



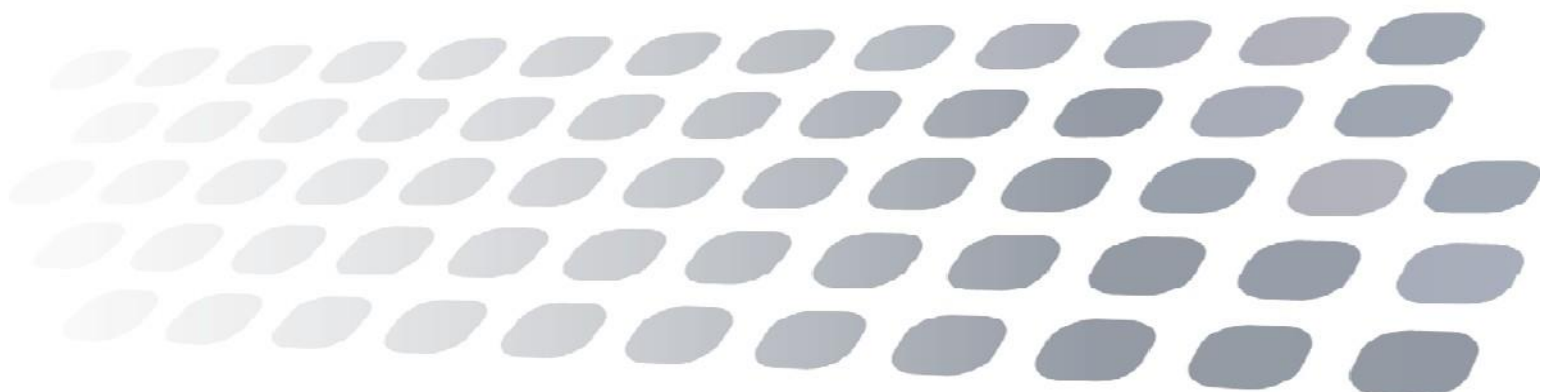
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CENTRO STUDI SUL FEDERALISMO

PERSPECTIVES ON FEDERALISM



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# The past, present and future of the EU's federal experience

by

Francisco Pereira Coutinho and Martinho Lucas Pires\*

Perspectives on Federalism, Vol. 10, issue 1, 2018



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Ed - I



## Abstract

In 2017 we celebrated the 60<sup>th</sup> anniversary of the Treaty of Rome and the 25<sup>th</sup> anniversary of the Treaty of Maastricht. The commemoration of these historic events was the perfect excuse for a critical and renewed discussion of European integration. It was also an opportunity for discussing the EU through the lens of “federalism”, i.e. to look at it from the perspective of federal theory and / or through its substantive and formal dimension. This issue of *Perspectives on Federalism* includes papers presented in conferences organized at Warsaw University in June 2016 and at Lisbon Nova Law School on May 2017 under the Jean Monnet Project “More EU - More Europe to Overcome the Crisis”. The articles discuss, either from a more general or from a more specific standpoint, within a variety of subjects, some of the federal features of the EU.

## Key-words

European integration, Treaty of Rome, Treaty of Maastricht, federalism



The EU has been under severe strain over the last decade. The financial crisis that started in 2008, the war in Syria, and unprecedented waves of refugees that fled to Europe, as well as challenges to the rule of law in certain European States, and most recently Brexit, have all defied the ability of the EU to adapt and address problems of and in the Member States both effectively and fairly. The idea that the EU has been undergoing a “constitutional mutation”<sup>I</sup> captures the importance of the moment well.

The issues that the EU currently faces are problems on a grand scale that are directly connected with the question of competences. They concern the nature, scope, distribution and justification of competences between the EU and the Member States within the European legal order: namely what kind of competence, how many competences, competences to who, and why. For example, in the “reformed” Economic and Monetary Union, is there too much centralization of budget control vis-à-vis the sovereign autonomy of Member States? Should there be a better distribution and burden-sharing of powers among States in the area of Freedom, Security and Justice to deal with increasing levels of migration? How should a European army be organized and financed? Or, in the case of other dimensions of the Economic and Monetary Union, where should the locus of the regulatory financial power lay — with the EU institutions or with Member States, or even with both?

