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The Constitutional Role of Independent Fiscal Institutions in the Eurozone

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Abstract

The new European economic governance has made the creation or reform of independent fiscal institutions (IFIs) compulsory, in particular for Eurozone countries. While these institutions have been subject to extensive investigation by the economic literature, a constitutional analysis of their prospective and actual impact on national legal systems is lacking. In fact, depending on their design and powers, they could alter the ordinary inter-institutional dynamics on budgetary decisions. IFIs could redress the marginalization of parliaments in budgetary procedures in so far as they are able to offer reliable and independent information from the executive, and should mechanisms of “comply or explain” be put in place. By contrast, in the event an IFI operates within the executive branch and is not autonomous in the exercise of its mandate, parliamentary accountability could be further jeopardized. IFIs could also affect democratic rule-making over the budget, should their technocratic determinations be able to replace those of the budgetary authorities. Through a comparative constitutional analysis and based on selected case studies—France, Italy, Spain, and the Netherlands—the article aims to assess the constitutional impact of IFIs on parliaments and on the problem of information asymmetry on the budget.

Keywords: Independent fiscal institutions; parliamentary accountability; European economic governance; technocratic decision-making; comparative constitutional law

A. Introduction: Independent Fiscal Institutions as Non-Identified Constitutional Objects?

The reform of the economic governance in the EU has triggered remarkable institutional innovations within Member States, in particular those of the Eurozone. One of the most significant changes, though being generally overlooked by legal scholarship and in the public debate, is the mandatory setting up of independent fiscal institutions (IFIs) for the sake of restoring fiscal credibility and preserving sound public accounts. EU and international law, through the Treaty on Stability, Coordination, and Governance in the Economic and Monetary Union (TSCG), have set some requirements for the Member States in order to make these fiscal institutions truly independent from budgetary authorities, and to enhance the transparency and the consistency of the decision-making revolving around fiscal policies.

It is worth mentioning here that IFIs—also called fiscal councils—are “publicly funded independent bodies under the statutory authority of the executive or the legislature which provide

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non-partisan oversight and analysis of, and/or advice on, fiscal policy and performance.¹ They have been established since the 1950s, albeit in a minority of countries like the US,² upon recommendations by the Organization for Economic Co-operation and Development (OECD), the International Monetary Fund (IMF) and central banks, including the European Central Bank (ECB).³ In Europe, most fiscal councils have been established since 2009, thus in connection with the financial crisis.⁴

The OECD and the IMF, in particular, have published an increasing amount of policy papers and reports on IFIs providing for an economic, fiscal, and policy-oriented assessment of the performance of these institutions, where created, without taking into account the constitutional dimension of their existence: namely, the impact on constitutional principles and dynamics, including representative democracy, separation of powers, checks and balances and democratic accountability. While reports and working papers published in the framework of the OECD, the IMF, and the ECB abound—as well significant contributions from the political science perspective—existing constitutional scholarship on fiscal councils is almost non-existent, except for a few country studies⁵ and limited comparative analyses.⁶ Fiscal councils so far have been treated mainly as economic and political objects.

¹Organization for Economic Co-operation and Development, *Recommendation on Principles for Independent Fiscal Institutions*, ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (2012), <http://www.oecd.org/gov/budgeting/recommendation-on-principles-for-independent-fiscal-institutions.htm> [Hereinafter OECD].

²PHILIP JOYCE, THE CONGRESSIONAL BUDGET OFFICE: HONEST NUMBERS, POWERS, AND POLICY MAKING 207 (2011).

³Anthony Annett, Jörg Decressin, & Michael Deppler, *Reforming the Stability and Growth Pact*, INTERNATIONAL MONETARY FUND (Feb. 1, 2005), <https://www.imf.org/en/Publications/IMF-Policy-Discussion-Papers/Issues/2016/12/31/Reforming-the-Stability-and-Growth-Pact-18031>; PROMOTING FISCAL DISCIPLINE (Manmohan S. Kumar & Teresa Ter-Minassian eds., 2007); Lars Calmfors & Simon Wren-Lewis, *What Should Fiscal Councils Do?* 25 ECON. POL'Y 649 (2011); Roel M.W.J. Beetsma & Xavier Debrun, *Fiscal Councils: Rationale and Effectiveness*, (IMF Working Paper, WP/16/86, 2016), <https://www.imf.org/external/pubs/ft/wp/2016/wp1686.pdf>; Benoît Cœuré, Member of the Executive Board of the ECB, Opening Remarks at the workshop on “Fiscal councils, central banks, and sound public finances:” The Importance of Independent Fiscal Councils (Jan. 27, 2016), <https://www.ecb.europa.eu/press/key/date/2016/html/sp160127.en.html>. See also European Central Bank, *Reinforcing Economic Governance in the Euro Area* (June 10, 2010), <https://www.ecb.europa.eu/pub/pdf/other/reinforcingeconomicgovernanceintheeuroareaen.pdf>; *Enhancing Economic Policy Coordination for Stability, Growth and Jobs—Tools for Stronger EU Economic Governance*, COM (2010) 367/2; id.; *Report from the Commission Presented Under Article 8 of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union*, Brussels, C(2017) 1201 final.

⁴Organization for Economic Co-operation and Development, *Draft Principles for Independent Fiscal Institutions: Background document No 3*, PARLIAMENTARY BUDGET OFFICIALS AND INDEPENDENT FISCAL INSTITUTIONS (Feb. 23–24, 2012), <https://www.oecd.org/gov/budgeting/49777912.pdf>.

⁵See, e.g., JOYCE, *supra* note 2, at 207; Cristina Fasone, *Corte dei Conti v. Ufficio parlamentare di bilancio?*, in IX TORUŃSKIE STUDIA POLSKO-WŁOSKIE VOL. IX — STUDI POLACCO-ITALIANI DI TORUŃ 171–200 (Zbigniew Witkowski ed., 2013); Miguel Ángel Martínez Lago, *Reglas fiscales y organismos independientes de supervisión: la autoridad de responsabilidad fiscal española* in ESTUDIOS SOBRE EL SISTEMA TRIBUTARIO SUTUAL Y LA SITUACIÓN FINANCIERA DEL SECTOR PÚBLICO 1–40 (Francisco Adame Martínez and Jesús Ramos Prieto eds., 2014); RESTORING PUBLIC DEBT SUSTAINABILITY: THE ROLE OF INDEPENDENT FISCAL INSTITUTIONS (George Kopits ed., 2013) [hereinafter RESTORING PUBLIC DEBT SUSTAINABILITY]; select sections in the national reports of the *Constitutional Change through Euro-Crisis Law Project* (2013–2015), EUI L. DEPT., <https://eurocrisislaw.eui.eu/>.

⁶Michal Horvath, *EU Independent Fiscal Institutions: An Assessment of Potential Effectiveness*, 56 J. COMMON MTR. STUD. 504 (2018); Cristina Fasone & Diane Fromage, *Fiscal Councils: Threat or Opportunity for Democracy in the Post-Crisis Economic and Monetary Union?*, in DEMOCRACY IN THE EMU IN THE AFTERMATH OF THE CRISIS 161 (Luigi Daniele, Pierluigi Simone & Roberto Cisotta eds., 2017); Diane Fromage, *Creation and Reform of Independent Fiscal Institutions in EU Member States: Incomplete and Insufficient Work in Progress?*, in CONSTITUTIONAL CHANGE THROUGH EURO-CRISIS LAW 108 (Thomas Beukers, Bruno de Witte, & Claire Kilpatrick eds., 2017); VALENTINA TONTI, L'ISTITUZIONE DELL'UFFICIO PARLAMENTARE DI BILANCIO NEL CONTESTO INTERNAZIONALE ED EUROPEO DELLA GOVERNANCE ECONOMICA (2017). For a study on two non-EU countries, the UK and Australia, see the comparison offered by Cal Viney & Thomas Poole, *Independent Fiscal Institutions*, in THE CAMBRIDGE COMPANION TO COMPARATIVE CONSTITUTIONAL LAW 441–70 (Roger Masterman & Robert Schütze eds., 2019).

Empirical political research has already shown some important findings upon which the legal analysis can build. The capacity of effective scrutiny of fiscal councils in the EU context has been measured through the use of surveys and constructing an index that considers the breadth of their mandate, the financial and human resources available, access to information, public awareness about their operation, the reactions from the government, and the relationship with the parliament.⁷ The study proves—also beyond the ranking of fiscal councils that is provided—that the IFIs better equipped in terms of resources are also in the best position to enhance fiscal surveillance and accountability in the EU even when the mandates fiscal councils are given are rather similar. Moreover, there isn't necessarily a correlation between the economic effectiveness of a fiscal council, as a watchdog on the public deficit, and its performance as enabler of a better democratic scrutiny of the budget.

Three conceptual models of fiscal councils have been described, each backed by a different understanding of the role they have to play in the fiscal domain.⁸ The “trustee model,” inspired by national central banks, sees these institutions as decision-makers rather than bodies informing the decisions of the budgetary authorities.⁹ It follows that the IFIs' determinations are binding or are directly able to interfere with the budget process, for example proposing amendments to the Parliament every time a bill under scrutiny can violate the fiscal rules.¹⁰ By contrast, according to the “agent model”—supported by the Commission in relation to the European Fiscal Board¹¹—fiscal councils are expected to act on behalf of the executive and under its control to pursue fiscal discipline and, as such, it can be doubted whether they qualify as independent institutions. The “orchestrator model,” instead, postulates that fiscal councils should mobilize and raise awareness within the Parliaments, among the citizens and by the media towards the fiscal targets without possessing the instruments to make fiscal choices.¹² Crucial to this end is the reputation a fiscal council is able to build, its capacity to improve the deliberative quality of the budget process by making it more transparent and by enhancing the public and the parliamentary scrutiny on it.¹³ It is the third model that has been adopted by most, if not all, IFIs in place in the EU; the sign of an important constitutional choice. The preference for “orchestrator” fiscal councils is the one endorsed by EU legislation and by the Commission for national IFIs. Indeed, from a constitutional-democratic standpoint, it appears that the most effective fiscal council is not necessarily the one endowed with the most far-reaching decisional or veto powers, but rather a fiscal council that acts independently from the executive and that is enabled to improve the legitimacy and the accountability of the budget process led by other actors—namely the government and, to a lesser extent, the parliament. Thus, the analysis will be focused on the “orchestrator” model of IFIs and, in particular, on four case studies showing the variation within this model, between fiscal councils that—due to their powers and authority—share some features of the “trustee” model, and IFIs whose mandate has been bypassed, ignored or at risk of being sidelined by the executive.

⁷See the study by Horvath *supra*, note 6, taking into account data collected until 2015.

⁸Tobias Tesche, *The Troika is Dead, Long Live the Domestic Troikas?: The Diffusion of National Fiscal Councils in the European Union*, 57 J. COMMON MKT. STUD. 1211, 1213-17 (2019).

⁹See Henrique S. Basso & James Costain, *Fiscal Councils: A First Step Towards Fiscal Delegation in Europe?*, in INDEPENDENT FISCAL COUNCILS: WATCHDOG OR LAPDOGS? 175 (Roel Beetsma & Xavier Debrun eds., 2018); Martin Larch & Thomas Braendle, *Independent Fiscal Councils: Neglected Siblings of Independent Central Banks? An EU Perspective*, 56 J. COMMON MKT. STUD. 267 (2018).

