided by the sum of all votes (yes, no, abstention) given by the individual opposition party groups to each bill.

$$\text{Consensus in Parliament} = \frac{S \text{ Yes} + \text{Abstention}}{S \text{ Yes} + \text{Abstention} + \text{No}}$$

While we agree that abstention and favourable vote are not equivalent, we decided to consider abstentions as a form of consensual behaviour because, as we have seen in the previous section, abstaining in the Portuguese system might have a remarkably cooperative connotation: the opposition party which decides to abstain helps a government bill to be passed, notably in the case of minority governments.

### The operationalisation of the independent and controlling variables

As noted above, our main assumption is that the crisis has an impact on the level of consensus in parliament. So a dummy variable has been created

to identify the beginning of the crisis, even though the definition of when the crisis really started is not straightforward. The fall of the Lehman Brothers, on 15th September 2008, is considered by many observers as the official 'beginning' of the world crisis. Hence, we built one dummy variable taking value 1 after September 15 and 0 before. Furthermore, in order to capture the effect of the Portuguese bailout on the opposition's behaviour, we created another dummy taking value 1 after 6th April 2011 and 0 before. We expect both these variables to be negatively related to the level of consensus in parliament.

In order to test the net effect of the crisis, we decided to introduce four control variables. First, socio-economic policies are expected to be more conflictual, since parties are expected to represent different socio-economic interests. Thus, we classified each law following the 21 categories of the Comparative Agendas Policy Project and then created a dummy variable to distinguish the laws dealing with the socio-economic policy sector – which is the sum of four different policy areas respectively called Macroeconomic issues, General Labour and Employment, General Social Welfare,

General Banking and Finance – from all the others. We called this variable Socio-economic sector and we expect it to be negatively associated with the opposition's propensity to vote yes or to abstain rather than to vote no.

Second, Portugal has experienced alternating types of government: coalition and single-party, majority and minority. The concentration of the executive power in a strong single-party majority cabinet gives the opposition very different political opportunities in parliament, compared with those given by the concentration of the executive in either a minority government or a coalition government. In the first case, the parliamentary opposition has neither space for nor interest in intervening or negotiating with the government in office, which is already supported by a strong and usually disciplined single-party majority. At the same time, this situation obliges the official parliamentary opposition to propose itself as constructive and alternative, in order to compete for power at the following election. In the second case, the life of parliamentary opposition seems to be more advantageous, particularly for smaller parties, which are the government's crucial allies in order

to get the majority in parliament (essential in the case of minority government, and sometimes necessary when intra-coalition divergence occurs). Hence, since the opposition parties might behave differently depending on the type of government in office, we also decide to control this variable (Majority government). It is also believed that the author of the bill affects the level of cooperation between majority and opposition (Mujica and Sanchez-Cuenca 2006; De Giorgi and Marangoni 2011). This is so because the parliamentary opposition by definition opposes the government. We therefore assume that the opposition will be more adversarial when a government bill is at stake. As a control variable, we thus created a dichotomous variable (Initiative) which assumes value 1 when the law in question was proposed by the government or any majority party member and value 0 otherwise.

Finally, some scholars emphasise that the characteristics of the legislative acts are likely to have a substantive effect on the patterns of voting behaviour. Giuseppe Di Palma (1977) showed how the high degree of consensualism found in the law-making process in the first four legislatures of

the Italian Republic was largely due to the poor quality of the laws enacted. In a widely polarised and fragmented party system, an impressive number of *leggine* (small laws) limited in both scope and policy comprehensiveness helped parliamentary actors to find the necessary compromise and agreement. Speculating a little on these acknowledgements, we expect the opposition to be more consensual on legislation which is limited in policy comprehensiveness (and hence, less relevant). As a result, we use the number of committees involved in the law-making process as a proxy for the political relevance of each bill and it is also controlled.

### Opposition in normal and hard times: a description

Do we observe any difference after the crisis in terms of types of law approved and the consequent level of conflict created in parliament? Our first hypothesis is based on the assumption that a larger number of relevant bills dealing with socio-economic issues has been approved since the start of the crisis in Portugal and that both the rel-

evance and the issue area of a given bill have an impact on the opposition's voting behaviour.

The legislative data at our disposal illustrate our assumption well: by examining the content of the laws approved during the five governments under analysis, we can observe a clear increase in the amount of legislation concerning relevant and socio-economic policies in the years of the financial crisis (Table 2).

Table 2. Average percentage of socio-economic laws, number of words and committees per legislature

	Percentage of laws approved dealing with socio-economic issues	Average number of Committees involved
<b>Guterres I</b> (1995-1999)	23.7	1.3
<b>Barroso</b> (2002-2004)	17.7	1.2
Sócrates I (2005-2009)	22.2	1.4
<b>Sócrates II</b> (2009-2011)	34.5	2.5
<b>Passos Coelho</b> (2011-)	34.5	2.9

Whereas socio-economic laws are never more than 24 per cent of the total in the first three governments under analysis (23.7 with the first Guterres government, 17.7 with Barroso's and 22.2 even with the first Sócrates government which witnessed the explosion of the crisis), they reach 34.5 per cent of the total legislation during both the second Sócrates government and the current Passos Coelho government. Furthermore, in Table 2 we can see the average number of committees involved in the approval process of these bills and a clear increase in their number can also be observed. Thus due to the rise in both the number of socio-economic bills passed since the beginning of the crisis and their growing comprehensiveness (given by the increasing number of committees involved in their approval), we would expect the level of conflict in parliament to grow.

Table 3. Index of consensus per legislature, all legislation (and important legislation only)

Legislature	Mean	N	Std. Deviation
<b>Guterres I</b> (PS, minority)	.75 (.75)	357 (95)	.15 (.14)
<b>Barroso</b> (PSD/CDS-PP, majority)	.64 (.57)	167 (31)	.25 (.25)
<b>Sócrates I</b> (PS, majority)	.62 (.65)	347 (41)	.27 (.26)
<b>Sócrates II</b> (PS, minority)	.69 (.65)	88 (7)	.19 (.26)
<b>Passos Coelho</b> (PSD/CDS-PP, majority)	.60 (.66)	54 (19)	.22 (.21)
Average	.67 (.69)	1014 (193)	.23 (.21)

Table 3 presents the average index of consensus per legislature. In the last row we can see that, on average, the Portuguese parliament is quite consensual: on average, bills are passed with 67 per cent of positive votes or abstention. But a further look at Table 3 also grants some support to our hypothesis concerning the negative impact of the crisis on the voting behaviour of the opposition in parliament: if we compare the two Socialist minority governments led by Guterres and Sócrates or the two PSD/CDS coalition governments led by

Barroso and Passos Coelho – thus keeping both the variable type of government and party in office constant – we can observe a decrease in the level of consensus after the crisis in both cases. Our first hypothesis seems to be confirmed

As it might be argued that the above numbers mix very important and more trivial legislation, Table 3 also presents the main index of consensus for pieces of legislation which went through at least 2 committees – thus the more inclusive (and probably more relevant in terms of policy comprehensiveness) legislative measures. We can see in the second column that, with the exception of the two coalition governments, the figures are not fundamentally different – for the 200 most important pieces of legislation (1/5 of the total), an average of 70 per cent of the votes were either positive or abstentions. While a decrease in consensus is observed from Guterres to Sócrates II (as expected in H1), the contrary is true when we compare Barroso with Passos Coelho. This finding, however, does not contradict our hypothesis: as we expected an increase of conflict due to the rising number of salient and socio-economic legislation, an analysis limited to the most important pieces of legislation is not sufficient to disprove H1.

Table 4 presents some descriptive statistics about the voting behaviour of each opposition party during the five governments under analysis. As we can see, the opposition parties vote together with the government much more often than they abstain or vote against. Crossing the average per party with the average per legislature, we can see at the bottom right of the table that the Portuguese opposition parties voted in favour of legislation almost half of the time, while they abstained 20 per cent and voted against only 30 per cent of the time. The figures are broadly the same when we look at important legislation only (with a slightly higher percentage of positive votes). However, we do observe variation across time and parties. Most importantly, Table 4 shows how the proportion of negative votes is lower during minority governments (Guterres I and Sócrates II) and how radical left parties are significantly less inclined to consensus than mainstream parties (see the last column on the right). These findings hold for both the entire legislation and the subset of relevant legislation only.

Table 4. Percentage of No, yes and Abstention votes per opposition party and per government

		<b>Guterres I</b>	<b>Barroso</b>	<b>Sócrates I</b>	<b>Sócrates II</b>	<b>Passos Coelho</b>	<b>Average</b>
PS	No		24% (36%)			20% (16%)	23% (28%)
	Yes		62% (46%)			51% (47%)	59% (46%)
	Abst		14% (18%)			29% (37%)	18% (26%)
PSD	No	12% (10%)		22% (24%)	9% (0%)		17% (15%)
	Yes	61% (64%)		60% (60%)	64% (40%)		61% (61%)
	Abst	27% (26%)		19% (17%)	27% (60%)		23% (24%)
CDS-PP	No	12% (15%)		25% (26%)	17% (20%)		19% (15%)
	Yes	64% (68%)		49% (50%)	60% (40%)		56% (61%)
	Abst	24% (17%)		26% (23%)	27% (40%)		25% (24%)
CDU <sup>1</sup>	No	16% (16%)	39% (50%)	45% (34%)	34% (60%)	59% (42%)	35% (31%)
	Yes	64% (60%)	47% (39%)	37% (49%)	48% (40%)	14% (26%)	47% (48%)
	Abst	21% (25%)	14% (11%)	18% (17%)	19% (0%)	28% (32%)	19% (21%)
BE	No		43% (61%)	32% (32%)	55% (60%)	44% (42%)	44% (31%)
	Yes		43% (29%)	53% (54%)	24% (40%)	40% (26%)	40% (48%)
	Abst		14% (11%)	15% (15%)	22% (0%)	16% (32%)	17% (21%)
Total	No	14% (14%)	37% (49%)	34% (29%)	29% (35%)	45% (33%)	31% (24%)
	Yes	63% (64%)	50% (38%)	47% (53%)	48% (45%)	31% (33%)	48% (53%)
	Abst	23% (24%)	14% (13%)	19% (18%)	22% (25%)	25% (33%)	21% (23%)

Note: we excluded the bills presented exclusively by the opposition party groups from the analysis; in parenthesis important bills only (N=1009 and 116).

1. We initially codified the two groups PCP and PEV separately, but we present them together for the sake of clarity, as their voting behaviour is almost identical.

Comparing minority and coalition governments before and after the crisis, Table 4 also indicates that the impact of the crisis on the PS and PSD – which vote less frequently against the government after the crisis (and abstain more often) – is very different from the impact on the CDS-PP and the CDU – for which the contrary is true. As for the BE, no significant difference is observable across time during the two governments. If we look at the most important legislation only, the difference in time is even more marked for the PS and PSD (in the decrease in ‘nays’ and the increase in ‘abstentions’) and for the CDS-PP (in the decrease in ‘ayes’). As far as the CDU is concerned, we see a huge increase in ‘nays’ from Guterres to Socrates II, but a decrease from Barroso to Passos Coelho. Finally, the BE clearly voted ‘no’ on the most important legislation more often before the crisis than after.

Table 5. Factors affecting the decision of opposition parties to vote yes or to abstain rather than vote no (excluding votes on initiatives from the opposition)

	PS		PSD		CDS-PP		PCP		PEV		BE	
	Yes	Abst.	Yes	Abst.	Yes	Abst.	Yes	Abst.	Yes	Abst.	Yes	Abst.
	B (sig.)	(B) (sig.)	B (sig.)	(B) (sig.)	B (sig.)	(B) (sig.)	B (sig.)	(B) (sig.)	B (sig.)	(B) (sig.)	B (sig.)	(B) (sig.)
<b>Intercept</b>	.42 (.341)	-.40 (.437)	.93** (.003)	-.20 (.586)	.79** (.008)	.01 (.974)	-.11 (.622)	-.73* (.006)	-.13 (.556)	-.76** (0.04)	-.19 (.473)	-1.26*** (.001)
<b>Majority government</b>	-	-	.71*** (.001)	1.19*** (.000)	.95*** (.000)	.80*** (.001)	1.42*** (.000)	1.09*** (.000)	1.42*** (.000)	1.13*** (.000)	.38 (.27)	.29 (.503)
<b>Simple bills (Less than one committee)</b>	.60 (.173)	.00 (1.000)	-.03 (.907)	-.15 (.655)	-.00 (.993)	.05 (.881)	-.09 (.682)	-.17 (.504)	-.07 (.759)	-.20 (.434)	.16 (.526)	.20 (.58)
<b>Socio-economic bill</b>	-2.03*** (.000)	-.65 (.199)	-.91 (.000)***	.03 (.901)	-.89*** (.000)	-.13 (.625)	-1.00*** (.000)	-.96*** (.000)	-.91*** (.000)	-.89*** (.001)	-.93*** (.000)	-1.52*** (.000)
<b>Multi-party bills</b>	1.16* (.016)	.18 (.774)	.90*** (.000)	-.40 (.198)	.58** (.010)	-.69* (.016)	1.34*** (.000)	.30 (.208)	1.39*** (.000)	.39 (.107)	1.52*** (.000)	.31 (.331)
<b>Crisis</b>	-	-	.31 (.218)	.54* (0.06)	-.49 (.831)	.31 (.23)	-.23 (.266)	.24 (.325)	-.38* (.057)	.10 (.659)	.15 (.515)	.66* (.021)
<b>IMF</b>	.72 (.130)	1.04* (.046)	-	-	-	-	-.85* (0.032)	-.09 (.82)	-.54 (.15)	.02 (.953)	-.41 (.24)	-.21 (.609)
<b>N</b>	214		799		799		994		1009		653	
<b>Nagelkerke R</b>	0.21		0.138		0.127		.227		.227		182	

Reference category: No \*\*\* $p < 0.001$  \*\* $p < 0.01$   $p < 0.1$

## 6. The analysis

In order to isolate the effect of the crisis on the opposition voting behaviour from other possible intervening variables, we computed a multinomial logistic regression. In Table 5, we evaluate the impact of a series of variables on each party's propensity to vote yes or abstain rather than to vote no. Together with the controlling variables specified above, we insert – as our main independent variable – a dummy for the start of the crisis (the fall of the Lehman Brothers on 15th September 2008) and for the date of the Portuguese bailout (that is, 7th April 2011). We observe a significant independent effect of the crisis on the opposition parties' behaviour but, as expected, the direction of the change varies from one party to another according to its governing aspirations and European attitudes.

Table 5 shows that the two most pro-European parties, the PS and the PSD, which have always alternated in government, tend to act more consensually after the beginning of the crisis than before, *ceteris paribus*. The PS, for example, is almost twice as likely to abstain – rather than to

vote no – after the bailout and the international intervention. Similarly, the PSD, which came into power just after the bailout, was actually 50 per cent more likely to abstain rather than to vote no after the fall of the Lehman Brothers. By contrast, everything being constant, the PCP and PEV appear to be remarkably less likely to vote yes rather than no after the start of the crisis and the bailout. No independent effect of the crisis could be found for the CDS-PP, whereas for the BE the start of the crisis increased (rather than decreased, as we would expect) the odds to abstain rather than to vote no by 66 per cent.

Three groups of parties can thus be distinguished according to the impact the crisis has so far had on their behaviour: the PS and PSD, which appear to have been, *ceteris paribus*, less adversarial since the crisis began; the CDU (PCP and PEV), for which the contrary is true; and the CDS-PP and BE for which no significant influence could be identified. This corresponds to our expectations in H2 and H3: from the mainstream and very pro-EU PS and PSD, to the radical and euro-sceptic PCP

and PEV; the CDS-PP and the BE being subject to contradictory forces (governmental ambition but ambiguity on the EU for the CDS-PP; and permanency of opposition but moderate euro-scepticism for the BE). These findings thus support H2 and H3 that the crisis would have contradictory effects according to whether the parties are permanently in opposition (or not) and according to their pro- or anti-European stances.

Also in line with our expectations, most of the controlling variables proved to have a significant impact on the opposition's voting behaviour in parliament. First, we see that when we have a minority government, all opposition parties are significantly more likely to vote yes or abstain than to vote no. These governments had probably involved the opposition much more in the law-making process than they would have done if supported by a parliamentary majority, thus leading to a more consensual decision-making process. Socio-economic policies, for their part, are significantly less likely to trigger a yes than a no (and often an abstention than a no) from the opposition parties – thus supporting the claim that these types of law are more divisive than the others. Finally, we ob-

serve that bi-partisan or multi-party bills are far more likely to trigger a yes than a no (for almost all parties), but their effect on abstention are not conclusive. On the other hand, we find no support for the effect of the number of committees on the voting behaviour, suggesting that more complex laws (at least according to our measure of complexity) do not trigger different votes from simple laws.

## 7. Conclusions

The opposition's voting behaviour is always pulled between a tendency towards conflict and one towards cooperation. Since the beginning of the crisis, making a choice between these two options has become even more difficult for the opposition because it implies choosing between the need to cooperate with the majority for the nation's sake and the opportunity to weaken an already fragile government. This contribution explores how the Portuguese opposition parties responded to this dilemma.

Our first conclusion is that, due to the financial crisis, the level of consensus between the government and opposition parties has decreased. The main reason for this decline is the rising number of socio-economic and salient policies – usually more controversial – discussed in parliament. However, both qualitative and quantitative analyses demonstrate a strong variation in the effect of the crisis on the opposition's behaviour across parties. While mainstream and traditionally pro-European parties (first the PSD and then the PS) are less adversarial than they would be in nor-

mal times, the exact contrary is true for the PCP and PEV, two more radical and euro-sceptic parties. For the CDS-PP and the BE, which are less extreme in their positive and negative European stances (respectively), results are more mixed. These findings thus illustrate the importance of the exclusion from power and the role external actors in conditioning the opposition's behaviour in parliament: the European Commission, the European Council, and since the bailout, the so-called troika (EC, ECB and IMF) have played a large role –both positively and negatively – in the current government-opposition relationship. We finally observe a variation across time in the sense that, after the onset of the crisis, the mainstream opposition parties are more adversarial when their possibilities to replace the government in office increase. Commitment and cooperation do not always prevail over an opposition party's ambition to rule.

The drift towards conflict, however, is not just a prerogative of the opposition. Self-calculation might have been crucial to Sócrates' decision to

present a fourth austerity package to parliament without involving opposition parties in the drafting. A similar dynamic seems to have happened recently when a package of austerity measures to be implemented from 2013 onwards was negotiated between Passos Coelho's government and the troika without consulting the PS (which, in response, felt free to vote against the budget for 2013). The alleged lack of dialogue with the opposition by both Portuguese Prime Ministers illustrates that the decision of the opposition parties to vote against or in favour of governmental initiatives may not exclusively depend on their own preferences. It is also contingent on the governing parties' willingness to collaborate.

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# 14. NATIONAL FISCAL RESPONSES TO THE ECONOMIC CRISIS: DOMESTIC POLITICS AND INTERNATIONAL ORGANIZATIONS<sup>1</sup>

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# 1. Introduction

When the deepest recession since the 1930s (EU Commission, 2009: 1) hit national economies in fall 2008, governments in democratic countries rapidly seemed to abandon orthodoxies of economic policy making that were broadly accepted since the 1980s. These include reducing intervention into the economy as far as possible, trust in markets, low government deficits and debts, and a rejection of counter-cyclical fiscal policies. Radical versions of this orthodoxy are the ‘Washington Consensus’ of 1989 reflecting the common views of World Bank and IMF. The Maastricht treaty of the European Union and its Stability Pact constitute less radical versions, while the pragmatic manifestation of this orthodoxy is the belief that counter-cyclical deficit spending (Keynesianism) ceased to work after the liberalization of capital markets, if it ever had worked before (Scharpf, 1987). Major government intervention, thus, should be limited to keeping inflation low through an appropriate monetary policy set by a preferably independent national or supranational central bank.

When the problems of the financial sector had become obvious in 2007/8, the first step of many governments was to support ailing financial institutions and large firms, while at the same time thinking about reforms of their financial institutions. The crisis of the financial sector led to declining industrial production and employment in the ‘real economy’. As interest rates approached the zero line, monetary policy reached its market-correcting limits. Having exhausted monetary policy options, most mature democracies turned to demand-management. They devised major fiscal packages composed of tax reductions and increased state expenditures in order to stimulate the economy. This was the second step of the anti-crisis measures. The third step was taken in winter 2009 - spring 2010 when economies recovered and some governments started exiting the expansionary fiscal strategy. Parallel to these measures, some governments used the crisis as an opportunity for reform, and attempted to push through structural changes to their labor market and to their social and environmental policies.

While national governments worked on their response to the economic crisis, four inter- and supra-national organizations attempted to coordinate these national policies: the European Union, the G20, the IMF, and the OECD. The EU and G20 claim that they have been able to reach this coordination.

In this paper I focus on the fiscal response strategies in late 2008 and 2009. While most observers have noted the commonalities – a general move from deficit-containing policies to deficit spending – I am interested in the often overlooked variations between the responses. I describe the national fiscal stimuli, showing that coordination between countries was very limited. This contradicts the arguments that national governments had very narrow maneuvering space on fiscal policy due a number of factors including economic internationalization and capital market liberalization, the restrictions imposed by political institutions such as the monetary system of the EU, and the impact of international coordination in economic policy regimes such as G20.

In explaining this variation, I argue that the default response strategy of governments was a se-

verely limited expansionary budget. A few countries departed from this default strategy. They either implemented a swift and significant shift to a strongly expansionary policy (given the crucial condition that they had a unified government that could react quickly and consistently), or they opted for the pro-cyclical policy given the condition that they would otherwise have had to cope with a breakdown of their economy or the loss of their membership perspective in the Euro-group, both of which were more highly valued than the insecure outcomes of risky counter-cyclical fiscal policy.

Far from being independent and efficient institutions of global governance, international organizations (IOs) served national governments in that these could outsource the blame for tough and electorally unfavorable policies to the IOs. For the countries following the default strategy, IOs were used to legitimate the lack of major anti-cyclical measures. For the countries with pro-cyclical fiscal policies the IOs were likewise “blamed” for tying the hands of national governments and leaving them with no other options.

I provide evidence for this explanation in a comparative analysis of the fiscal policies of EU-countries and mature non-EU democracies in 2008 and 2009. I do not include Cyprus, since Cyprus did not feel the full force of the economic crisis until fall 2009. I leave out Greece as well, since its recent crisis made clear that Greek public sector data are far from reliable. And I do not analyze the Bulgarian case since in April 2010 the new Bulgarian prime minister said that the preceding socialist government lied about its deficits, which were much higher than reported (newspaper reports first half of April 2010). Due to these severe data imperfections these three countries have to be excluded from this comparison. This does not mean that data for other countries are without flaws. Some data on government finances for 2008-9 are still estimates. Even data for earlier periods show considerable variation between respective statistical sources – such as IMF or OECD – and between publications of the same statistical organization in time. Even worse, this imprecision does not vary at random between countries; rather, some countries seem to report much more reliable data than others. Therefore statistical analyses assuming randomly distributed errors in the data have

limited reliability and must be interpreted very cautiously. In drawing my conclusions, then, I will rely as much on qualitative as well as quantitative data.

In the following section I will present my argument. The third section will describe the fiscal response strategies. In the following section I start by discussing standard explanations, and finally I will show that my argument is supported by the data.

## 2. The argument

When a major shock such as the crisis of 2008/9 hits a national economy, governments have three basic options for fiscal policy: (a) they significantly expand spending in order to introduce a demand stimulus to the economy; (b) they neither significantly expand nor restrict spending; or (c) they curb spending so that fiscal balances are not negative, notwithstanding negative economic growth. In addition to pursuing policies that are in line with the overall political goals of the relevant parties, each strategy has specific political costs and advantages that must be considered in regards to the chances for re-election.

Expansionary budgets are a powerful signal to voters that the government is doing something to ameliorate an economic crisis. The beneficial economic effects of these strategies are dependant on a number of variables, such as the ability to precisely time the implementation of measures and the economic openness of a country. Precise timing requires that the fiscal stimulus follows very shortly after the point in time when economic output decreases. Very open countries – and this

applies in particular to small nations – risk that the demand stimulus trickles away with regard to the domestic economy, since citizens use the additional resources to buy from abroad. Unless there is a firm contract between nations to harmonize their fiscal policy, the economic success of such stimulus packages depend either on low import shares or on the willingness of other governments to expand their budget in a similar way. On the other hand the costs of expansive packages may be increased debt levels which have to be covered later, inflationary pressure, and the danger of capital flight. Finally, size matters. Very small nations that are integrated into world markets have to cope with the ups and downs of the world economy without any chance of influencing these global markets through their own fiscal policies. They have much less incentive to enter the risky business of demand management than do large nations, in particular if their domestic market is large in comparison to their world market exposure.

The opposite option is a strategy of radical budget cuts during a recession. This strategy has a number of advantages such as the avoidance of all the downside risks of the counter-cyclical policies. However, governments run the risk that their procyclical policies will increase unemployment and further decrease economic growth. This hurts the programmatic goals of almost all governing parties and also reduces the likelihood of re-election. In addition, austerity strategies tend to cut resources in areas such as education, social policy transfers, and services. Given the fact that most citizens strongly support the welfare state, these policies are electorally risky (Pierson, 1994).

Both strategies imply a radical shift from previous fiscal policies. During the past 30 years the broadly accepted benchmark for fiscal policies in the OECD is prudent policy based on a foundation of little or even no deficit spending. Many governments, however, failed to behave in such a way. The literature gives a long list of plausible hypotheses why, contrary to expectations, governments have in fact engaged in considerable deficit spending. These hypotheses include arguments related to the electoral competition of politicians

elected in single-member electoral districts, the tendency of parliaments to overspend, the needs of compensation offered to compromising coalition partners, the weakness of the finance minister, or the number of spending ministers (see the literature discussion in Franzese, 2010, Hallerberg, 2004, Hallerberg and Hagen, 1999, Hallerberg et al., 2009, Wehner, 2010). Furthermore, due to time-invariant political institutions, there are arguably country-specific levels of deficits. In the Euro-zone this deficit should not exceed the 3 % level – measured as percentage of GDP – during ‘normal times’ according to the Maastricht rules. In a major recession such as in 2008/9 this level of deficits is shifted upwards. This is due to decreased tax revenues and increased social security spending (in particular for unemployment insurance) affecting the nominator. In addition, if the denominator (GDP) decreases, share of deficits in GDP will increase, all other things being equal.

There are good reasons for governments not to deviate too much from this previous level of deficits plus the increment that is due to the crisis. The effects on debts of this increased deficit will be hard to tackle once the crisis is over. It is un-

clear whether the effects of increased spending will lower domestic unemployment due to problems of implementation of the stimulus package and due to the risk that it will create demand in other countries, whilst being largely inconsequential for the domestic labor market. Hence it makes sense to increase spending for a small amount to alleviate the worst labor market outcomes of the crisis and signal to the voter that government is trying to fight the crisis. I assume that this is the default fiscal policy response to the crisis. It is not very risky in economic and electoral terms, it still allows for the possible positive effect of other import countries stimulating the economy, and – most importantly – it does not require a significant shift from the status quo.

The other two options available to governments (significant deficit spending or pro-cyclical policy) require a significant shift from the fiscal status quo. Governments must be willing and able to bring about this change in a short period of time. Unified governments – i.e. governments that have little internal programmatic conflict over fiscal policy – that are under no formal and informal obligation to negotiate with opposition parties have

a higher likelihood of deviating from previous prudence-oriented fiscal policies (this argument draws heavily on Spolaore, 2004). Being a unified government is an almost necessary but not a sufficient condition for dramatic fiscal policy change during economic crisis. There may be many ideological or economic reasons not to deviate from the default strategy. One of the most pressing economic reasons is the soundness of pre-crisis fiscal policy in a country. It is much less problematic for countries with a balanced budget and low debts to stimulate the economy by increasing demand through increased spending than it is for countries with high debts and deficits (see Egert, 2010 or IMF, 2010).

This argument can explain why some governments opt for a significant fiscal stimulus. But why should governments decide to take the electoral risk of a significant pro-cyclical policy during a severe crisis? The answer could be that this strategy will be honored either by substantial gains in other fields which can offset the blame for increased unemployment, or by the avoidance of substantial punishment. Both these substantial gains and punishments can be offered by interna-

tional organizations. Potential membership in the Euro-Zone may be a substantial gain for former post-communist countries. The avoidance of dramatic economic breakdowns by accepting obligations of IMF loans is another example.