Issues of competences, notably their distribution and management within supranational settlements, have long been discussed in academia within the conceptual framework of federalism. The EU itself has been characterized as 'a developed form of international organization which displays characteristics of an embryonic federation'.<sup>II</sup> This theoretical approach is very controversial; however, federalism is a concept that is part, for better or for worse, of the EU’s normative history and that is firmly connected to its past, present, and future.<sup>III</sup>

In 2017 we celebrated the 60<sup>th</sup> anniversary of the Treaty of Rome and the 25<sup>th</sup> anniversary of the Treaty of Maastricht. The commemoration of these historic events was the perfect excuse for a critical and renewed discussion of European integration. It was also an opportunity for discussing the EU through the lens of “federalism”, i.e. to look at it from the perspective of federal theory and / or through its substantive and formal dimension.



This issue of *Perspectives on Federalism* includes papers presented in conferences organized at Warsaw University in June 2016 and at Lisbon Nova Law School on May 2017 under the Jean Monnet Project “More EU - More Europe to Overcome the Crisis”. The articles discuss, either from a more general or from a more specific standpoint, within a variety of subjects, some of the federal features of the EU: i) Samo Bardutsky critically engages public discussions and manifestos on the future of Europe on differentiated integration from the point of view of federal theory; ii) Tommaso Visone presents a historic research of the anti-federalist tensions at the heart of the Union to reveal a more complex scenario than what is currently perceived; iii) Matteo Bonelli analyses federal interactions and challenges between the EU and its Member States regarding the application of rule of law principles; iv) Rui Tavares Lanceiro draws a comparison between the EU and other federal systems, such as the United States and Germany, regarding the principle of sincere cooperation between national administrations when applying EU law; v) Sérgio Coimbra Henriques digs into the challenges that are ahead for the implementation of the federal capital markets framework; vi) Juliana Almeida and Guilherme Torrão Costa look at federal tensions and manifestations, from a historical and critical perspective, in European patent law; vii) Mariana Pinto Ramos discusses the difficulties of balancing different and conflicting interests between the Member States and the EU within the process of the European Social Dialogue; viii) Jacek Czaputowicz and Marcin Kleinowski look at how the voting system in the EU Council compares and differs from the voting systems in legislative bodies of other States; ix) Kamil Lawniczak explores issues of socialisation and legitimacy intermediation in the Council.

The articles present a diverse, thorough and profound perspective of federalism in the EU in several of its manifestations, and engage with the key question that the conferences set out to discuss: where are competences in the EU heading?

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<sup>1</sup> See Menéndez 2013 and Martinico 2016.

<sup>ii</sup> Wyatt 2006: 132. See also Stein 1981 and Weiler 2001.

<sup>iii</sup> See for example Schütze 2010 and Walker 2016.



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# Differentiated integration contingent on objective ability: a federalist critique

by

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## Abstract

This article is inspired by the 2017 discussions on the future of Europe (in particular some of the ideas debated in the White Paper on the Future of Europe, published by the European Commission) and the events that took place in the crises and post-crises period (aftermath of the financial crisis, ongoing refugee crisis and the Brexit shock). It is particularly interested in the scenario of differentiated integration. In this regard, it observes how in the aftermath of the crises, there was a shift in the rationale of differentiated integration with objective (in)ability of the states taking a prominent role. It presents a federalist critique of this development, drawing on the work of Daniel Elazar, discussing the concepts of non-centralization, federal process and federal covenant in the context of the 2017 discussions in the EU.

## Key-words

differentiated integration, crisis, non-centralization, federal covenant, European Union, White Paper on the Future of Europe, weakness, objective inability



## 1. Introduction

This article observes some of the discussions on the direction that the European Union is going to take after it has lived through some of its recent crises (Eurozone crisis, refugee crisis and Brexit). It focuses on proposals that the Union take the path of differentiated integration: different Member States can deepen their bonds at different intensities. The article also observes that there is a developing trend in the European Union to make the participation of a Member State in the projects of differentiated integration contingent upon the State's objective ability.

This trend is problematic. The main reason is that it threatens to reinforce the centre-periphery divide in the European Union. The article exposes this trend to a federalist critique. The critique is based on the work of Daniel Elazar (in particular his seminal book *Exploring Federalism*). The starting point of the critique is the central tenet of Elazar's understanding of federalism, the idea of non-centralization, defined in part as the guarantee that the authority to participate in exercising powers will not be taken away from the different sites of power without their consent. When an objective inability of a participant in a federal system threatens to remove from them altogether the chance to participate in the common project(s), this represents an even graver negation of the idea of non-centralization.

The claim in this article is that making participation in projects of differentiated integration contingent upon objective ability would run counter to Elazar's demand for a sense of partnership, that ultimately protects the fundamental integrity of the federal partners. Building on Elazar's description of federalism as capable of reconciling human capacity and human weakness, the claim here is federal process equally demands that partners do not deny each other opportunity to participate based on failure and limited resources.