¹⁰This was the controversial proposal advanced by the European Fiscal Board in November 2017. See *2017 Annual Report*, EUR. FISCAL Bd. 39 (2017) https://ec.europa.eu/info/sites/info/files/2017_efb_annual_report_en_0.pdf.

¹¹*Id.*; Tesche, *supra* note 8, at 1213; *The European Fiscal Board: Supranational de novo Body or Orchestrator?*, 51 IT. POL. SCI. R. 389, 391-397 (2021) (hinting to the case of the European Fiscal Board).

¹²Beetsma & Debrun, *supra* note 3; Kenneth W. Abbott, Phillip Genschel, Duncan Snidal, & Bernard Zangle, *Two Logics of Indirect Governance: Delegation and Orchestration*, 46 BRIT. J. POL. SCI. 719, 722 (2015).

¹³Tobias Tesche, *On the Legitimacy of Fiscal Councils in the European Union: Trustees or Orchestrators of Fiscal Discipline?*, 15 J. CONTEMP. EUR. RSCH. 21, 27 (2019).

Building on this literature, the article aims to assess the constitutional implications of national fiscal councils on the democratic accountability of budgetary decisions in Eurozone countries. After a brief review of the relevant legal provisions at EU level and taking stock of the broad discretion left to Member States on the design and mandate of fiscal councils—Part B—, the contribution emphasizes the specificities of these institutions compared to other independent authorities—Part C. I. It then moves on to examine the two main rationales for the setting up of IFIs and the constitutional functions they can fulfill, in particular to counter the information asymmetries on the budget, the focus of this contribution—Part C. II. The article offers a comparative analysis of fiscal councils—in France, Italy, Spain, and the Netherlands—reflecting different “orchestrator” models of IFIs—Part D. It critically assesses their effective contribution to enhance accountability mechanisms, and concludes that fiscal councils are potentially able to challenge executive dominance and parliamentary and citizens’ marginalization from budgetary decisions, based on a series of standards—Part C. II. However, it can probably take years before their “accountability-enhancing function” is fully exploited. The success of their process of institutionalization largely depends on their capacity to use the power assigned strategically so as to increase their visibility and to trigger a public debate over fiscal choices acting as authoritative points of reference.

B. Legal Provisions at EU Level and Models of Fiscal Councils

Directive 2011/85/EU requires national fiscal rules to be based on “reliable and independent analysis carried out by independent bodies or bodies endowed with functional autonomy vis-à-vis the fiscal authorities of the Member States.”¹⁴ It does not, however, contain any further requirement as to the characteristics or the prerogatives of these institutions.

By contrast, although it does not impose a specific model, Regulation 473/2013—binding on Eurozone countries only—is more precise on the institutional configuration IFIs should have. For example, the wording of Article 2 seems to exclude that the “agent” model of fiscal councils is in line with EU law. Amongst the basic features prescribed for IFIs are: A statutory regime protected by law; independence from the budgetary authorities and from public and private bodies; appointment of their members based on competence and expertise; access to information and adequate resources to fulfil the tasks; and capacity to communicate publicly in a timely manner. These are all characteristics that prohibit the functional dependence of an IFI from the executive and, rather, hint to budgetary and staff autonomy, to develop their own communication channel, and to the non-partisan and non-majoritarian role of the members. More vague are, instead, the functions fulfilled by IFIs according to the Regulation. Article 5 requires them of ensuring the compliance with—European—numerical fiscal rules incorporating in the national budget processes the medium-term budgetary objective. In addition to this and as an option—“where appropriate”—fiscal councils can be assigned the task to provide public assessments with respect to national fiscal rules. It follows that EU law does not prevent Eurozone countries from equipping their IFIs with further powers beyond these minimum requirements and, thus, also with decision-making powers, as per the “trustee” model, which however has not been adopted in any EU Member States in the post-crisis governance.

Regulation 473/2013 basically entrenches into binding rules most of the Common principles on national fiscal correction mechanisms, including fiscal councils as monitoring institutions, provided in an ad hoc Communication by the Commission in 2012.¹⁵ Nor are more specific indications offered in this respect by Article 3(2) of the TSCG, which is binding on all EU Member

¹⁴Council Directive 2011/85, art.6(1)(b), 2011 O.J. (L 306) 42, SPEC. ED. CROAT.

¹⁵*Communication on Common Principles on National Fiscal Correction Mechanisms*, at 7, COM (2012) 342 final; Carlos Closa, Felipe González de León & Fernando Losada Fraga, *Democracy vs. Technocracy: National Parliaments and Fiscal Agencies in the EMU Governance*, 19–20, (D.10 Reconnect Working Paper Series, 2020), <https://reconnect-europe.eu/wp-content/uploads/2020/11/D10.2.pdf>.

States—except Hungary, Poland, and Sweden—and hinting to the IFIs’ role in the activation of the automatic correction mechanism.

Therefore, Eurozone countries appear to enjoy wide discretion on how to best fulfil the requirements set in EU law and in the TSCG.¹⁶

As shown by the Report published based on Article 3(2) of the TSCG, the Commission has adopted quite a flexible and generous stance on the interpretation given by Member States to the requirements for setting up fiscal councils. Some countries, such as Belgium, at first sight do not look to be really complying with the conditions of independence and of effective monitoring of budgetary authorities fixed at EU level.¹⁷ Moreover, it should be borne in mind that, at the end of 2013—by when the supranational rules on fiscal councils had to be implemented—seven Member States still had no IFI—Bulgaria, Czech Republic, Greece, Lithuania, Malta, Poland, and Slovenia.¹⁸ In Ireland and Greece—as well as in Spain, see section D—the creation of an independent fiscal council was included amongst the conditions for receiving financial assistance, in 2010 and 2015, respectively.¹⁹ Furthermore, the creation of a new fiscal council instead of the reform of pre-existing one(s)—like Courts of Auditors, audit offices, or parliamentary budget offices—has been controversial in some Member States such as Italy and Spain.²⁰

Despite the Commission’s flexible and lenient approach in ascertaining the correct implementation of the new economic governance’s rules by the Member States, its 2017 Report on the Fiscal Compact questioned the very existence of an independent fiscal institution in Poland—to be identified in the Supreme Audit Office, according to the national government²¹—and considered problematic the repeated failure of the Slovenian authority to appoint the IFI’s members.²²

Not with standing the minimalist approach of EU legislation and the flexibility of the Commission, this institution has, on the one hand, publicly denounced the most evident cases of deviation from EU rules, as in the cases of Poland and Slovenia. On the other hand, the Commission seems to endorse the “orchestrator” model for national IFIs conceiving them as enablers of parliamentary accountability and of the democratic quality of the budgetary procedures, expected to become—thanks to fiscal councils—more visible and better understood by citizens. The European Commission has repeatedly warned Member States against the threat of IFIs lacking independence and autonomy from the budgetary authorities. Too close ties of an IFI with the executive have been criticized by the Commission, not only in relation to authorities that were evidently “agents” of the government, but also with regard to IFIs set up within the executive, though enjoying a certain autonomy.²³ By the same token, with a view to trigger a public debate and to enhance the democratic scrutiny, the Commission has regularly recommended the Member States to provide for “comply or explain” procedures in parliament whenever the estimates, forecasts and figures produced by the government do not reflect those of the IFI or are considered as unrealistic by the IFI itself.²⁴

¹⁶See Fromage, *supra* note 6; *Enhancing Economic Policy Coordination*, *supra* note 3.

¹⁷*Enhancing Economic Policy Coordination*, *supra* note 3, at 8, Appendix V.

¹⁸See *Constitutional Change through Euro Crisis Law*, *supra* note 5; EUROPEAN CENTRAL BANK, MONTHLY BULLETIN 97 (June 2014).

¹⁹Directorate-General for Economic & Financial Affairs, *The Economic Adjustment Programme for Ireland*, EUR. COMM 65 (Occasional paper 76, Dec. 8, 2010), https://ec.europa.eu/economy_finance/publications/occasional_paper/2011/pdf/ocp76_en.pdf; Memorandum of Understanding between the European Commission acting on behalf of the European Stability Mechanism and the Hellenic Republic and the Bank of Greece (Jul. 30, 2015), at 11, https://ec.europa.eu/info/sites/info/files/01_mou_20150811_en1.pdf.

²⁰See Fasone, *supra* note 5; Ágel & Lago, *supra* note 5.

²¹Maciej Serwaniec, *The Legal Status of the Polish Supreme Audit Office’s Corps of Auditors*, in XIII TORUNSKIE STUDIA POLSKO-WŁOSKIE 51 (2017).

²²*Enhancing Economic Policy Coordination*, *supra* note 3, at 8.

²³*Enhancing Economic Policy Coordination*, *supra* note 3, at 9–10.

²⁴Council Directive 2011/85, *supra* note 14, at 7. In fact, the requirement to introduce “comply or explain” procedures can also be considered to stem from the TSCG for the Euro area countries, Bulgaria, Denmark and Romania that committed to implement and monitor the structural balanced budget rule.

The favorable approach of the Commission to the IFIs' "orchestrator" model at the domestic level stands somewhat in contrast to the design of the EU "fiscal council," the European Fiscal Board, established by the Commission Decision (EU) 2015/1937 as an ancillary body of this institution with a consultative role. The double standard applied by the Commission, indirectly promoting an "orchestrator-type" of fiscal council in the Member States and following an "agent-type" of IFI for its own fiscal council instead of involving more the European Parliament has been extensively contested recently.²⁵

C. The Constitutional and Democratic "Potential" of Independent Fiscal Institutions

I. How New Is the Setting Up of Fiscal Councils in the EU in Relation to Other Independent Institutions?

The creation or reform of IFIs, requested by the EU under such special circumstances, is somewhat unprecedented and leaves open many constitutional issues. EU law is not new in demanding domestic legal systems to adapt their own institutional set up to EU procedures and powers.²⁶ However, the obligation to create *ad hoc* bodies fulfilling certain budgetary functions to work independently from, but at the same time in close cooperation with, governments and parliaments was unknown till now. Up to the point that—it has been argued—the establishment of IFIs mandated by the EU could even challenge the respect of Member States' "national identities, inherent in their fundamental structures, political and constitutional . . ." ²⁷

There is a connection here with research already carried out on the rise of independent agencies²⁸ and their governance, in terms of multiplication and diversification of powers in the bureaucratic state.²⁹ It is not by chance that most studies dealing with independent agencies over the last few years have been carried out in the EU context, where the proliferation of these authorities has probably reached a peak and the challenge to the traditional tripartition of constitutional powers—legislative, executive, and judicial—is perceived as problematic *ab origine*.³⁰

The case of IFIs, though, is somewhat peculiar as they are non-majoritarian technical bodies able to interfere with one of the most political functions pursued by States: The power of the purse, which, according to the famous motto "no taxation without representation," stands at the heart of the relationship between citizens and public authority. This is why the activity of fiscal councils cannot be purely evaluated according to a cost-benefit assessment of their performance, or in terms of theory of delegation of powers and agency theory.³¹ By the same token, the growing literature on central banks and the ECB cannot properly be applied in this field. The initial

²⁵Tesche, *supra* note 8, at 1211; Diane Fromage, *The European Commission's Relationship to the European Fiscal Board and to National Independent Fiscal Institutions in Monitoring National Budgets*, in GOVERNING WITH NUMBERS: ECONOMIC INDICATORS AND THE BUDGET DECISION IN THE CONSTITUTIONAL STATE 181 (Corrado Caruso & Marta Morvillo eds., 2020).