### 3. Fiscal policy change 2008/9

In this section I describe the course of fiscal policy in the 32 countries under study. I combine three types of information. First, I consider the development of deficits in 2008/9 compared to the previous period. I take deficits both as nominal as well as cyclically adjusted (or 'structural') deficits. During a crisis tax revenue decreases and social security spending increases. These so-called automatic stabilizers create additional demand in the economy without any further political action, and they increase the nominal deficit. The cyclically adjusted deficits indicate the size of the deficits as if there were no revenue loss and spending increase due to the crisis. Hence it informs about the discretionary fiscal policy choices. Data about deficits (in % of GDP) are of limited reliability and the data for 2009 are largely based on estimates. Hence a cautious strategy is to avoid the interpretation of small changes, while focusing only on the large differences. Since countries tend to have nation-specific levels of deficits, it makes sense to take the previous level of deficits into account. Regressing the average deficits in 2008 and 2009 on the average deficit in 2006 and 2007 yields posi-

tive and significant coefficients for unadjusted deficits for 32 countries and positive albeit not significant coefficients for adjusted deficits, which are available for 25 countries (Data sources are OECD Economic Outlook, May 2010 and downloads from Eurostat). This supports findings of institutional determination of deficit levels and is also in accordance with research showing that there are country specific patterns of fiscal policy use during booms and recessions (Egert, 2010). For the countries under consideration, the average deficit increased from + 0.5 % (2006/2007) to -3.5% (unadjusted deficits)(2008/2009) and from -0.4% (2006/2007) to -3.0% (nominal deficits) (2008/2009).

As a sensible strategy for gauging the stimulus levels during the crisis I calculated the difference between the average deficits in 2008/9 and in 2006/7, both for the adjusted and unadjusted time series. These differences vary considerably between countries. The level of deficits is 4.0 (unadjusted deficits, 32 countries) and 2.6 percentage points (adjusted deficits, 25 countries) higher in

2008/2009 compared to the two years (2006/2007) prior to the crises. Nation specific deficit changes are depicted in columns 2 and 3 of table 1.

Table 1: Fiscal responses to the economic crisis 2008 /2009

	Average deficit 2008/9 minus average deficit 2006/7 (unadjusted)	Average deficit 2008/9 minus average deficit 2006/7 (structurally adjusted)	Fiscal pack- age	Assessment: Extent of counter-cyclical fiscal policy
Australia	-3.3	-2.4	-4.6	Strong
Austria	-1.2	-0.7	-1.1	Slight
Belgium	-3.5	-1.5	-1.6	Slight
Canada	-3.9	-2.6	-4.1	Strong
Czech Republic	-2.2	-0.6	-3.0	Slight
Denmark	-4.2	-2	-2.5	Strong
Estonia	-4.8			None. Pro-cyclical. In European Exchange Rate Mechanism II
Finland	-3.5	-1.1	-3.1	Slight. Among the most-counter-cyclical governments in the group of countries with moderate counter-cyclical policy
France	-3.3	-2.2	-0.6	Slight
Germany	-0.9	-0.3	-3.0	Slight
Hungary	3.1	5.5	4.4	None. Pro-cyclical
Iceland	-20.5	-18.5	9.4	None. Clearly pro-cyclical. No autonomous role of domestic government in fiscal policy
Ireland	-11.3	-8.3	4.4	None. Pro-cyclical development
Italy	-1.7	0.2	0	Slight
Japan	-3	-2.1	-2.0	Strong
Latvia	-6.2			None. Pro-cyclical. Under IMF conditionality. In European Exchange Rate Mechanism II
Lithuania	-5.4			None. Pro-cyclical. In European Exchange Rate Mechanism II
Luxembourg	-2.4	-0.8	-3.6	Slight
Malta	-1.8			Slight
Netherlands	-2.2	-2.2	-1.5	Slight
New Zealand	-4.5	-3.2	-4.3	Strong

Norway	-3.9	-3	-0.8	Slight. Among the most-counter-cyclical governments in the group of countries with moderate counter-cyclical policy
Poland	-2.3	-2	-1.0	Slight
Portugal	-1.4	-0.5	-0.8	Slight
Romania	-4.5			None. Pro-cyclical. Under IMF conditionality
Slovak Republic	-1.4		-1.1	Slight
Slovenia	-3		(-2.1)	Slight. Among the most-counter-cyclical governments in the group of countries with moderate counter-cyclical policy
Spain	-8.8	-6.9	-3.5	Strong
Sweden	-2.8	0.4	-2.8	Slight. Among the most-counter-cyclical governments in the group of countries with moderate counter-cyclical policy.
Switzerland	-0.8	-0.2	-0.5	Slight
United Kingdom	-6.2	-4.3	-1.4	Strong
United States	-6.3	-4.9	-5.6	Strong

**Column 2 and 3:** *Unadjusted /structurally adjusted deficits 2008 and 2009 minus unadjusted/structurally adjusted deficits 2006 and 2007, divided by 2. Since deficits are indicated by a negative sign, the increase has a negative sign as well.*

**Fiscal package:** *2008-2010 net effect of fiscal package on fiscal balance.*

**Source:** *Deficits: OECD Economic Outlook May 2010; Eurostat (downloaded June 11, 2010). Fiscal Package OECD: (OECD, 2009b), Slovenia: IMF Source <http://www.imf.org/external/np/sec/pn/2009/pn0965.htm>; limited comparability to OECD operationalization of fiscal package.*

The obvious problem concerns the difference between the previous deficit level and the deficit level during the crisis. Even the adjusted deficits do not necessarily reflect deliberate fiscal response strategies, as they also capture changes in the denominator (GDP), spending decisions made before the onset of the crisis, or time-invariant schemes that have some cost dynamics and are not accounted for in the calculation of the automatic stabilizers. Increasing health care costs due to demographic change would be an example. Furthermore, they also depend on the cost of one-shoot bail-outs and crisis-interventions that were not intended to create a lasting additional demand.

To overcome these shortcomings, we need information about the magnitude of those fiscal packages that were expressly intended to stimulate the economy by creating additional demand. The respective national governments, the OECD (OECD, 2009b; OECD, 2009a: Chapter 3), the European Union (EU Commission, 2009), the European Trade Union Institute (Watt, 2009), and the IMF in its surveillance reports have given information on the scope of these fiscal packages. However, the data vary considerably depending on

the source. The major explanation for this is that some governments labeled spending decisions which were taken before the crisis as elements of the crisis package (Watt, 2009: 12), some governments labeled EU means as part of the national fiscal package, and there may be other ways and means through which governments increased or decreased the 'published' size of their fiscal package according to their strategic needs. Combining data from the OECD on fiscal packages with the data on differences of the unadjusted and the structural deficits can help to classify countries though. In addition to the quantitative data I also checked qualitative data from newspaper reports, the OECD Economic Outlook, the OECD Economic Surveys, the IMF Staff Reports and Reports from Article IV consultations, and IMF country reports and related materials for whether there is strong evidence that the national government expanded the budget in order to create significant additional demand. The final assessment is in column 5 of table 1. The classification for whether a country pursues a clear pro- or a strong-countercyclical policy or whether the countercyclical policy is only slight is based on these decision rules: In order to classify as pro-cyclical, the fis-

cal packages must be positive (i.e. contraction of public spending and/or tax increases). In addition there are strong indications in the expert reports that the country pursued a deliberate pro-cyclical policy. This classification can be sustained even if the increase of deficit levels is substantial; the increase would have been higher without the pro-cyclical fiscal policy. A strong counter-cyclical policy is defined as fiscal policies with a net effect of the fiscal package – i.e. the claimed discretionary policy – on the fiscal balance of at least 1.4 percentage points. In addition, the increase of the structurally adjusted deficit level – i.e. the discretionary policy indicator – has to be  $\geq 2$  percentage points, and the increase of the unadjusted deficit level is  $\geq 3$  percentage points. Given the size of the average output gap in Europe – estimated to amount to about 6 percent of GDP in 2009 (Watt, 2009: 12) – these thresholds are not overly strict. Note that deficits are indicated by a negative sign; for example a change from a deficit level from -3% in period t-1 to -6% in period t meets the criteria for an increase of the deficit level of 3 percentage points. In cases of missing data for one or two of the three criteria, I relied on qualitative data from OECD and IMF reports.

Most countries chose the default strategy. It consisted of a small expansion of the public budget. However, a few countries created a more significant amount of additional demand, indicated by fiscal packages or stimulus size that exceeded 3% of GDP. The assessment of these cases as exceptionally expansionary was frequently also confirmed by the respective evaluations of country experts. Australia, Canada, Denmark, Japan, New Zealand, Spain, the UK, and the USA are the members of this group. When the fiscal package was positive (i.e. the government reduced state expenditure), it is clear that the country in question cannot be classified as having pursued an expansive fiscal policy, even where there is an increase in our stimulus-measure. A third group of countries falls into this category, having decided to pursue a contractive fiscal policy even during the crisis. This applies to Latvia, Lithuania, Estonia, Hungary, Iceland, Ireland, and Romania.

This classification is provisional and some cases are difficult to assess correctly: Some data speak in favor of moving Sweden to the group of countries with a strong stimulus, and notwithstanding the insistence of the British government to return

to expansive policies, the UK is a borderline case as well. Relying on additional qualitative information and a summary evaluation of the quantitative data, one could argue that Finland, Norway, Slovenia, and Sweden had the most expansive fiscal policy within the group pursuing the default strategy.

This descriptive finding of strong variations in crisis responses is interesting in itself. According to major theories on globalization, the notion of the iron fist of liberalized capital markets or the wordy claims of successful coordination by G20, IMF, or the EU Commission, we would have expected a strong congruence among the crisis responses. This did not happen, though.

## 4. Explanations

How can we explain this variation in crisis responses? There are a number of very plausible economic arguments that may explain some, but probably not the most important, determinants of government action during the crisis. For example, the size of automatic stabilizers correlates inversely with the fiscal package (OECD, 2009a: 118) – but that does not explain why Switzerland and the US chose very different response strategies notwithstanding the similar sizes of automatic stabilizers. In many cases governments considered their level of previous deficits and debts when deciding on their intervention strategies. Fiscally healthy Norway had a much better starting position for a risky strategy of expansion than did Italy or Portugal, but all three ended up in the default group, whilst Japan with a debt of 167% of GDP in 2007 pursued an expansionary policy.

Finally, there is a classic collective action problem. Countries that are highly integrated in the world market need to have strong confidence that other nations will pursue similar policies. In the absence of coordination, a country that attempts to strongly stimulate demand through an expansive budget

risks financing the economic recovery in the other countries (from which citizen import goods and services) while carrying the cost of this measure domestically. Small countries in particular have little incentive to contribute to such a global effort in fiscal stimulation, since they know that their own effort will be negligible toward the collective good of a recovered global economy. From the small country's perspective, it makes strategic sense to allow the governments of large countries to carry the burden (Olson, 1965).

Arithmetic means, standard deviations in brackets.

Automatic stabilizer: This figure indicates the change of the budget balance, as a per cent of GDP, for a 1% change in GDP.

Source: IMF (website), OECD (Economic Outlook) (Website) for debts, deficits, imports & exports, population size, Automatic Stabilizer: Girouard and Andre, 2005: 22.

If we start from the ordinal classification (last column in table 1), the means of some of the independent variables are in line with predictions,

Table 2: Size of the country, trade integration, automatic stabilizers and previous debt and deficits by fiscal response

	Expansionary (8 countries)	Default (17 countries)	Pro-cyclical (7 countries)
Deficits 2006/7 (% GDP)	1.0 (4.1)	0.6 (5.1)	-0.1 (8.2)
Gross debt 2007 (% GDP)	57.0 (47.6)	55.0 (23.9)	28.1 (25.5)
Imports & Exports 2008	59.5 (23.8)	115.6 (62.0)	116.6 (40.2)
Population size (log)	3.5 (1.5)	2.1 (1.5)	1.1 (1.4)
Automatic Stabilizer 2003	0.41 (0.08)	0.48 (0.06)	0.42 (0.07)

with the exception of debt and automatic stabilizers (Table 2). In bivariate analyses the fiscal response (1 procyclical, 2 default, 3 expansionary) correlates significantly (Kendall's tau b) with trade integration (-.40\*\*) and size of population (.40\*\*). Using a 4-point scale (1 procyclical, 2 default, 3 default, but among the most expansionary fiscal policies in the 'default' group, 4 expansionary) yields the same substantive results. Combining all five independent variables in one robust model is difficult, given the low number of cases. In particular, data for the size of the automatic stabilizers are available only for 25 of the 32 countries. In addition the outcome variable is ordered and therefore the ordered logit model is usually the appropriate choice. But in this application we only have 32 (or 25) data points. We know the properties of the maximum likelihood estimator (consistency, normality, and efficiency) in large samples, but unfortunately we do not know the small sample properties of maximum likelihood estimators. Therefore we might abstain from employing ML estimators when the sample size is too small (Long, 1997: 53) The question is, whether we want to use an ordered model (ML) which requires enough observations or a linear model

which requires the outcome to be on an interval scale and which also suffers – although to a lesser degree – from small n's. Both solutions will force us to violate one assumption. I opted for the linear regression model. Table 3 reports the results of the regression analyses. Regressions have been re-run for the operationalization of the dependent variable as a 4-point scale (1 pro-cyclical, 2 slightly counter-cyclical, 3 countries with strongest counter-cyclical policies among the 'default' group, 4 clearly countercyclical). Since data for automatic stabilizers are available only for 25 countries, models were estimated with and without the variable 'automatic stabilizer'.

Table 3: Regression models : Dependent variable: Fiscal response strategy

	Response (3-point)	Response (4-point)	Response (4point)	Resonse (3 point)	Response (4-point)
Independent Variables	#2	#3	#4	#5	#6
Deficit Level 2006/7	0.04	0.11*	0.11*	0.02	0.08**
Gross Debt 2007	0.00	-0.01	0.00	-0.00	-0.01
Import & Export (%GDP 2007)	-0.00	-0.00	-0.00	0.00	-0.00
Population (log)	0.22**	0.48*	0.33*	0.09	0.15
Automatic Stabilizers		-3.49			
One-Party Government				0.73**	1.09**
IMF-Conditionality or European Exchange Rate Mechanism II				-0.88**	-1.22**
Constant	1.52**	3.57**	1.97**	1.79**	2.18**
N	32	25	32	32	32
Prob>F	0.02	0.01	0.01	0	0
R2adj	0.25	0.43	0.30	0.75	0.73

\*  $p < .05$ , \*\* $p < .01$

The most obvious result of the analyses (Model #1 – Model #4) is the effect of country size. Countries with a large domestic market have a stronger in-

clination for countercyclical policy – probably since national governments with small and open economies do not see much sense in stimulating the world economy with their limited resources.

Free-riding on large nations is a more attractive option.

The second result is that the coefficients for the level of debts, trade integration, and automatic stabilizers have the theoretically expected sign; however, they are not significant. Finally the coefficients for the level of deficits before the crises contradict the theoretical expectations, and two of these coefficients are even significant. In addition, given the large number of independent variables and the small number of cases, the R2 is not overwhelming. Hence the major conclusion is that while these variables of models #1-#4 explain some of the variation in response strategies, they do not constitute a convincing explanation. The models are not sufficiently specified.

The conclusion from models #1-#4 is that economic constraints and the rational economic cost-benefit calculations of national governments in a global economy impact fiscal policy decisions. But they do still leave room for national variation in choosing a policy response. Therefore we have to focus on politico-institutional determinants of fiscal policy, assuming that ‘...economic policy-making is a quintessentially political process.

Even in a field where the correct choice of policies depend heavily on expertise and the instruments for policy implementation, policy is driven by a dynamic that is as much political as economic' (Hall, 1986: 229).

A number of politico-institutional studies on fiscal consolidation in Europe would not predict this pattern of variance in response strategies in 2008/9. One-party governments – such as the British – would be considered particularly institutionally well equipped to constrain deficit growth (Hallerberg, 2004). These governments did exactly the opposite in 2008/9. However, the theories and arguments about incremental, long-term fiscal consolidation do not apply to a situation where governments change goals from deficit containment to economic stimulation and where administrations have to react swiftly and in a short-time perspective. What counted in the months after autumn 2008 was whether governments found support and majorities for risky measures within a short period of time, or whether it took long to agree on a fiscal package. Hence the focus must be on government capabilities in reacting swiftly to external shocks – and this is not the theme of the

literature on the long term convergence of levels of deficits.

An explanation could be found in partisan theory. Tom Cusack showed for the period 1961-94 and for 14 countries that leftist parties are likely to adopt counter-cyclical fiscal policies while right-wing parties adhere to pro-cyclical fiscal stances (Cusack, 2001). This explanation obviously does not work well for the crises of 2008/9: Australia, Spain, and the UK were governed by Social Democratic parties and the US president is a Democrat, but the Canadian, Japanese, and New Zealand governments were bourgeois governments. Another explanation is federalism. State governments have an incentive to save money in periods of expansive federal budgets and hence tend to turn the counter-cyclical central budget into a pro-cyclical direction (Rodden and Wibels, 2010). However, with the US, Canada, Australia, and quasi-federalist Spain among the most counter-cyclical governments, this effect obviously did not have a powerful influence in the last two years. Finally, one can assume an electoral cycle with governments at the end of their term being particularly interested in risky expansion-

ary and electorally favorable policies. However, despite facing a general election, the German government disregarded many demands for a more pronounced fiscal policy, while the US president launched his program of economic stimuli shortly after his election.

My argument is very simple and straightforward. It starts from the assumption that governments need to be able to make swift and significant fiscal policy changes. This requires that there is no need for time-consuming negotiations between political parties that are members of a governing coalition. Hence we expect one-party governments to react stronger and more expeditiously than coalition governments. Among the eight governments that pursued a pronounced expansionary policy, seven are one-party governments (Australia, Canada, Japan, New Zealand, Spain, UK, USA)<sup>2</sup>. It

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2. This classification refers to the period fall 2008 until December 2009. If there were more one party-governments and coalition governments, such as in Japan, the classification refers to the type of governments that has been most of the time in office. The classification of New Zealand as one-party government is a borderline-case. On the one hand, National's John Key negotiated support-agreements with the very small Maori Party, Act party, and the

was only in Denmark that a coalition government brought about major fiscal reform within a short period of time.

In almost all other countries that pursued the default strategy – some slight counter-cyclical policy – or even pro-cyclical policy, the government was a coalition composed of two or even more parties. This does not apply to France and Malta though, both having a one-party government. In France the government is clearly dominated by the President and the UMP. However, president Sarkozy decided to have a broad government including many independents and former members of the French political left. Hence there is arguably an informal French governing coalition. The government in Malta reacted through a stimulus package in 2009, amounting to 1.5% of GDP, two thirds of which is financed by EU grants. A larger stimulus package would have been hard to legitimize, given Malta's inflation problem and the previous policy of fiscal consolidation pursued by the reelected bourgeois government (IMF, 2009b: 11). Even if

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United Future party. On the other hand, it insisted that it is a one-party minority government, see EDWARDS, B. 2009. New Zealand. *European Journal of Political Research*, 48, 1052-1066.

more governments were one-party governments pursuing the default strategy, this would not contradict my argument: In order to depart from the default strategy executives must be willing and able to change the course of fiscal policy dramatically in the short term. It would be much more critical against my argument if there were many coalition governments in which governing parties held very different views on taxation and spending that deviated from the default response.

The German and Swiss case are good examples for the logics of the default strategy. Both countries were hit by the crisis, governments in both nations have a strong concern for fiscal sustainability, both were very skeptical about the effectiveness of demand-side management, and both feared that they would help other countries more than themselves when stimulating their internationally strongly integrated economies. In both countries governing parties disagreed about adequate means and goals of intervention in the economy; in Switzerland arguably more so than in Germany. In addition to immediate intervention into the financial sector and the electorally very visible and self-explaining 'focused' policies,

such as the wrecking premium in Germany, actors in governments need to argue and compromise about further fiscal policies. This took time, and initial claims needed to be scaled back. Other strategies to do something but not too much were to re-label previously accepted expansive policies as 'stimulus' (Watt, 2009), to finance stimuli by EU transfers or by the simultaneous introduction of taxes to finance the expansive package, such as the new tax on pornography in Italy (newspaper reports Nov 17<sup>th</sup> and 29<sup>th</sup>, 2008).

Another strategy of electorally favorable crisis intervention with low risks was the shifting of blame and virtual resources to international organizations. During the three G20-meetings that dealt with the economic crisis (Washington, D.C., Nov 2008; London April 2009; Pittsburgh, September 2009), the US administration – together with the British government – tried to motivate European governments to stimulate the economy to an extent comparable to that of the US. The answer was a very clear 'no' by the German and French government and the European Commission, all being able to free-ride on the Anglo-Saxon demand-management. (newspaper reports, March

21, 2009; April 3, 2009; April 4, 2009; September 7, 2009). The solution agreed by most governments was the reinvigoration of the IMF. It was decided to treble the resources of the IMF. This increase was not brought about by transfer of real funds, but rather by an increase of the credit lines of the member states. As far as these resources were needed, they were channeled in particular to the European members of the IMF (Woods, 2010). Since far-reaching reforms of the internal structure of the IMF failed, the old rich democracies kept their dominance of the IMF. The IMF imposed the tough austerity measures in Latvia, Hungary, Iceland, and Romania, which otherwise would be hard to defend domestically without the existence of IMF conditionality. This outsourcing of competences to the IMF showed electorates that the government was doing something about the economic crisis, in particular if the domestic crisis packages were small.

At the same time the European Union pursued policies similar to the domestic default strategy. It re-labeled expenditures as fiscal packages (such as an energy and technology program) and cautioned

against any further, risky expansionary strategies (newspaper reports March 21, 2009).

But how can we explain that some governments (Latvia, Lithuania, Estonia, Hungary, Iceland, Ireland and Romania) opted for pro-cyclical policies, risking aggravating the economic crisis? Obviously, coalition governments were able to introduce this measure, which could even lead to a break down of governments and electoral defeat. The simplest answer is that these governments did not have much choice. The Baltic nations, Ireland (IMF, 2009a), and Iceland were arguably hit hardest by the crisis due to their specific reliance on international finance. Hungary, Romania, Iceland, and Latvia chose to ask for IMF loans, thereby accepting the policy goals of financial sustainability. In addition, the Baltic states (which are in the European Exchange Rate Mechanism II) are the next candidates for membership in the Euro-Zone. Hence for these countries a counter-cyclical policy could endanger the feasible Euro-membership. Arguably, this membership is more important both for governments and electorates as compared to short term improvements of growth and employment. Therefore, the government did not

have much choice given their relationship with either the EU or IMF<sup>3</sup>. In the case of Ireland, deficits increased massively due to lowered taxes and due to the extraordinary fiscal burden from financial support to banks. Hence the Irish government hardly had any other choice but to design a pro-cyclical fiscal policy package (IMF, 2009a).

The last two columns of table 3 show the results when dummy variables for one-party governments and IMF credits/membership in the European Exchange Rate Mechanism II are entered in the model. Obviously these two variables are highly significant and the explanatory power of the models with these two dummy variables is about twice as high as those of models #1-#4. Certainly economic and fiscal variables were important for governments when they designed

3. One could argue that those countries that had unsound public finances in the years preceding the crises were forced to ask for IMF support given the impact of the crisis. Hence the fiscal situation in 2006/2007 could explain both the fiscal policy in 2008/2009 and IMF loans. This is not true, though. Among the four EU countries (Greece, Italy, Hungary, Portugal) that had public debt > 60% in 2007 and a deficit of > 3 % of GDP either in 2006 or 2007 only Hungary was under IMF conditionality in 2008/2009.

their fiscal responses to the crisis. But the most important factor was whether these governments could react swiftly enough to deliver a sufficiently strong stimulus to the economy. The other main factors are the political constraints that leave governments no choice but to pursue a fiscal policy which in all likelihood will contribute to a worsening of the crisis in the field of growth and employment.

## 5. Conclusions

The fiscal response to the economic crisis of 2008/2009 varied considerably between 32 democracies that belong either to the OECD or EU. The countries can be assigned to three groups: A group of eight nations reacted by a significant demand stimulus that let the countries to depart considerably from the previous level of public deficits. Governments in these nations pursued a counter-cyclical fiscal policy. The US is the most prominent member of this group. A group of seven countries chose the opposite strategy. They designed fiscal policies intended to scale down public expenditure. Often this did not result in a reduction of the overall deficit. However, the response was clearly pro-cyclical. Hungary is a case in point. A third group of 17 countries opted for a slightly expansionary policy strategies. Governments did something, but the magnitude of the fiscal stimulus is dwarfed by the magnitude of the crisis and the magnitude of the fiscal stimulus by governments that expanded significantly. Switzerland or Germany are instances of this strategy.

I argued that there are strong economic and electoral reasons for risk-averse governments to pursue a mildly expansionary policy such as the 17 countries of the second group. They minimize the risks that future increases of public debt are not rewarded by economic recovery, or they minimize the risks to avoid stimulating the economies of their trading partners more than their own. They also minimize electoral risks. Their risk-averse policies still allow them to claim to their electorate that they are actively doing something for the economy. Furthermore, in becoming active on the international level, they shift competences and responsibilities to international organizations (the IMF in particular), thereby allowing them to claim tied hands.

If governments depart from this default strategy in favor of a significant counter-cyclical policy, they must be able to take swiftly risky decisions. This implies that they do not need lengthy negotiations between political parties with different views on economic and fiscal policy, as is usually the case in coalition governments. Therefore a major de-

terminant of the expansionary strategy is the presence of a unified government, usually in the form of a one-party government.

If governments opt for pro-cyclical policy in a major economic crisis, they do so because they have little other choice. They are either under IMF conditionality (Hungary, Iceland, Romania, Latvia), or they have a much higher valued goal on the horizon, such as a feasible membership in the Euro-Zone, that would be endangered by an expansionary fiscal policy (in the Baltics, for example). In both cases domestic governments are able to shift the blame to international organizations for not being able to do more about the current crisis.

I hasten to add that the available fiscal data are of limited reliability and that two cases fit the argument only with additional arguments: Denmark with its coalition government that allowed for significant fiscal expansion starting from a very favorable fiscal situation before the crisis, and Ireland, that was hit so hard by the economic crisis that it did not need International Organizations to legitimize pro-cyclical fiscal policy.

I have to stress that my findings are in accordance with many works on fiscal consolidation, which show that this process depends critically on the distribution of interests and power in governments (Hallerberg, 2004, Spolaore, 2004, Franzese, 2010). The major difference between most of this literature and this analysis concerns the goals: In the absence of an imminent crisis, governments are concerned with fiscal consolidation. During an economic crisis and if monetary means are exhausted, governmental goals may change towards expansionary fiscal policy.

If I am right, who is wrong? (1) My descriptive analysis contradicts arguments according to which the option of substantially different fiscal strategies is gone after capital market liberalization and monetary EU-integration (see for example (Scharpf, 1987)). (2) Economic variables – such as previous levels of debt or deficits, the size of the automatic stabilizers, the size of the domestic market, and the likelihood that the fiscal stimulus will be exported to other countries – have a limited explanatory power. Economic variables certainly constrain governments, but in the end fiscal policy is about politics. (3) Partisan

politics explain little of the variation of spontaneous fiscal reaction to economic crisis. This contradicts analyses that show that left parties are more in favor of counter- and bourgeois parties more in favor of pro-cyclical policies (Cusack, 2001). One has to add, however, that my findings may be valid for the second most dramatic economic crisis after the crisis of the 1930s (EU Commission, 2009), while Cusack's findings concern the period of 1961-1994. (4) My findings are not in accordance with many accounts that emphasize the constraining functions of institutions such as central banks or federalism. In hard times, politicians are obviously able to stretch the institutionally defined corridor for political action considerably. What counts in the end is just politics such as the logics of one-party versus coalition governments. (5) We have little evidence for the claims by international organizations that the EU, OECD, or IMF had a large capacity to steer and coordinate fiscal policies across countries. Even in economically densely integrated societies, fiscal policy is still mainly framed by the domestic political actors.

Some qualifications are in order: Even the default strategy of a small fiscal stimulus contributed to

strongly rising public debts in most countries; ‘default’ strategy does not mean that these governments did not have to cope with major fiscal problems after the crisis. In addition, my argument does not claim to explain the policies of exiting the expansionary strategies and of reducing the public debt. There are very good reasons that this process will be strongly conditioned by the variables which have shown themselves to be powerful in explaining fiscal consolidation in the past. Rather, with regard to choosing between a strong, a weak, or no counter-cyclical policy, this comparative analysis showed that in the global crisis of 2008/9 a swift and significant departure from standard patterns of fiscal policies towards a major demand stimulus required the presence of governments that are able to make decisions without lengthy negotiation or compromises. It is difficult to gauge whether these policies really worked in terms of avoiding even worse outcomes in terms of growth and employment. And it is even much more difficult to gauge whether the advantages of a consistent counter-cyclical policy are not off-set by the problems facing the public household once the crisis is over.

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# 15. THE DISCURSIVE DOUBLE GAME OF EMU REFORM: THE CLASH OF TITANS BETWEEN FRENCH WHITE KNIGHT AND GERMAN IRON LADY

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# 1. Introduction

In the aftermath of the EU's enlargement towards Central and Eastern Europe, many scholars and observers of European integration were proclaiming that the French-German “engine” of Europe had come to an end. The political legitimacy of French-German initiatives was contested by coalitions of smaller member states and the ‘new Europe’ was calling for new leadership dynamics. However, the experience of the Eurozone debt crisis provided dramatic evidence that no alternative to the Franco-German partnership has yet to emerge in the enlarged EU. In a time of existential crisis, Franco-German initiatives appear to have remained the basic dynamic of integration. However, unlike in the past, agreements on steps forward have proven to be particularly difficult. This is largely due to these countries’ contrasting political economic policy ideas, cultures, and practices.