In its concluding part, the article explores the idea that there is a moral commitment between the partners in the project of European integration that should – on the one hand – serve as an argument for them to maintain the sense of partnership within the federal project. On the other hand, the adherence to this moral commitment should reassure *all* the partners (including the stronger, abler ones) that the balance between justice and power within the federal project will be maintained. In discussing this moral commitment, the article



makes use of Elazar's concept of the federal covenant and proposes its own understanding of what Europe's federal covenant ought to be.

## 2. "Europe at a crossroads"

Context is of paramount importance to this account; the atmosphere in which these arguments are written is one somewhere between crisis and "post-crisis". Or rather, crises, and "post-crises". First, there is the financial and economic crisis and post-crisis. For the majority of the Eurozone countries, the sovereign debt crisis has ended: Portugal left the economic adjustment programme in 2014, leaving Greece as the only eurozone country still in an adjustment programme. However, in the aftermath of the years of unruly markets and austerity measures, a discussion is now starting on the institutional reform of the eurozone. 2015 and 2016 saw the arrival of a large number of persons (mostly from war-torn Syria, but also Afghanistan and other Asian and African countries) to Europe. The different reactions and rhetoric of the various countries – on the one hand those that were the final destinations of the majority of the arriving refugees, on the other hand those that were predominantly transit countries or that were unaffected by this particular arrival – ought to trigger a serious discussion on solidarity, trust, mutual recognition and division of competences in the EU. However, it was the third crisis that served as the most direct trigger for the wider discussion on the future of the EU: the unprecedented decision of a Member State to leave the EU, made by the United Kingdom in 2016-2017.<sup>1</sup>

It is an atmosphere in which, for the majority of Europeans, there is a tangible presentiment that change is imminent in the European Union, in the way it functions and it is structured. Many Europeans also harbour the emotion that such a change is indeed due at this point in time. Perhaps the most forceful indication of these sentiments was the apprehensive "electoral season" of 2017. Europeans waited, although most of them as spectators, but closely and fearfully, on the results of the presidential elections in Austria and France and the parliamentary election in the Netherlands. Fear that radical right-wing parties, fuelled with the result of the Brexit referendum, calling for more "protection" against foreigners, loosening or breaking ties with the European Union, and reliance on forms of direct democracy, might take over the government in important countries in the centre of



Europe, leading to a likely break-up of the European union, was real. As was the relief when the populist projects failed for the time being.<sup>II</sup>

### 3. The White Paper on the Future of Europe

The acknowledgment of the above described sentiments on imminent change, spread widely among the Europeans, that can be considered to have come from the “highest” level as well as in the most formal way is the “White Paper on the Future of Europe”, published by the European Commission on 1 March 2017.<sup>III</sup> The tone of the introduction to the White Paper is symptomatic of what we have referred to as the atmosphere of crises and post-crises:

... many Europeans consider the Union as either too distant or too interfering in their day-to-day lives. Others question its added-value and ask how Europe improves their standard of living. And for too many, the EU fell short of their expectations as it struggled with its worst financial, economic and social crisis in post-war history. // Europe’s challenges show no sign of abating. Our economy is recovering from the global financial crisis but this is still not felt evenly enough. Parts of our neighbourhood are destabilised, resulting in the largest refugee crisis since the Second World War. Terrorist attacks have struck at the heart of our cities. New global powers are emerging as old ones face new realities. And last year, one of our Member States voted to leave the Union (White Paper 2017:6).

The White Paper does not purport to provide definite answers, but rather to present “a range of scenarios for how Europe could evolve by 2025.” (White Paper 2017:7). In laying out five scenarios, the document is clear that the idea is not to offer blueprints, but illustrative glimpses into EU’s future. Also, the expectation is that the final outcome of the debate in the 27 post-Brexit Member States will be a combination of features from the five scenarios. (White Paper 2017:15). It is quite difficult to speculate in what way the scenarios would be pieced together. Some of them are mutually exclusive and in that sense comparable to different, almost fully opposite directions that simply cannot be taken at the same time. A clear example: what features from Scenarios 2 (“Nothing but the Single Market”) and 4 (“Doing Less More Efficiently”) could possibly be combined into Scenario 5 (“Doing Much More Together”)?<sup>IV</sup>



This is not a claim that the five scenarios of the Commission's White Paper are all mutually exclusive. It is merely a remark that what is on offer in the document is not as wide a selection as claimed in the document itself.<sup>V</sup> Many of the directions discussed can be seen as lacking in plausibility or feasibility.<sup>VI</sup> What does attract the attention of the observer, however, is the Scenario that would embrace and deepen Europe's penchant for differentiated integration.