²⁶See Treaty on European Union, art. 4(2), Nov. 1, 1993, O.J. C 326, establishing the competition authorities in the 1990s and the creation of the EU's antitrust enforcement system following EU Regulation 1/2003; Giorgio Monti, *Independence, Interdependence and Legitimacy: The EU Commission, National Competition Authorities, and the European Competition Network*, in INDEPENDENCE AND LEGITIMACY IN THE INSTITUTIONAL SYSTEM OF THE EUROPEAN UNION 180 (Dominique Ritleng ed., 2016).

²⁷Fromage, *supra* note 6, at 116.

²⁸Up to the point of comprising them in an autonomous branch of government: see Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV., 724 (2000); Alec Stone Sweet & Mark Thatcher, *Theory and Practice of Delegation to Non-Majoritarian Institutions*, 25 W. EUR. POL. 1 (2002); Mark Tushnet, *THE NEW FOURTH BRANCH: INSTITUTIONS FOR PROTECTING CONSTITUTIONAL DEMOCRACY* 25-41 (2021).

²⁹See Jon Pierre & Jenny De Fine Licht, *How Do Supreme Audit Institutions Manage Their Autonomy and Impact? A Comparative Analysis*, 26 J. EUR. PUB. POL'Y 226 (2019).

³⁰Article 4(2) TEU; Madalina Busuioc, *European Agencies: Pockets of Accountability*, in THE REAL WORLD OF EU ACCOUNTABILITY: WHAT DEFICIT? 87 (Mark Bovens, Deirdre Curtin & Paul t'Hart eds., 2010); Renaud Dehousse, *The Politics of Delegation in the European Union*, in INDEPENDENCE AND LEGITIMACY IN THE INSTITUTIONAL SYSTEM OF THE EUROPEAN UNION *supra*, note 26, at 57; Marta Simoncini, *ADMINISTRATIVE REGULATION BEYOND THE NON-DELEGATION DOCTRINE: A STUDY ON EU AGENCIES* (2018).

³¹See, e.g., Giandomenico Majone, *REGULATING EUROPE* (1996); Hussein Kassim & Anand Menon, *The Principal-Agent Approach and the Study of the European Union: Promise Unfulfilled?*, 10 J. EUR. PUB. POL'Y 121 (2003).

creation of national central banks was not due to EU law, even though under the present functioning of the European System of Central Banks the abolition of one of the central banks would amount to a violation of EU law as well as national decisions that could impair their independence.³² Central banks are directing and managing monetary policy and, at least not directly, macroeconomic and fiscal policies, an issue that has become increasingly contested in the case of the ECB in an attempt to provide financial support to the Eurozone countries in need.³³ Unlike central banks, fiscal councils in the EU landscape are devoid of decision-making powers.³⁴ Moreover, the governance of monetary policy and that of fiscal policy have followed a different evolution.³⁵ The former is dominated by a widespread agreement amongst economists regarding the determinants and the outputs of certain monetary choices on the stabilization function, while different recipes are still under discussion for what concerns the effectiveness of a certain fiscal policy mix on the same function.³⁶ For example, in the domain of monetary policy it is much less disputed that increased level of money supply not paralleled by a comparable growth in the real output is likely to trigger inflation. By contrast, to fulfill stabilization through fiscal policy, putting employment and the level of prices under control, some seem to favor more expansionary policies, while others support the implementation of fiscal constraints. Finally, IFIs follow different accountability schemes and encounter other types of problems compared to central banks, the latter often dealing with too strong an independent status rather than with the threat of a “political capture” some fiscal councils currently risk facing.³⁷ This is also confirmed by the somewhat “special case” of the ECB after the Eurozone crisis, whose level of independence has often been considered to be at odd with the new tasks it has been conferred, in particular in the framework in the Banking Union.³⁸ The question of politicization of fiscal policy also derives from the several objectives it aspires to: “Compared to monetary policy, which pursues one primary or at most two interconnected objectives, fiscal policy covers several objectives”.³⁹ Fiscal policies try to pursue at the same time a combination of objectives falling under three broad categories: Namely allocative efficiency; distribution; and stabilization of aggregate output.⁴⁰ Even though fiscal and monetary policies are certainly interconnected nowadays, drawing on the case of the ECB to maintain price stability is certainly the primary objective under Article 127(1) of the TFEU, while secondary objectives include *inter alia* full employment and balanced economic growth.

This variety of objectives is also reflected in how the design and mandate of fiscal councils in the Eurozone have been conceived. Indeed, the requirements fixed under EU law for their setting up and reform have been implemented in a variety of ways depending on the specific characteristics of the constitutional system. Some have originally been meant to strengthen the

³²Joined Cases C-202/18 & C-238/18, *Ilmārs Rimšēvičs v. Republic of Latvia*, paras. 46 ff. (Feb. 26, 2019 as rectified by order of Apr. 10, 2019), <https://curia.europa.eu/juris/document/document.jsf?text=&docid=211050&pageIndex=0&doclang=IT&mode=req&dir=&occ=first&part=1&cid=540503>.

³³See Simon Wren-Lewis, *Comparing the Delegation of Monetary and Fiscal Policy*, in *RESTORING PUBLIC DEBT SUSTAINABILITY* *supra* note 5, at 54 (2014); Larch & Braendle, *supra* note 9, at 272-273 (arguing in favor of the delegation of the fiscal policy to IFIs, and the judicial saga on the ECB’s Outright Monetary Transaction Programme and the Public Sector Purchase Programme). *Cf. Special Collection on European Constitutional Pluralism and the PSPP Judgment*, 20 GERMAN L. J. (2020), <https://www.cambridge.org/core/journals/german-law-journal/special-collection-on-european-constitutional-pluralism-and-the-pspp-judgment>.

³⁴Tesche, *supra* note 8, at 1216.

³⁵Larch & Braendle, *supra* note 9, at 267.

³⁶Wolfgang Schäuble, *Why Austerity is the Only Cure for the Eurozone*, *FIN. TIMES*, Sept. 5, 2011; *contra* Joseph Stiglitz, *Europe’s Austerity Disaster*, *SOC. EUR.* (Sept. 29 2014), <https://socialeurope.eu/europes-austerity-disaster>.

³⁷See Mark Dawson, Ana Bobić & Adina Maricut-Akbik, *Reconciling Independence and Accountability at the European Central Bank: The False Promise of Proceduralism*, 25 *EUR. L. J.* 75 (2019).

³⁸See Diane Fromage, Paul Dermine, Phedon Nicolaidis & Klaus Tuori, *ECB Independence and Accountability Today: Towards a (Necessary) Redefinition?*, 26 *MAASTRICHT J. EUR. & COMP. L.* 3 (2019).

³⁹Larch & Braendle, *supra* note 9, at 268.

⁴⁰See RICHARD MUSGRAVE, *THE THEORY OF PUBLIC FINANCE: A STUDY IN PUBLIC ECONOMY* (1959).

executive—in Spain and in Germany—, the parliaments—like in Austria and in Italy—, or the autonomy of already independent institutions—like the central bank in Estonia and the Court of Auditors in France, based on the assumption that budgetary and fiscal procedures work better when politics is constrained. Given the nature of the EU competence in the field, there is no European fiscal council empowered to coordinate the activities of its national counterparts—indeed, by any means this is the role of the European Fiscal Board—unlike as it happens for the Commission in relation to national competition authorities and for the ECB vis-à-vis national central banks.⁴¹ The difference in the structure and level of coordination amongst independent authorities depends on the competences at stake: In the case of fiscal and economic policies, the EU can only coordinate Member States’ policies,⁴² while monetary and competition policies fall within the exclusive competences of the Union.⁴³ The lack of a “harmonizing” force behind Member States’ fiscal councils and the lack of any structured coordination of their work have been criticized from an economic standpoint. In other words, the absence of a European centralized management of fiscal councils would undermine the “development, effectiveness and efficiency” of their activity in relation to their ability to tackle the deficit bias.⁴⁴

On the one hand, too strong differences amongst independent fiscal institutions would risk making their operation useless, if not unsustainable, in relation to the deficit bias they aim to counter at the Eurozone-wide level. On the other hand, the constitutional autonomy of the Member States and the constrained scope of action of the Eurozone in the field of fiscal policy make pursuing the fiscal councils’ functions country-dependent. This further confirms that a constitutional investigation of the new IFIs can shed light on certain elements of their operation that the economic analysis has largely overlooked so far.

II. Why Create Fiscal Councils?

There are two main intertwined rationales for the creation of IFIs: Namely to tackle the information asymmetry over the budget between the executive, on the one hand, and the legislative branch and the people, on the other hand; and to cope with the deficit bias. Dealing with the first rationale—the one that is more significant from a constitutional standpoint, and that is the main focus of this article—the IFIs’ contribution to respond to the problem of information asymmetry citizens and parliaments face to control the budget process can be particularly important, especially for parliamentary opposition and minorities. The “executive financial hegemony”⁴⁵ has affected parliaments for decades now and is more or less evident depending on the system of government.⁴⁶ The economic and fiscal governance in the Eurozone, however, has further complicated this picture and has worsened the problem of information asymmetry given the way the European and the National Semesters develop in a constant interplay between EU institutions and Member States’ governments.

Some studies have already shown that, in the inter-institutional struggle that typically dominates budgetary and financial procedures, the setting up of IFIs, depending on where they

⁴¹The mandate of the European Fiscal Board, already evoked, and the many “soft networks” of Eurozone IFIs that have been created: The Network of EU Independent Fiscal Institutions, the EU Network of Independent Fiscal Institutions; and the Organization for Economic Co-operation and Development’s (OECD) Network, aiming to exchange information and best practice and to act as pressure groups.

⁴²Consolidated Version of the Treaty on the Functioning of the European Union art. 5, May 9, 2008, 2008 O.J. (C 115) [hereinafter TFEU].

⁴³*Id.* at art. 3(1).

⁴⁴See Arnout Mijts, *The Unsustainability of Independent Fiscal Institutions*, CLINGENDAEL – NETH. INST. INT’L REL. 1 (2016), <https://www.clingendael.org/sites/default/files/pdfs/PB%20The%20Unsustainability%20of%20Independent%20Fiscal%20Institutions%20-%20April2016.pdf>.

⁴⁵Viney & Poole, *supra* note 6, at 446.

⁴⁶See Joachim Wehner, *LEGISLATURES AND THE BUDGET PROCESS: THE MYTH OF FISCAL CONTROL* 43 (2010).

are established and with which tasks, can determine a shift in the long-standing executive dominance of budgetary issues in most EU countries.⁴⁷ Across the EU Member States parliaments have been frequently marginalized in fiscal decision-making and are less equipped with information on fiscal policy compared to the governments. This evidence is further strengthened by the fact that the European measures of the new economic governance, urging tighter fiscal discipline in a predetermined timeframe, in principle reduce the room that national parliaments have for maneuver in a context like that of the EU where these legislatures have normally been considered as the “latecomers” or the “losers” of the European integration process.⁴⁸

By contrast, fiscal councils could provide parliaments—and especially the opposition—with an additional source of information, independent from the executive, whose legitimacy relies on the technical competence and the reputation of its members. By monitoring the executive on the grounds of the financial effects of its policy options, by providing, endorsing or assessing macro-economic forecasts, and by making the results of their analyses publicly available, IFIs can reinforce parliamentary and public *ex ante* scrutiny and *ex post* oversight on budgetary matters.