The Eurozone crisis itself was ‘read’ very differently by the two countries, which also prescribed different solutions on different timetables. As the crisis initially unfolded, French leaders continued to prescribe neo-Keynesian stimulus; described the

problem as one of mutual responsibility resulting from imbalances between deficit countries (read Southern Europe) and surplus countries (read Germany); recommended deeper integration through greater *gouvernance économique* (economic governance) along with a range of policy innovations; and preached solidarity in response to the Greek debt crisis together with a quick bailout to stop escalating market concerns beginning in January 2010. By contrast, the German leadership delayed action, first pushing Greece to solve its own problems with a discourse about public profligacy and ‘lazy Greeks;’ and only when the crisis was ready to explode did it agree to a loan for Greece at punitive market rates on May 3, 2010, followed by a new loan guarantee mechanism—pushed by France and even a telephone call from US President Obama—on the weekend of May 9-10, as market contagion threatened other European countries (the infamously named ‘PIGS’—Portugal, Ireland, Greece, and Spain—the additional ‘I’ for Italy comes a year later). On this historic occasion, a deal was brokered in which France got some of the political (economic) institutions and

policy actions it most wanted, including a bailout for Greece and a loan guarantee mechanism—the European Financial Stability Facility (EFSF)—for countries under threat, in exchange for accepting German political economic policies and philosophies. These included enforcing *ordo-liberal* macroeconomic principles of austerity budgets across Europe, accepting the creation of a further treaty-based loan guarantee mechanism, the European Stability Mechanism (ESM), and agreeing to reinforce the Stability and Growth Pact (SGP), giving it more teeth through fines and sanctions. Subsequent episodes in the saga of the Eurozone crisis reiterated this basic pattern.

Paradoxically, the compromise between the two powers has been evaluated very differently by their European counterparts as well as their own national publics. Sarkozy’s role in the crisis was seen in much more positive light than that of Merkel. Whereas Sarkozy was viewed as something of a ‘White Knight’ riding to the rescue of Greece and Eurozone countries throughout Europe, Merkel was pictured as Europe’s new ‘Iron Lady’ outside Germany, imposing hardship on Greece as well as other European countries. This is because at

home, the Chancellor had to please a public highly resistant to financial solidarity at the expense of the German taxpayers that would come without severe austerity for the 'PIGS'. In contrast, the French public generally accepted Sarkozy's turn to austerity and the increasingly stringent 'pacts' that accompanied it. Eventually, the French and German discourse converged to a certain extent, as they agreed to more solidarity and institutional integration along with austerity, but emphasised different aspects in order to legitimise the 'deal' towards their respective public opinion.

So how do we explain these differential views of French and German leadership in the crisis, both outside and inside their countries? Part of the answer naturally requires setting these leaders in the context of long-standing national economic and political traditions, considering their particular perceptions of national economic interest at the time of the crisis as well as of political interest—related to electoral considerations. But another important component has to do with the very structure of decision-making, with multiple actors at multiple levels.

At the EU level, the main tension concerns the articulation between supranational and inter-governmental politics, and the ways in which the various actors have responded to events. The key supranational actors in the Eurozone governance architecture, the EU Commission, charged with oversight of Eurozone activity and member-state adherence to the Stability and Growth Pact, and the European Central Bank (ECB), charged to maintain the stability of the euro, have naturally sought to carry out their respective duties while not only ensuring against threats to their prerogatives but also taking advantage of windows of opportunity that would enable them to help solve the crisis. Both institutional actors, however, are limited by the fact that major decisions about any significant change in the governance of the Eurozone can only be decided by the member states—and in particular France and Germany. As the major member-state actors, however, France and Germany themselves have to take into account their previous 'history-making' grand bargains at the EU level, including their 'certain idea of Europe (Parsons 2003) that led to the creation of the common currency'<sup>1</sup>. At the same time, though, they

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1. Naturally, other EU leaders present around the

also have to deal with the responses of national publics and their own electoral prospects.

The national level, in other words, is as important to any compromise solution as is the supranational. This suggests that Robert Putnam's (1988) classic discussion of the two-level game in international relations has great relevance for our case. What we will show, however, is that rather than seeing this as a two level game, in which the two levels remain largely separate, the EU's Eurozone negotiations are better viewed as a simultaneous double game. In this game, moreover, rather than using rational choice institutionalism to model the interest-based calculations of 'rational' state actors, we argue that a discursive institutionalist approach (Schmidt 2008) provides greater value-added to our understanding of how EU leaders perceived their interests as well as achieved compromises. Discursive institutionalism considers both the substantive content of ideas and the

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table are also important, to propose, mediate, promote compromise, or to oppose. But they ordinarily line up behind one or the other major player, with the Northern Europeans largely behind Germany as the crisis unfolded, the Southern Europeans behind France. And if Germany and France cannot agree, then there is no agreement.

discursive interactions through which agents (re) construct and convey their ideas about interests and values in given institutional contexts on an on-going basis. These occur through a 'coordinative discourse' with other (supranational) policy-makers in leaders' efforts to reach agreement and in a 'communicative discourse' with the public—both their own national publics and the European public more generally.

To elucidate all of this, the paper analyses the ideational 'frames' of the two leaders while tracing their discursive interactions against changing background conditions since the European debt crisis was triggered by Greece in October 2009 until the last measures taken in 2012 before the French Presidential elections. The empirical analysis is based on a systematic corpus of press conferences and media interviews by Nicolas Sarkozy and Angela Merkel after European summits. It is complemented by a number of press interviews (including some given by their respective Finance Ministers) and important speeches in that same period of time.

## 2. Explaining The Dynamics Of Agreement In Eu Multi-Level Politics

### 2.1 A risky simultaneous double game

As European integration has increasingly blurred the demarcation lines between domestic and foreign policy, the articulation between domestic politics and intergovernmental negotiations has become increasingly important for any understanding of governance and democracy in the EU. Paradoxically – partly because comparativists tend to concentrate on the former while international relations specialists deal with the latter – the processes of articulation remain under-researched and under-theorised with regard to EU integration. In the 1980s, R. Putnam (1988) put forward the famous metaphor of the two-level game. His argument was that, while negotiating international treaties, national leaders have to seek agreement at two different tables, which implies different sets of preferences at the national level on one hand, and at the international level on the other. These two arenas are presumed to

mutually influence each other, since the overlap of the two preference sets determines the possibility of ratifying an agreement. The main implication is therefore that moves in international politics will mostly be brokered and ratified if they provide for domestic benefits.

Other scholars have extended this analysis to the role of domestic politics in EU integration. Andrew Moravcsik (1997) put forward a liberal intergovernmentalist account of international relations in which states define their preferences on the basis of domestic society (or some subset thereof). With regard to the ideational variant of liberalism in particular, he suggests that State preferences stand for a national identity composed of views about the legitimate social order, i.e preferences about the scope of the nation (citizenship and borders), commitment to particular political institutions, and ideas about the nature of redistribution (Moravcsik 1997). State behaviour understood as the management of international interdependence is then geared toward gains on

the basis of these preferences. Building on this approach, German scholars have more recently claimed the “domestication”, i.e. a new orientation towards domestic societal preferences and identities, of the EU policy of Germany (Harnisch 2006) and France (Schild 2009). Here again, the central argument suggests a subordination of foreign policy to domestic preferences. Both approaches are useful in the sense that they point to crucial aspects of the articulation between domestic and EU politics. While the two-level game metaphor stresses the interactions between the two arenas, ideational liberal intergovernmentalism stresses the importance of societal preferences and long-established identities. However, both theories also have a serious drawback: they assume the existence of two separate realms of fixed preferences that interact with each other. Those preferences tend to be reified and pictured as homogeneous (especially in the liberal approach) and the formation of preference sets seems to happen at different moments. Moreover, both imply that international agreements are mainly geared towards the satisfaction of domestic preferences, hence the two-stage nature of the process.

This is where the uniqueness of European politics must be taken into account. In the EU, we argue, the outcome of intergovernmental negotiations must be understood as a simultaneous double game, rather than a two-level game. The domestic and the EU spheres of preference formation do not interact with each other, they inter-penetrate each other. Preferences at national and EU level are therefore co-constitutive. Democratic legitimacy results less and less from the preservation or reproduction of established national preferences, and more and more from the ability to re-configure and re-negotiate those preferences in the context of exacerbated interdependence. The “game” therefore should be understood less as the overlapping of preference sets and win solutions than as a discursive game of real-time deliberation and contestation.

In today’s EU, political leaders and decision-makers do not only have to address their national constituencies; they also need to speak to other European audiences in order to convince them that the policy option they advocate is not the mere defence of a national preference but serves the collective ‘good’ of the EU as a whole. During the crisis of the Eurozone, not just national leaders act-

ing in their EU capacity but also national finance ministers like the French Minister for economics, Christine Lagarde, and her German counterpart, Wolfgang Schäuble, have sought to reach their neighbour constituencies with interviews in the press. Interdependence among the member countries in the EU has gone so far that agreement is no longer an option: it has become a necessity. As a result, it is not just that the possibility of an agreement is at stake – as in the two-level game theory – but also the electoral fate of national leaders. If they prove to be unable to legitimise an agreement brokered at the EU level, national leaders will have to bear the political costs of popular resentment. The referenda for the ratification of EU treaties are the opposite of this. They represent a counter-example to the simultaneous double game since they do feature a rigid two-step process where treaties bargained in intergovernmental conferences are then submitted to popular consent. This was the case of the rejection of the Constitutional treaty. By contrast, in the simultaneous double game of policy change in the EU, national elites have the crucial role of bridging the gap between the management of interdependence and of national preferences and identities.

How member-states have come to hold, maintain, and change their EU-related identities, visions, and discourses depends in large measure on the interactive processes of discussion, debate, deliberation, and contestation among and between elites and citizens over time. National political elites, who simultaneously act as EU policymakers (henceforth termed European elites), have played a key role in articulating visions of the EU that have had a major influence on public perceptions, especially during the early years of the ‘permissive consensus’ up until the 1990s (see, e.g., Schmidt 2006). Since then, these elites’ discourses often reflect as they respond to the greater contestation coming from an increasingly ‘constraining dissensus’ (Hooghe and Marks 2009), in which divisions over the EU as well as, more generally, between more open and closed views of Europe and citizenship have been growing (Kriesi, Grande et al. 2008). The media has also played a major role in ‘mediating’ between elites and citizens, and in particular in shaping public opinion on the EU through what and how they report and comment on the EU (Koopmans and Statham 2010; Risse 2010). Social movements also play an increasingly significant role in influencing public opinion and

leaders, in particular on issues of great political salience, whether across member-states as in the case of the mobilization against the Bolkestein directive (Crespy 2012) or within member-states in referendum campaigns about EU treaties. European elites’ discourses have also, naturally, been strongly influenced by past elites’ ideas and commitments, whether because of the ‘rhetorical entrapment’ engendered by previously accepted policy obligations (Schimmelfennig 2001) or the ideational trap resulting from the institutionalised ideas of their predecessors (Parsons 2003).

## 2.2 A discursive institutionalist analysis

To say that European elites may be constrained by past EU or national level discourses and actions, however, does not mean that they end up caught in the path-dependence of institutionalized ideas, as historical institutionalists might argue, locked into parroting the outcomes of the winning political coalition’s expressed interests, as rational choice institutionalists might suggest, or even condemned to reproducing national cultural and identity frames, as sociological institutionalists could seem to suppose. European elites, in

particular when it comes to supranational policy articulation and action, still have a certain degree of freedom of manoeuvre in the construction of their ideas and the articulation of their discourse. Certainly, their freedom is greatest when they are the ones to construct the founding ideas of a given discourse, as was the case for General Charles de Gaulle, Konrad Adenauer, Altiero Spinelli, and others. But subsequent leaders also have a modicum of choice, even if this must follow to some extent the flow of past ideas and discourse—if only to build legitimacy and ensure resonance for the public.

The analytic framework used herein is ‘discursive institutionalism,’ which analyses the substantive content of ideas and the interactive processes of discourse in institutional context (Schmidt 2006; Schmidt 2008). In European Studies, this approach is closest to identity and discourse analyses (Diez 2001, Risse 2010). The difference is that it is more explicit about the need to focus on the dynamics of change in ideas through the interactive processes of discourse, and more concerned about situating these in formal institutional context (in addition to the ideational one). With regard to the EU, that

context is a multi-level system consisting of a 'co-ordinative' discourse of elite policy construction at the EU level and a 'communicative' discourse between elites and the public involving national level policy discussion, contestation, and legitimization. Complicating this is the fact that policymakers can use an ostensibly communicative discourse to their own general publics—in speeches or in interviews in national or the foreign press - to simultaneously signal their positions to fellow policymakers, ahead of coordinative negotiation meetings. By the same token, they may say one thing behind closed doors in the coordinative negotiations, something else to their national press as they emerge from their meetings, as a communication to their own constituencies. Legitimacy issues often arise when there is a significant lack of congruence between the coordinative discourse at EU level and the communicative discourse at the national level. This may come at the national level, as the press and opinion leaders may complain that national leaders have not been honest about the EU commitments they may have made, or at the EU level, as EU leaders may complain that a fellow leader has gone back on EU level promises in national speeches or actions.

National institutional settings also represent both opportunities and constraints for political leaders when trying to persuade at home. These institutional settings can be stylised as 'simple' polities in which decision-making tends to be channelled through a single authority, as in countries like France, which are unitary states with statist policymaking and majoritarian representation systems, or as 'compound' polities in which decision-making tends to be more dispersed, as in Germany, which are federal states with corporatist policymaking and proportional representation systems. In Germany, with its compound polity containing many veto players – in particular the *Bundestag* (lower house of Parliament) or the *Bundesverfassungsgericht* (the Constitutional Court) – the political system requires a 'thick' coordinative discourse among the wide range of national actors with a say in decision-making in order to reach agreement. In France, by contrast, with its simple polity in which top down decisions by a restricted governing elite are the rule, making for a 'thin' coordinative discourse, communicative discourses to the general public are much more elaborate—and necessary, since disagreements generally turn into mediated public debates and

often also spill out into the street, if unions and social movements mobilise and protest (Schmidt 2006).

Therefore, European leaders' positions cannot be explained without also considering institutions and electoral politics, and in particular the extent to which, in this simultaneous double game, considerations other than those involved in solving the Eurozone crisis, such as getting re-elected or maintaining one's majority, play an important role. To illustrate, the German leader's stance on the Greek bailout cannot be understood without also understanding the compound polity in which she operates, in which ministries such as that of Finance have considerable independence, in which the *Bundesbank* and the Constitutional Court in Karlsruhe are fully independent, and in which frequent regional elections can change the majority in the *Bundesrat* (second chamber).

In Germany, the heated discussions about the first emergency measures for rescuing Greece took place in the run-up to the regional election in the significant region of North Rhine-Westphalia (NRW). The government parties were going down in the polls and ended losing more than 10% of

the votes compared to 2005. As result, the Chancellor's party, the CDU lost control of the *Land*, to the benefit of a red-green coalition. NRW was only the first in a series of election defeats. In March 2011, the CDU lost the rich Baden-Württemberg, which had been a CDU's stronghold for 58 years. In the Bremen election in May 2011, the CDU lost over 5% of the votes while the SPD and the Greens were victoriously re-elected with enhanced scores. Merkel's initial discourse, about 'lazy Greeks' who needed to put their own house in order, while she was protecting German savings, made it very difficult for her to legitimate her switch in discourse, to then insist on national TV that 'the future of Europe depended on it [the Euro]' and 'it was essential to maintain the stability of the Euro'. The discourse rang hollow, while the turnabout angered numbers of her supporters, including the influential *Frankfurter Allgemeine Zeitung*. Part of the explanation for her increasing insistence on more stringent institutional mechanisms, automatically applied, also has to do with the attempt to demonstrate to a disenchanted electorate that their savings would be safe, and that the Eurozone countries would become more and more like Germany. In contrast, Sarkozy has none of the prob-

lems of the institutional and electoral problems of his German counterpart, given that France is a 'simple' polity with tremendous concentration of power and authority in the president, which has only increased under his presidency as a result of constitutional reform.

Drawing from various conceptualizations in different strands of the literature focusing on the role of ideas and discourse, the chapter explores three dimensions of public discourse about the Eurocrisis, focused on economics, institutions, and identity. In all three dimensions, we consider the cognitive and normative frames contained in EU leaders' discourse, which may be conceived of in a number of different ways at different levels of generalization (Hall 1993; Sabatier 1998; Schmidt 2008; Mehta 2010). Putting these together, we identify three levels, including: 1) policy ideas related to policy measures and solutions, both economic (for instance the EFSF) and institutional (the budgetary 'golden rule'); 2) programmatic ideas related to larger policy paradigms (for instance, convergence or regulation) related to broader economic philosophies (Keynesianism or ordo-liberalism); and 3) norms, values and identi-

ties (for instance, stability or solidarity). In the latter category, drawing from the framing literature (Hunt, Benford *et al.* 1994), we also consider how political leaders conceive of Europe, the position of their country in Europe as well as the role of various institutions. Here, attention will be paid to frames delineating boundaries between us (the French? The Europeans?) and them (the so-called PIGS? The speculators?)

The following sections present a diachronic and comparative analysis of French and German discourses over the two sequences and at the level of institutional and policy solutions, economic paradigms and philosophies, and norms and identities.

### 3. Policy And Institutional Solutions: Activating Solidarity, Constitutionalizing Austerity

In the course of 2010, France and Germany eventually agree to set up two financial instruments: the EFSF with the first Greek bailout in May, and then in the fall, the ESM. With both, German leaders kept insisting, both in the coordinative discourse with their European partners and in the communicative discourse to the German public, that they would not agree to such funds, until they did. At a press conference in the fall (on September 16, 2010), for example, both Merkel and her Finance Minister, Wolfgang Schäuble, maintained that they would not agree to any extension of the EFSF to a permanent fund. By December of that same year, they agreed to the EMS at the EU level.

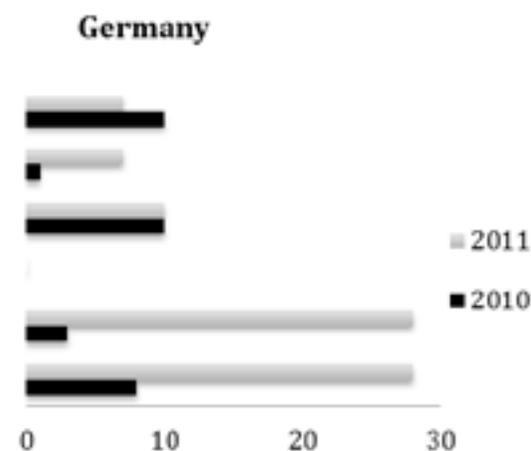
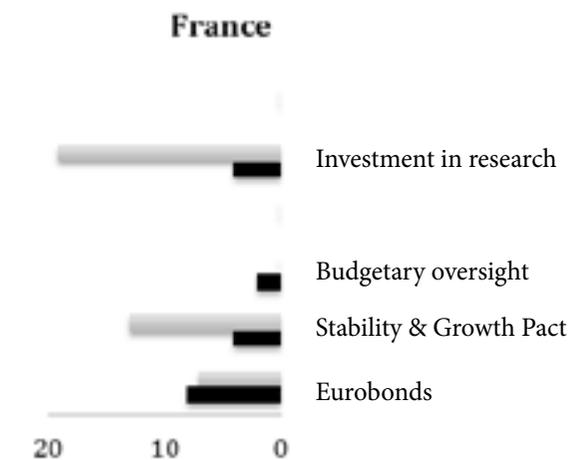
What is clear is that Germany mainly followed France with regard to policy solutions—albeit reluctantly, and with much delay. This comes out clearly from a systematic analysis of the press conferences and press interviews of Merkel and Sarkozy for the year. Graph 1 demonstrates that whereas French leaders advocated establishing

not only the two funds but also such solutions as Eurobonds or enhanced budgetary oversight, Angela Merkel was stuck on already existing, but inefficient, policy solutions such as respecting the rules enshrined in the Stability and Growth Pact or even investing in research contained in the Lisbon strategy. At the same time, all the think-tanks were abuzz with discussions of how to create a European Monetary Fund or to make Eurobonds work, while major economists, opinion makers, and even government officials, including Schäuble himself, published op-eds in major newspapers on various mechanisms for financial solidarity. But none of this had an impact on Germany's position. We observe a similar pattern with regard to institutional solutions. Although Germany finally embraced France's long-standing demand for '*gouvernance économique*', that is, for an economic government that would oversee the Eurozone, it did so on condition that this meant strengthening the sanctioning mechanisms for the countries that would not be able to abide by the budgetary rules.

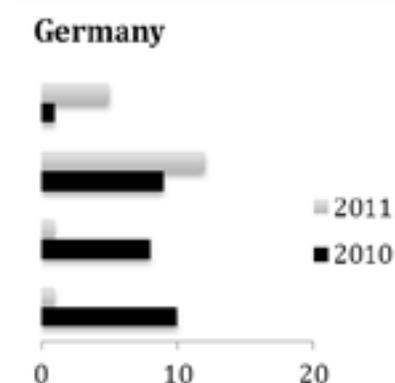
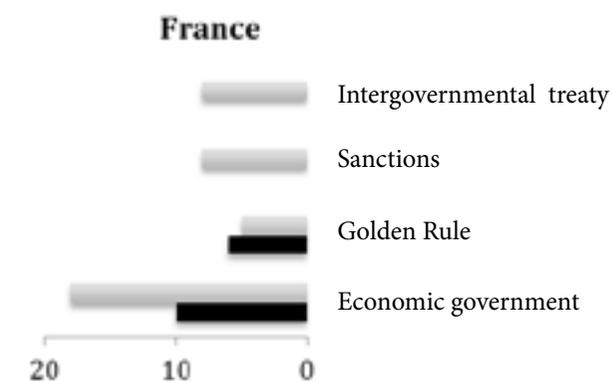
The French went along with this with some reluctance, in particular because these were increasingly focused on automatic financial sanctions (see the French President's Press conference on March 25, 2010). Moreover, Merkel repeatedly evoked the idea that the existing treaties forbade bailouts in the Eurozone. And finally, once the bailout and loan guarantee had been agreed, Angela Merkel missed few opportunities to remind her European partners of her country's decision to anchor a budgetary 'Golden Rule' (*Schuldenbremse*, literally debt brake) in the German Constitution (PC 10.05.2010, *Le Monde* 19.05.2010).

In the sequence of institutional consolidation in 2011, the respective French and German discourses on policy solutions did not change much. The German Chancellor, while fully endorsing the ESFS and the EMS, developed a complex set of arguments to explain how they might function together. She also continued to refer to the stability and growth pact and the need to invest in research in order to boost competitiveness. On the French side, Nicolas Sarkozy moved on to the advocacy of fiscal integration, in particular with regard to tax competition, an idea that was followed more or less by Angela Merkel.

Graph 1 : Economic policy solutions



Graph 2 : Institutional policy solutions



By contrast, discourse on the institutional policy solutions changed markedly in 2011. The issue of automatic sanctions was more salient in the French discourse because Nicolas Sarkozy had

to justify his consent to automatic sanctioning mechanisms as well as the role of the EU Commission in the monitoring of the excessive deficit procedure. In addition, he very often mentioned the role of the new economic government of the Eurozone in order to stress that the long-standing French demand was satisfied in the course of Franco-German negotiations. This theme remained marginal for the German Chancellor.

The newest, most salient theme in this sequence of the crisis was the ‘golden rule’ for budgetary discipline. Both France and Germany converged on this theme, as well as on the idea of enshrining it in a new intergovernmental treaty. While this mechanism was inspired by Germany, Nicolas Sarkozy had already advocated introducing it in the French Constitution since early 2010. Polls showed that the French President had been quite successful in communicating the new orientation towards austerity to the French electorate. In August 2011, a poll confirmed that a majority of the French approved the introduction of the “golden rule” into the French Constitution<sup>2</sup>.

2. “Sondage: plus d’un français sur deux approuve la Règle d’or”, 25.08.2011, [www.lepoint.fr](http://www.lepoint.fr) (20.03.2012)

## 4. Economic Philosophies and Paradigms: Convergence Towards German *Ordnungspolitik*

Ordo-liberalism is a German invention. It was forged in the 1950s under the leadership of Ludwig Erhard, with the philosophical ideas underlying the paradigm informing not just the *Bundesbank* but also, later, the ECB, which absorbed its ideology. The paradigm itself was developed by a discourse coalition led in the early post-war period by Alfred Müller-Armack, the entrepreneurial actor who articulated the arguments that convinced policy actors, political actors, and then the public of the necessity and appropriateness of this idea (Lehmbruch 2001). It has remained a pervasive and distinctive form of neo-liberalism conceived as an alternative to Keynesianism that has also, to a certain extent, underpinned the German concept of social market economy (Ptak 2004). The German ‘social market economy’ which emerged after much political struggle during the 1950s was a compromise accepted by conservatives and social democrats alike that consecrated a state that would govern the economy according to ordo-liberal economic principles while at the same time

‘enabling’ corporatist management and labour co-ordination of wages and work conditions (Streeck 1997).

Post-war Germany, as a result, adopted a political economic philosophy and program that was the direct opposite of that of France’s post-war *dirigisme*, in which an interventionist state was much more actively engaged in both macroeconomic steering and microeconomic industrial policy. France’s *dirigiste* political economic philosophy also began in the 1930s, as the brainchild of technocratic elites of the right and even, in some cases, of the far right who were influential during the last days of the Third Republic and the Vichy regime as well as the Liberation era (Nord 2010). This pattern of state ‘voluntarism’ has persisted, despite the fact that since the 1980s, post-war Keynesianism and state *dirigisme* gave way to neo-liberal reform in which the state engineered the ‘*dirigiste*’ end of *dirigisme* through liberalization, privatization, and deregulation (Schmidt 1996; 2012).

Nonetheless, the deep-seated idea of the legitimacy of strong state interventionism helps explain why a Conservative French President—who had embraced neo-liberalism for the previous two years of his mandate—would be ready to jump back in with a more state-led, Keynesian approach to the 2008 crisis. A very different set of deep-seated ideas about the value of the ordo-liberal ‘Culture of Stability,’ which had continued largely unchanged since the early post-war period, helps explain why a Conservative German Chancellor would resist any such state action in response to the 2008 crisis. And this also helps explain Chancellor Merkel’s resistance to President Sarkozy’s push for more active and immediate response to the Greek crisis as of 2010.

Thus, graph 3 suggests that part of the reason for the seemingly interminable discussions over the exact conditions for the Greek bail out can be further explained by the fact that Sarkozy and Merkel focused on different underlying policy paradigms and philosophies for the ESFS and the EMS. Whereas the French leaders’ discourse continued to highlight the importance of the economic convergence of member-states, in keeping with

the original ideas behind the European Monetary Union, German leaders used the key words of the ordo-liberal frame, austerity and competitiveness, while adding conditionality as the way in which to ensure that member-states with excessive debts commit themselves to austerity budgets to reduce public deficits, under the supervision of the EU authorities. The *leitmotiv* of the German political establishment's discourse was control over public finance, as signalled by the use of a wide range of terms, all expressing this idea in the German language – *Haushaltsdisziplin, Haushaltskonsolidierung, Defizitkontrolle, Sparkurs*, etc<sup>3</sup>. These terms, moreover, are all closely associated with the concept of competitiveness, which was over-used in every speech of the German Chancellor, as in the following quote:

“As a matter of fact, and this has been acknowledged everywhere, the competitiveness of the various Euro-countries is different, and we are helping ourselves to become the most competitive regions in the world if we pay attention to the

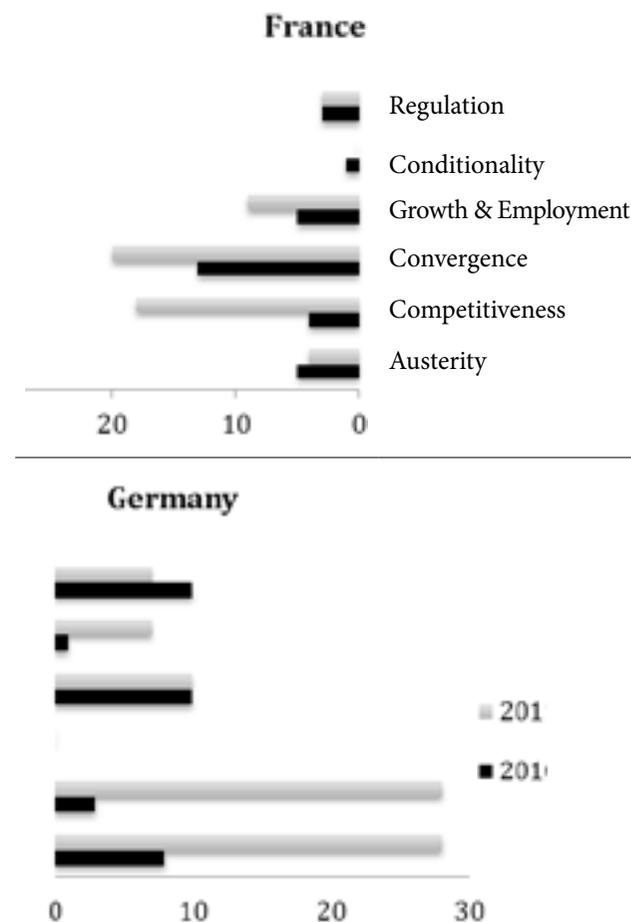
3. Just as the French term « *rigueur* » is avoided to refer to austerity measures because of its political negative connotation, *Konsolidierung* is preferred to *Sparkurs* in the German discourse.

strengthening and the improvement of our overall competitiveness. We need to be careful that it does not lead to excessive divergences within the Eurozone, but rather that we grow together thanks to better competitiveness” (PC 04.02.2011).