#### 4. "Those Who *Want More Do More*"

Under Scenario 3, "new groups of Member States agree on specific legal and budgetary arrangements to deepen their cooperation in chosen domains". Adding to such existing arrangements as currency sharing and the Schengen area, examples of potential future "coalitions of the willing" (White Paper 2017:20) as the Commission refers to the smaller groups of Member States, include co-operation in matters of defence or deeper integration in the field of taxation (White Paper 2017:20).

Not only does the Commission's starting point for a discussion include a scenario that envisages a multi-speed Europe, it also seems to be one of the few practically and politically feasible options in the document. Armin Cuyver (2017) is right that the White Paper puts "the ball firmly in the court of the Member States". Many of the Member States in that very court might find it politically more opportune to open the door widely for differentiated integration rather than commit, whole-heartedly, to the "federal scenario", as Avbelj (2017:16) correctly described the "Doing Much More Together" option in Scenario 5.

Differentiated integration may hold considerable appeal to politicians in Member States. But how are we to evaluate the prominence of this solution among the potential paths the Union might go down? In order to do so, an account of the logic/rationale that differentiated integration follows must be developed. The account in this article is based on the established understanding of the rationale of differentiated integration. However, as was mentioned in the beginning of this article, the context in which the proposals for differentiated integration are made, is essential for the understanding of the logic and rationale as well. Hence, the claim made in the continuation is that the rationale has changed in the atmosphere of crises and post-crises, and needs to be understood slightly differently than in times of normalcy.



In laying down an established, standard explanation of the rationale, we rely here primarily on the lexicon developed by the political scientists Frank Schimmelfennig and Thomas Winzen (2016:3). Schimmelfennig and Winzen first identify a situation where differentiated integration takes into account efficiency and distributional concerns. They refer to this situation as “institutional differentiation”, with its origins in the processes of enlargement of the EU. Given that old member states may be concerned with competition coming from new member states, or, with the ability of newcomers to “meet the policy requirements”. However, the objective pursued by institutional differentiation is not only ‘protecting’ old member states from newcomers, but also extending to new member states “more time to adapt to EU rules and market pressures,” for which exceptions are granted. In his account of the different understandings of differentiated integration, built around three ideal types (“multiple speeds”, “federal core Europe” and “flexibility à la carte”) Daniel Thym (2017:29) similarly speaks of the “multiple speeds” ideal type. Differentiated integration of multiple speeds is where “economic discrepancies”, rather than political willingness, guide the distinction between Member States. Thym’s (2017:31) concrete example is the creation of the monetary union, which took place gradually, with new members joining once they have fulfilled the convergence criteria.

The other limb of the rationale for differentiated integration is what Schimmelfennig and Winzen (2016:3) refer to as “constitutional differentiation”. The motivation that drives “constitutional differentiation”, are the “concerns about national sovereignty and identity.” Constitutional differentiation is understood by to be “driven by comparatively Euro-sceptic countries that are opposed ideologically, or fear popular resistance, to supranational centralization.” Indeed, this second observed motivation seems to closely follow the logic of the Commission in describing the scenario of “those who *want* more do more”. The Commission does not mention the ability or inability of the Member States to participate in a vehicle of differentiated integration. The emphasis – both in the model of constitutional differentiation, and in the Commission’s Scenario No. 4, is on the political will of Member States, on their reluctance to relinquish more powers, rather than their capacities.

Differentiated integration based on rationale of the *will* can of course be seen from two different angles: for unwilling Member States, institutional differentiation is about “orientating European integration on national interest” – this is what Thym (2017:34) refers to as “flexibility à la carte”. Willing partners, on the other hand, see differentiated integration



as a road, albeit a winding one, towards a “*finalité fédérale*”, which is what Thym (2017:32) described as the “federal core Europe” ideal type.

Schimmelfenning and Winzen (2017:4) also contrast the temporary nature of institutional differentiation (e.g. adjustment periods of several years after the accession) with the relatively permanent character of constitutional differentiation. Similarly, Thym (2017:30) recounts how politicians, when arguing for a “multiple speed” approach for monetary union, emphasised that there was no permanent decoupling taking place, but rather that it was only the timescales that were different. The emphasis on the temporary nature of institutional differentiation speaks in favour of our claim that differentiated integration in times of normalcy is only exceptionally motivated on the (in)ability of the (non-)participating Member States.