The second objective fiscal councils help to pursue—with a more evident economic underpinning, notably to counter the deficit bias—is linked to the systematic violation of the deficit and debt rules of the Economic and Monetary Union (EMU) by several Member States, which was perceived as the main cause of the Eurozone crisis, and of its intensity and pace. IFIs were seen as instrumental to a better and quicker compliance with EMU targets, to support fiscal consolidation. One of the fundamental assumptions behind the decision of EU institutions to foresee the creation of IFIs is the support fiscal councils are expected to give to smart budgetary consolidation for long-term growth and to economic coordination within the EMU. As the situation in the Eurozone countries receiving financial assistance or support demonstrated, the economic and financial crisis was principally the fault of budgetary authorities—for example parliaments and governments—based on irresponsible fiscal decisions. Thus, the legal response, in principle, has gone in the direction to limit the discretion of budgetary authorities through setting clear numerical fiscal rules and through the creation of new non-majoritarian watchdogs upon them. The operation of IFIs, at least as for how it was conceived at EU level, seconds the understanding of the EU integration process as “a project of further rationalization of national democracies.”⁴⁹ Fiscal councils were established as to redress a failure of democratic representative institutions, by instating elements of rationalization into budgetary procedures. To put it in Maduro’s words,⁵⁰ fiscal councils serve to correct “democratic malfunctions in national political processes”.

IFIs’ *raison d’être* has not vanished or been undermined by the present EU governance of the pandemic. Despite the triggering of the general escape clause for the temporary suspension of the Stability and Growth Pact,⁵¹ the European and National Semesters are regularly developing and provide the setting within which the distribution of resources of the Recovery and Resilience

⁴⁷Cristina Fasone & Elena Griglio, *Can Fiscal Councils Enhance the Role of National Parliaments in the European Union? A Comparative Analysis*, in *THE EURO CRISIS AND THE STATE OF EUROPEAN DEMOCRACY* 264 (Bruno de Witte, Adrienne Héritier, Alexander H. Trechsel eds., 2013); Fasone & Fromage, *supra* note 6.

⁴⁸NATIONAL PARLIAMENTS ON THEIR WAYS TO EUROPE: LOSERS OR LATECOMERS? (Andreas Maurer & Wolfgang Wessels eds., 2001). See also NATIONAL PARLIAMENTS AFTER THE LISBON TREATY AND THE EURO CRISIS: RESILIENCE OR RESIGNATION? (Davor Jančić eds., 2017).

⁴⁹Miguel Poyares Maduro, *Passion and Reason in European Integration*, in *EUROPA IN DER WELT - VON DER FINANZKRISE ZUR REFORM DER UNION* 95, 97 (Ingolf Pernice & Rüdiger Schwarz eds., 2013); on this particular aspect during the crisis, see Christian Joerges, *Integration Through Law and the Crisis of Law in Europe’s Emergency*, in *THE END OF THE EUROCRAT’S DREAM. ADJUSTING TO EUROPEAN DIVERSITY* 299 (Damian Chalmers, Markus Jachtenfuchs & Christian Joerges eds., 2016).

⁵⁰Maduro, *supra* note 49, at 100.

⁵¹*Communication on the Activation of the General Escape Clause of the Stability and Growth Pact*, COM (2020) 123 final (allowing to temporarily depart from the normal budgetary requirements, provided that this does not endanger fiscal sustainability in the medium term).

Facility is managed.⁵² However, expansive fiscal policies can be for some time, no paradigm shift enshrined in Treaty changes appears to be on the agenda.⁵³ Thus, IFIs can keep working as fiscal watchdogs without this preventing them from being granted new tasks at a domestic level, for example assessing national recovery and resilience plans and in the field of spending review, checking how new EU funds are spent.

Indeed, fiscal councils are meant to constrain the attitude of most governments to short-term expansive economic policies, and public spending in particular, with a view to increasing electoral popularity through their decisions rather than looking after the long-term interests of the population to limit public deficit and debt. From this standpoint, fiscal councils serve the objective of “intergenerational constitutional justice” against “time inconsistency pressures.”⁵⁴ It has been argued, with this regard, that fiscal councils could be a “weapon against populism” being able to favor the adoption of more responsible and technically-meditated political decisions.⁵⁵ Independent fiscal institutions, at least in principle, can prevent the risk of political manipulation of populist governments’ macroeconomic forecasts and fiscal policies crafted just to please the voters. Precisely because of this counter-majoritarian function they have, fiscal councils can be subject to attempts of political dismantling and capture, as occurred in Hungary⁵⁶ and in Poland.⁵⁷

From this perspective, the first and the second rationales for the creation of IFIs are intimately related. Fiscal councils can improve the functioning of constitutional democracies by instilling the virtues of the limited government against a populist manipulation of fiscal governance, run in the majority interest—for re-election—only. As a consequence of this, the legislative-executive imbalance on budgetary policies can be re-calibrated through IFIs indirectly supporting opposition and minorities groups to gain visibility in the decision-making without identifying the Parliament with the majority *sic et simpliciter*. By the same token, by supplying independent and authoritative information to the citizens and to all political groups in Parliament, on an equal footing, the quality of the budgetary procedures, in terms of openness, transparency and visibility, can be enhanced. Also the public scrutiny, accountability and the critique on the executive’s fiscal policy can become more well-grounded, thereby reducing the risk of irresponsible fiscal governance.

The ability of fiscal councils to strengthen democratic accountability seems dependent on a series of factors including: The enhanced transparency of the budgetary procedures they might be able to trigger; and the extent to which they can force the executive to publicly bear the responsibility for its budgetary choices and to justify in front of the parliament the deviation from the medium-term objective.

In particular, the following elements will be analyzed more in depth in Part D to evaluate fiscal councils’ contribution to re-balance the information asymmetry: (i) their institutional position, namely where they have been established in relation to the system of government; (ii) their ability to act independently in terms of equipment of human and financial resources; (iii) the mandate assigned, as for the powers and the scope of action; (iv) how do they count in budgetary

⁵²See Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility, art. 17, 18, 19, 27, Annex V, 2021 O.J. L 57, 18.2.2021, 17–75; *Communication on One Year Since the Outbreak of COVID-19: Fiscal Policy Response*, COM (2021) 105 final.

⁵³See Council of the European Union, *Joint Declaration on the Conference on the Future of Europe*, COUNCIL OF THE E.U. (Mar. 5, 2021), <https://data.consilium.europa.eu/doc/document/ST-6796-2021-INIT/en/pdf>.

⁵⁴See Viney & Poole, *supra* note 6, at 442, 445.

⁵⁵Tobias Tesche, *Fiscal Councils: A Weapon Against Populism?*, EUIDEAS (June 20, 2019), <https://euideas.eui.eu/2019/06/20/fiscal-councils-a-weapon-against-populism/>.

⁵⁶See András Jakab & Pál Sonnevend, *Continuity with Deficiencies: The New Basic Law of Hungary*, 9 EUR. CONST. L. R. 120 (2013); George Kopits & Balázs Romhányi, *Hungary: A Short-Lived Fiscal Watchdog*, in RESTORING PUBLIC DEBT SUSTAINABILITY *supra* note 5, at 212; Tesche, *supra* note 13, at 26 (dealing with the Hungarian—too powerful—Budget Council substantially put aside by the Fidesz Government and paying a high price for its success).

⁵⁷Serowanec, *supra* note 21.

procedures, toward the exercise of the “power of the purse” by parliaments,⁵⁸ already very much weakened by executive dominance⁵⁹ and by the EU fiscal surveillance regime;⁶⁰ (v) the role, if any, assigned to the evidence and data fiscal councils provide in constitutional adjudication especially when budgetary, financial, and fiscal acts are concerned.

D. Comparative Constitutional Analysis of Different “Orchestrator” Independent Fiscal Institutions

These five elements which, as hypothesized here, are able to affect the chances for a fiscal council to directly or indirectly enhance parliamentary accountability, will be analyzed in four Eurozone countries: Italy, France, Spain, and the Netherlands. The focus on Eurozone countries is justified by the fact that the Euro Area’s Member States have to comply with stricter budgetary rules and requirements on fiscal councils. The countries selected for the examination of the fiscal councils present significantly diversified systems of government, levels of decentralization, economic performances, and levels of compliance with EU fiscal rules.

The selection of the four case studies responds primarily to the intention to investigate the functioning of IFIs in relation to parliaments of countries that have followed very different models of institutional design and degree of empowerment of their fiscal council within the “orchestrator” model.⁶¹ As anticipated in Part A, IFIs could be ideally placed along a continuum between the “trustee” fiscal councils and the “agents.” Both extremes are problematic from a democratic standpoint and from the perspective of the EU—loose—legal framework: the “trustees” risk seconding a technocratic mode of fiscal policy-making detached from the channels of representative democracy and completely de-politicized; the “agents,” instead, challenge the independent nature of the domestic fiscal surveillance becoming the instruments for the implementation of the governmental fiscal choices. In between, there are several regulatory options of “orchestrator” fiscal councils aiming to improve the quality of the budgetary procedures as deliberative processes and to foster a collaborative approach on fiscal policy between budgetary authorities and the public. These “orchestrators” are well-represented by the Dutch, the French, the Italian, and the Spanish IFIs and they may get more or less close to the “trustee” or to the “agent” models without being identified with them.

I. The Institutional Position

In Italy, the setting up of an IFI according to the new European legal framework has been preceded by a discussion, at political and institutional level, on whether the existing Court of Auditors could comply with the basic requirements provided for and could fulfil the tasks assigned by EU rules.⁶²

⁵⁸Riccardo Pelizzo, Rick Stapenhurst & Davd Olson, *The Role of Parliaments in the Budget Process* 1 (WBI & SMU Soc. Sci., Paper No. 02-2006, 2006), https://ink.library.smu.edu.sg/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1083&context=soss_research.

⁵⁹Uwe Puetter, *Europe’s Deliberative Intergovernmentalism: The Role of the Council and European Council in EU Economic Governance*, 19 J. EUR. PUB. POL’Y 161 (2012); Deirdre Curtin, *Challenging Executive Dominance in the European Democracy*, 77 MOD. L. R. 1 (2014); Mark Dawson, *The Legal and Political Accountability Structure of ‘Post-Crisis’ EU Economic Governance*, 53 J. COMMON MKT. STUD. 976 (2015).

⁶⁰See, e.g., Davor Jančić, *National Parliaments and EU Fiscal Integration*, 22 EUR. L. J. 225 (2016); Christopher Lord, *How Can Parliaments Contribute to the Legitimacy of the European Semester?*, 70 PARLIAMENTARY AFF. 673 (2017); Ben Crum, *Parliamentary Accountability in Multilevel Governance: What Role for Parliaments in Post-Crisis EU Economic Governance?*, 25 J. EUR. PUB. POL’Y 268 (2018). In particular, under point (iv), it is ascertained if the parliament entertains stable relationship with the fiscal council for the supply of information, and if the government is subject to an obligation of “complying or explaining” in case of deviation from the fiscal council’s estimates and forecasts.