Moreover, although the Pact adopted in March 2010 was named the ‘Pact for the Euro,’ the Germans often referred to it as the ‘Pact for Competitiveness’ (PC 04.02.2011, PC 11.03.2011). And subsequent to the May agreement, Merkel implicitly linked the push for zero deficit to increased competitiveness, while she strongly associated the ‘solidity’ of public finances with austerity measures across Europe (*Le Monde* 19.05.2010).

Notably, with the May agreement on the Greek bailout and the EFSE, the French President embraced to a large extent the ordo-liberal framing of the crisis. That said, Sarkozy nonetheless endeavoured to maintain a discursive balance between the invocation of austerity, on one hand, and of growth and employment, on the other. By contrast, the German discourse had no place at all for the main French alternative frame, that of a necessary policy convergence within the Eurozone.

Graph 3 : Paradigms



This constituted a clever discursive strategy by French political leaders. On the one hand, they strongly converged towards the competitiveness program and framing. In February 2011, Christine Lagarde, who was the French Minister for Finance at that time, gave an interview to the *Spiegel* seeking to persuade the German political establishment and public of the French commitment to increasing competitiveness and stability. On the other hand, besides competitiveness, Nicolas Sarkozy avoided evoking the austerity frame nationally, emphasizing instead the idea of policy convergence within the Eurozone, which was in tune with the French vision of a core Europe. He also talked more about growth, employment and the regulation of finance as complementary references to Keynesian policy. In contrast, Angela Merkel used competitiveness, along with austerity, as her main discursive frames, with convergence, growth and employment and conditionality as secondary frames. Regulation was absent from her discourse in this period of time.

By the end of the period under study, however, President Sarkozy was more willing to see convergence rather than competitiveness as the main

goal of the Pact for the Euro. The framing discrepancy was acknowledged by the French President:

‘We have also changed the name, it is ‘Pact for the Euro in favour of competitiveness and convergence’. This allowed us to put an end to the debate between those who were for convergence and those who were for competitiveness’ (PC 11.03.2011)

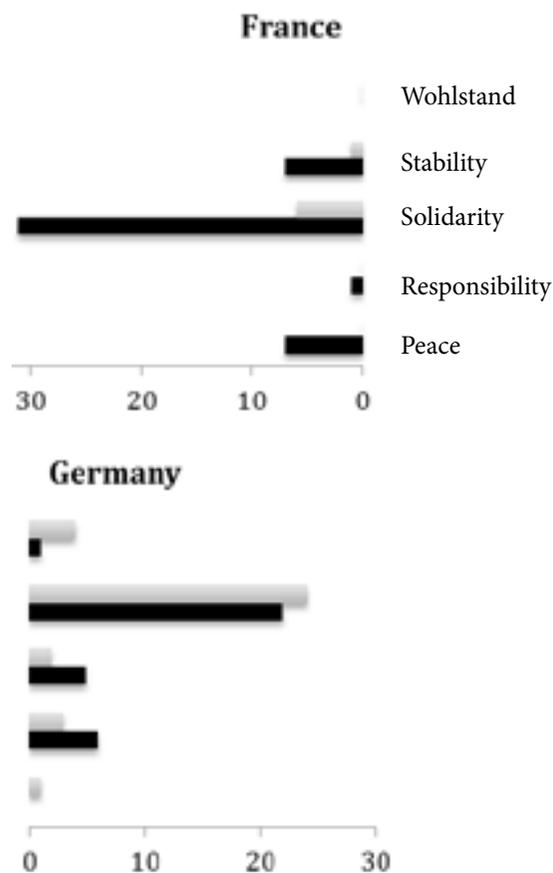
Meanwhile, the competitiveness frame also permeated the French discourse to a significant extent (cf. Christine Lagarde in *Spiegel* 14.02.2011). The main French achievement in terms of convergence was the setting up of the so-called economic government of the EU, a gathering of the Eurozone leaders. While the Germans were stressing convergence in terms of wages (with the end of indexation on inflation<sup>4</sup>), Sarkozy emphasised a move that France had advocated for a long time, namely integration in fiscal policy with first steps towards harmonization.

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4. Here, one should note that the end of wage indexation on inflation had already been implemented for a few years in France.

## 5. Norms and Identities: Solidarity Vs Stability

Graph 4 : Norms and values



While the cognitive arguments in the German and French leaders' discourse were reasonably well-developed, the normative arguments were strikingly thin, with scant reference to values, especially as far as Germany was concerned. Whereas French leaders repeatedly talked of solidarity, the best German leaders could come up with was 'stability,' as Graph 4 demonstrates. Stability itself is a traditional frame inherited from the monetarist spirit of the Maastricht Treaty, for which the core task of the ECB is to ensure price stability (low inflation) while the rules for EMU are enshrined in the Pact of Stability and Growth. For Germany, in other words, stability of the currency has been elevated to a moral value, as a result of history and collective memory.

The German Chancellor's value-based discourse on stability stands in contrast to the French President's emphasis on solidarity, in particular towards Greece and, more generally, within the Eurozone, as the main justification for setting up the EFSF and the EMS. Sarkozy also appealed to the

grand narrative of EU integration: 'The Euro is Europe, Europe means peace on the continent' (PC 08.05.2010). In stressing the principle of solidarity, the French banking interests that were to benefit most from a bailout for Greece<sup>5</sup> were discursively absent from the construction of the French position, which helped make it more legitimate. This was also, one might add, true for the German discourse, in which citizens' interests were at the forefront of the discourse, as the German government insisted time and again that it was most concerned about engaging the German taxpayers' responsibility in the financial rescue of Greece. Indeed, the idea of solidarity remains marginal in the German discourse and, when mentioned, it is always associated with responsibility and stability. On the one hand, as the largest and economically most significant member of the Eurozone, German leaders made clear that they felt responsible

5. French banks are massively involved in Greece through the acquisitions of Greek proximity banks, up to €79 bn versus €43 bn for German banks. More generally, French banks are very involved in Southern European markets, including in Spain and Portugal. Cf Elie Cohen, « Grèce : nuages noirs sur les banques françaises », *Telos*, 02.05.2010, [http://www.telos-eu.com/fr/article/grece\\_nuages\\_noirs\\_sur\\_les\\_banques\\_francaises](http://www.telos-eu.com/fr/article/grece_nuages_noirs_sur_les_banques_francaises) (12.05.2011)

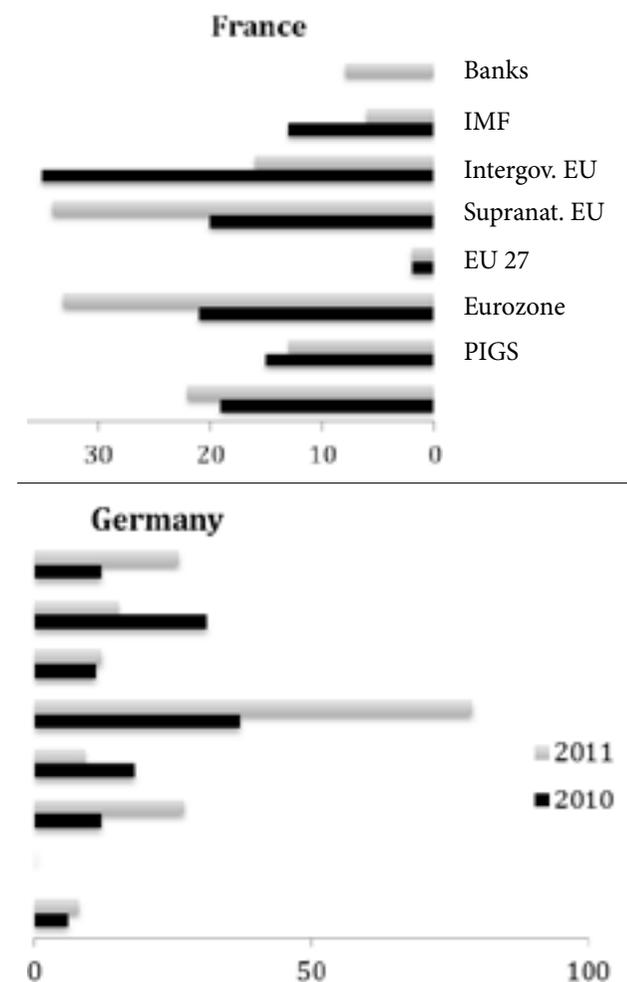
for the survival of the common currency. On the other hand, they were equally clear about the fact that the PIGS also had to commit themselves to policies that would allow for stabilizing the common currency. In Angela Merkel's words, 'stability and solidarity are two sides of the same coin' (PC 26.03.10).

The normative discourse and the appeal to values became even thinner in 2011 compared to 2010. While Nicolas Sarkozy still referred to solidarity, albeit less often, the most salient frame in this respect was the idea of stability, which had long been most salient in the German discourse. The stability of the common currency had by now become the main normative guiding principle. Interestingly, Angela Merkel also referred to the German concept of *Wohlstand* as a secondary frame, i.e. the underlying idea of the German post-war economic miracle, making clear that what was really at stake with the Eurocrisis for the Germans was a threat to their standards of living and well-being. While this frame might have been quite efficient in the communicative discourse directed at the German domestic constituency, it naturally could

not work as a legitimizing discourse at the European level.

The most salient normative dimension here involves the different assignation of responsibility. This can be scrutinised through identity frames, i.e. the discursive references to actors depicted as protagonists ('us') or antagonists ('them') in the crisis, as shown in Graph 5. In the first months of 2010, the French President mainly put the blame on 'the markets' while pointing to speculators as common enemies for the Eurozone: 'it is logical that a member country of the Euro that is being attacked by speculators, as it is the case of Greece today, should be able to rely on the solidarity of other members of the Eurozone. Otherwise, why did we decide to have a common currency?' (PC 03.03.10). He pressured the German Chancellor while instrumentally appealing to her European commitment: 'I believe in the European solidarity of Germany, I believe in Mrs Merkel's European commitment' (CP 07.03.2010). This is where Nicolas Sarkozy most clearly manages to profile himself as the 'White Knight' rescuing Greece.

Graph 5 : Protagonists



In contrast, Angela Merkel played the ‘Iron Lady,’ first stressing the lax budgetary policies of the PIGS as she insisted in a joint press conference early on in the crisis that: ‘Greece won’t be left alone, but there are rules and these rules must be adhered to,’ (*Washington Post* February 12, 2010). In March, she directly countered Sarkozy’s insistence that speculators were the problem, saying: “I would suggest that we should not assume that the situation was only caused by mean speculators (...) If the budget situation in Greece had not been what it was, the speculators would have not had such a chance. This is actually something that should not have taken place after the Treaty of Maastricht” (PC 26.03.10). The underlying idea among the German establishment and public was that the Greeks should be punished for cheating and then lying about the state of the country’s public finances. This position echoed the German public’s hostile stand on what was then seen as the “Greek crisis”. In February-March 2010, numerous opinion polls showed that about two thirds of German citizens opposed the idea of the federal government committing itself to financial help<sup>6</sup>.

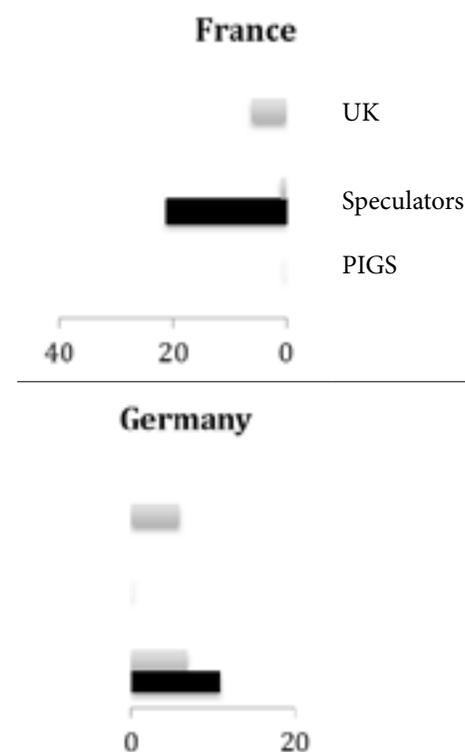
6. <http://de.statista.com/statistik/daten/studie/77453/umfrage/finanzielle-hilfen-der-bundesr-egierung-fuer-griechenland/>, February 2010. “Bürger stützen harten Kurs gegen Griechenland”, [www.stern.de](http://www.stern.de), 30.03.2010.

In the same vein, the French and the German leaders disagreed with regard to the main protagonists in the crisis. For Nicolas Sarkozy, the PIGS countries were to be seen as allies, while integration was to be re-directed towards further convergence of a core Europe embodied by the Eurozone countries and led by intergovernmental institutions such as the Council of Ministers and the European Council and its permanent President.

For the German Chancellor, in contrast, the banks were to be seen as allies rather than enemies. In the first sequence of the crisis, Angela Merkel also resisted the vision of a core Europe and insisted on moving forward with the 27 member states of the EU as a whole; she consistently referred to the leading role of the supranational institutions; the ECB, the EU Commission and the Court of Justice. Furthermore, while Nicolas Sarkozy was objecting to involvement of the IMF in the beginning, Angela Merkel insisted that a substantial part of the financial burden would be shared with the involvement of the IMF.

[egierung-fuer-griechenland/](http://de.statista.com/statistik/daten/studie/77453/umfrage/finanzielle-hilfen-der-bundesr-egierung-fuer-griechenland/), February 2010. “Bürger stützen harten Kurs gegen Griechenland”, [www.stern.de](http://www.stern.de), 30.03.2010.

Graph 6 : Antagonists



The norm of stability was consistent with a framing of collective identities that focused on the Eurozone, in particular with regard to the view of antagonists and protagonists in the crisis. First, the UK appeared as the main antagonist because of its veto and then refusal to adopt the Euro Plus Pact

and the intergovernmental treaty; this was equally highlighted in both the French and German discourses. More interestingly, the gap between the French and the German framing of protagonists had closed to a significant extent in 2011 when compared to 2010. Nicolas Sarkozy still emphasised the French-German axis as a main protagonist more often than Angela Merkel, but the latter mentioned the Eurozone – as opposed to the EU 27 – and intergovernmental institutions more often than she had in the previous year. This accounts for a relative convergence towards the new intergovernmental governance mechanisms advocated by France in the Eurozone. In turn, the Commission and the ECB became much more salient in the French discourse than the intergovernmental institutions. Similarly, the discursive patterns converged with regard to the role of the IMF and the banks as allies for the Eurozone countries in the crisis.

## 6. Conclusion

In the complex set of discursive interactions that defined the Franco-German partnership in 2010 and 2011 during the Eurozone crisis, there was a lot of give and take on both sides. However, if we were to be pushed to make a final assessment of the exercise, we would conclude that Germany, for all the criticism of Chancellor Merkel as the ‘Iron Lady’ unwilling to take action in solidarity with Eurozone members under pressure from the markets, won out over Sarkozy, as the ‘White Knight’ ready to ride out in defence of the weaker member-states. This comes out clearly in the final table (see Table 1), when we consider how much of the German discourse on policy ideas and solutions, programmatic ideas and paradigms, and principles and values was taken up by the French leadership.

The fact that this discourse has supported austerity policies across Europe and, indeed, has locked European leaders into maintaining such policies for fear of a loss of credibility with the markets and of electoral support from their domestic constituencies, has had serious economic consequences.

Eurozone economies have slowed, while the PIGS have been sliding into recession. It is true that growth has now become a new buzzword. But with austerity budgets linked to rapid deficit reduction still the main game in town, one wonders how European leaders expect to promote growth, and where the money will come from, given the continued resistance by Chancellor Merkel to real financial solidarity, through Eurobonds, using the ECB as a lender of last resort, or even increasing the firepower of the loan guarantee mechanisms. It is clear that change has begun with the appointment of Italian Prime Minister Monti in November 2011 and the election of French President Hollande in 2012. But it may very well be that only a further change in leaders and parties, with a move from conservative to social democrats in major national political posts, will allow for a change in discourse and action. But this would mean that the social democrats would also have to develop new ideas and discourse capable of changing the minds of the markets, by now fixed on stability *and* growth—an impossible combination.

Table 1 Discursive differences between France and Germany

	France	Germany
<b>Policy ideas: Economic policy solutions</b>	Greek bail out EFSF + EMS Fiscal harmonization EBC last resort (debt monetization) Fiscal harmonization	Sanctions IMF involvement Private sector involvement Investment in research
<b>Policy Ideas: Institutional policy solutions</b>	Gouvernement économique	Golden rule
<b>Programmatic Ideas: Programs and paradigms</b>	Convergence Growth & employment Regulation	Competitiveness Conditionality Growth & employment
<b>Philosophical Ideas: Principles, norms, values</b>	Solidarity Peace	Stability Responsibility Wohlstand
<b>Antagonists</b>	The markets/speculators UK	PIGS UK
<b>Protagonists</b>	The Eurozone The French-German axis Intergovernmental institutions  PIGS	Supranational institutions IMF The banks

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# SECTION V: EUROPEAN CITIZENSHIP IN TIMES OF CRISIS

# 16. EU CITIZENSHIP AND INTRA EU MOBILITY: A VIRTUOUS CIRCLE EVEN IN TIMES OF CRISIS

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# 1. Introduction

One of the major and constant aims of European integration and EU citizenship in particular is to create a common European social, economic and political space by diminishing national barriers (Maas, 2008). While the idea of the creation of an EEC and consequently an EC citizenship has started to manifest itself as early as the mid-1970s, EU citizenship was formally introduced in 1993 with the ratification of the Maastricht Treaty (Hansen 2000). The main target of EU citizenship is the encouragement of an EU identity and the widest possible participation of the member states' citizens to European integration.

EU citizenship allows citizens of the EU member states to circulate, settle and work anywhere within the EU, to participate in European and local elections (both as voters and as candidates) in their country of residence while it promotes citizens' access to EU institutions (e.g. by establishing their right to report to the European Parliament and their access to the European Ombudsman). EU citizenship is based upon the values of democracy, freedom, tolerance and the rule of law. In

fact, the European Union Charter of Fundamental Rights (2000) brings together the civil, political, economic and social rights granted to EU citizens and the residents of the EU member states in one single text. Those rights are divided into six sections; Dignity; Freedoms; Equality; Solidarity; Citizens' rights and; Justice. Beyond this large set of rights enshrined in the EU Charter of Fundamental Rights and in EU citizenship, research suggests that the most important aspects of EU citizenship is **freedom of movement inside a no-internal-border-zone** and a common currency (Euronat 2005).

Seeking an empirical point of entry for studying the meaning of EU citizenship today and particularly at a time of economic and political crisis, we have chosen to focus on what in global terms has been described as social processes of 'mobility' and non-mobility' (Urry, 2007; Elliott and Urry, 2010, Fortier and Lewis, 2006) and what in the specifically European context results in distinctions between 'movers' and 'stayers' (Recchi and Favell, 2009). European societies are changing through policy and institutional developments

at the level of governance but one tangible aspect of these developments is to facilitate / encourage mobility across the EU. Indeed the movement of people throughout the EU is an important part of the EU integration process, a test case of whether the EU is becoming integrated enough or not. Interestingly, mobility within the EU 15 was remarkably low but dramatically increased in EU25 and EU27 after 2004. It can be argued that even though the new Member State citizens mainly moved out of economic necessity seeking better employment and life prospects they have become pioneers of European integration (Recchi and Triandafyllidou, 2010).

This paper outlines first the dimensions and main features of intra EU mobility. It then questions, on the basis of original data from a quantitative survey and a set of qualitative interviews conducted in four countries (Spain, France, Italy and Greece) with intra-EU migrants from Poland, Romania, Britain and Germany, whether intra EU migrants have a more positive view of the EU and whether they feel more attached to it than the average citizen in the countries studied or the average citizen in these mobile Europeans' member state of ori-

gin. In other words, the paper asks whether exercising EU citizenship rights such as the right to free movement makes people more favourable to the process of European integration and more attached to the EU. The paper questions whether EU integration can emerge from actual mobility rather than from a common sense of belonging. EU citizenship in this sense becomes instrumental. While an 'independent variable' defining the mobility rights of EU citizens, it is also a 'dependent variable' as mobility has an impact on the meaning of EU citizenship and the attachment of intra EU migrants to Europe, their negative or positive views of European integration. Our hypothesis is driven by the basic assumption of political science that the experience of living within a territorial entity with a common set of rights and duties, is in itself an important experience of political socialisation that can inculcate a feeling of belonging, a feeling of membership to this community.

Such a growing feeling of belonging to Europe and the EU can of course be hampered by negative experiences of rights that are not respected and by difficulties in participating in the public life of the country of destination. This paper thus inves-

tigates the obstacles that intra EU migrants face in their effort to civically and politically integrate in their destination country and discusses the different experiences of intra EU mobility of citizens from different member states. The main distinction investigated is between citizens of new and old member states as they also signal two different types of migratory projects (more on this below, see also Recchi and Triandafyllidou 2009).

The paper seeks also to make a contribution towards a better understanding of the relationship between political identity and citizenship. It actually argues that as regards European identity and EU citizenship, the latter does not emanate from the former, as is the case normally in the context of the nation state and with regard to national citizenship, but rather it is the former that generates the latter. This does not necessarily mean that EU identity is purely instrumental. It rather means that in a polity like the EU where the creation of a common political and civic space is hampered by not only the different national identities and history narratives but also by the absence of a common language and a common set of media, the experience of mobility and the exercise of the EU

citizenship rights contribute significantly to the making of this common public space and hence eventually to a positive view and a feeling of attachment to the EU.

## 2. EU Citizenship and Intra EU mobility

The real ‘pioneers’ of EU mobility are perhaps the post war labour migrants from southern Europe (Italy, Spain, Portugal and Greece) to northern Europe (Germany, France, Belgium, the UK). While these migrations have largely stopped in the early 1970s after the 1973 oil crisis (and the then sending countries experienced return migration in the late 1970s and in the 1980s), today we are witnessing a whole new set of movements where the nationalities of the movers and the directions of moving are completely different. While in the post war period migration within Europe had a South to North axis, since 1989 intra European and more recently intra EU migrations follow the East to West or East to South direction.

The European Union offers actually a borderless space among 27 sovereign states (soon to become 28 with the accession of Croatia in the summer of 2013). This is even more striking in a continent where for centuries so many wars have been fought (and even recently, not forgetting the break up of the former Yugoslavia) to defend or move state boundaries. European citizenship – which

has its cornerstone in the right of free movement – permits one to reside in any EU Member State, enjoying the same entitlements of nationals. This constitutes quite a unique regime, which can still be qualified as *international* migration, though it operates under the conditions of *internal* migration. To stress this novelty semantically, in their documents EU institutions tend to designate the term ‘mobility’ to any cross-state transfer of European citizens, whereas ‘migration’ is used to refer to Third Country Nationals only.

From its early and timid formulation in 1951 (with the Treaty establishing the European Coal and Steel Community), the right of visa-free crossing and settlement among EEC (then CE then EU) Member States widened its scope as well as the pool of potential recipients – from miners and steelworkers in the 1950s to all workers after 1968, to virtually any EU citizen from the 1990s, and even EU long-term residents after 2004 (settlement being still conditioned on either work, study or economic self-sufficiency). The legal impact of the almost universal expansion of free movement

and settlement rights in the EU is remarkable, especially because it entails access to social rights on a transnational scale. Hence, it contributes indirectly to the creation of a European welfare system, eroding an important area of Member State sovereignty, and pushing forward political integration (Favell and Recchi, 2009). To place this into context, free movement across states in the US was fully acknowledged as a constitutional right only in the 1940s (Giubboni, 2007).

Thus, in the last half-century the rights of free movement and settlement have *deepened*, but at the same time they have also *enlarged*. This was seen most spectacularly in 2004 and 2007, when 12 new Member States joined the EU.

In the last five years of the twentieth century, net migration into the EU15 amounted to about 600,000 persons per year – that is, half the amount of the US. In the following five years, this figure almost doubled. For the first time, immigration flows became larger in Europe than in the US (especially as American immigration policy tightened after 9/11). The peak was reached in 2003, when net migration to the EU15 reached two million persons (Eurostat, 2009: 54). Such migration

flows have been notably asymmetric. In absolute number, the highest figures have been recorded in Spain, Germany, the UK and Italy. Unprecedentedly, in Spain and Ireland (as well as Cyprus and Luxemburg, small states experiencing vigorous immigration), newcomers have been as numerous as 15-20 per thousand residents (Herm, 2008: 2).

To a large extent, this migration boom was fed by the 2004 and 2007 enlargements. On average, between 2004 and 2008 the yearly net increase of immigrants in the EU15 amounted to about 250,000 persons from central Europe (mainly Poland) and about 300,000 persons from Southeast Europe (mainly Romania) (Brücker et al., 2009: 23, 27). At the peak of out-migration from Central-Eastern Europe, in 2006, three quarters of all new immigrants in the EU originated from the 2004 and 2007 accession countries.

Interestingly, Eastern enlargement triggered East-West/South population movements even before they took place, as migrants moved West somewhat earlier in anticipation of being automatically legalized and 'upgraded' once their home country joined the EU. For instance, 40 percent of citizens from central Europe who requested a work permit

in the UK in 2004 were already residing there pre-enlargement (European Commission, 2008: 11). Movements were even more rapid and proportionally larger (given the size of the countries of origin) immediately preceding and soon after the second enlargement. By the end of 2007 the stock of registered Romanians and Bulgarians living in EU15 had equalled that of movers from the 2004 enlargement countries: 1.9 million persons.

Overall, Eurostat calculates that in 2007 the EU27 Member States hosted 29.1 million foreign citizens of which 10.6 million were intra-EU migrants (European Commission, 2008: 115). EU movers formed 2.1% of the EU population, and 2.6 % in the EU15. About 40 percent were citizens of New Member States (NMS), the majority being Romanian (1.6 million), Polish (1.3 million) and Bulgarian (310,000). This means that an astounding 7.2% of Romanians, 4.1% of Bulgarians and 3.4% of Poles exercise their free movement rights to live out of their country as EU citizens. Out-migration has been remarkably high in Lithuania and Cyprus as well, as over 3% of the working age population moved abroad in Europe up to 2007. Even these impressive figures grossly underestimate the

real size of the mobile population, as they do not include temporary, seasonal and shuttle migrants who move back and forth across home and host(s) countries and thus escape any form of statistical registration (either in local or national censuses, permits of stay, or official surveys). They also fail to include returned movers, who have made use of their EU citizenship rights in the past (for a discussion see also Recchi and Triandafyllidou 2010).

Men and women are equally represented among citizens of central European countries who have moved, while women constitute slightly larger numbers among the Romanian and Bulgarian contingent, perhaps because of the strong demand for domestic workers from these countries in EU15. Furthermore, it is no surprise that the new opportunities of mobility created by EU enlargements have been seized by the youngest cohorts of workers. More than three-quarters of the NMS citizens who moved in 2007 were under 35 years of age.

Partly due to their younger age, the proportion of university graduates among Central-Eastern European movers is only slightly below that of native workers in EU15. In fact, the share of NMS mov-

ers with an upper secondary degree is higher than among natives in the EU15 workforce. This means that the human capital of those who moved West/South after the enlargements is heavily under-utilized.

Central-Eastern European workers have found work mostly in industry, construction, hotels, restaurants, and as domestic care-givers. This places them at the bottom of the occupational hierarchy, with more than 35% classified by Eurostat as holding low-skilled manual employment (European Commission, 2008: 130). In stark contrast, EU mobile workers from Western Europe are over-represented (compared to natives) among managers (more than 10%), professionals (more than 25%) and other high prestige occupations (*ibid.*).

The large differences of occupational destinations of intra-EU movers from the 'old' and 'new' Europe have eventually become mirrored in their collective representations in the EU15. While they are European citizens, public opinion views Poles and Romanians as 'immigrants', to the point that they are sometimes even confounded with third-country nationals in the press, whereas Germans, Britons or Spanish can circulate as 'mobile Euro-

peans' with little exposure to discrimination (Recchi and Favell, 2009).

The individual migration projects of citizens from the new Member States are influenced by a number of factors, most notably economic need (low salaries, high unemployment rates, decline of specific industrial sectors, deregulation of labour markets, implosion of welfare systems), but also an overall desire to improve their lives and ensure a better future for their children. Qualitative studies suggest a variety of migration projects, motivations and ways in which migrants make sense of their migration experiences (Kassimati, 2003; Metz-Goeckel et al., 2008; Lazarescu, 2009; Marouf, 2009; Nikolova, 2009; Triandafyllidou, 2006; Favell and Nebe, 2009; Meardi, 2009). Hereafter, we draw on these studies for evidence and examples.