⁶¹Following the “most different” case logic of case selection see Ran Hirschl, *The Question of Case Selection in Comparative Constitutional Law*, 53 AM. J. COMP. L. 125, 139–142 (2005).

⁶²In principle, Audit Offices and Courts of Auditors could qualify as national IFIs. See Zahirul Huque & Thiru Thiagaraja, *Public Accountability: The Role of the Auditor-General in Legislative Oversight*, in MAKING GOVERNMENTS ACCOUNTABLE:

Indeed, the Italian Court of Auditors is an institution regulated directly in the Constitution,⁶³ with a solid reputation in terms of independence and autonomy from political authorities, and with a long-standing tradition, as its establishment goes back to 1862.

Constitutional Law number 1/2012, which among other things introduced into the Italian Constitution the principle of a balanced budget, took a clear stance on the form the Italian fiscal council had to take: a new independent body, established at the two parliamentary chambers “in compliance with their constitutional autonomy, to whom the task to analyze and check the trends in public finance and to assess the respect of budgetary rules are assigned.”⁶⁴ Thus, the new fiscal institution is enabled to accomplish an *ex ante* review.⁶⁵ By contrast, the Court of Auditors is responsible for the *ex post* evaluation of the managements of the budgets of regional and local authorities as well as of the State administrations, for the coordination of public finance among the level of governments, and the respect of the balanced budget rule by public administrations.⁶⁶

For the purpose of the implementation of the reform of the European economic governance, however, the Court of Auditors does not stand as the independent fiscal institution required. The reason lies with its composition and the expertise of its members. In fact, they are mostly lawyers by training, in particular magistrates called to also exercise judicial functions, who thus use a legal approach to assess the compliance by public administrations of fiscal rules set by the law. The new fiscal council, instead, was intended to act according to a more economic-based expertise, in matters of public accounting and financial management.⁶⁷

In contrast to the Italian case, at the time the Eurozone crisis started, Spain had recently established an independent fiscal council, the budget office of the Spanish *Cortes Generales*—*Oficina Presupuestaria de las Cortes Generales*—regulated by law number 37/2010 and based at the General-Secretariat of the Congress. It can be asked by the Chambers to provide any study and report about public accounts that is needed and it is at the complete disposal of the *Cortes*. According to law number 37/2010 and law number 22/2013, it is primarily by means of this parliamentary budget office that governmental information on budgetary matters reaches the Chambers and is elaborated upon, in addition to the independent source of information the office has, given its access to any financial and economic database of the country. During the European Semester, the Government must transmit regularly to the *Oficina Presupuestaria*, and indirectly to the two Chambers, several reports about public accounts. The parliamentary budget office will then table an annual report before the *Cortes*. However, this body experienced many problems, first in its creation, and, second, for its appropriate functioning due to the political pressure exerted on it and the lack of constructive cooperation by the Government. The worsening of the Spanish economic situation and the request for financial assistance for the banking sector made the creation of a well-functioning independent fiscal institution mandatory, also according to the Memorandum of Understanding.⁶⁸

It is in this context that, in November 2013, organic law number 6/2013 established another fiscal council, this time at the Ministry of Budget and Public Administrations, the *Autoridad Independiente de Responsabilidad Fiscal* (AIREF). This new body, which is treated by the

THE ROLE OF PUBLIC ACCOUNTS COMMITTEES AND NATIONAL AUDIT OFFICES 3 (Zahirul Huque ed., 2015); Tushnet, *supra* note 28, 158–172.

⁶³COSTITUZIONE DELLA REPUBBLICA ITALIANA [CONSTITUTION], dec. 22, 1947, art. 100, 103.

⁶⁴*Id.* at art. 5 (own translation).

⁶⁵Luigi Gianniti & Chiara Goretti, *Prime note sull'Ufficio parlamentare di bilancio*, XXVII RIVISTA GIURIDICA DEL MEZZOGIORNO 81, 84 (2013); Legge 24 dicembre 2012, n. 234, art. 18, G.U. no. 12, Jan. 15, 2013 (it).

⁶⁶L. n. 243/2012, *supra* note 64, art. 20.

⁶⁷Mario P. Chiti, *L'ufficio parlamentare di bilancio e la nuova governance della finanza pubblica*, 5/6 RIVISTA ITALIANA DI DIRITTO PUBBLICO COMUNITARIO 977 (2013); Rita Perez, *L'ufficio parlamentare di bilancio*, 2 GIORNALE DI DIRITTO AMMINISTRATIVO 197 (2014).

⁶⁸Miguel Ángel Martínez Lago, *La Autoridad Fiscal Independiente*, U. COMPLUTENSE MADRID 16 (2014) <https://eprints.ucm.es/id/eprint/24379/1/EPrintMAML201401.pdf>.

Spanish authorities as the actual IFI to fulfil the requirements set by EU rules and by the TSCG, is meant to be completely independent from the Government, from an organizational and functional viewpoint,⁶⁹ even though there is a structural tie with the Ministry of Budget. Its practical operation, as it will be explained, shows in fact a considerable degree of autonomy.

In France, instead, no authorities could be credited as an independent fiscal institution when the EU reform of the economic governance was introduced. Organic law number 2012-1403 of 17 December 2012, on the programming of public finances, set up the *Haut Conseil des Finances Publiques* and strongly linked it to the existing Court of Auditors. Although, as it will be highlighted, the *Haut Conseil* has been able to establish solid relationships with the Parliament, its institutional positioning is quite unique in the Eurozone. For example, it deviates completely from the Italian choice not to consider the Court of Auditors, as it was or following a reform, as the IFI under EU law.

The Dutch fiscal framework, including its fiscal council(s), is peculiar in many regards in comparison to the French, the Italian, and the Spanish experiences. First of all, the establishment of its fiscal council, the Central Planning Bureau for Economic Policy Analysis (CPB), dates back to 1945, to the post-World War Two recovery. Since then, as it will be shown, this institution has acquired a solid reputation in the national context, and worldwide, for its unbiased judgment and for its ability to influence the public debate without abandoning its neutrality.⁷⁰ Its opinions and reports are well-respected by the majority and the opposition and minorities. In fact, the features of this fiscal council and the reasons for its success are strongly linked to the specificity of the Dutch political system—which is based on consensual practice, consultations, and coalition governments—and it might not work outside of this context. At the same time, however, the tasks assigned under EU law to IFI were not conferred to the CPB, but rather to the Advisory Division of the Council of State, a branch of one of the highest administrative courts in the Netherlands devoid of judicial functions. This is a further example of how diverse the institutional configuration of fiscal councils maybe without this affecting in principle their ability to counter the problems of information asymmetry and of deficit bias.

Some countries, like the Netherlands and Spain have more than an IFI in operation, established at different moments in time, and accommodating to the specific institutional setting of the country.

II. Independence and Functional Autonomy

Independence and functional autonomy from the budgetary authorities, and from the executive in particular, are key features of any “orchestrator” fiscal council, reflected in the process of appointment of its members, in the nature of the legal provisions regulating its activity, and in the budget and staff at its disposal.

Soon after the entry into force of Constitutional Law number 1/2012, a peculiar kind of legal source for the Italian constitutional system was enacted, law number 243/2012, which is one of the few examples in the country of legislation that has to be passed—and amended—by absolute majority of each house of Parliament rather than simple majority. It is this more rigid source of law compared to ordinary legislation that regulates in detail the “Parliamentary Budget Office.” The new IFI’s structure and functions are thus a guaranteed by a law that can only be amended by a qualified majority of deputies and senators.⁷¹

The Italian Parliamentary Budget Office (PBO) is composed of a council of three members, one of them acting as the president. Already, in the appointment procedure the close link of the PBO with both houses of Parliament is patent. The three members are appointed by agreement between the Presidents of the Senate and of the Chamber of Deputies, and are picked and chosen from

⁶⁹Organic Law No. 6/2013, art. 7 (B.O.E. 2013, 274) (Spain).

⁷⁰OECD, *Netherlands*, 2 OECD J. BUDGETING 175 (2015).

⁷¹L. n. 243/2012, *supra* note 64, art. 16 –19.

a list of 10 candidates prepared by the standing committees competent on public finance, each committee deciding by two-thirds majority. The appointments, which last for six years and are not renewable, must take into account the degree of independence of the candidates, “their renown expertise and experience in the fields of economics and public finance at national and international level.”⁷² Their honorarium is equal or comparable to that of the members of other independent authorities. The headquarters, offices and other instrumental resources for the Parliamentary Budget Office are provided for by the Presidents of the two Chambers; a feature that can trigger some doubts regarding the real independence of the PBO from Parliament as a budgetary authority. The same assessment concerns the financial resources for the PBO, as Article 20 of law number 243/2012, provides for three million euro a year, starting from 2014, for the new fiscal council. This budget is transferred from the state budget to the Chambers, which then make these resources available to the Office.

As in Italy, the legislation on the Spanish AIReF is also enshrined into a “reinforced” source of the law compared to ordinary legislation, an organic law, to be seen as a guarantee against unilateral change by the majority in office. The AIReF is composed of a President, who directs the activity of the bodies, and of Heads of Divisions appointed by the Council of Ministers upon proposal by the AIReF’s President among people with at least 10 years of experience in the field. The President, also appointed by the Council of Ministers, is proposed—based on merits, competence, and expected independence—by the Minister of the Budget and of Public Administration. The Spanish Congress is directly involved in this appointment. Indeed, the Committee on the Budget of the Congress invites the appointee for hearings and votes, on behalf of the Congress and by absolute majority, for its appointment.⁷³ Thus, although this has never happened so far, the Congress could reject the appointee.

From time to time the AIReF has denounced the shortage of fiscal and human resources it has to face compared to the tasks to be implemented, including checking the expenditures of all regional and local autonomies, and for being dependent on the unilateral commitment of the Minister of the Budget for the material transfer of resources.⁷⁴

Also, the French *Haut Conseil*, like its Spanish counterpart, is regulated by organic law. It is presided over by the first President of the Court of Auditors and four of its 10 members are magistrates of this Court.⁷⁵ The other members are the director-general of the National Institute of Statistics and Economic Studies, one member is appointed by the Economic, Social, and Environmental Council, and four members are chosen by the President of the National Assembly, by the President of the Senate, and by the Presidents of the two committees on finances, based on their economic expertise. Thus, there is also a strong parliamentary involvement in the appointment process, including that of the minorities. Indeed, the chairmanship of the two finance committees is assigned to representatives of the opposition.⁷⁶

According to the OECD Database on Independent Fiscal Institutions,⁷⁷ the human and financial resources of which the *Haut Conseil* is equipped are fairly modest, below one million euro per year and with two units of full-time staff. The limited resources allotted can be explained by the narrow mandate the French IFI is given. Yet, they constrain the activity of the fiscal council to a considerable extent.

⁷²*Id.* at art. 16.2.

⁷³B.O.E. 2013, 274, *supra* note 68, at art. 24.

⁷⁴Miguel Jiménez, *La autoridad fiscal pide a Montoro una paga extra por exceso de trabajo*, EL PAÍS (Nov. 12, 2015), https://elpais.com/economia/2015/11/12/actualidad/1447312520_491209.html.

⁷⁵Loi organique 2012-1403 du décembre 18, 2012 *relative à la programmation et à la gouvernance des finances publiques* [organic law 2012-1403 of December 17, 2012 on the Planning and Governance of Public Finances]. JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Dec. 18, 2012, art. 11.

⁷⁶Michel Lascombe, *La Nouvelle Gouvernance Financière*, 4 ACTUALITÉ JURIDIQUE. DROIT ADMINISTRATIF 228 (2013).

⁷⁷OECD, INDEPENDENT FISCAL INSTITUTIONS DATABASE, (Sept. 16 2019), <https://www.oecd.org/gov/budgeting/parliamentary-budget-officials/>.

The Law that regulates the Dutch CPB, of 1947, is ordinary parliamentary legislation and does not make this IFI legally independent from the Ministry of Economic Affairs. Moreover, the three members of the Board of Directors are appointed by the Minister of Economic Affairs, in consultation with seven other Ministers, often coming from different political parties forming the coalition so that a broad consensus on the appointees is needed. Thus, one at first can doubt the actual independence of this body, also considering that it is completely financed by the Dutch Government—above seventeen million euro. However, the long mandate of the Directors—seven years in contrast to the four year term of the legislature—, the independent staff of which it is equipped—more than 120 people—, the network of relationship in which it is embedded, in particular with a number of academics working as advisors, and the systematic review of its activities by external and foreign experts, have contributed to build a solid reputation of autonomy of the Bureau. Decades of practice have shaped it as an impartial guarantor of Dutch sound public accounts and it is well regarded by all political forces.⁷⁸ The other Dutch IFI, the Advisory Division of the Council of State, is acknowledge under Article 73 of the Constitution and advises the Government and the Parliament on legislation and governance. It is mainly composed of councilors of state and supported by a large administrative staff.

Thus, independence and functional autonomy, by law and *de facto*, characterize any orchestrator IFI meant to orient the public debate and parliamentary deliberation toward sustainable fiscal policies. They can be guaranteed through various arrangements, ranging from the nature of the sources of the law designing its operation and functions, procedures of appointment that limit the interference of the government, the length of the term of office, to the actual resources granted.

III. Mandate

The Italian PBO evaluates the macroeconomic and financial forecasts; assesses the macroeconomic impact of the most significant bills, in particular the budget bill; ascertains the ongoing trends in public finance, also by sub-sector, and the compliance with the budgetary rules; evaluates the sustainability of public finance in the long-term, the activation and the use of the correction mechanism and the deviation from the medium-term objective under exceptional circumstances.⁷⁹

Compared to the Italian IFI, the Spanish AIREF has a broader mandate. It publishes studies, reports, and opinions on request of all public administrations, including the Parliament, or *ex officio*. By law the AIREF endorses—with or without observations—the macroeconomic forecasts included in the annual stability program and in the budget bills—*proyectos de ley the presupuestos*—and detects any potential bias in the Government's forecast that could trigger the activation of preventive, corrective, or coercive measures, including the correction mechanism.⁸⁰ The AIREF also checks the draft stability programs to see if the objectives, in terms of balanced budget and of public debt, are fulfilled and to assess how the budget of public administrations has been executed.⁸¹ It also supervises the economic and fiscal programs and the rebalancing plans of the Autonomous Communities.⁸² Unlike the other fiscal councils analyzed here, the AIREF is the sole watchdog of the budgetary and macroeconomic performances of all levels of government in Spain, from the States to the municipalities, which requires a huge amount of work.

The powers of the French *Haut Conseil*, instead, are much more limited than those of the Spanish and Italian IFIs. As also observed by the former Council's President, they are restricted to what EU

⁷⁸F.J. Henk Don & Peter J.C.M. van den Berg, *The Central Planning Bureau of the Netherlands: Its Role in the Preparation of Economic Policy*, CENT. PLAN. BUREAU FOR ECON. POL'Y ANALYSIS (1990); Frits Bos, *The Dutch Fiscal Framework and the Role of the Central Planning Bureau*, CENT. PLAN. BUREAU FOR ECON. POL'Y ANALYSIS (2007).

⁷⁹L. n. 243/2012, *supra* note 64, art. 18, lit. a–e.

⁸⁰B.O.E. 2013, 274, *supra* note 68, art. 21.

⁸¹*Id.* at art. 16, 17.

⁸²*Id.* at art. 18, 19.

law prescribes, without adding any further competence.⁸³ Before the Programming Act for setting the multi-annual financial framework is transmitted to the Parliament—and to the Council of State—, the Government submits it to the *Haut Conseil* for its assessment in the light of the macroeconomic forecasts and the projection of growth of the gross domestic product. The same assessment is accomplished with regard to the annual budget bill and the social security financing bill—and the amending budget bills—and the opinion of the *Haut Conseil* is made public and is also transmitted to the Parliament together with the relevant bills.⁸⁴ The *Haut Conseil* also issues opinions on the national stability program and on the deviation from the medium term-objective. Even though the Government has to systematically inform the fiscal council—alongside the Parliament—of any new measure that might trigger a prospective change of the structural balance,⁸⁵ no formal “comply or explain” procedure is regulated in case the Council’s opinions are disregarded by the executive.

The Dutch IFI under EU law is the Advisory Division of the Council of State. In 2013, it was given the power to monitor the compliance of the fiscal rules and of the balanced budget position.⁸⁶ The Council of State, being an advisory body of the Government, is mainly composed of members appointed by the Government—formally by the Crown—the majority of which has a legal background. The Advisory Division—in contrast to the administrative law division of the Council of State that serves as one of the four highest courts of appeal in administrative matters—is always consulted by the Government before a bill is introduced to the Parliament, and also checks the compatibility of the bills with the fiscal rules.

Despite the formal acknowledgment of the Council of States’ Advisory Division as the Dutch IFI, it is the CPB that stands as the main fiscal watchdog for its domestic and international long-standing reputation and the far-reaching powers granted. Indeed, of the national case studies of “orchestrators” analyzed here, that of the CPB is probably the one getting closer to the “trustee” model.

The Dutch fiscal system has elaborated its own rules of functioning, supervised by the CPB and added on top of the EU governance framework, which is articulated mainly on deficit and debt-based rules. Since 1994, the Dutch fiscal framework has become a trend-based fiscal framework with real net expenditure ceilings for the whole term of government.⁸⁷ The CPB elaborates the short-term, medium-term, and long-term projections to fix the net expenditure ceilings.

In addition to this, the CPB exercises many other crucial functions. Indeed, unlike most fiscal councils in the Eurozone that just assess or endorse the macroeconomic forecasts presented by the executive, the CPB produces on its own the macroeconomic forecasts according to which the Government then prepares the Budget, other fiscal documents, and macroeconomic programs. This confirms that the Bureau is not only perceived as a reliable actor to check the budget, but it is actually able to inform the content of the budget through its forecasts. It steps in before the budget process and the start of the multi-annual programming, rather than only once the documents have already been defined. Interestingly, the CPB is also competent to review the fiscal implications of parties’ electoral manifestos and the alternative budgetary proposals opposition parties put forward, with a view to making the ensuing debate over the Government’s budget more informed and to check whether the alternative proposals are realistic.

This brief overview of the selected IFIs’ mandates reveal, once again, remarkable differences within the orchestrator model, from the minimal attribution of powers endowed to the *Haut Conseil* to the breadth of the tasks fulfilled by the Spanish AIREF and the Dutch CPB. Provided that a fiscal council is assigned resources commensurate to the tasks conferred—which has been

⁸³Fromage, *supra* note 6, at 129.

⁸⁴Loi organique 2012-1403, *supra* note 74, at art. 14, 15. See also Diane Fromage, *Le Haut Conseil des Finances Publiques: quelles conséquences deux ans après sa création?*, 4 REVUE DU DROIT PUBLIC ET DE LA SCIENCE POLITIQUE EN FRANCE ET A L’ÉTRANGER 1107 (2015).

⁸⁵Loi organique 2012-1403, *supra* note 74, at art.19.

⁸⁶Hauke Vierke & Maarten Masselink, *The Dutch Budgetary Framework and the European Fiscal Rules*, EUR. COM. 5 (2017) https://ec.europa.eu/info/sites/default/files/economy-finance/eb027_en.pdf.

⁸⁷Barry Anderson & Joseph J. Minarik, *Design Choices for Fiscal Policy Rules*, 5 OECD J. BUDGETING 159 (2006).

doubted with regard to the Spanish IFI—the broader the mandate, the higher the expectation that the fiscal council in question is able to make its voice heard in the public debate and to indirectly enhanced the quality of parliamentary deliberation on fiscal and budgetary issues.

IV. The Relationship of Fiscal Councils with the Parliament and the Government

Although the constitutional and legal provisions on the PBO were introduced in 2012, the Italian fiscal council has been in operation only since September 2014—the Council was appointed in May, but it started working in September 2014. The delayed implementation of the national and the European rules on the independent fiscal institution was partly derived from the phase of political turbulence that characterized Italy, with the change of two Governments in one year following the 2013 parliamentary elections, and partly derived from organizational difficulties. The symmetric bicameral structure of the Italian Parliament did not help the setting up either. Indeed, both Chambers enjoy exactly the same powers on budgetary matters and both Constitutional Law number 1/2012 and Law number 243/2012 repeatedly refer to the rules of procedure of both chambers for the creation of the PBO; rules that have never been amended. At that time it was not politically feasible to change the rules of procedure of both Chambers for this purpose—as absolute majority is requested—and accordingly, for the first time ever, the Senate and Chamber signed a Joint bicameral Protocol with detailed conditions for the establishment and the functioning of the Parliamentary Budget Office.⁸⁸ That was the first occasion in which an organizational and procedural decision not dealing with political and parliamentary activities was jointly taken by the two Chambers. Likewise, the Council appointment procedure was also long—and, as of writing, the first renewal of the PBO has just been finalized after the former members were *de facto* prorogued in their mandate,⁸⁹ which has exceeded six years (2014-2022). The relevant standing committees have to agree first on ten candidates, and then the two Presidents have to choose by common accord the three members. Indeed, a compromise is not easily reached and the political deadlock in Parliament affects the operation of the fiscal council.

During the first years of activity, the PBO has established systematic contacts with the Parliament.⁹⁰ The Office has regularly prepared reports and analyses upon requests of parliamentary committees and the President has been invited to attend committee meetings or to participate in parliamentary hearings almost on a monthly basis, according to a power conferred to the Parliament by Law number 243/2012 (Article 18.2). Perhaps one of the most important powers the Italian IFI has, which the Parliament has exploited to a limited extent, lies in the prerogative to publish *ex officio* independent information that can become a benchmark against governmental information through the “comply or explain” procedure. If the PBO publishes information and data—contained in either reports, thematic focus, or notes—that are significantly divergent from those of the Government, the executive must appear before one of the committees competent on finance, upon request by one third of its members.⁹¹ Under these circumstances, the Government must explain in Parliament why it confirms its own evaluation or, rather, decides to endorse that of the PBO. For example, on the Document of Economics and Finance (DEF) 2015, the main fiscal and macroeconomic planning document including the national stability program—proposed by the Government and approved by the Parliament—as

⁸⁸Andrea Razza, *L'Ufficio parlamentare di bilancio nella nuova governance italiana della finanza pubblica*, 4 RIVISTA GIURIDICA DEL MEZZOGIORNO 893 (2013) and Elena Griglio, *Il protocollo sull'Ufficio parlamentare di bilancio: una “fuga” dai regolamenti parlamentari?*, 1 QUADERNI COSTITUZIONALI 116 (2014).