While economic motivations remain central for most if not all citizens of the new Member States who have migrated to EU15, the importance of these motivations by comparison to other motivations such as maintaining or increasing one's social or professional status or enjoying a family life can vary. Thus we may between two extremes: at

one pole we find people who moved because they could not earn a living in their place of origin, while at the other end of the continuum we find people who moved to improve their future, buy a house, support their children's education, accumulate capital to start a business, or simply experience work and life 'in the West'. Of course, these are the two opposite ends of a continuum and real biographies and experiences lie somewhere in between (for more see Recchi and Triandafyllidou 2010). In addition, there are people who move within the EU mainly for reasons of lifestyle, this is the case mainly of the 'sunset migration' of northern Europeans to Italy, Spain, Portugal or Greece (King et al. 2000).

### 3. Methodology

The data presented in this paper come from an ongoing project with title “MOVEACT – We are all citizens now! Intra EU Mobility and Political Participation of English, Germans, Poles, and Romanians in Western and Southern Europe”<sup>1</sup> coordinated by Ettore Recchi and Valentina Bettin.

The study interrogates a random sample of EU movers from four Member States: two new (Poland and Romania) and two old (the UK and Germany) ones. Their countries of origin – Poland, Romania, the UK and Germany – are the four Member States that have sent the largest number of migrants to other Member States in the first decade of the new century (Herm 2008, 3). The receiving countries studied here are four: France, Italy, Spain and Greece. These countries present a coherent set for comparison as they show a relatively high rate of immigration for the four selected nationalities. On one hand, the four countries are the privileged destination for British and German expatriates within the EU. On the

other, Spain and Italy have been and still are the favoured destination of intra-EU flows of Romanians, while Greece and France have been hosting a sizeable Romanian community even from before accession; all the target countries have received increasing numbers of Polish movers over the decade (second only to the UK, Ireland and Germany) (Triandafyllidou 2006; Recchi and Triandafyllidou 2010).

In each target country, we sampled and phone-interviewed 500 EU movers – that is, 125 per nationality. Overall, we have a 2,000 interviews dataset, collected between December 2011 and March 2012. A few words on the sample are in order. Since EU movers form a highly selected population, we carried out ‘onomastic sampling’ out of landline telephone directories, following the successful strategy described in Braun and Santacreu (2009). We are aware of the spread of mobile phones in recent years – especially among migrants, that often stuck to mobile phones only. However, our research interest lies with ‘settled movers’ – i.e., movers that have long-term resi-

dent histories or plans of settlement. This is our reference population. After all, we cannot expect social and political participation in the host localities from ‘temporary’ or ‘volatile’ movers – such as Erasmus students. Thus, we took registration in phone line directories as a proxy of long-term settlement.

In parallel, we explored – mainly via internet search and consulate lists – the universe of migrants’ associations in Italy, France, Spain and Greece to map out organisations and groups (also in the cyberspace) formed by EU movers. After drawing a first map, we contacted all of them either by email or by phone. We were thus able to get additional information – crucially, whether that specific group was still in existence, as we soon discovered that the majority of these associations are short-lived but leave their footprint in the internet even long after their disappearance. At last, we came out with a directory of 194 organisations formed by EU movers of the four nationalities in the four countries. A detailed analysis of this separate dataset is provided in chapter 6 of this report.

Finally, we used the association survey also to select 48 politically active movers (12 per coun-

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1. For more information you can visit the project’s website at: <http://www.moveact.eu>

try) from the different nationalities at stake, with whom we carried out in-depth interviews about their own experience of activism and their interpretation of patterns of political participation among co-national movers. Some of these are leaders of the surveyed associations, while others were named as prominent figures in local or national politics of the host country. We have used parts of the transcripts of these interviews to elucidate some of the statistical findings of the phone survey (the full transcripts are in a separate annex).

## 4. Do Mobile EU Citizens Feel more European than Others?

The main research question of this paper is whether instead of citizenship emanating from an attachment to the nation or in the case of EU citizenship from an attachment to the European Union as a territorial entity and political community and to Europe as a general cultural community, the opposite is the case. Thus, EU citizenship emerges as a practice, through the exercise of the right to free mobility within the EU, and through this experience develops into a feeling of stronger attachment and generates more positive feelings towards Europe and the EU, than what is the case for the average non-mobile EU citizen. In our analysis we first discuss the prerequisite for exercising one's right notably knowing about them. Second, we investigate what is the meaning of EU citizenship for our respondents and their more positive or negative view of Europe and the EU. In the analysis we systematically compare with citizens of the same countries who are still in those countries or with natives of the host member state with a view to understanding how intra

EU migrants views and feelings towards the EU are different from those of 'stayers'. Third we consider how much our respondents feel attached to their nation, locality and/or to Europe and the EU. We thus seek to understand the meaning of EU citizenship also in relation to feelings of belonging at the national or sub-national level.

### 4.1 Knowing about one's rights

Knowledge of European citizenship rights is linked to several demographic factors such as age, educational level and nationality of the respondent as well as to factors pertinent to the respondent's migration experience, such as the period of migration, the knowledge of the language of the country of residence or having a partner of different nationality.

Four out of ten EU movers in our sample state that they have poor knowledge of their rights as EU citizens. With regard to the respondents educational level university graduates tend to be better

informed. Interestingly enough, those who have migrated before 1989, and hence before the emergence of EU citizenship, appear to be more aware of their EU citizenship rights (Table 1). There are a number of factors that can account for this as the majority of the respondents who migrated before 1989 come from Germany (43.9%) and the UK (29.3%), they belong to the highest social classes<sup>2</sup> (65%) and they are, in their vast majority (97.1%)<sup>3</sup>, over 40 years old which means that they had already migrated and were adults at the time of the Maastricht Treaty (1992) and thus were likely to keep track of all the developments that concerned them.

2. Based on their profession.

3. 35.2% belongs in the 40 to 59 age group and 61.9% in the over 60 age group.

Table 1.

Knowledge of EU citizenship rights (%)			
	Poor	Mediocre	High
<b>By Gender</b>			
Men	38.6	28.8	32.6
Women	40.6	31.3	28.1
<b>By Age Group</b>			
39 and less	39.3	36.0	24.7
40 thru 59	37.8	31.6	30.5
60 and more	42.9	23.2	33.9
<b>By Migration Period</b>			
1989 and before	35.2	26.0	38.9
1990 thru 2003	39.7	33.1	27.2
2004 and after	46.4	28.2	25.4
<b>By Education Level</b>			
University	28.3	27.4	44.3
Lower	48.1	31.6	20.4
<b>By Nationality</b>			
United Kingdom	49.2	21.2	29.6
Germany	31.7	28.8	39.5
Poland	41.4	35.7	22.9
Romania	39.9	33.7	26.4
<b>By Country of Residence</b>			
Greece	51.7	27.0	21.3
France	36.4	32.7	30.9
Italy	36.4	26.4	37.2
Spain	38.0	33.0	29.0
<b>Total</b>	40.6	29.8	29.6

German citizens' awareness over EU citizenship is significantly higher than that of other nationalities in this sample. As explained by a German interviewee residing in Spain:

*I was reported from the Spanish consulate and from the Ministry of Foreign Affairs in Germany. Even Lufthansa offers business information brochures in the destination country.'(Int.1.S.G: German man residing in Spain involved in local politics)*

Knowledge of rights is particularly low in the case of Greece with half of our respondents admitting that they have poor knowledge of their rights. Our interviews suggest that in the case of Greece there has been little or no effort to disseminate information on EU citizenship to EU movers, while at the same time even public services are poorly informed as to which countries belong to the EU, yet this problem appears in other countries as well. As a German interviewee residing in Spain describes:

*The public administration does not provide good and comprehensive information in general, neither to his citizens nor to the European movers (Int.3.S.G: German man*

*residing in Spain active in the field of trade unions and NGOs)*

However, some of our interviewees have pointed out that the information is available as long as one takes the initiative to look for it him/herself, thus it is the lack of interest that generates the lack of awareness over EU citizenship rights. As a Romanian interviewee living in France notes:

*You have to ask for the information, you have to be interested to get the information. On the Internet you can find every information you need (...).I think it's a personal matter, you have to be interested to find information. (Int.3.F.R: Romanian residing in France involved in a Romanian association)*

In addition many interviewees have pointed out that access to information has been improving over the years:

*In my experience, and in light of the research that I've done, awareness and understanding of the rights and opportunities that arise from being a European citizen are growing and progressing in recent years. More and*

*more people are conscious and aware of what they're able to do and what they can request, as well as what they must do and request when living in one of the EU countries. (Int.3.I.P: Polish woman residing in Italy, social activist)*

Finally, a Polish interviewee residing in France draws attention to the fact that the current economic and Eurozone crisis has had negative effects on the efforts for raising awareness on European citizenship rights which affects mainly those who do not have the means and the skills to educate themselves:

*There are two categories of European citizens: young ones who will find everything on the websites and people who don't use Internet and for whom the information is much more difficult to get. Everything demands money, and now we have crisis. Who thinks about informing people about their rights, we think how to come out of crisis. (Int. 3.F.P.: Polish woman residing in France, director of a European organisation)*

Table 2

The Image of Europe					
	A very positive image	A fairly positive image	A neutral image	A fairly negative image	A very negative image
MOVEACT Survey					
<b>By Nationality</b>					
United Kingdom	12.2%	35.1%	25.3%	14.9%	12.4%
Germany	20.2%	40.2%	22.7%	12.0%	4.9%
Poland	16.2%	32.4%	38.0%	11.2%	2.1%
Romania	17.7%	35.4%	24.6%	13.9%	8.4%
<b>By Country</b>					
Greece	14.3%	29.6%	31.1%	14.3%	10.9%
France	16.7%	48.2%	21.0%	10.5%	3.6%
Italy	14.9%	39.5%	28.8%	12.9%	3.9%
Spain	20.4%	25.0%	30.0%	14.5%	10.1%
<b>Total</b>	<b>16.6%</b>	<b>35.8%</b>	<b>27.6%</b>	<b>13.0%</b>	<b>7.0%</b>
Eurobarometer*					
United Kingdom	1%	12%	35%	30%	19%
Germany	3%	27%	44%	20%	5%
Poland	5%	37%	47%	8%	1%
Romania	4%	45%	38%	8%	1%
Greece	2%	26%	35%	24%	13%
France	2%	30%	40%	20%	6%
Italy	5%	37%	35%	16%	5%
Spain	2%	24%	51%	19%	3%
<b>EU 27</b>	<b>3%</b>	<b>28%</b>	<b>41%</b>	<b>20%</b>	<b>6%</b>

\*. Data from Eurobarometer 2011

## 4.2 The meaning of EU citizenship for mobile EU citizens

The assumption that intra-EU mobility, and the interaction between citizens of different member states it involves, leads to sense of shared community has been behind the establishment of several EU funded exchange programs. The actual outcome of these programs is hardly self-evident<sup>4</sup>, yet such initiatives are still considered very important. For instance, a British interviewee residing in Italy pointed out that:

*The projects for mobility are very important. They now find themselves somewhat underattack, since they were conceptualized as forms of cultural tourism that, in times of crisis, can be cut. As an example, I'll cite the Erasmus university program; its number one importance, ahead of exams and results, is the affections and the true mobility that it generates. Many, after having gone through an experience of mobility, continue to live*

4. See, for instance, Sigalas, 2010.

*in another European country, or at the very least, feel like European citizens. (Int.2.I.B. British man, residing in Italy, involved in local politics)*

According to the most recent standard Eurobarometer (2011: 20) data, whose fieldwork was conducted at the same time as our phone survey, only 31% of EU's citizens have a (very or fairly) positive image of the EU. On the contrary Europe does conjure up a positive image for the majority of our sample (52%) (Table 2). This should not come as a surprise, since intra-EU migrants are the ones actually enjoying what has been identified as EU's most significant feature, namely free movement.

A closer look at the data may offer us more insight on how the mobility experience shapes one's image of Europe. The length of membership of a state to the EU and the EC does not necessarily make its citizens feel more European or have a more positive view of the EU. The positive or negative image of Europe is linked to history and geopolitics (EURONAT, 2005; af Malmberg and Strath 2001). This becomes apparent when comparing the Eurobarometre rates of two of the

Union's early member states, German and Britain, or when comparing Britain to Romania or Poland. However, what is striking is that in the case of the 'old member state' migrants the mobility experience appears to have increased their positive views vastly while negative opinions have decreased.

The rates of positive views of the 'new member state' movers on the other hand appear to be on the same level as those in their country of origin while negative views among the movers are more frequent than in the country of origin. Perhaps this could be linked to failed expectations with regards to changes of their mobility experience after their countries accession to the EU. As described by a Romanian interviewee living in Greece:

*For me it's just a coincidence that we are Europeans. But today I do not know if it means something good. We waited so long to become a member; I am talking about the EU. For the freedom to travel, to work in the EU and there is really nothing. **On the contrary, you have much more to lose (...)** **Because you believe that you have equal rights with them but you don't have ac-***

**cess anywhere; they only see you as a labor force and only in certain jobs. You're limited even if theoretically you have equal rights.**(Int. 3.G.R: Romanian woman residing in Greece, head of a Romanian association, emphasis added)

Free movement is indisputably one of EU's most important attributes, yet considering free movement as the most important feature of the EU is inversely related to the respondent's attachment to the EU; Only half of those claiming to be very attached to the EU regard free movement as the EU's most important feature while the corresponding rates for those not very attached and not attached to the EU exceed 60 percent.

Similar patterns appear with reference to the respondents' nationality and country of residence: nationalities with **higher rates of attachment to the EU present lower rates of regarding the EU as free movement** and vice versa (see also Table 4 below, emphasis added). This finding shows that free movement is probably associated with an instrumental view of the EU and EU citizenship.

Table 3

Most important feature of the EU					
	Free movement rights across member states	A common currency	Common laws and democratic institutions	A common Christian heritage	Other
<b>Gender</b>					
Men	59.1	13.7	20.6	5.9	0.7
Women	57.5	13.6	24.5	3.5	0.9
<b>Age Group</b>					
39 and less	64.3	12.8	20.1	2.4	0.4
40 thru 59	60.4	10.9	24.5	3.4	0.7
60 and more	49.1	18.4	23.2	8.1	1.2
<b>Migration Period</b>					
1989 and before	47.2	18.2	26.5	7.9	0.2
1990 thru 2003	62.5	12.3	21.2	2.9	1.2
2004 and after	60.9	12.0	22.2	4.1	0.9
<b>Education Level</b>					
University	52.6	12.5	28.9	5.3	0.7
Lower	61.9	14.1	19.1	4.0	1.0
<b>Nationality</b>					
United Kingdom	56.8	17.1	17.9	5.9	2.3
Germany	47.4	18.8	29.1	4.1	0.6
Poland	59.0	8.3	27.7	5.0	0.0
Romania	69.3	10.5	16.7	3.1	0.4
<b>Country of Residence</b>					
Greece	67.5	9.0	18.4	4.0	1.0
France	50.0	13.8	29.8	6.5	0.0
Italy	58.9	16.1	21.7	3.1	0.2
Spain	56.6	15.7	21.2	4.4	2.1
<b>Total</b>	58.2	13.6	22.8	4.5	0.8

Although the creation of a common space for movement is valued highly by most respondents, there are also those who are more interested in the EU as a political and economic community. Based on the above trends, as well as our qualitative findings, while free movement is considered as the EU's most important feature by all categories of intra-EU movers, those with a higher educational level and those who have migrated in an earlier period (namely before 1989) are more likely to regard the EU as a community sharing a set of democratic values such as equal rights and mutual respect.

The results of our study here show a dramatic move away from the Euro, as an important feature of EU citizenship and of the EU integration process, if compared with findings from about 10 years ago when the common currency was introduced. Indeed the results of a quantitative survey run through the Eurobarometre for the Euronat project study (see Euronat 2005) had found that the right to free movement and the common currency were overwhelmingly the most important features of EU citizenship. Our findings suggest that while free movement remains a quintessential element of EU citizenship by far more impor-

tant than any other aspect, democratic values get a second position with the Euro being ranked a distant third. Unsurprisingly the Euro is less important in the countries hit harder by the current economic crisis.

Also democratic values are ranked more important by respondents from the old EU countries. This comes as no surprise as 'old' intra EU movers have moved for quality of life or family reasons rather than purely for reasons of employment and better life and work opportunities, as happened for migrants from the 'new' member states.

The image of the European Union and the attachment to it appear to be directly linked: 71.4% of the respondents who claim to be attached to the EU say that they have a positive image of the Union while only 18% of those who are not attached share the same view. There is clearly a relation between the image of the EU as well as their attachment to it and their knowledge of EU citizenship rights which could imply either that the higher awareness of EU citizenship rights leads to a more positive view of the EU and a higher sense of attachment or that those having a positive view and feeling more attached tend to stay more informed.

Table 4

	Positive image of the EU		Attached to the EU	
	No	Yes	No	Yes
<b>Age Group</b>				
39 and less	50.8	49.2	50.8	49.2
40 thru 59	48.0	52.0	48.0	52.0
60 and more	44.4	55.6	44.4	55.6
<b>Education Level</b>				
University	38.3	61.7	23.8	76.2
Lower	54.0	46.0	39.7	60.3
<b>Nationality</b>				
United Kingdom	52.6	47.4	45.8	54.2
Germany	39.6	60.4	22.8	77.2
Poland	51.4	48.6	20.9	79.1
Romania	46.9	53.1	44.6	55.4
<b>Country</b>				
Greece	56.2	43.8	47.9	52.1
France	35.1	64.9	24.2	75.8
Italy	45.6	54.4	30.2	69.8
Spain	54.6	45.4	32.1	67.9
<b>Total</b>	<b>47.7</b>	<b>52.3</b>	<b>33.4</b>	<b>66.6</b>

Another factor that seems to influence one's view of the European Union is the nationality of their partner as our respondents in an inter-ethnic partnership have, in their vast majority, a very or fairly positive image of the EU.<sup>5</sup> Finally, the level

5. 60.1% of those in an interethnic partnership express positive views of the EU, the corresponding percentage for those in a non-interethnic partnership is merely 35.6%.

of knowledge of the host country's language also influences our respondents attachment to the EU and their image of the EU.

More than half of our respondents adopt a geographical definition of Europe and do not identify it with the EU while at the same time claim to have a positive image of the EU. The EU's positive image rates are higher in France than in Italy, Spain

and Greece. However, several interviewees have expressed their disappointment at the way the EU has dealt with the current economic crisis exacerbating inequalities between the member states and paying less attention to democracy and solidarity, the ideals on which the EU was launched as a political and not only economic Union in the 1990s.

As a German interviewee residing in Italy serving as an Assessor for the Municipality of a small town eloquently puts it:

*When I was in high school in Germany, they began speaking of Europe, united, without borders, and it was a wonderful idea. But we still have a long way to go to get there. What is lacking is a shared frame of mind for all of the countries. Each country thinks individually and Europe cannot function without a real European government. The Euro -the economic union- isn't enough to keep all the countries together. We need something else. (Int.1.I.G: German woman residing in Italy, political activist)*

The negative stereotyping among the member states<sup>6</sup> as well as the rise of xenophobia, both enhanced by the current economic crisis, certainly pose a giant step back to the feeling of common belonging between Europeans. As described by the head of a Romanian association in Spain:

*To be European is freedom to travel, of speech. It is the possibility to collaborate among different countries. To help each other. In this moment, with the crisis, is more difficult. We are all European, but many think "This Romanian is occupying our jobs". There is an increase of xenophobia. People doesn't care if we belong to the European Union. In this moment the meaning of being European and the reality doesn't fit. (Int.3.S.R. Romanian man residing in Spain, head of a Romanian association)*

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6. For instance see: Shore, 2012.

### 4.3 Feeling European and national identity

European identity is not antagonistic to national identities; European citizens regard their national identities and cultures as powerful enough to withstand the pressures of European integration (Triandafyllidou, 2005). Feeling European does not make one less British, German, Romanian or Polish. In fact, 'Europe has been part of many national identities' (Delanty and Rumford, 2005: 92). Kohli (2000) speaks of a *hybridization* of identity: 'Europe as a post-national entity may offer a focus for contradictory attachments. European identity may be part of an identity mix linking it with national (and possibly other territorial) identities; or it may be part of a specifically hybrid pattern where contradictions remain virulent and situational switches occur.' (Kohli, 2000: 131). According to the author, populations with more blurry territorial attachments<sup>7</sup> are more likely to be carriers of such hybrid identities.

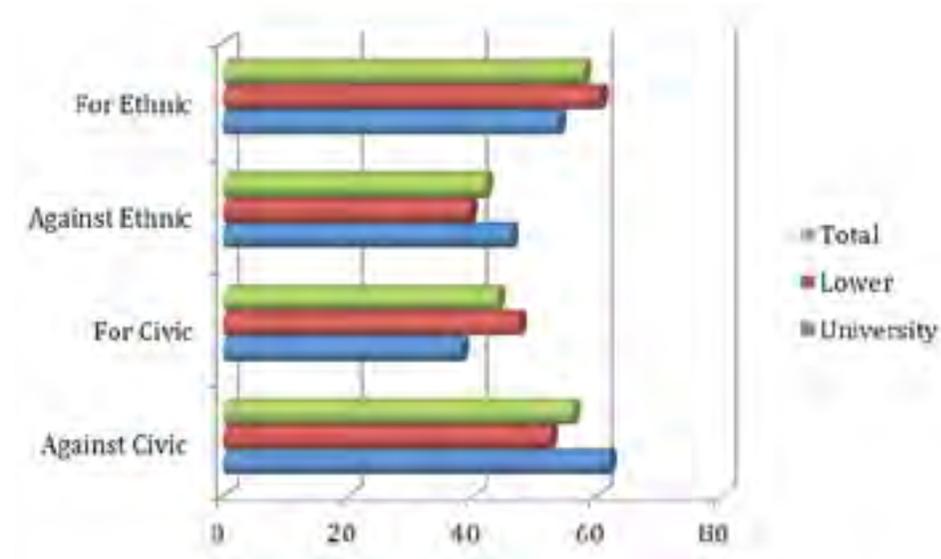
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7. Including international migrants and those in inter-ethnic marriages.

According to Fligstein, Polyakova and Sandholtz (2012:118), we can distinguish two groups of Europeans. The first one is more attached to national identity, but may be open to a ‘Christian and “historical” European identity’. This group has had limited interaction with citizens of other member states, belongs to lower social strata and educational levels, it includes the elderly –who ‘still remember World War II and its aftermath’-, and the right wing that considers European identity and immigration as a threat to the nation. The other group, which, at least in part, has embraced the European identity, includes people of higher social status and education. Our findings on mobile EU citizens are in line with the above categorisation: attachment to the European Union is higher among the respondents belonging to higher social classes and to the political ‘left’ and ‘centre’ and those having a higher educational level.

Seeking to understand how European and national identity are related (if at all) and what is the meaning attributed to each, we have asked our respondents to express their understanding of what citizenship is more generally, namely if they relate it more to ethnic or civic elements.

Table 5



The rates of our respondents in favour of an ethnic citizenship appear to exceed the rates of those in favour a civic one (Table 5). However, the higher the educational level, the larger the scepticism over both types of citizenship. What comes as a surprise is that an important segment of our respondents disagrees with both types of citizenship: 58% of those who do not endorse strictly civic interpretation of citizenship also disagree with a strictly ethnic one.

Looking at patterns of identification at different levels (city, region, country, Europe), the majority of our respondents (about 80%) either express a strong preference for their city and country of residence in relation to their city and country of origin or remain neutral between the two (Table 7). Similarly, our respondents either remain neutral or show a strong preference towards their country of residence and of origin in relation to the EU (Table 6). However, local, national and European attachments are not contending each

other, in fact, as shown by the EURONAT project ‘a European level of identity is included in citizens’ national identities’ (Triandafyllidou, 2005: 10).

Yet negative views on both the country of residence and the country of origin are higher among movers from the ‘new’ member states which can be attributed to the difficult socio-economic conditions that a large part of the population in the new member states is still facing 20 years after the socio economic and political transition, to their migration trajectories (as economic migrants, who often emigrated initially as undocumented non EU migrants and later ‘regularised’ through their country’s entry to the EU) and also because of negative public perceptions of them in their country of residence. These findings are in line with what we have highlighted above, notably that many of our Polish and Romanian interviewees note that they face important obstacles and do not fully enjoy their rights as EU citizens.

Table 6

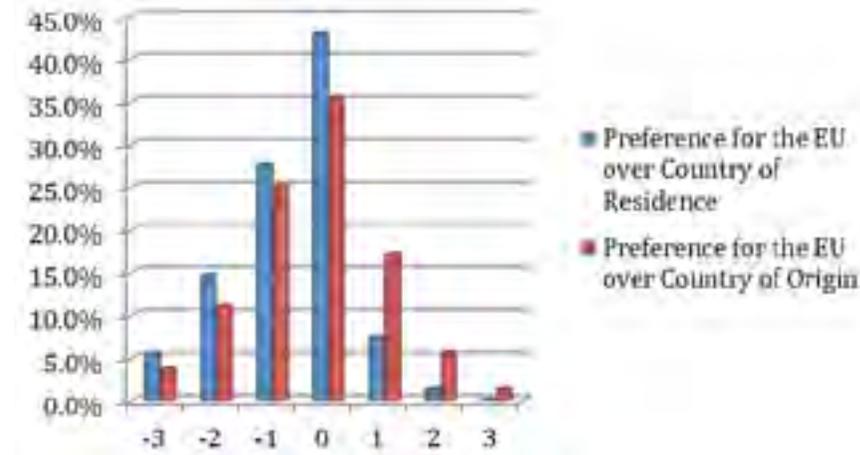
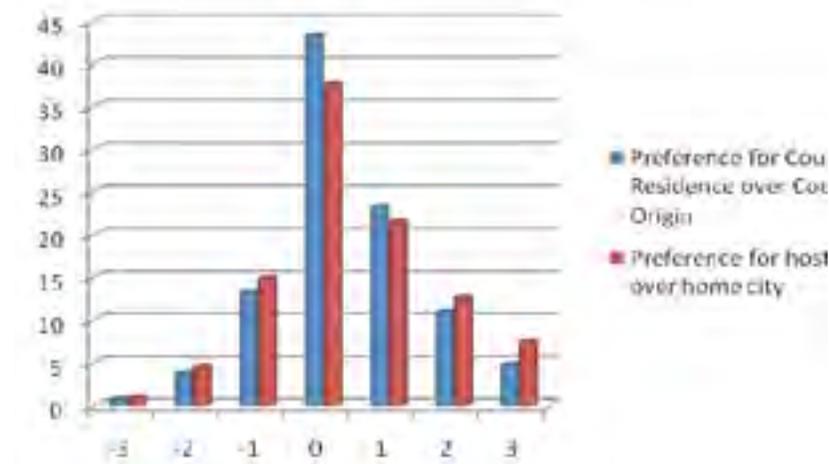


Table 7



## 5. Concluding remarks

This paper presents new data on how intra EU migration influences the meaning of EU citizenship, the positive or negative image of the EU, and the feeling of attachment to it. The data presented and analysed are both of a quantitative and qualitative nature and hence allow not only for assessing what is the impact of intra EU migration (or else called intra EU mobility) but also for illustrating and explaining our findings on the basis of qualitative interview data.

Our main research question that EU citizenship can be strengthened by the reality of intra EU migration rather than by a pre-existing common political European identity is partly confirmed. In principle this is the case indeed. Thus people who are intra EU migrants have a more positive view of the EU and feel more attached to it than their non migrant fellow nationals. However this is the case when their overall intra EU migration experience has been positive and/or at least their EU citizenship rights have not been overtly violated. Thus old member state citizens and people who have migrated to another member state early on tend

to confirm our hypothesis. By contrast citizens of the new member states and people who have migrated recently tend to have equally positive views as their fellow nationals in the country of origin and actually more negative views than their fellow nationals in the country of origin. As if to say the intra EU migration experience has polarized them and has actually led many to develop a negative image of the EU. This is not surprising as new member state citizens are mainly economic migrants, at least more often than their old member state counterparts who moved largely for quality of life, study or family reasons.

Interestingly those that feel attached or strongly attached to the EU and Europe consider the right to free movement as a less important feature of EU Citizenship and rather emphasise the common values and the sense of a political community. People who feel more attached to the EU and who have a more positive image of the EU and Europe also tend to know more about their EU citizenship rights. It is however unclear what is the direction of the causal relation. Is it because they

know more that they develop a more positive image and a stronger feeling of attachment or is it because they have a stronger level of attachment and a more positive view that they seek for more information and have more knowledge. Indeed clarifying this point is important for our argument as the former view would support a development of a positive EU feeling and a stronger attachment through political socialization. In other words intra EU migrants need by definition to learn more about their EU citizenship rights and duties because these are pertinent for their everyday lives. Thus they are expected to seek for this information and acquire this knowledge more than their fellow nationals who have not moved within the EU. This would then lead to a more positive attitude towards the EU and a virtuous circle of creating a common political community.