⁸⁹And one of the three members resigned on September 1, 2021 as a consequence of a new recent governmental appointment to coordinate the implementation of the national recovery and resilience plan. The appointment of the new members was confirmed by the Decree of January 18, 2022, published on the GAZZETTA UFFICIALE DELLA REPUBBLICA ITALIANA [G.U.] [OFFICIAL JOURNAL OF ITALY], Jan. 20, 2022, no. 15.

⁹⁰Lucio Landi, *L'ufficio parlamentare di bilancio nell'ordinamento italiano*, 2 RIVISTA TRIMESTRALE DI DIRITTO DELL'ECONOMIA 177 (2015).

⁹¹L. n. 243/2012, *supra* note 64, at art. 18.3,

subsequently updated in September 2015, the PBO expressed some concerns as for the too optimistic macroeconomic trends depicted by the Government. On that occasion, the doubts expressed by the PBO did not trigger the use of the “comply or explain” procedure as instead, happened once before, in 2016, on the validation of the macroeconomic forecasts provided in the draft budgetary plan for 2017, which was granted with a series of observations.⁹²

By contrast, when, in 2018, the PBO did not validate the macroeconomic and fiscal forecast presented by the Italian Government appointed in June that year—alongside the draft budgetary plan for 2019—due to the patent deviation from the medium-term objective and from the macroeconomic and fiscal targets agreed by the previous Government with the EU institutions, the “comply or explain” procedure was not triggered by parliamentary minorities. This not with standing, also taking stock of the patent PBO’s rejection of the fiscal and macroeconomic policy promoted by the first Conte Government and the negative opinion of the European Commission on the draft budgetary plan citing the IFI,⁹³ the executive was subsequently forced to submit a new version of the budget, also in line with the PBO’s concerns.⁹⁴

For different reasons, the relationship of the Spanish AIREF with both the Parliament and the Government has never been easy. The creation of a new fiscal council within the Ministry of the Budget and of Public Administration at the time of the approval of the organic law was strongly contested by the socialist party, by the United Left, by *Convergència i Unió*, by the Basque National Party, and by the Mixed Group for two main reasons. First, they advocated for keeping just one fiscal council “incapsulated” in the Parliament, though being functionally independent, and to have a fiscal council designed as a collegial body rather than a monocratic body like the AIREF.⁹⁵

Second, beyond the appointment process of the President, the AIREF and the Spanish Parliament lacks any permanent or systematic channel of communication. To put it better, the Parliament does not enjoy any “special relationship” with the AIREF compared to other public administrations. The AIREF’s President has to appear before the competent committees of the Congress and of the Senate at least once a year, and so the Presidents did. There are no further obligations the President has to comply with in relation to the Parliament and despite the request to organize oral hearings of the President in committees filed by representatives of the opposition, no such hearings have been organized. Nonetheless, the Parliament benefits from the online publication on the AIREF’s website of reports and opinions it regularly delivers based on its institutional duties under organic Law number 6/2013, and these materials provide useful background information for the budget scrutiny and oversight of the two Chambers.

Also, the relationship between the AIREF and the Government has been troublesome. Indeed, organic Law number 6/2013 establishes that the relevant information of the public administrations to be delivered to the AIREF must be transmitted “preferably” through the Ministry of the Budget, rather than by the competent authority, although the AIREF can ask for additional information directly from the administration in question. An Order of the Minister of the Budget of 2015 implementing this provision envisaged for this Ministry the role of “filter” between the relevant administration and the AIREF in the transmission of the requested information.⁹⁶ According to

⁹²Andrea Vernata, *L’Ufficio parlamentare di bilancio: tra virtualità ausiliarie e soggettività eurounitaria*, 2 DIRITTO PUBBLICO 502 (2017); Ylenia Guerra, *L’ufficio parlamentare di bilancio nel contesto costituzionale del governo dei numeri*, in GOVERNING WITH NUMBERS: ECONOMIC INDICATORS AND THE BUDGET DECISION IN THE CONSTITUTIONAL STATE 311 (Corrado Caruso & Marta Morvillo eds., 2020).

⁹³Guido Rivosecchi, *Manovra di bilancio 2019: la rientrata procedura di infrazione per debito eccessivo*, 1 QUADERNI COSTITUZIONALI 155 (2019).

⁹⁴See *Commission Opinion on the Draft Budgetary Plan of Italy and Requesting Italy to Submit a Revised Draft Budgetary Plan*, C(2018) 7510 final.

⁹⁵Fromage, *supra* note 6.

⁹⁶Orden HAP/1287/2015, de 23 de junio, por la que se determinan la información y procedimientos de remisión que el Ministerio de Hacienda y Administraciones Públicas tendrá con carácter permanente a disposición de la Autoridad Independiente de Responsabilidad Fiscal, Boletín Oficial del Estado No. 156, July 1, 2015.

the then AIREF's President José Luis Escrivá, this undermined the autonomy of the fiscal council and thus, on behalf of the authority, he decided to sue the Government before courts, in particular before the *Audiencia Nacional*, claiming that the right to access information had been impaired. The controversy was, in the end, settled by ensuring that the Ministry of the Budget would have simply transmitted to the AIREF the information received by the other administration without any limitation or manipulation of it.

This fight between the AIREF and the Government shows that the Spanish fiscal council has struggled for its independence from the executive and eventually succeeded by achieving a compromise solution. The governmental attempt to move the IFI close to the “agent” model has been defeated by the AIREF. However, given the way the AIREF is financed and staffed, it has not been easy to fulfill on time the many tasks it has been assigned. Also, the relationship with the Parliament remains rather weak. Although, thanks to the AIREF's activity, the independent information flow towards the Parliament, and the public in budgetary matters has increased as well as the AIREF's visibility in the media,⁹⁷ there are no signs of a systematic cooperation with the legislature. For instance, in case the recommendations issued by AIREF are disregarded by the administration to which they are addressed, the administration must give reasons for its conduct publicly, but the Parliament is not involved in this “comply or explain” procedure.

Maybe to supplement its narrow mandate and the lack of a codified “comply or explain” procedure in which the Parliament can participate, the French *Haut Conseil* and the legislature have established a stable and fruitful relationship. The cooperation between the French IFI and the Parliament has been particularly strong from the beginning, perhaps also because the Council's President—from 2013 to February 2020—, Didier Migaud, used to be the chairman of the National Assembly's Finance Committee.⁹⁸ Article 20 of the organic law, according to which the President of the Council is heard at any time upon request by the National Assembly and the Senate's committees, has allowed the Parliament to rely on the insights and the information provided by the *Haut Conseil* on a systematic basis. More than 30 parliamentary hearings of the Council's Presidents have been organized by the finance committees of the two Houses to date—on average from four to five per year. This is exactly the opposite of what was described in the Spanish case.

On some occasions, the President of the *Haut Conseil* has complained about the very short deadline the organic law fixes for the issuing of the fiscal council's opinions, which is just one week.⁹⁹ This element, in addition to the fact that the IFI is often asked to deliver more than one opinion at the same time and that the Government transmits relevant information and data at the very last moment without delivering beforehand preliminary information on what are increasingly complex documents and bills, makes the rhythm of work of the *Haut Conseil* almost unsustainable. The timeframe of the council's activity remains a critical issue, that only in part depends on the Government's willingness to cooperate.

That said, the *Haut Conseil's* opinions do not tend to be particularly deferential toward the Government, whose selected figures and forecasts have been recurrently considered as “too optimistic” or “not completely reliable,” confirming the level of independence this institution has from the executive and paving the way for their use in court against the Government.¹⁰⁰

Perhaps, in a comparative perspective, the most influential IFI amongst those examined here, for the ability to affect parliamentary and public debates and, as a consequence, the activities of the

⁹⁷Grégory Claeys, *How Visible Are Independent Fiscal Institutions in Public Debate?*, BRUEGEL BLOG ONLINE (Apr. 3, 2019), <https://www.bruegel.org/2019/04/how-visible-are-independent-fiscal-institutions-in-public-debate/> (stating that the Spanish AIREF became the second most cited IFIs in the national media after the UK's Office for Budget Responsibility in the period 2012–2018 with an average of 3459 mentions per year).

⁹⁸Fasone & Fromage, *supra* note 6, at 172. The current President of the *Haut Conseil* is Pierre Moscovici, former European Commissioner for economic and financial affairs, taxation, and customs (2014–2019).

⁹⁹Fromage, *supra* note 6, at 135.

¹⁰⁰See HAUT CONSEIL DES FINANCES PUBLIQUES, Opinion No. HCFP-2020-2 on the Stability Program for 2020 (Apr. 14, 2020).

Parliament and the Government, is the Dutch CPB. As anticipated, this fiscal council assesses the economic effects of elections platforms of political parties and of coalition agreements. Since 1986, political parties have submitted on a voluntary basis their electoral manifestos to the CPB for its evaluation two months before the elections. The neutral assessment of the CPB, made publicly available, orients the electoral campaign and, probably, the voters' behavior in a manner that overall is seen as instrumental to the better performance of the Dutch democratic system: Voters who are better informed are deemed to make more considered political choices. A study has recently revealed that two-thirds of the electorate considers the CPB calculations important, while twenty percent of the respondents to the survey affirm that these calculations helped them to cast their ballots.¹⁰¹ The number of political parties sending their election platforms to the CPB for an assessment has substantially increased from three in 1986 to eleven in the elections of 2017, a sign the political parties do trust the CPB.¹⁰² After the election, as soon as a coalition is formed, the CPB assesses the economic implications of the coalition agreement, which normally triggers an intense debate in Parliament. The activity of the CPB to set up the new medium-term fiscal framework runs in parallel to the electoral cycle. One year before the elections the CPB publishes the estimates of the Dutch economy and public finance in the medium and long-term, assuming no changes in policy, and then publishes an update five months before the elections. Some months after the elections and the appointment of the new Government, the executive makes the new medium-term framework public based on the revised estimates of the CPB. This continuous monitoring also strengthens the ability of the Parliament to control the deployment of the electoral process and to check the capacity of the Government to deliver. There are, nevertheless, critics of the conferral of such powers to a fiscal council as it might risk bringing the CPB into the political struggle. However, this has not happened to date in the Netherlands, thanks to the reputation of the CPB and to the clear demarcation of its role compared to those of political parties in the electoral arena.¹⁰³

Moreover, since 1990, the CPB has investigated the efficiency and the effectiveness of the public expenditures and of the institutional choices behind them, thus putting in place a sort of permanent process of spending review and offering cost-benefit analyses of policy proposals.¹⁰⁴ For example, major studies published by the CPB in the 1990s have dealt with social security arrangements, and the productivity and sustainability of the relevant expenditures. Those studies enhance the fact-finding and scrutiny activity of the Parliament although there is no structural relationship in place between the Chambers and the CPB, not even in the appointment.

The Parliament regularly invites the CPB's members of the Board of Directors for hearings. There are also deadlines by which the CPB delivers important documents to the Parliament. For example, in June every year the Parliament is informed of the budget plans for the next few years and of the execution of the current budget during the first quarter of the year. In September, the state budget is submitted to the Parliament together with the macroeconomic outlook prepared by the CPB and the debate on the budget is also affected, as said, by the CPB's analyses published on the opposition parties' budgetary proposals.