Our study surprisingly shows that intra EU mobility generates a strong preference for the city and country of residence. Indeed, the majority of our respondents (about 80%) either express a strong preference for their city and country of residence in relation to their city and country of origin or remain neutral between the two. Similarly, our re-

spondents either remain neutral or show a strong preference towards their country of residence and of origin in relation to the EU. This shows that the EU is far from creating a common political identity that would replace national or even local identities. At the same time this finding also suggests that local, national and European attachments are not contending each other, in fact, as shown by the EURONAT project several years ago a European level of identity is included in citizens' national identities.

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# 17. CRISIS AND TRUST IN THE NATIONAL AND EUROPEAN GOVERNMENTAL INSTITUTIONS

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Our contribution assesses the impact of the crisis on citizens' trust in national and European governmental institutions. More concretely, we examine trust in the national government (NG), national parliament (NP), the European Commission (EC) and the European Parliament (EP). We analyse an EU-27 country sample over the time frame 1999–2012 with a particular focus on 12 member states of the euro area (Austria, Belgium, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal and Spain – the EA-12). We identify the events associated with the bankruptcy of Lehman Brothers in September 2008 as the start of the crisis and differentiate a pre-crisis period (spring 1999–spring 2008) from a crisis period (autumn 2008–spring 2012).

## 1. Measuring trust in the national and European governmental institutions

We construct our measure of trust in the national and European governmental institutions from responses to the Eurobarometer (EB) surveys carried out bi-annually from spring 1999 (EB 51) to spring 2012 (EB 77).<sup>1</sup> To measure trust in the national and European governmental institutions, the survey put this question to respondents: “I would like to ask you a question about how much trust you have in certain institutions. For each of the following institutions, please tell me if you tend to trust it or tend not to trust it.”<sup>2</sup> The respondents were then presented a range of institutions, among which were the national government, national parliament, the European Commission and European Parliament. The respondent could then choose from the following answers: “tend to trust”, “tend not to trust” and “don't know”. We analyse

the percentage of net trust measured as the number of “tend to trust” responses minus the “tend not to trust” responses.

### Trust in the national government and European Commission in the EU-15/27

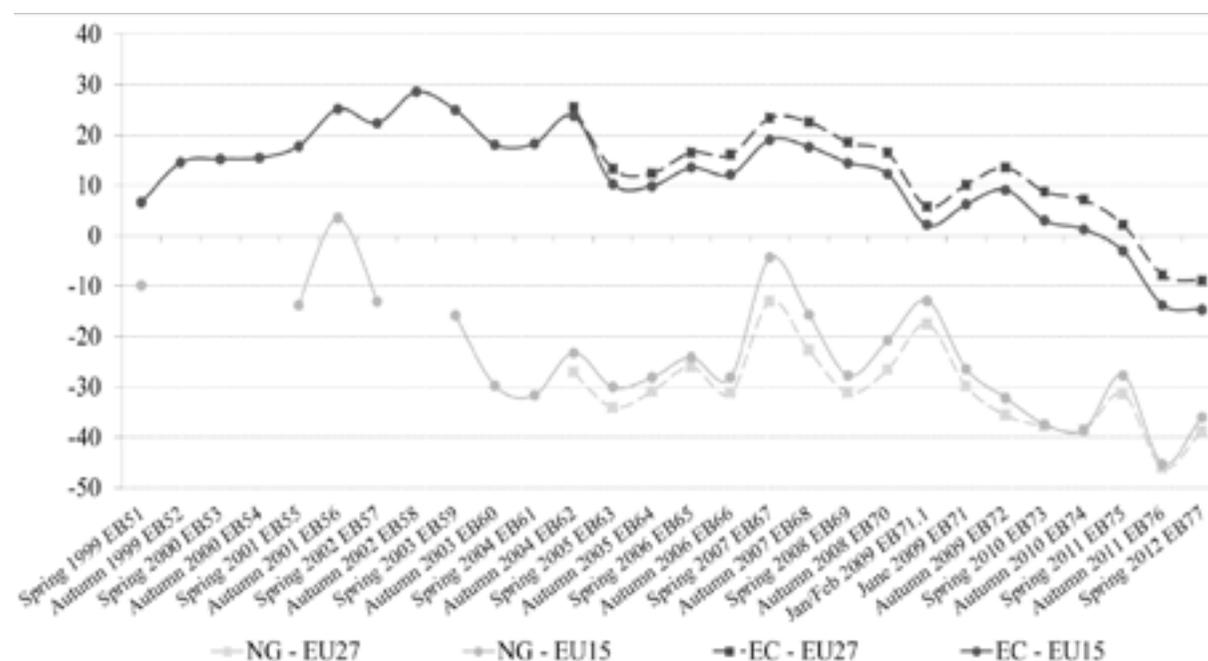
Figure 1 shows citizens' net trust in the NG and the EC in an EU-15/27 country sample from 1999 to 2012.<sup>3</sup> First, a steady and marked decline in trust in the EC of -29/-28 percentage points in the EU-15/27 throughout the crisis period can be detected. In comparison, a decline in trust of the NG by -8 percentage points in the EU-15/27 can be considered moderate. Second, when comparing the mean levels of the pre-crisis period with the crisis period in the EU-15, the decline of trust in the EC was steeper, at 17 percentage points, than trust in the NG at 11 percentage points.

1. Our methodological approach is presented in Roth et al. (2013). The data sources used to generate the data from EB 51 to EB 77 are also shown.
2. A slightly different question is used for the European institutions. See here Roth et al. (2013).

3. All single time trends are depicted in Figures A1 and A3 in the appendix.

Third, levels of trust in the EC still remained well above those in the NG over the whole time frame. Fourth, as there were no pronounced differences in standard deviations in the pre-crisis or crisis periods for either trust trends (3.2 and -1 percentage points), we conclude that both trends followed their long-term paths amid the crisis.

Figure 1. Trust in the national government and European Commission in the EU-15/27 (1999–2012)



Notes: Modified version of Figure 1 in Roth et al (2013). NG = national government, EC = European Commission. Values are population weighted for the respective country samples. In Jan./Feb. 2009, the special Standard EB 71.1 was utilised. As the survey item concerning trust in the NG was not included in Standard EBs 52, 53, 54 or 58, the data for these four observation points respectively are missing. The dashed line represents the start of the crisis in September 2008 and differentiates the pre-crisis and crisis periods. From autumn 2004 to autumn 2006, the EU-27 country sample consists of EU-25 countries excluding Romania and Bulgaria. From spring 2007 onwards, Romania and Bulgaria are included. As the figure depicts net trust, all values above 0 indicate trust by a majority of the respondents and all values below 0 a lack of trust by the majority.

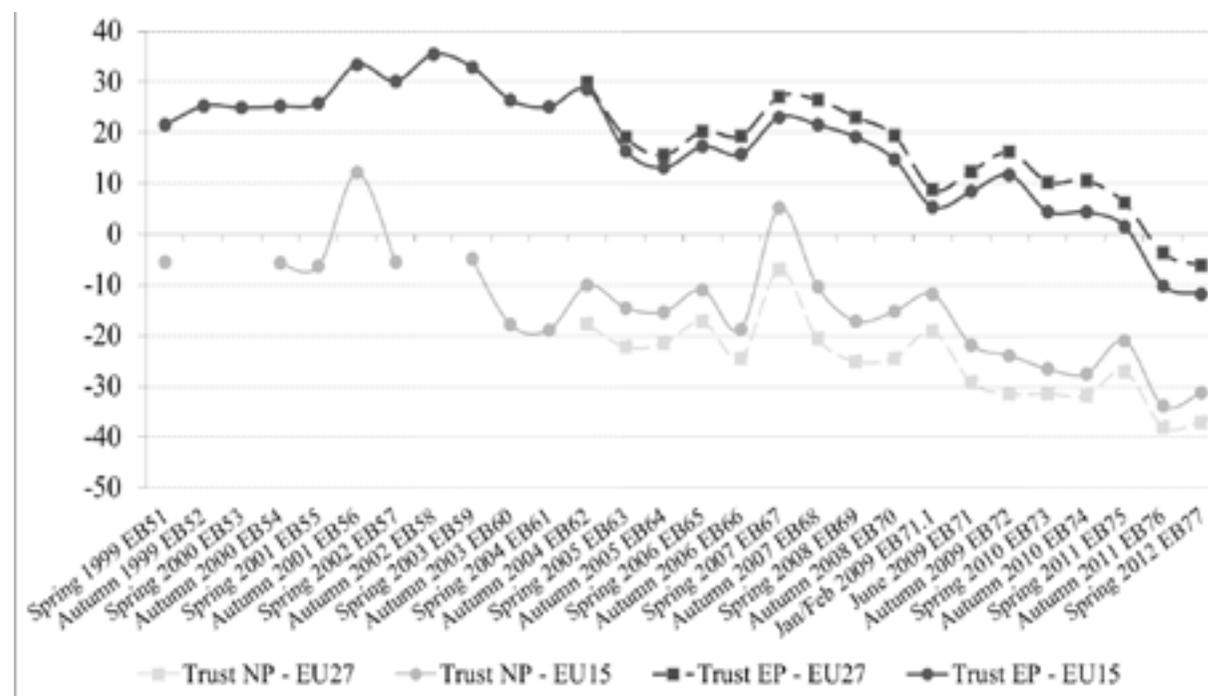
Sources: Standard EBs 51-77 and Special EB 71.1.

## Trust in the national parliament and European Parliament in the EU-15/27

Figure 2 shows citizens' net trust in the NP and the EP in an EU-15/27 country sample from 1999 to 2012.<sup>4</sup> A steady and pronounced decline of trust in the EP of -31/-29 percentage points in the EU-15/27 throughout the crisis period can be seen. In comparison, decreasing trust in the NP of -14/-12 percentage points in the EU-15/27 was less strong but still notable. When comparing the mean levels of the pre-crisis period with the crisis period in the EU-15, the fall in trust in the EP was sharper, at 21 percentage points, than trust in the NP at 15 percentage points. Yet levels of trust in the EP remained well above those in the NP over the whole time frame. Finally, as there were no pronounced differences in standard deviations in the pre-crisis or crisis periods in either trust trends (2.4 and -1.6 percentage points), we conclude that both trends followed their long-term paths amid the crisis.

4. All single time trends are depicted in Figures A2 and A4 in the appendix.

Figure 2. Trust in the national parliament and European Parliament in the EU-15/27 (1999–2012)



Notes: Modified version of Figure 2 in Roth et al (2013). NP = national parliament, EP = European Parliament. Values are population weighted for the respective country samples. In Jan./Feb. 2009 the special Standard EB 71.1 was utilised. As the survey item concerning trust in the NP was not included in Standard EBs 52, 53 or 58, the data for these three observation points respectively are missing. The dashed line represents the start of the crisis in September 2008 and differentiates the pre-crisis and crisis periods. From autumn 2004 to autumn 2006, the EU-27 country sample consists of EU-25 countries excluding Romania and Bulgaria. From spring 2007 onwards Romania and Bulgaria are included. As the figure depicts net trust, all values above 0 indicate trust by a majority of the respondents and all values below 0 a lack of trust by the majority.

Sources: Standard EBs 51-77 and Special EB 71.1.

## Trust in the EA-12, comparing the core and its periphery, EA-4 and EA-8

Table 1 depicts the values for the changes in net trust from spring 2008 to spring 2012 for the EU-15/27 and EA-12 country samples. As can be observed, all three samples follow the same pattern. Trust in the EC and EP declined significantly by around 30 percentage points, while trust in the NG and NP declined by around 10 and 15 percentage points, respectively. Taking this similar pattern into consideration, it seems sound to conclude that countries in the EA-12 country sample appear to be determining the overall trend.<sup>5</sup>

5. As the trends shown are population weighted, this conclusion is not too surprising given that the EA-12 countries comprise more than three-fifths (approximately 323 of 504 million citizens) of the overall population of the EU-27. In addition, the three EU-15 and non-EA-12 countries – namely Denmark, Sweden and the UK – only experienced moderate declines in trust (see also appendix Figures A1-A4). Trust in the NG and NP actually increased in Sweden.

Table 1. Net trust levels and changes in net trust in the EA-12, EU-15 and EU-27 (2008–12)

Country	Trust	Levels Spring 2008	Levels Spring 2012	Changes Spring 2012–Spring 2008
EA-12	NG/NP	-25/-16	-34/-31	-9/-15
EU-15	NG/NP	-28/-17	-36/-31	-8/-14
EU-27	NG/NP	-31/-25	-39/-37	-8/-12
EA-12	EC/EP	21/27	-11/-7	-32/-34
EU-15	EC/EP	14/19	-15/-12	-29/-31
EU-27	EC/EP	19/23	-9/-6	-28/-29

Notes: Modified version of Table 1 in Roth et al (2013). EA = euro area, NG = national government, NP = national parliament, EC = European Commission, EP = European Parliament. Values are population weighted for the respective country samples. As the table presents data on net trust, all values above 0 indicate trust by a majority of the respondents and all values below 0 a lack of trust by the majority. The periods still reflecting trust by a majority of citizens are shaded in grey.

Sources: Standard EBs 69 and 77.

With the presumptions that countries from the EA-12 might be responsible for the trust trends in the EU-15/27 sample, Table 2 shows the values for the changes in net trust for selected countries in the EA-12 (namely Spain, Greece, Portugal, Ireland, Italy, Germany and France) along with a *periphery* country sample, the EA-4 (Spain, Greece, Portugal and Ireland) and a *core* country sample, the EA-8 (Germany, France, Italy, Austria, Finland, Belgium, the Netherlands and Luxembourg). After differentiating the trends of the EA-8 and EA-4 countries, the most interesting patterns appear.

Table 2. Net trust levels and changes in net trust in the EA-8 and EA-4 and across selected EA-12 countries (2008–12)

Country	Trust	Levels Spring 2008	Levels Spring 2012	Changes Spring 2012–Spring 2008
EA-8	NG/NP	-33/-23	-24/-20	9/3
EA-4	NG/NP	3/10	-70/-68	-73/-78
Spain	NG/NP	20/20	-70/-71	-90/-91
Greece	NG/NP	-31/-2	-85/-74	-54/-72
Portugal	NG/NP	-29/-15	-62/-55	-33/-40
Ireland	NG/NP	-14/-3	-46/-45	-32/-42
Italy	NG/NP	-59/-57	-68/-76	-9/-19
Germany	NG/NP	-25/-15	-17/-3	8/12
France	NG/NP	-38/-21	-4/-5	34/16
EA-8	EC/EP	16/22	-4/0	-20/-22
EA-4	EC/EP	38/37	-36/-29	-74/-66
Spain	EC/EP	42/46	-38/-37	-80/-83
Greece	EC/EP	13/21	-56/-43	-69/-64
Portugal	EC/EP	42/46	-15/-12	-57/-58
Ireland	EC/EP	43/51	-10/-10	-53/-61
Italy	EC/EP	29/29	-16/-14	-45/-43
Germany	EC/EP	6/18	-9/1	-15/-17
France	EC/EP	11/19	5/6	-6/-13

Notes: Modified version of Table 2 in Roth et al (2013). EA = euro area, NG = national government, NP = national parliament, EC = European Commission, EP = European Parliament. The EA-8 and EA-4 country samples are population weighted. Pronounced differences between the EA-8 and EA-4, as well as the minimum and maximum values are shaded. Darker shading represents maximum values. Lighter shading represents minimum values. As the table presents data on net trust, all values above 0 indicate trust by a majority of the respondents and all values below 0 a lack of trust by the majority.

Sources: Standard EBs 69 and 77.

First, whereas in the EA-8 trust in the NG/NP actually increased by 9/3 percentage points respectively, in the EA-4 trust declined by -73/-78 percentage points. In the EA-8 country sample, this positive trend was driven by the two large economies, Germany and France, which enjoyed increases of 8/12 and 34/16 percentage points, respectively. Although the levels of trust in Italy were significantly lower than those in Germany and France, falls of -9/-19 percentage points were moderate compared with the decreases in the EA-4.<sup>6</sup> In the EA-4, the pronounced declines were driven by Spain, where trust in the NG/NP fell by -90/-91 percentage points respectively (from 20/20 to -70/-71%).<sup>7</sup> In Greece, Portugal and Ire-

land, trust in the NG/NP fell by -54/-72, -33/-40 and -32/-42 percentage points.<sup>8</sup>

Second, while in the EA-8 trust in the EC/EP declined significantly, by -20/-22 percentage points, in the EA-4 the fall of -74/-66 percentage points was similar to the fall in trust of the NG/NP. The decrease in the EA-8 countries was driven by moderate declines in Germany and France and more pronounced ones in Italy. The substantial decline in the EA-4 countries was driven by Spain, where trust in the EC/EP fell by -80/-83 percentage points.<sup>9</sup> In Greece, Portugal and Ireland, trust in the EC/EP declined by -69/-64, -57/-58 and -53/-61 percentage points, respectively.<sup>10</sup>

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6. Although Italy's decline in trust in the NP was moderate, its level of -76% in spring 2012 was the lowest in the EU-15/EA-12 over the 13-year period covered. In spring 2012, only 8% of Italian citizens still trusted the NP.

7. This was the most pronounced decline in the EU-15/EA-12. In spring 2012, only 13% of Spanish citizens still trusted the NG and 11% the NP. As can be seen from Figures A1 and A2, however, new eurozone member Cyprus (from 2008 onwards) encountered even steeper declines of 101% and 98% in the NG and NP.

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8. With a level of -85% in spring 2012, trust in the NG in Greece reached the lowest level in the EU-15/EA-12. Only 6% of citizens still trusted the NG.

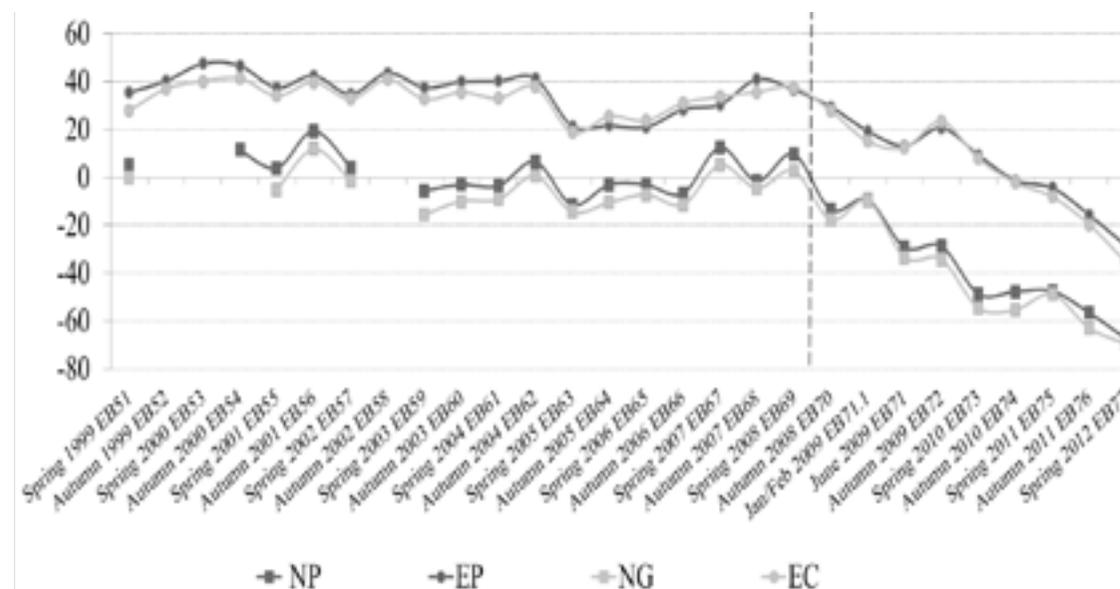
9. Both declines were the most pronounced in the EU-27.

10. For Greece it has to be pointed out that in spring 2012, trust in the EC (-56%) reached the lowest level in the EU-27 over the 13-year period.

## Trust in the national and European governmental institutions in the periphery, EA-4

Figure 3 shows citizens' net trust in the NG, NP, EC and EP in the countries of the periphery (EA-4 country sample) from 1999 to 2012. In the pre-crisis period, all four trust trends were very stable around the mean values of 0% for the NG and NP and 35% for the EC and EP, with standard deviations of around 6-8%. In the crisis period, all four trust trends fell steadily, with standard deviations rising to 18-20% and the mean levels dropping to approximately -40% for the NG and NP and around 0 and 5% for the EC and EP, resulting in an overall decline in mean levels of around 30% to 40% in trust in all four institutions. Given these values, we conclude that trust trends in the crisis period left their long-term paths amid the crisis. Finally, if trust in the NG and NP continue to decline linearly at the same pace, we project that all trust in the NG and NP will have been lost by 2014.

Figure 3. Trust in the national and European governmental institutions in the EA-4 (1999–2012)



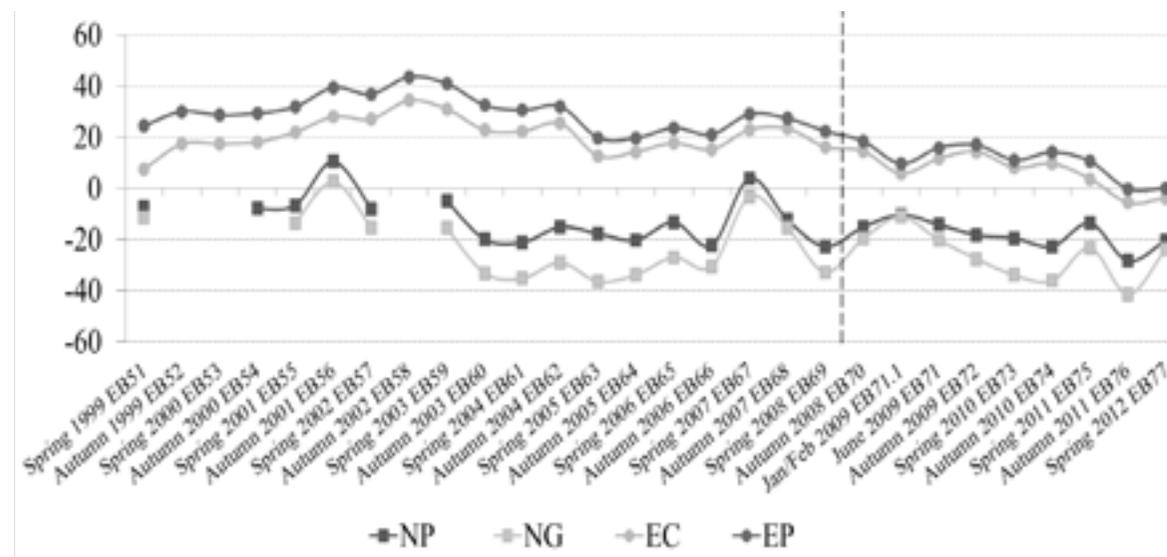
Notes: Modified version of Figure 3 in Roth et al (2013). The EA-4 comprises Spain, Greece, Portugal and Ireland. NG = national government, NP = national parliament, EC = European Commission, EP = European Parliament. Values are population weighted. In Jan./Feb. 2009 the special Standard EB 71.1 was utilised. As the survey item concerning trust in the NP was not included in Standard EBs 52, 53 or 58, the data for these three observation points respectively are missing. As the survey item concerning trust in the NG was not included in Standard EBs 52, 53, 54 or 58, the data for these four observation points respectively are missing. The dashed line represents the start of the crisis in September 2008 and differentiates the pre-crisis and crisis periods. As the figure depicts net trust, all values above 0 indicate trust by a majority of the respondents and all values below 0 a lack of trust by the majority.

Source: Standard EBs 51-77 and Special EB 71.1.

## Trust in the national and European governmental institutions in the core, EA-8

Figure 4 shows citizens' net trust in the NG, NP, EC and EP in the EA-8 country sample from 1999 to 2012. With no significant difference appearing in the standard deviations in the pre-crisis or crisis periods, all four trust trends followed their pre-crisis paths. In addition, the mean levels of trust in the NG and NP only moderately declined by 4 and 7 percentage points, respectively. The mean levels of trust in the EC and EP showed steeper falls, by 14 and 19 percentage points. Given these values, we conclude that whereas trust in the NG and NP was not affected at all by the crisis, trust in the EC and EP declined significantly in the course of the crisis. This declining trend, however, still followed its long-term path amid the crisis.

Figure 4. Trust in the national and European governmental institutions in the EA-8 (1999–2012)



Notes: Modified version of Figure 4 in Roth et al (2013). The EA-8 comprises Germany, France, Italy, Austria, Finland, Belgium, the Netherlands and Luxembourg. NG = national government, NP = national parliament, EC = European Commission, EP = European Parliament. Values are population weighted. In Jan./Feb. 2009 the special Standard EB 71.1 was utilised. As the survey item concerning trust in the NP was not included in Standard EBs 52, 53 or 58, the data for these three observation points respectively are missing. As the survey item concerning trust in the NG was not included in Standard EBs 52, 53, 54 or 58, the data for these four observation points respectively are missing. The dashed line represents the start of the crisis in September 2008 and differentiates the pre-crisis and crisis periods. As the figure depicts net trust, all values above 0 indicate trust by a majority of the respondents and all values below 0 a lack of trust by the majority.

Sources: Standard EBs 51-77 and Special EB 71.1.

## 2. Conclusions

Seven points should be highlighted.

First, when analysing the effects of the crisis on citizens' trust in the national and European governmental institutions for the EU-15/27 and EA-12 country samples, one detects moderate declines in trust in the national government and parliament, but pronounced declines in relation to the European Commission and European Parliament since the start of the crisis.

Second, the overall decline in trust trends have been driven by the countries of the EA-12, in particular by the periphery countries.

Third, whereas in the core of the EA-12 trust in the national government and parliament has actually increased, in its periphery trust in the national government and parliament has fallen sharply and steadily since the start of the crisis. This sharp and steady fall explains the overall moderate decrease of trust in the national government and parliament in the EA-12.

Fourth, while in the core of the EA-12 trust in the European Commission and European Parliament has declined, in the periphery it has done so to a greater extent. Thus, the overall pronounced fall of trust in the European Commission and European Parliament in the EA-12 is partially driven by the periphery countries.

Fifth, whereas throughout the crisis trust trends in the core countries of the EA-12 have still followed their pre-crisis paths, the trends in the periphery countries have left their pre-crisis paths. Trust trends were stable overall in the EA-4 throughout the pre-crisis period, but since the start of the crisis trust has declined steadily and the trends have departed from their long-term paths.

Sixth, if the steady decline of trust in the national government and parliament in the EA-4 continues to decline linearly at the same pace, we project that all trust in the national government and parliament will have been lost by 2014.

Seventh, the continual decline in trust in the national parliament in the EA-4 has been driven in

particular by two countries, Spain and Greece. Since the start of the crisis in Spain and Greece net trust in the national parliament declined by -91 and -72 percentage points to reach net levels of -71 and -74 percentage points respectively in Spring 2012. Latest Standard Eurobarometer data from EB78 (Eurobarometer 2012) indicate that net trust in Spain and Greece has once more declined by -5 and -6 percentage points in November 2012 to reach levels of net trust of -76 and -80 respectively.<sup>11</sup> As both countries can be characterised as young democracies, this steady decline of trust in the national parliament<sup>12</sup> in Spain and Greece should be regarded as worrying and should catch the immediate attention of national and European policy-makers. In accordance with previous

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11. In November 2012 the change in net trust since the crisis in Spain and Greece has reached values of -96 and -78 percentage points respectively. In Spain and Greece only 9% of citizens still trusted the national parliament in November 2012. 85% and 89% already mistrusted the national parliament at this point of time.

12. On this point, see also the political scientist Kenneth Newton, who clarifies that concerning citizen's trust in the national parliament, "a sudden or consistent decline in confidence in it is a serious matter" (Newton, 2001: 205).

empirical results (Stevenson and Wolfers, 2011), initial empirical evidence on the determinants of trust in the national parliament in an EA-12 country sample suggests that, among other factors, it is the significant increase in unemployment rates in Spain and Greece during the crisis period that has greatly determined the steady decline in trust in the national parliament in these countries since the start of the crisis (Roth et al., 2013).