All IFIs analyzed, despite the diversity of powers and of organizational arrangements, appear to have the potential to counter the problem of information asymmetry vis-à-vis the parliament and the public. They have exercised their authority, more or less convincingly, to strengthen governmental accountability, even where no structured relationship with the parliament were envisaged, and have resisted the threat of executive's interference with their own activities. The IFI that appears most apt to "orchestrate" the public discussion on budgetary and fiscal

¹⁰¹Janis Platais, Dace Kalsone & Sander van Veldhuizen, *Costing Election Manifestos: Experience from EU IFIs*, in INDEPENDENT FISCAL INSTITUTIONS IN THE EU FISCAL FRAMEWORK 82, 99 (European Fiscal Board ed., 2019).

¹⁰²*Id.* at 85.

¹⁰³Frits Bos & Coen Teulings, *Netherlands: Fostering Consensus on Fiscal Policy*, in RESTORING PUBLIC DEBT SUSTAINABILITY, *supra* note 5, at 121.

¹⁰⁴*Id.* at 100.

policies is the Dutch CPB, maybe also taking advantage of decades of activities and of the special tasks assigned in relation to elections, while the “comply or explain” procedure has not proved to be particularly effective and widely employed.

V. Constitutional Adjudication

A last issue to consider is whether the reports and opinions of IFIs provide the ground for judicial review, a prospective sign of the fiscal councils’ influence in the constitutional system. In other words, whether they are used, in particular in constitutional adjudication, by the parties and by constitutional judges themselves. In the Netherlands there is no—*ex post*—constitutional review of legislation as such¹⁰⁵ and the Council of State, though in different divisions, acts both as the Dutch IFI under EU law and as advisory body also assessing *ex ante* the compliance of bills with the Constitution.

In Italy and in Spain it is extremely rare that the parties in constitutional proceedings use the fiscal council’s opinions to advance their arguments and the Spanish Constitutional Tribunal has never expressly cited evidences produced by IFIs in the constitutional case law. Since the Italian PBO has been established, the idea to allow the Constitutional Court to make use of the IFI’s expertise to assess the fiscal and economic implications of its own rulings, and of the referendum’s proposals whose admissibility is checked by the Court has been put forward—under the form of ordinary and constitutional amendment bills—on a couple of occasions.¹⁰⁶ However, no further action has been taken and these proposals have never been approved. This notwithstanding, recently, the Italian Constitutional Court issued an unprecedented interim decision, order number 131/2021, asking the President of the PBO to report to the Court, within three months, on the fiscal resources available for the residences for the implementation of security measures (REMS),¹⁰⁷ which came under review for the alleged violation of the competences of the Minister of Justice in their management, of the domain reserved to the law in criminal matters, and of the prohibition of inhuman and degrading treatment. This is the first, and so far, the only, time the Constitutional Court has used its fact-finding powers to trigger the intervention of the PBO.¹⁰⁸

Unlike the other countries, in France the *Conseil Constitutionnel* regularly refers to the *Haut Conseil*’s opinions, as they form, amongst other things, the ground for the referrals of fiscal legislation to the Court by parliamentary minorities. In a judgment of 2012, the French *Conseil Constitutionnel*, deciding on the *Loi organique relative à la programmation et à la gouvernance des finances publiques* that also set up the *Haut Conseil*, clearly established a connection between the enforcement of the principle of sincerity of the budget, recognized in French constitutional case law for years, and the new fiscal council:

*Considérant que l'article 6 de la loi organique énonce le principe de sincérité des lois de programmation des finances publiques, en précisant: «Sa sincérité s'apprécie compte tenu des informations disponibles et des prévisions qui peuvent raisonnablement en découler»; qu'il est notamment prévu à l'article 13 que le Haut Conseil des finances publiques rend un avis sur les prévisions macroéconomiques sur lesquelles repose le projet de loi de programmation des finances publiques; que la sincérité de la loi de programmation devra être appréciée notamment en prenant en compte cet avis.*¹⁰⁹

¹⁰⁵See Martje De Visser, *CONSTITUTIONAL REVIEW IN EUROPE: A COMPARATIVE ANALYSIS* (Hart Publishing, 2014).

¹⁰⁶See respectively, A.S. 1952, *Modifiche alla l. n. 87/1953*, XVII legislatura, Senate of the Italian Republic, XVII parliamentary term, June 9, 2015; A.C. 1147, *Modifiche agli articoli 71 e 75 della Costituzione, in materia di iniziativa legislativa popolare e di referendum*, Italian Chamber of Deputies, XVIII parliamentary term, Dec. 13, 2018.

¹⁰⁷Health residences hosting the authors of criminal offences affected by mental diseases.

¹⁰⁸Art. 12, *Norme integrative per i giudizi davanti alla Corte costituzionale* of 16 March 1956, as subsequently modified.

¹⁰⁹Conseil Constitutionnel [CC] [Constitutional Court] decision No. 2012-658 DC, Dec. 13, 2012 (Fr.).

Since then, according to Article 61 of the French Constitution, a series of cases were brought before the *Conseil Constitutionnel* by parliamentary minorities also on these grounds, although they have never succeeded.¹¹⁰ For instance, in a *saisine parlementaire* against the Social Security Financing Act for 2014, law number 2013-1203, a minority of senators and of MPs challenged the constitutionality of that law taking into account that, according to the opinion of the *Haut Conseil*, the macroeconomic forecasts on which the Social Security Financing Act was based were not sufficiently reliable and, therefore, the principle of sincerity had been violated.¹¹¹ This case could have been an opportunity for the Parliament, through its parliamentary minorities, to use independent information to scrutinize closely the government's fiscal policy, and, if necessary, to challenge its effectiveness. The Constitutional Council, however, dismissed the constitutional challenge. It held that no evidence supported the hypothesis that the Social Security Financing Act would have impaired the achievement of the national objective on the expenditure for health care insurance and the government, during the legislative process, had tabled an amendment—which was adopted—aimed at reducing the negative impact on public expenditures. In stating this, the Constitutional Council provided a narrow reading of the *Haut Conseil's* influence on the decisions of the government and of the impact of the fiscal council's opinions as a standard for the constitutional review of budget and financing acts. Nevertheless, referring to the *Haut Conseil's* opinions both in the parliamentary procedures and in the constitutional jurisprudence has enhanced the visibility and the reputation of this institution in the public debate.

While France is the only country amongst the case studies selected where, to date, citations of the fiscal council's opinions can be retrieved in constitutional judgments, it cannot be excluded that such a development is possible in Spain—where parliamentary minorities are also entitled to bring cases to the Constitutional Tribunal—or in Italy, in the near future, as a consequence of the growing IFIs' influence in the national debate and of the turning point of Order No. 131/2021.

E. Concluding Reflections

The comparative analysis conducted on very different types of “orchestrator” fiscal councils shows that none of the IFIs examined undermine parliamentary accountability, as could have happened in the event they were given binding powers, veto powers, or rule-making powers as “trustees” to directly interfere with budgetary procedures.¹¹² Even in the case of the Dutch CPB, empowered to produce the macroeconomic forecasts on which the entire budget process is constructed, this fiscal council has enhanced the ability of opposition parties to scrutinize the budgetary policy of the executive. Nor does it appear that these new or reformed institutions have worked “in alliance” with the government, as their “agents” to sideline the parliament. Rather, in the four cases, though to different degrees, the fiscal councils have improved the quality and the quantity of the fiscal and macroeconomic information the parliament can use to control the government and that can form the ground to challenge the budgetary activity of the government, when it is not in line with the objectives set and with the economic projections. In particular, in Spain and in Italy, over the last few years, tensions between the fiscal council and the government have emerged.

The fiscal council's physical proximity with the Parliament is not necessarily a pre-condition to build a cooperative relationship, even though legislative provisions enabling the parliament to ask the IFI for data and information or to invite the fiscal council's members for hearings certainly help the legislature to re-balance the information asymmetry with the government that typically

¹¹⁰See, e.g., Conseil Constitutionnel [CC] [Constitutional Court] decision No. 2013-682 DC, Dec. 19, 2013 (Fr.); Conseil Constitutionnel [CC] [Constitutional Court] decision No. 2014-698 DC, Aug. 6, 2014; Conseil Constitutionnel [CC] [Constitutional Court] decision No. 2014-699 DC, Aug. 6, 2014; Conseil Constitutionnel [CC] [Constitutional Court] decision No. 2014-707 DC, Dec. 29, 2014; Conseil Constitutionnel [CC] [Constitutional Court] decision No. 2017-755 DC, Nov. 29, 2017.

¹¹¹Decision No. 2013-682 DC, *supra*, note 109.

¹¹²Xavier Debrun, David Hauner, & Manmohan S. Kumar, *Independent Fiscal Agencies*, 23 J. ECON. SURV. 44 (2009); Tesche, *supra* note 13.

features budgetary matters. The opinions of the fiscal councils in France, for instance, have also paved the way to justify constitutional challenges against budget acts or acts having fiscal implications supported by the government brought before Constitutional Courts by parliamentary minorities, even though they cannot constitute a ground for reviewing the contested measures.

In the case studies selected, the analysis of the five main factors that, according to the guiding hypothesis, can deem to affect the influence of IFIs on parliamentary accountability—for example their institutional position, the capacity to act independently, the mandate conferred, the powers exercised in budgetary decisions toward the parliament and the government, and the extent to which fiscal councils' opinions are taken into account in constitutional adjudication—reveals that overall fiscal councils strengthen parliamentary accountability. That said, especially for the newly-created fiscal councils, in France, Italy, and Spain there are weaknesses to address. In France, in particular, the minimal powers conferred and the ability to deal with tight time constraints to deliver the opinions lacking any preliminary information of the government. In Italy, the “comply or explain” procedure in case of deviation of the government from the PBO's opinions needs to be fine-tuned as it has hardly been practiced. In Spain, the number of tasks assigned to the AIReF, also in relation to local and regional autonomies, compared to the staff and the resources available, is problematic. The cooperation with the parliament could be strengthened—the only way seems to be by amending the organic law, though—, while the struggle with the government on the access to information has settled down, addressing the concerns of the AIReF.

As the Dutch experience shows, however, building up a solid reputation, visibility and trust in the relations with the budgetary authorities, political parties and the public opinion needs time, probably decades. The design and the powers of fiscal councils have to be adapted over time looking at the peculiar features of the institutional and economic system. There is no one-size-fits-all solution when it comes to IFIs. Even in the case such as the Netherlands, which used to have a fiscal council in operation for more than seventy years, recent changes have been introduced setting up a new IFI to strengthen the monitoring of numerical fiscal rules.

Although further research is needed to follow the process of “institutionalization” of the new IFIs, especially for what concerns their mutual relationships, the evidence collected through this comparative investigation suggests that of the key-functions fiscal councils are expected to fulfil, to re-balance the information asymmetry on the budgetary and fiscal choices has a remarkable constitutional potential—whose first signals can be detected in the enhanced access parliaments have now to non-partisan information used to scrutinize the executive—and will probably be fully deployed in the coming years. At the same time, contrasting the information asymmetry of the parliament and of the public vis-à-vis budgetary decisions may also support IFIs to exercise their other paramount function, notably to counter the deficit bias of executives that will perceive the pressure of a better-informed public opinion and parliamentary debate about the medium and long-term effects of different fiscal policy options.