### 3. References

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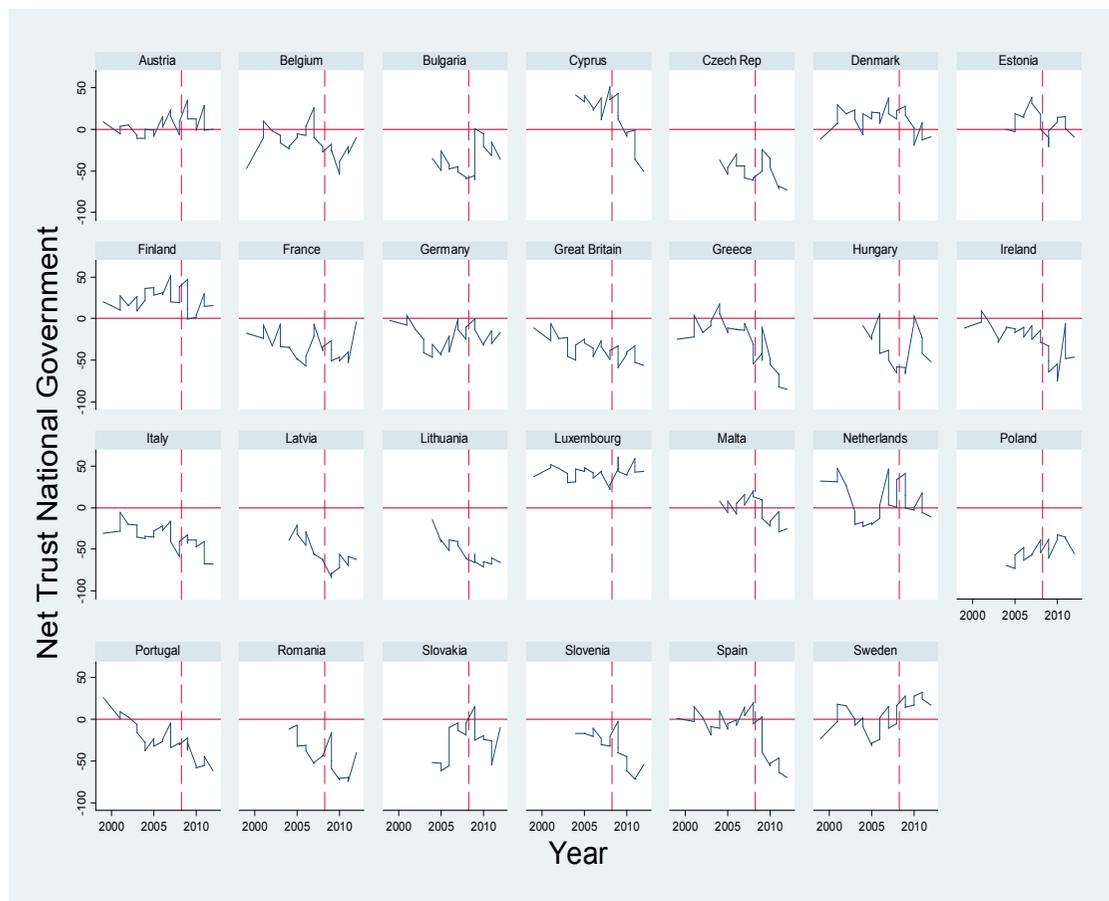
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## 4. Appendix

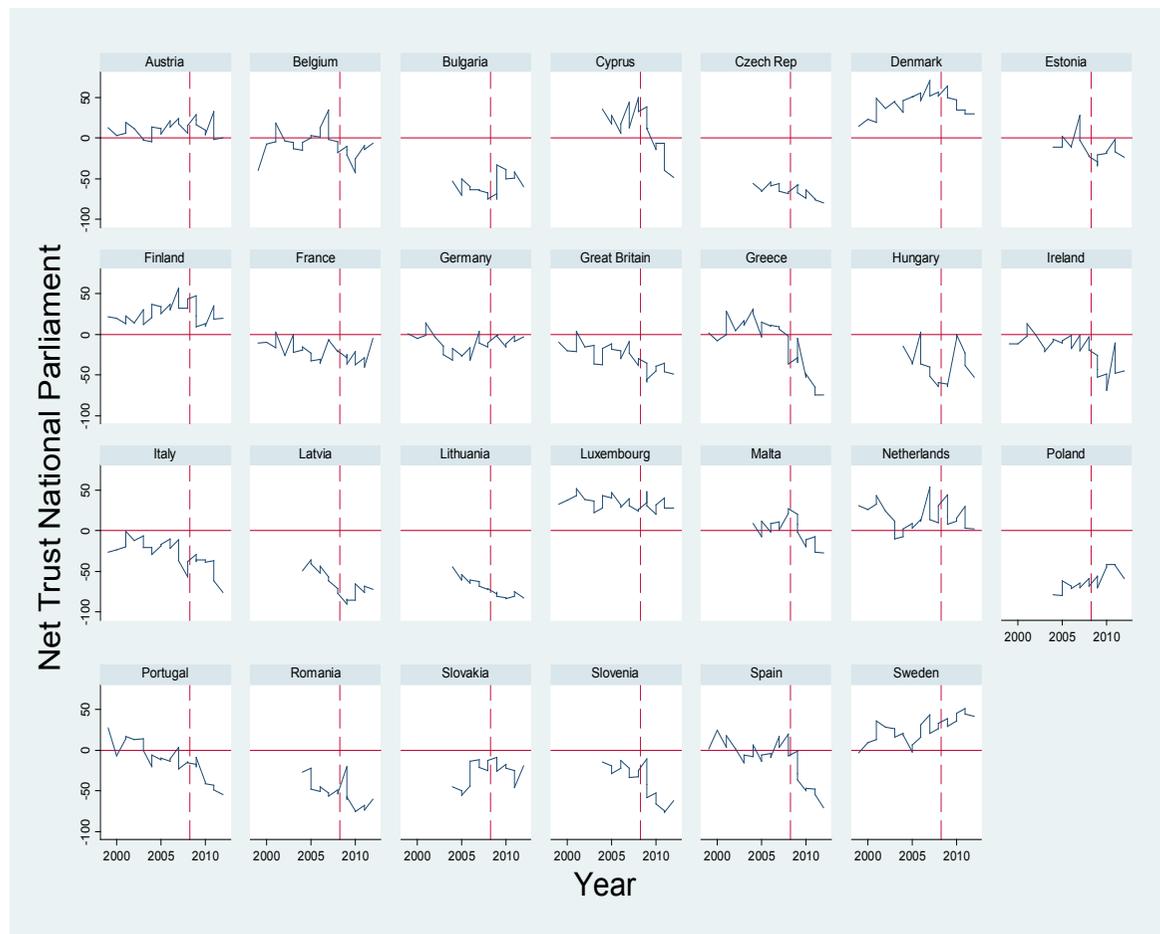
Figure A1. Net trust in the national government, by EU-27 country (1999–2012)



*Notes: Modified version of Figure A1 in Roth et al (2013). Y-axis displays a range from -100 to +50. For the EU-15 countries, the data commence in spring 1999 (EB 51). For the 12 new member states, the data commence in autumn 2004 (EB 62), even for Romania and Bulgaria. Data for EBs 52-54 and EB 58 are missing and have been automatically been interpolated by Stata. As the figure depicts net trust, all values below 0 indicate a lack of trust by the majority of respondents. In the case of Great Britain, data from EBs 51-69 are for Great Britain, whereas data from EB 70 onwards are for the UK.*

*Sources: Standard EBs 51-77 and Special EB 71.1.*

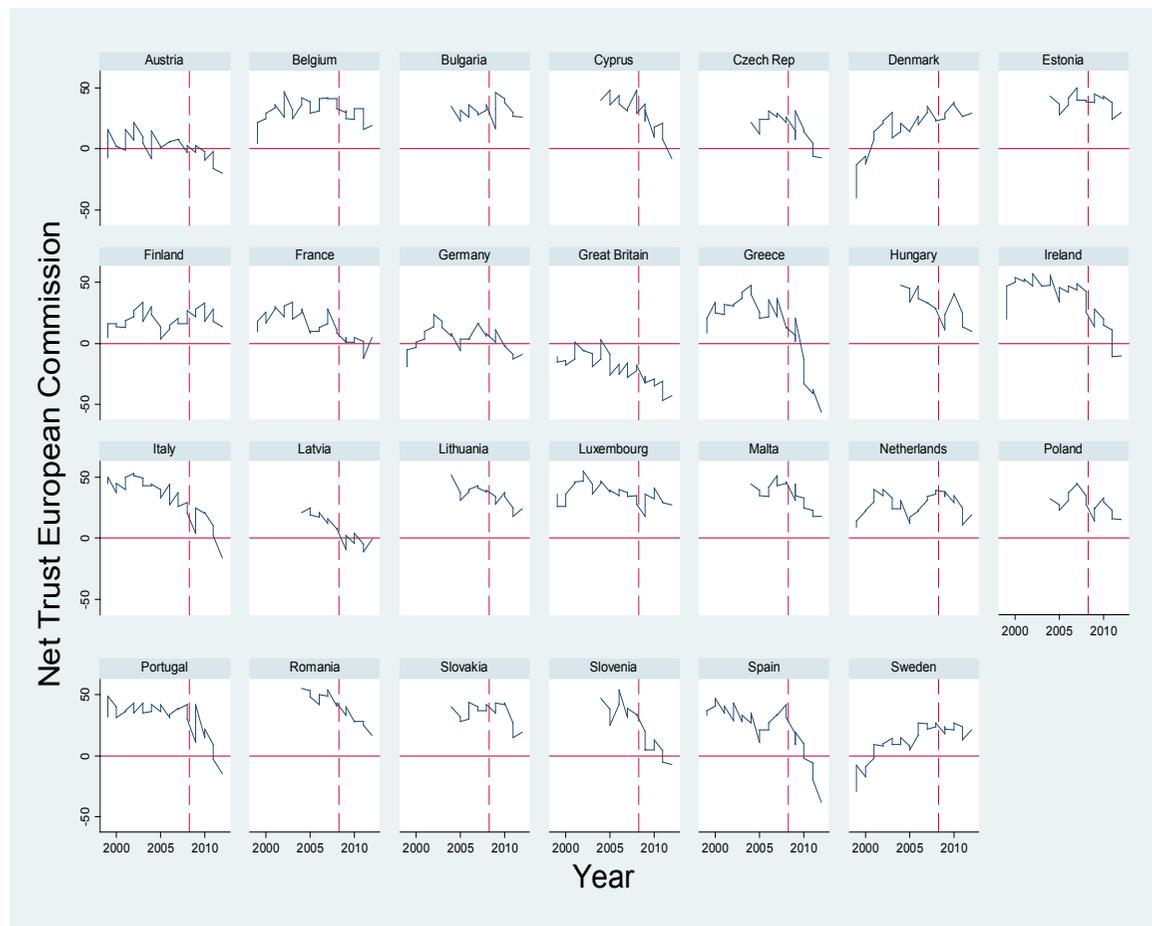
Figure A2. Net trust in the national parliament, by EU-27 country (1999–2012)



Notes: Modified version of Figure A2 in Roth et al (2013). Y-axis displays a range from -100 to +50. For the EU-15 countries, the data commence in spring 1999 (EB 51). For the 12 new member states, the data commence in autumn 2004 (EB 62), even for Romania and Bulgaria. Data for EBs 52-53 and EB 58 are missing and have been automatically been interpolated by Stata. As the figure depicts net trust, all values below 0 indicate a lack of trust by the majority of respondents. In the case of Great Britain, data from EBs 51-69 are for Great Britain, whereas data from EB 70 onwards are for the UK.

Sources: Standard EBs 51-77 and Special EB 71.1.

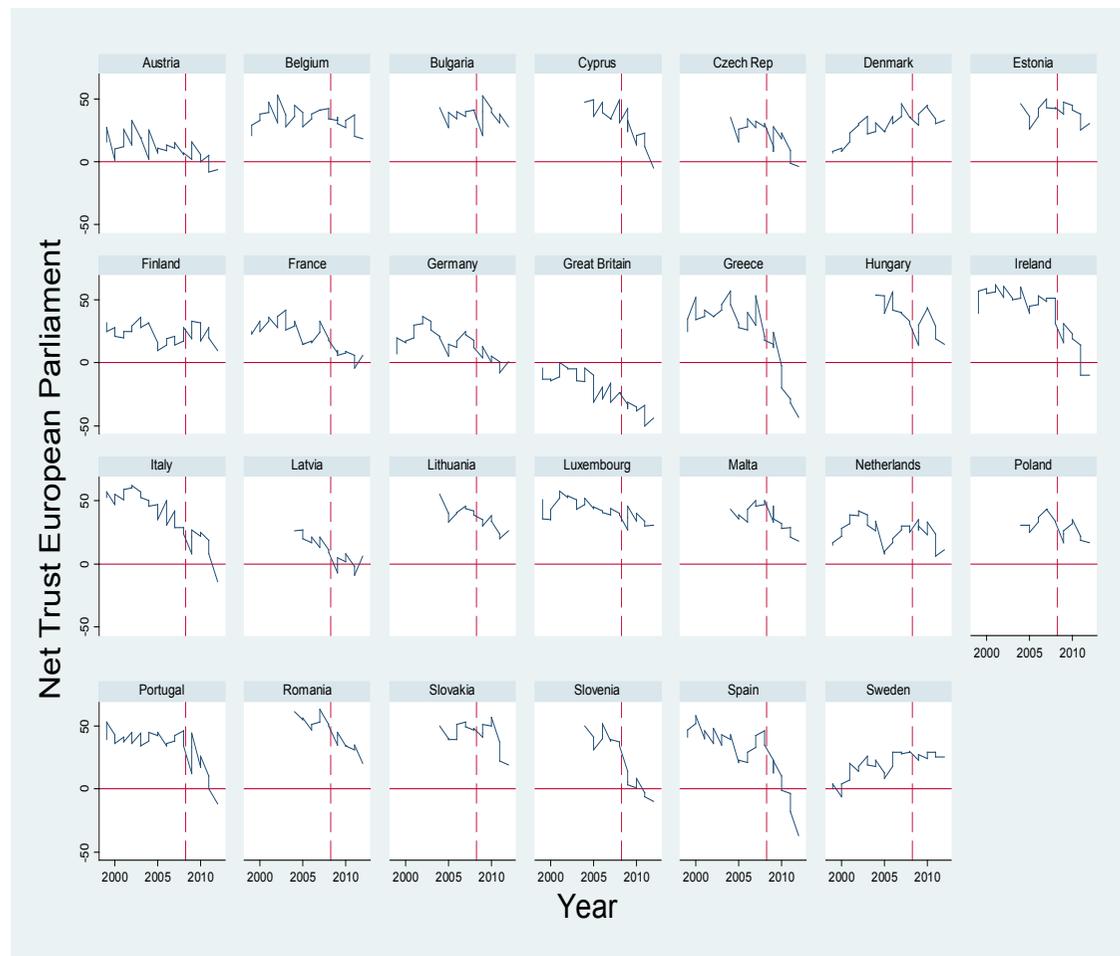
Figure A3. Net trust in the European Commission, by EU-27 country (1999–2012)



Notes: Modified version of Figure A3 in Roth et al (2013). Y-axis displays a range from -50 to +50. For the EU-15 countries, the data commence in spring 1999 (EB 51). For the 12 new member states, the data commence in autumn 2004 (EB 62), even for Romania and Bulgaria. As the figure depicts net trust, all values below 0 indicate a lack of trust by the majority of respondents. In the case of Great Britain, data from EBs 51-69 are for Great Britain, whereas data from EB 70 onwards are for the UK.

Sources: Standard EBs 51-77 and Special EB 71.1.

Figure A4. Net trust in the European Parliament, by EU-27 country (1999–2012)



Notes: Modified version of Figure A4 in Roth et al (2013). Y-axis displays a range from -50 to +50. For the EU-15 countries, the data commence in spring 1999 (EB 51). For the 12 new member states, the data commence in autumn 2004 (EB 62), even for Romania and Bulgaria. As the figure depicts net trust, all values below 0 indicate a lack of trust by the majority of respondents. In the case of Great Britain, data from EBs 51-69 are for Great Britain, whereas data from EB 70 onwards are for the UK.

Sources: Standard EBs 51-77 and Special EB 71.1.

# 18. CRUMBLING OR COPING? EUROPEAN CITIZENSHIP IN (THE) CRISIS

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# 1. Introduction

The “European Year of Citizens 2013” has been dedicated to the rights that come with EU citizenship.<sup>1</sup> Yet, the Euro crisis confronts European Union Citizenship with a critical test of whether it can adjust past practices and cope with the present hard realities. Since its establishment in the Maastricht Treaty, this innovative form of citizenship of a non-state polity has unfolded unprecedented dynamics. It has extended individuals’ access to rights and protections against discrimination within and across the borders of the EU member states, thus turning former aliens into members<sup>2</sup>. Yet, at present, profound power shifts have undermined the EU’s established equilibrium between markets, intergovernmental and supranational powers. This has strengthened the former at the

1. Launched by the European Commission, this year long program is supposed to “encourage dialogue between all levels of government, civil society and business at events and conferences around Europe to discuss those EU rights and build a vision of how the EU should be in 2020” (<http://europa.eu/citizens-2013/>).
2. See Evas/Liebert, in Liebert, Evas, Gattig 2013 (forthcoming).

expense of the latter, privileging specifically financial players, technocracy and the big member states. The outcomes of this great transformation will likely shape not just the fate of the single currency and the EU as we have known it, but also the prospects for citizenship of and in the EU.

Two questions arise: First, how does Union Citizenship cope with the Euro crisis and the mode of Euro-rescue management? And second, why should and how could Union Citizenship matter at all for the future EMU regime? My analysis is premised on the conceptual framework of “European Citizenship” as a transnational “community of practice” that provides mechanisms, on the one hand, for associating the existing plurality of diverse *demoi* that constitute the Union and, on the other, for linking this new form of political community to EU governance. Herein derives my assumption that no common European identity or homogenous people are required for a legitimate EMU, but Union Citizenship norms and practice will be a central variable. My key proposition is that the current Euro crisis and its management

face these norms and practices with a reality test as to whether and how they can cope with powerful market pressures, growing social divides and newly centralising pulls for EMU governance. While an analysis in full detail of the conditions for reinforcing Union Citizenship vis-à-vis these challenges is beyond the scope of this paper, it nevertheless does appear imperative for a future legitimate EMU governance regime.

This paper develops in three steps. I start with the conceptual framework of Union Citizenship as a ‘multi-*demoi* community of transnational practice’; in the second part, I assess whether and how Union Citizenship copes or crumbles vis-à-vis economic divergence, social strains and executive centered, technocratic modes of Euro-rescue management. The third section presents arguments as to why Union Citizenship is constitutive for Euro-Governance, followed by suggestions for reinvigorating Union Citizenship in view of future EMU.

## 2. Union Citizenship as ‘multi-demoi community of practice’

In the wake of the fall of the Iron Curtain, the Maastricht Treaty established Union Citizenship as an arguably modest attempt to contribute to the legitimacy of Economic and Monetary Union which the European Union was resolved to build. Citizenship in the EU was not given autonomous status but was made dependent on nationality in a member state. Albeit a far cry from the constitutive requirements of a full-fledged democratic Euro-polity, Union Citizenship after Maastricht via Amsterdam to Lisbon Treaty reforms, developed unprecedented dynamics.<sup>3</sup> To account for these dynamics, Union Citizenship cannot be conceived in the strictly formal sense of treaty norms and legal provisions. Drawing from Emanuel Adler’s metaphorical depiction of Europe as a “civilizational community of practice” (Adler 2009, 2011)<sup>4</sup>, I therefore suggest an interdisciplin-

ary approach, analysing Union Citizenship within the framework of a “multi-demoi community of practice.”<sup>5</sup> The practice of this community revolves around a contentious “space of law” created by the EU Citizenship provisions of the Maastricht Treaty and by successive EU case law, legislation and treaty reforms, hence resulting from the “contrasting dynamics at the interface of integration and constitutionalisation” (Shaw 2010). Given its multi-demoi composition, this community rests on norms and practice for overcoming its fragmentation. Such ‘bridges’ or transnational linkages among the diverse ‘demoi’ include, for instance, structural interdependencies, exchange

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mances” and “socially meaningful patterns of action which...simultaneously embody, act out, and possibly reify background knowledge and discourse in and on the material world” (Adler & Pouliot 2011: 5-6).

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3. For accounts of this dynamic development of Union Citizenship, see Evas & Liebert 2013; Shaw 2010; Bellamy et al. 2006; Weiler 1999; Wiener 1997.

4. “Practices” are defined here as “competent perfor-

5. For elaborations on the term ‘demoicracy’, see Nicolaidis (2012), for contributions to developing this as a conceptual, analytical and theoretical research program, see Besson 2007, Cheneval, Lavenex and Schimmelfennig.

and communication networks, coordination and cooperation arrangements, or discursive translation mechanisms.<sup>6</sup> This transnational practice which Union Citizenship arguably facilitates is framed by legal norms but is by no means reducible to them.

Concerning the normative dimension of Union Citizenship practice, the Maastricht Treaty of the European Union confers on every person holding the nationality of a Member State the status of a ‘citizen of the Union’ who enjoys complementary rights<sup>7</sup>, most importantly that of free movement across national borders, and protection against discrimination founded on nationality, gender, religion and several other grounds. To safeguard

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6. For instance, Union Citizenship is grounded on fundamental rights, basic values and objectives laid down in the treaties and the Charter of Fundamental Rights. To the extent that these are shared cross-nationally, they can nurture horizontal trust and feelings of mutual obligations among fellow citizens from different ‘demoi’.

7. The most important EU citizenship rights include the rights to free movement, to vote and to stand as a candidate for municipal elections and European Parliament elections, the rights of diplomatic and consular protection, and the right to petition to the ombudsman of the EP; see Lisbon Treaty Art. 20.

the pluralistic diversity of this community, member states are committed to mutually respect their nationality laws and not discriminate against non-national Union citizens. For developing and applying these norms to citizenship practice, individual litigation cases requesting ‘preliminary rulings’ by the European Court of Justice as well as EU legislation have played pivotal roles.

Citizenship in the EU since its inception in Maastricht has been subject to longstanding asymmetries between the European strong economic freedoms and weakly constitutionalised social and democratic rights (Eder & Giesen 2000; Schiek, Liebert, Schneider 2010). Yet ECJ case law has contributed to extending citizens’ rights beyond the economic realm increasingly into the civic and social sphere (Reich 2012), while the 2009 Lisbon Treaty has extended social values, objectives and provisions as well as political rights:

Regarding Union civic rights, namely the exercise of fundamental freedoms, the ECJ has advanced cross border mobility and residency rights, making them independent from citizens’ economic status as worker, family residency or third coun-

try origin.<sup>8</sup> Also, the ECJ has extended protection against discrimination based on nationality to every citizen of the EU, including students’ access to a University abroad<sup>9</sup>, and has turned down illicit residency requirements towards beneficiaries of a disability pension<sup>10</sup>; or invoked data protection and equal rights of citizens for non-national EU citizens<sup>11</sup>. Moreover, it has ruled against discrimination as regards the change of surnames of children with dual nationality.<sup>12</sup> Finally, it has defended family protection in its own right, dissociating it from cross-border mobility.<sup>13</sup>

- In terms of social rights, the ECJ has shaped the conditions under which Union citizens are entitled to non-discriminatory treatment concerning social benefits beyond secondary Community law, provided they have established a genuine link with their host-state that entitles

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8. Baumbast (2002); Zhu (2004); .

9. Commission v Austria (2005), cf. Bressol case (2010);

10. Nerkowska v Zaklad case (2008).

11. Huber case (2008).

12. Avello (2003); Grunkin and Paul (2008); Sayn-wittgenstein (2010),

13. Zambrano (2011); cf. McCarthy (2011).

them for instance to student fellowships or child allowances<sup>14</sup>, or to post-diploma allowances for nationals, even if they have received their education abroad.<sup>15</sup>

- The Lisbon Treaty has strengthened the ‘social dimension’ of European Union, by committing it to social values, objectives and provisions such as “social justice”, “social cohesion”, “social progress”, “social market economy”, fighting “social exclusion and discrimination”, “equal treatment of women and men”, a “horizontal social clause” for assessing the social impacts of EU policies, and including also “solidarity between the member states” (Liebert 2011).
- Finally, concerning the political rights attached to citizenship in and of the EU, the Lisbon Treaty establishes the new European Citizen Initiative.
- As a result of these developments, Union Citizenship has turned from a relatively empty shell into an expanding set of norms and provisions

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14. Martinez Sala v. Freistaat Bayern (1998); Grylcyzk (1999); Morgan (2007); Collins (2004); De-Cuyper (2006);

15. D’Hoop (2002).

with added value for economic, and to some extent, also social and political practice. But whether and how it can cope with the Euro crisis is the next question to be addressed.

### 3. How Union Citizenship performs in (the) Euro crisis and EMU

Arguably, the Euro Crisis is the outcome of a vicious circle of negatively reinforcing financial markets failure, Eurozone states' spending irresponsibility, flawed EMU design and heterogeneity of Eurozone economies. In response to the Eurozone (EZ) crisis that erupted after 2008<sup>16</sup>, short term bailout loans were granted by the EZ and IMF to states on the brink of insolvency likely to trigger systemic destabilization of the Single Currency. Thus, Euro-crisis managers made choices against direct transfers and in favour of winning time for redistributing risks, requiring the governments of the assisted states to implement severe

austerity and adjustment programs that would be externally monitored by the 'Troikas'<sup>17</sup>.

Besides the 'assisted states' (Greece, Ireland, Portugal), other Eurozone members with difficulties of sovereign debt refinancing, but aimed at preventing loss of sovereignty, adopted large scale austerity and structural reform policies on their own (Italy, Spain). Moreover, the EU member states jointly committed themselves to long range preventive measures by introducing balanced budget rules into their domestic legal orders, including acceptance of supranational scrutiny and automatic sanctions.<sup>18</sup> Aimed at long term sustainability of the EMU, and for restoring trust in international financial markets regarding the re-

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16. The Eurozone crisis was a result of different dynamics triggered by the 2008 financial crisis break out in the US, on the one hand comprising rising international credit costs that were unsustainable for some of the fiscally most vulnerable EZ member states, and on the other hand fuelled by failing national banks, as in the cases of Ireland, Greece, Portugal and Spain where governments were forced to bail banks out, thus increasing public debt burdens.

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17. European Central Bank, European Commission and IMF.

18. The "Treaty on Stability, Coordination and Governance in the Economic and Monetary Union" (TSCG, also 'Fiscal Compact') was signed by 25 EU member states on March 2<sup>nd</sup>, 2012 as an international treaty since the UK and the Czech Republic opposed it.

silence of the Eurozone, member states declared that they would embark on a roadmap “towards a genuine Economic and Monetary Union”. For the future EMU, three building blocks are envisaged, to be established in three subsequent stages: a banking union aimed at “breaking the link between banks and sovereigns”, an economic union for supporting structural coordination, convergence and enforcement among member states; and a fiscal union with a central insurance system to absorb economic shocks (Van Rompuy 2012).

This roadmap for completing EMU will require member states to delegate important national prerogatives to supranational European agencies and, thus, hollow out national citizenships without providing mechanisms for Union Citizenship to fill these gaps. Certainly, national and EU constitutional and legal norms regulating citizenship rights and practices in the EU remain formally in place. But under the impact of the European Union’s quest for fiscal discipline, not only crisis states for a limited period of time but all signatories will have to comply in the future. Thus, fiscal discipline and mandates by supranational or international agencies inevitably will bring these

tensions in the EU’s constitutional order to the fore. Constitutionally speaking, the future EMU would tilt its existing asymmetries further to the advantage of financial, economic, and fiscal integration and to the disadvantage of social and democratic integration.

Whether European Citizenship - faced with a present crisis management and future EMU regime - can make headway to ensure freedom, justice and democratic legitimacy or whether it will crumble, is ultimately a question of practice. Hence, the question of ‘coping or crumbling’ puts Union Citizenship empirically speaking ‘on trial’. For the purpose of this paper, empirical evidence is selectively scrutinised to develop the argument that Union citizenship does not fully fail in coping with the crisis in terms of economic freedoms, but that it falls short in ensuring social justice and democratic legitimacy regarding the present and future of euro-governance.

Arguably, Union Citizenship’s added value for coping with the crisis consists, on the one hand, of legal provisions for securing economic benefits, social justice and democratic legitimacy, and, on the other, of specific transnational mechanisms

for translating these norms in practice, the effectiveness of which, however, is questionable:

Regarding the added economic value of Union Citizenship that was originally confined to bridge the diversity of peoples in an economically always closer (converging) Union, can it help citizens to cope with diverging economic performance in other ways than moving out of crisis states?

And, considering issues of social justice under the austerity rule, does Union Citizenship provide mechanisms to translate legal commitments to ‘Social Europe’ into practice?

Last but not least, to the extent to which Union Citizenship is a prerequisite of a democratic EU polity, which mechanisms can help the ‘demoi’ in crisis or failed states under technocratic austerity regimes to limit the phase of emergency, to forestall the hollowing out of democratic institutions, and to revert trends towards the deconsolidation of democracy?

### [Searching the economic value added by Union Citizenship](#)

The global financial crisis that has massively afflicted the euro-zone since 2008 brought demo-

cratic-economic prosperity beliefs to a sudden halt. Trust in the stability of the euro and the eurozone was scattered by the series of protracted 'sovereign debt crises'. Citizens in EU member states are being subjected to the most severe financial turmoil and economic downturn since World War II. As a consequence of growing disparities among member states' economic competitiveness, European societies experienced massive losses of incomes and jobs accompanied by increasing levels of poverty or social exclusion.<sup>19</sup> In this context, European Citizenship – originally designed for a diversity of the 'demoi' committed to the principle of mutual recognition only – cannot cope with diverging socio-economic performance without effective mechanisms of redistribution. Yet, the disempowerment that citizens experience in national arenas vis-à-vis the unprecedented empowerment of market agents and non-elected supranational bodies is arguably exacerbated by di-

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19. From 2008 to 2011, in the EU27 the percentage of total population at risk of poverty, materially deprived or with low work intensity rose from 23.4 to 24.2, corresponding to around 120 million. Poverty or social exclusion were above average in Greece with an increase of 28.1 to 31.0% and in Spain with 22.9 to 27%; see Eurostat news release 171/2012, 3 Dec 2012.

visions of civil society, interest groups and public opinion about how to distribute the costs of the financial, economic and fiscal crises: Although economic stagnation, recession and employment crises have aggravated, the European trade union's call for reconciling austerity policies in Southern Europe with economic growth measures has remained largely inconsequential.<sup>20</sup> Nor have EU governments responded to public support for complementing austerity programs with public employment programs, a demand that was jointly endorsed by overwhelming majorities in crisis-countries as well as a majority of the younger cohorts in the more prosperous countries.<sup>21</sup> While in principle the majority of the general public of the latter is critical against a 'Transfer Union', people are in favour of economic growth stimulus measures to mitigate the socially disruptive consequences of economic stagnation or recession.

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20. The largest industrial trade-union of Europe, the German IG Metall with 2,3 million members, called for a "Marshall plan for Greece" already in 2011 (FAZ, 28.9.2011, p. 11), since then DGB has followed suit.

21. Eurobarometer Fall 2012.

For coping with the consequences of economic recession, and in the absence of stronger capabilities of intervention, market citizenship of the Union remains the last resort for many as it provides legal rights and entitlements for cross-border mobility in search of jobs. Citizenship in the EU offers particular young unemployed or skilled laid off workers opportunities to exit shrinking labour markets and to seek a better life in more prosperous economies. Union Citizenship secures them the right to cross-border mobility, to picking residence, seeking and getting employment or enrolling for study to family reunification in another member state. However, compared to the scope of unemployment for instance in Spain, Union Citizenship did not open the gates for mass-exodus of unemployed persons from the European periphery to the Centre and North<sup>22</sup>. Disaffected by

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22. The dramatic situation of unemployment in Spain has reached at the end of 2012 a rate of 26% , including 55% of young people, and equalling to in total 6 million persons, 3,5 of which were long term unemployed. Over the past 5 years since the beginning of the crisis, it had thus more than doubled. Only in 2012, 850.500 jobs have been lost. These data are without parallel in the history of the statistical series, since the Instituto Nacional de Estadística (INE) was founded. Among the young

language, cultural and administrative barriers in potential host countries there, nationals make use of freedom of movement rights rather for leaving towards former colonies (emerging economies in Latin America, Asia or South Africa), and only in relatively small proportions in search for jobs elsewhere in the EU. Also, it is conventional wisdom that citizens are usually little aware of their rights, have hardly exercised them, and are therefore willing to engage with transnational practices to a quite limited extent. The Euro-crisis does not seem to have changed this state of play significantly.

Different from cross-border movers, the grand majority of nationals of assisted crisis states will not be able, aware or willing to make use of Union Citizenship in terms of freedom of movement as workers, job seekers, students, or family members. Under the present construct of a technocratic-executive regime of Euro-Governance, these citizen-stayers, even if adversely affected by failures of good governance - such as lack of trans-

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people, 125.000 unemployed have left only in the last quarter of 2012 (El Pais 24.1.2013, [http://economia.elpais.com/economia/2013/01/24/actualidad/1359013302\\_659501.html](http://economia.elpais.com/economia/2013/01/24/actualidad/1359013302_659501.html))

parency, budgetary opaqueness or administrative mismanagement of their states - are not entitled to place complaints with the European Ombudsman on the grounds of Union Citizenship. Although the TSCG puts member states' 'balanced budget rules' effectively under supranational executive scrutiny, its implementation remains formally under national responsibility alone. As static Union Citizens, they may not even turn to the European Court of Justice in hope of finding protection against unwarranted infringements of their constitutional rights and legal entitlements.

#### Claiming social justice

Transnational public debates about how to cope with the Euro crisis are marked by discursive tensions over the legitimacy of austerity rule, on the one hand, and claims for social justice on the other. For saving the euro, the fiscally stronger EZ members perceive themselves as unwillingly condemned to finance the more weaker ones (Arfaras 2012: 17ff.). Others complain about the dismantling of social and democratic citizenship rights at the national level, and about the progressive fragmentation of citizenship in the EU that would ultimately foster European disintegration (limes

4/3, 2012). In this context, the dominant, German led response to the Euro-crisis - the rescue strategy based on the implementation of austerity and ordoliberal economic ideas - is accused of having led to a new "north against south" wall in Europe.<sup>23</sup>

Concerning tensions among normative expectations and citizens' actual experiences and preferences regarding 'Social Europe' in the context of the Euro-crisis, three areas must be put under focus:

New challenges to the 'social cohesiveness' of Union citizenship have derived from increasing social inequalities within the assisted states as well as among them and the assisting states;

- Regarding the social values underpinning the 'community of demoi', negative cultural stereo-

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23. In the special issue of the Italian magazine "limes, Rivista italiana de geopolitica" entitled "'Nord contro Sud, il muro d'Europa" (31. October 2012), Hans Kundnani talks about a "Scontro di civiltà in Europa" (Limes 2012: 9ff.), José Manuel Freire Nogueira about a "disunione europea", Carlo Pelando asks about "Il posto dell' Italia nel Reich in formazione" (Limes 2012: 143), and Umberto Cini compares "Xenofobia e germanofobia, appunti di un'estate greca".

typing reinforced by transnational mass public communication frames have reinforced perceptions of differences and moral hazard rather than trust, subjective feelings of solidarity and shared understandings of social justice;

- As a consequence, social policy preferences as to where to attribute the competences diverge among mass publics: while in the more affluent societies majorities want to keep them at the nation state level, publics in the assisted states in their majority endorse the Union as the appropriate site for ensuring a European social dimension (European Social Union), with the capability and responsibility for mitigating the harsh social consequences of the financial, economic and debt crises.
- In view of social Union Citizenship rights and normative commitments under the Lisbon Treaty and the Charter of Fundamental Rights, three types of mechanisms for translating such norms into practice can be identified: First, by encouraging litigation, case law has defended individuals or groups against instances of private or public employers or government budgets that infringed labour rights or constitu-

tional social rights.<sup>24</sup> Second, social objectives, such as reconciling work and family obligations or part-time work have been advanced in the past by the European social dialogue. At present the Economic and Social Committee lobbies for programs for socially inclusive economic growth or measures for social cohesion. And finally, the building of transnational advocacy coalitions, including European and national party-groups in the European Parliament has helped promote European social policy especially in legislative realms under co-decision making. Whether any of these established mechanisms or the more recent European Citizen Initiative will help prepare the ground for applying the transversal “social clause” or solidarity projects between member states is an open question.

- Calling for democratic legitimacy

Supposedly, the dilemma of democratic citizenship in the EU consists in the futility of squaring

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24. The Constitutional Court of Portugal, in a 2012 ruling, has revoked the Portuguese Government's austerity measures affecting nearly exclusively civil servants.

the circle between effective and democratic governance – or reconciling the EU's alleged output based democratic legitimacy with one proceeding from inputs. The current state debt crises within and outside the euro-zone are cases in point: On the one hand, driven by financial markets, interests and doctrinal ideas, all except two of the 27 EU-member governments have agreed on strict fiscal discipline through effectively binding mechanisms, to be secured - even in the face of severe recessions - by a multilateral Fiscal Treaty regulating sanctions and incentives, notably with access to the ESM. But to the extent to which the EU's new austerity regime under conditions of capital mobility will mandate social welfare retrenchment on governments, social inequalities can be expected to rise, will be attributed by mass publics to the EU's “fiscal straightjacket”, will shake public support for European integration. Ultimately, this would undermine not only input but also its output based democratic legitimacy.

In the EU under the crisis, power shifts have been strengthening the influence of big finance over governments and the rule of unelected technocratic agencies at the supranational at the expense

of the national level. Provided one agrees that Union Citizenship means “the prospect of influencing government policy according to reasonably fair rules and on a more or less equal basis with others” (Bellamy 2008), then the European Council’s politics of ‘permanent austerity’ under the Fiscal Compact must be expected to confront the multi-demoi community with the challenge of securing equal rights across economically diverging and even unilaterally depending demoi. If general compliance with the debt-brake rule and thus prevention of state bankruptcy were not only signed by governments and enshrined in national constitutions but were to be effectively controlled by each of the demoi in particular and in addition in community, each of them should enjoy the same full discretion for implementing this rule in detail. Thus, neither would any member state fail nor would the Union want to or need to interfere within the demoi in crisis, requiring to dismantle entrenched social entitlements, undermine constitutional rights, and provoke protest or political apathy or, in extreme cases, even leading to democratic break-down.

Yet, in practice, Euro-crisis governance did face European Citizenship with the unprecedented dilemma of fiscal consolidation at the expense of democratic deconsolidation – or consolidated democracy at the expense of fiscal deconsolidation. In hard times of national fiscal crises, citizens have been required to comply with EU budgetary control and austerity measures as a condition for receiving rescue programs aimed at fiscal re-consolidation, even if these involved democratic deconsolidation – that is the dismantling of the democratic standards and rights that citizens had achieved over the past or the rise of populist and extremist forces. Alternatively, citizens wishing to keep intact the social contract and constitutional compromise on which their democratic stability had rested in the past ran up against externally imposed budgetary constraints and austerity policies. Put differently, they had to choose among the alternatives of exit, loyalty and voice. Thus, if they did not emigrate, they either silently complied with the EU’s 2009 austerity turn, that is accepted the shrinking of personal incomes and retrenchment of social protection. Or they sought to defend their socio-economic rights by giving voice to their claims, acting them out in street protest,

mobilizing old or new social movements or engaging with populist parties (Kaldor 2012; Pappas 2013), largely “subterranean forms of politics”, in opposition to national austerity and adjustment programs.<sup>25</sup> Thus they arguably jeopardized their state’s fiscal deconsolidation and the EU’s monetary stability. Under these circumstances there is a seemingly unresolvable trade-off between input- and output-sources of democratic legitimacy. So what is left of democratic citizenship in the EU? After having explored the impacts of Euro (crisis) governance on Union Citizenship in its economic, social and political dimensions, the next section will reverse the perspective and discuss which institutional innovations are preconditions for adjusting Union Citizenship to EMU.

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25. While street protest in Athens is widely covered by the mass media abroad, this is much less so for Portugal, where teachers, professors, students and including the interest organisations of the members of the Armed Forces took to the streets, inviting citizens to join them in peaceful mobilisations against non-proportionate budget cuts, to protect their social and democratic constitution against austerity policies that were mandated by the Troika and namely Germany (LUSA 10. 11. 2012).

How Union Citizenship matters for the legitimacy of Euro-Governance

Under which conditions can Union Citizenship be an asset for Euro-Governance? After shortly reviewing the state-constitutionalist proposition, I will develop an alternative line of argumentation, searching for constitutive mechanisms for linking both the multi-demos community of practice and EMU governance.

Regarding the prerequisites for legitimate Euro-crisis or EMU governance, advocates of the state-constitutionalist approach to European integration maintain that what chiefly matters is state sovereignty or, more recently, national constitutional identities. This state-centric concept has been used by the German Constitutional Court meaning a set of unalienable core values, competences and state institutions, for instance democratic elections and parliament. Through these lenses, only national citizenship norms and practices count, but can be easily plaid off against each other. For instance, in an assisted member state, constitutionally entrenched socio-economic rights may conflict with structural adjustment programs explicitly mandated by the parliament

of an assisting member state, requiring the former to implement state reform for dismantling constitutional social rights and entitlements that run counter government commitments to austerity budget programs. Another inter-demos conflict arises in case the government of an assisted state calls for a national referendum to approve national austerity programs, which in turn runs counter the representative democratic mandate for government issued by the demos (parliament) of an assisting state. In these cases of inter-demos conflict, Union Citizenship matters little if at all. At most, it is invoked to ensure economic freedom of movement for young and skilled unemployed nationals from crisis-ridden states. But it does not help reconcile the power struggles among the Euro-demos in the crisis.

By contrast, the so-called “community method” of European governance seemingly provides a better fit with the assets of Union Citizenship, understood here as a “multi-demos community of practices”. The community mode of EU governance has been designed to “guarantee both the diversity and effectiveness of the Union” by providing “a means to arbitrate between different interests by

passing them through two successive filters: the general interest at the level of the Commission, and democratic representation, European and national, at the level of the Council and European Parliament, together the Union’s legislature”<sup>26</sup> This framework does implicitly accommodate Union Citizenship at the input as well as the output side of community governance: On the one hand as the legal basis and would-be constituency of the European Parliament, on the other hand as a reference for the Commission framing the “general interest”. Through these lenses, Union Citizenship plays a double role for the legitimacy of Union governance. The problem here with EMU governance is that this makes only very limited use of the community method for reconciling conflict among the multiple demos of the Union. Thus, if Citizenship in the EU is a source of economic, social and democratic value added, the realisation of these potentials requires alternative mechanisms to conventional input- and output legitimation.

Pierre Rosanvallon (2008) has made a valuable proposition for how to overcome the dead-end

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26. White Paper on European Governance (July 2001), quoted after Dehousse 2011: 4.

street of juxtaposing “output” vs. “input” types of democratic legitimacy. He distinguishes three alternative types of democratic legitimacy that compete with and at the same time complement electoral forms of representative government: The legitimacy of independent non-partisanship for surveillance and scrutiny of majoritarian institutions in the “general interest” (id., pp. 93ff); the legitimacy of “reflexivity”, as the opening up of the electoral-representative channels for polyphone discourses and argumentative practices (id., pp. 151ff.); and the legitimacy of “proximity” based on a “politics of presence” by political elites and the “democracy of interaction” with and among citizens and civil society (id., pp. 209ff.). The following applies these ideas to Union Citizenship in the context of Euro-crisis governance.

“Legitimacy of non-partisanship”: Union Citizenship norms and practices have not yet engaged with “non-partisan agencies’ for the purpose of surveillance and scrutiny of national governments as well as EU Governance. For instance, Union Citizenship and the most powerful player in that respect, the European Central Bank operate on two separate planets. The legitimacy of the

EU’s supranational institution with the supreme authoritative say in the Euro-crisis and EMU is vested in financial markets and their responses to ECB policy (or rhetoric). Also its formal autonomy is sealed off against claims for accountability in the name of the European multi-demos community. But appropriate institutional innovations provided, Union Citizenship might well unfold its potentials for non-partisan forms of surveillance of EMU.<sup>27</sup>

1. “Legitimacy of reflexivity”: Union Citizenship has to develop innovative devices, such as “polyphone channels” if it aims at realizing the argumentative practice of “reflexivity”. For Union Citizenship to count for EMU governance in that respect, it requires not primarily rights to voting but to voice. Voice requires citizens’ representation or participation in forums of

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27. Innovative mechanisms include, for instance, drawing citizen representatives by lot; an example for a citizen- or civil society induced form of surveillance of EMU governance is “Finance Watch”, other exemplary fields might include the “Troikas” monitoring state governments under adjustment programs; or the scrutiny of national austerity programs, or the implementation of the “horizontal social clause”.

consultation for decision-makers, either by interest groups, organised civil society or discursive methods for securing representativeness, such as “discursive representation” (Dryzek and Niemeyer 2008). If any of these mechanisms – eventually coupled with the new social media – is effectively in place, Union Citizenship should perform as a reflexivity forum even for the most remote agencies such as the European Banking Association (EBA).

2. “Legitimacy of proximity”: At present, Union citizens in search of venues for “proximity”, meaning they are wanting to interact with European political elites, have a limited range of options, with varying vicinity. Strictly speaking, Union Citizenship offers opportunities for actively participating in the democratic life at the local community and the European Union levels, wherever one resides. But in a broader sense, politically active Union Citizenship invokes the “democratic life of the Union”, as it is laid down by the Lisbon Treaty. This is composed of three domains: the party-parliamentary

ry “multilayered field of representation” (Crum and Fossum 2012); moreover, sites for non- or counter-majoritarian citizenship participation that have come into play in the life of democracies in general (Pettit 2006a, 2006b), and Union Citizenship, in particular (Evas, Liebert and Lord 2012); finally, third, transnational civil society and social movement mobilisation that have become a third field where Union Citizenship claims are practiced (Liebert and Trezn 2010). In none of these three fields, will Union Citizenship encourage much “proximity” capable of transcending self-referential national government as well as self-contained supranational governance practices. For instance, neither joining a European NGO represented in the European Economic and Social Committee nor launching a European Citizen Initiative, nor rallying for direct democratic participation through national referendums nor European election campaigns will bring the citizens any closer to the EU decision-makers than, for in-

stance, in-depth quality media coverage or the new social media can do.

3. In sum, depending on how Union Citizenship adjusts to EMU by conceptual and institutional innovations for surveillance, reflexivity and proximity in modes that foster transnational communication, exchange and cooperation across the divergent ‘demoi’, it will matter for the legitimacy of governing the Euro.

## 4. Innovating Union Citizenship beyond the Euro-crisis

Aimed at fighting the failures of markets and states, national legislative competences are being transferred to the European level, strengthening existing non-elected or creating new technocratic bodies with unprecedented executive, legislative and judicial enforcement powers. For doing so in legally and democratically legitimate ways, the EU will have to either circumvent or reform its treaty base, thus creating strains with existing equilibriums and putting public support at risk. New mechanisms are required for linking Union Citizenship to the reconstruction of EMU.

There are many who warn that the politics of “permanent austerity” that EU leaders adopted in response to the financial and sovereign debt crisis puts “democracy in straightjackets” (Mair 2011; Schäfer and Streeck 2013 forthcoming). The Council of Europe’s Parliamentary Assembly has voiced fears that “austerity measures are a danger for democracy and social rights” (CoE 2012). Countering these concerns, there is an emerging

coalition of those advocating democratization of the EMU as a precondition for the rescue of the Eurozone, including its fiscally vulnerable states. In this respect, Miguel P. Maduro identifies caveats of democracy in Europe as the key to the EU’s current malaise: National democratic sovereigns are blind towards the mutual dependencies they created by co-living with others in a single market and sharing a common currency, he argues and, in addition they also failed to give themselves collective powers strong, legitimate and just enough for safeguarding their common goods (Maduro 2012).

If governance of the current or any future euro-crisis is to be effective and legitimate and the vision for the future of the Economic and Monetary Union to take roots, innovative conceptions for democratic legitimation are needed. These should credibly convey the message that the unfinished journey of democracy in Europe is going

on.<sup>28</sup> But such legitimation strategies need to go beyond mere communication and tackle three structural issues of EU political institutional and policy design: How to hold the newly empowered non-elected supranational authorities publicly accountable; how to provide citizens with new opportunities for democratic participation; and, more specifically, how to provide them with a voice on crucial issues of social justice deriving from economic decision-making that directly affects their lives.

The following reviews three sets of ideas that do not aim at a supranational Leviathan but at developing the infrastructures for linking Union Citizenship and EMU governance by strengthening (1) the fiscal capacity of the Eurozone for reinforcing non-partisan and socially just countercyclical redistribution; (2) horizontal party alliances for

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28. For earlier proposals focusing on representative and direct democratic reforms in the EU, see the „modest propositions“ developed by P. C. Schmitter (2000): “How to Democratize the European Union. And Why Bother”; P.C.Schmitter and A.Trechsel (2004): “The Future of Democracy in Europe. Trends, Analyses and Reforms”; and S. Hix (2008): “What is Wrong with the EU Polity and How to Fix It”.

constituting competing electoral links among citizens and EMU governance, hence proximity and (3) deliberative devices for enhancing the reflexivity of EMU. All three are designed to help close current weaknesses of Union Citizenship.

(1) “A Budget for Stability and Democracy in Europe” (Tavares 2012-13). One of its most important flaws of Union Citizenship is its lack of substantive resources for financing the general social programs for the unemployed or specific solidarity projects. Tavares and Maduro propose tapping Single Market benefits for new revenue sources that will allow the EU to co-finance European policies; thus giving itself the budget that is urgently needed to make EMU sustainable but that the conflictive logic of ‘donor states’ has consistently denied so far (Maduro 2012; Tavares 2012, 2012-13). Regarding the feasibility of this formula as the basis of a new European political-institutional settlement, the question is whether supporters for this idea can rely on an advocacy coalition sufficiently strong to win the opponents over. This coalition arguably would include ‘donor states’ who have convinced themselves to rather endorse a generalised common revenues scheme

than to shoulder domestically new burdens. On the side of the opposition, one would find the ‘isolated tables’ of euro-outsiders, organized banking and export industry interests sharing resistance against spill-overs from the EMU into Single Market taxation.

(2) Contention about the new horizontal and EU level redistributive policies will likely trigger politicisation and political competition which should help build the European political space, with competing European parties, first order European parliamentary elections and a Commission Presidency supported by the parliamentary majority. This practice remains below the threshold of treaty reforms and therefore show a way forward out of the democratic legitimation deficit of EMU. The emerging European Union would be capable of saving the Euro without sacrificing democratic standards. Equally important, it would dismantle the new ‘wall’ that has already split intergovernmental Europe into core and periphery (infamously labelled ‘GIPSI’ countries) and that ultimately threatens to destroy the Union. Yet, accepting that European political parties would live up to the task of putting alternative transna-

tional party programs together and run competitive election campaigns on the same policy issues across the different member states, Euro-policy makers must also be prepared to deal with the rise especially of those parties who want more political powers to be returned back home. Another question is how to reconcile the persistently high level of European party political fragmentation with the rationale of effective and legitimate majority governance of the EU/Eurozone. It can be assumed that the parliamentary Euro-polity (like all complex societies) would most likely attain the features of a consociational democracy built on a multi-party or even grand coalition government. For reversing the paradoxical trend of less and less European citizens caring to turn out for elections the more powers the European Parliament gets, representative democratic reforms from above will be necessary but not sufficient. They need to be complemented with democratizing practices from below (Liebert, Evas and Gattig 2013). These will provide citizens with opportunities for transnational networking with like-minded, independently or coordinated with European elections or plebiscites on relevant EU policy issues as much as in ordinary EU politics and policy making. Thus,

deliberative methods will help develop the cognitive predispositions for citizenship in the EU as a community of practices.

(3) Some of the most recent democratic innovations in theory and practice are informed by the ‘deliberative turn’ that democratic theory has taken over the last decade<sup>29</sup>. Regarding the European context, the European Think-Tank ‘Notre Europe’ has early on aimed at drawing lessons from the failed referendums on EU constitutional treaty ratification in France and the Netherlands in 2005 and is dedicated since to assessing deliberative and participatory experiments at EU level<sup>30</sup>. EU Commissioner Margot Wallström launched in December 2008 a “pan-European Citizens’ Consultation”, inviting citizens from all

29. To name but three of the influential contributions to the deliberative turn in democratic theory, see J. Dryzek (2000): “Deliberative Democracy and Beyond: Liberals, Critics, Contestations”; id. (2006) “Deliberative Global Politics: Discourse and Democracy in a Divided World”; and id. (2011) “Foundations and Frontiers of Deliberative Governance”.

30. L. Boussaguet (2011): “Listening to the views of European public. An assessment of the first participatory experiments to be organised across the Community”. Notre Europe, Policy Paper 44, September 2011.

Member States to debate the future of the EU in the first EU citizens’ conferences across territorial and linguistic boundaries.<sup>31</sup> EuroPolis, “a deliberative polity-making project” funded by the EU’s research framework program, has conducted live social experiments focused on the 2009 European parliamentary elections for assessing how European citizens’ attitudes and voting behaviour change depending on their exposure to balanced information.<sup>32</sup> In European integration theory, the deliberative turn has gained purchase in inspiring the innovative conception of ‘integration through deliberation’<sup>33</sup>. In drawing heavily on and developing this paradigm, pluri-annual EU framework

31. Website of ex-European Commissioner Margot Wallström, [www.ec.europa.eu/archives/commission\\_2004-2009/wallstrom/communicating/debate-eu\\_en.htm](http://www.ec.europa.eu/archives/commission_2004-2009/wallstrom/communicating/debate-eu_en.htm). For a review, see Boussaguet L. and R. Dehousse (2007) “L’Europe des profanes: l’expérience des premières conférences citoyennes », in Costa and Magnette (eds. 2007) : « Une Europe des élites ? Réflexions sur la fracture démocratique de l’Union européenne ».

32. For presentation and discussion of EuroPolis research findings, see [www.sv.uio.no/arena/english/research/projects/europolis](http://www.sv.uio.no/arena/english/research/projects/europolis).

33. E.O.Eriksen and J.E.Fossum eds. (2000): “Integration through Deliberation”.

research program ‘RECON’ has brought together theorists of deliberative democracy such as James Bohman and John Dryzek with over a hundred of European Social Scientists, Lawyers and Political Economists in order to develop and assess alternative models for reconstituting democracy in the EU<sup>34</sup>. Deliberative innovations in democratic theory and practice provide important resources for upgrading the democratic legitimation of the future Eurozone/EMU. They are important as they will help overcome certain limitations of representative democracy, on the one hand, and correct flaws in implementing direct democracy, on the other<sup>35</sup>. Most importantly, they suggest deliberative devices for enhance the democratic value added of Union Citizenship in terms of reflexivity, non-partisanship and scrutiny.

34. For the integrated research project “Reconstituting Democracy in Europe” coordinated by ARENA, University of Oslo, and funded under the EU 6<sup>th</sup> framework research program (2005-11), see [www.recon-project.eu/](http://www.recon-project.eu/)

35. See T. Evas, U. Liebert, C. Lord eds. (2012) ‘Multilayered Representation in the European Union. Parliaments, Courts and the Public Sphere (Baden-Baden, NOMOS); and U. Liebert, A. Gattig, T. Evas eds. ‘Democratizing the EU from Below? Citizens, Civil Society and the Public Sphere’ (Ashgate, forthcoming).

## 5. Summary and conclusion

This paper submits that the future of Union Citizenship – coping or crumbling with the Euro-crisis – is contingent on whether and how it adjusts to Euro-governance along the way to the completion of EMU. To answer the question about how Union Citizenship copes in (the) crisis and what it takes to fill the current voids, this paper has conceptualised Union Citizenship as a “multi-demos community of practice” a conception which serves, so my first proposition, as a constitutive framework for framing legitimate Euro-(crisis)Governance.

In the main part of the analysis I have reviewed three fields – economic, social and democratic – where the Euro crisis is challenging Union Citizenship practice and where tensions with Euro-governance emerge. I suggested that freedom of movement and related rights are in fact exercised, albeit to a much too limited degree to effectively alleviate the pressures of the unemployment crises in the Southern European states. Also, the social dimension of Euro-governance so far is close to non-existing. Finally, political rights associated with Union Citizenship are marginalized due to a

construction of crisis-intervention programs that eclipses largely the community method. At the EU level social dialogue, civil society participation and citizens’ representation or consultation is all the more difficult, the more supranational authority is being shifted from elected or consultative to executive bodies, namely the European Central Bank, European Council and the European Commission, or to technocratic agencies, such as the ECB, the EBA and others. To make things worse, in matters of Euro-governance, citizens are even denied the right of complaint to the European Ombudsman. As a result of this current state of affairs, static citizens from crisis societies who cannot choose the exit option either comply or voice protest on the streets as well as via populist parties. On the other hand, also many citizens of the assisting member states voice concerns about excessive economic burdens and anxieties regarding the future of their national social security systems. Hence, if assessed in the conceptual framework of a multi-demos community of transnational practices, Union Citizenship is utterly fragmented and not (yet) a variable that helps shape the political

economy of the EU in crisis in more effective, socially just and democratically legitimate ways. Union Citizenship in the crisis is still largely a void.

By way of conclusion, I suggest three lessons about Union Citizenship in (the) crisis to be learnt:

First, regarding the prospects for Union Citizenship to cope or crumble, in the current situation, we cannot yet see whether the financial, banking and sovereign debt crises and their contaminations of the Eurozone will be good or bad for the future of Europe Citizenship (cf. Schmitter 2012). On the one hand, the present author joins in with many who believe that the EU did reach – politically and normatively speaking – the limits of how it managed the Euro-crisis to the detriment of Union Citizenship.

Second, I have pointed out the dilemma of democratic citizenship between fiscal consolidation and democratic deconsolidation and argue that this can be resolved by reinforcing Union Citizenship, filling its empty spaces, and reinvigorating it as a framework for coping with the economic crisis,

dealing with the social crisis and getting by the democratic crisis.

Third, drawing on insights into past failures of involving citizens via direct democratic procedures in EU Constitutional Treaty reforms, I have pointed to the deliberative turn in recent democratic theory and practical experiences across the world as a set of complementary techniques to make the Community method resilient vis-à-vis the new modes of Euro-governance. The present paper argues for upgrading the legitimacy of EMU-Governance – in terms of its non-partisanship, reflexivity with and proximity to the citizens - by strengthening Union Citizenship through deliberative methods.

These lessons and further detailed propositions quoted above – the boosting of Union Citizenship's own resources and bolstering of its parliamentary link to EU governance – taken together will add up to reinvigorate Union Citizenship beyond the crisis. Ultimately, this should help build the democratic block that the present EMU road-map still lacks.

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