## 5. “Those Who (*Objectively*) Can Do More”

The situation is different in an atmosphere of crisis. Funda Tekin’s 2017 account of differentiated integration purports to contribute to the ongoing discussion of whether it is possible and necessary for all 28 Member States to advance together in the “crisis-ridden EU”. Tekin’s account already explicitly notes that differentiated integration can not only be about achieving consolidation between the deepening and enlargement of the EU (a goal similar to Schimmelfenning and Winzen’s institutional differentiation), but also about the “reversal of integration steps that are already complete”, for example Brexit, or the possibility of Greece leaving the Eurozone. Differentiated integration, in 2017,

represents a possibility to compensate for the heterogeneity of the EU member states (MS) in terms of their *objective ability* and their political will to pool more sovereign rights at the European level. (Tekin 2017:3, emphasis added)

Tekin’s example of Greece as a potential candidate for leaving the eurozone is only the most obvious one. All of the Eurozone Member States that have found themselves in need of financial assistance, or even if they were subjected to the different procedures of economic co-ordination such as the excessive deficit procedure, felt the threat of “reversal differentiated integration”, the threat of finding themselves “thrown out” of the Eurozone





on the basis of their objective inability to participate. For these Member States, this was the moment when they grew accustomed to being constantly reviewed, measured and assessed, with the “objective”, numerical indicators of economic situation bulldozing through the “subjective” concerns of welfare, equality, social rights and so on (Christodoulidis 2017:64).

The legal dimension of the question of such “reversal differentiated integration”, of course, is not to be overlooked. The European Central Bank, in 2009, published a working paper that discussed the possibilities of a withdrawal of a Member State from the euro, but also an expulsion from the euro (Athanassiou 2009). The working paper admitted not only that there are no legal possibilities for the expulsion of a Member State (either from the EU or EMU) but also that the legitimacy of such a solution would be questionable (Athanassiou 2009:35). Yet, the working paper deplored the fact that thereby the Union is deprived of an “ultimate deterrent against a Member State’s non-compliance’ (Athanassiou 2009:35), and went on to explore indirect avenues of expulsion. Among them, an option that seems to be worth exploring is the use of the mechanism of enhanced co-operation as foreseen by the Lisbon Treaty. But the conditions under which enhanced cooperation can be triggered under the Treaty, such as for example that it should not affect the interests of the countries outside of the club and that it should not compromise the *acquis communautaire*, were considered excessively strict. The working paper concluded by establishing that, to be able to take the indirect avenue of expulsion, the mechanism of differentiated cooperation would have to be combined with concluding treaties outside of the EU framework. The process would transform the old treaties into empty shells and enable the willing and able to move on to a new club (Athanassiou 2009:36).

The assertion that differentiated integration, in and after the crises, serves to compensate the heterogeneity of the Member States, not only on the basis of their political will, but also on the basis of their objective ability, can be corroborated with help from examples from the other two crises mentioned in the beginning of the presentation: the refugee crisis and even Brexit.

### 5.1. Who can manage migration flows?

The first example must have become visible to anyone who had the opportunity to follow the media and the discourse of national leaders in the countries along the so-called Balkan migration route during and in the aftermath of the 2015 refugee crisis. What seems to have



happened during the months when a large number of people travelled along the Balkan route is that the countries on the margin of Europe found themselves in some unsettling type of race in which they wanted to demonstrate that they were capable of - using the appropriate jargon - “managing migration flows”.<sup>VII</sup> The impression was that countries such as Slovenia (EU Member State within the Schengen area) and Croatia (Member State, yet outside of Schengen), but also Macedonia and Serbia, countries with a near-quixotic hope of one day joining the EU, were given an opportunity to demonstrate, by adequately receiving, and then either sending on or returning the incoming people, that they are in some way “worthy” of belonging to an area where there are no internal border controls (Greider 2017).

On the Austrian border with Slovenia, Schengen rules have been suspended since 2015, and the suspension has recently been extended for a further 6 months.<sup>VIII</sup> Commissioner Avramopoulous declared that this is the final extension that Austria will be granted (Posaner 2018). This was met on the Austrian side with ideas of changing the Schengen rules so that further extensions will become possible.<sup>IX</sup> Also, recently, a regulation was adopted tightening security controls at the external borders.<sup>X</sup> The application of the regulation in April 2017 led to lengthy congestion on the land border crossings between Slovenia and Croatia (which is an external border of the Schengen area; but an internal border of the European Union).<sup>XI</sup> Despite the standstill in the country’s road traffic, it is my opinion that the fear of the tightening of the controls on the internal borders, *de facto* pushing Slovenia out of Schengen, was stronger (Cvjetović 2017).

The *de facto* exclusion from a concrete project of differentiated integration may call for an additional category to be added to the established categorization of differentiated integration, developed by Alexander Stubb (1996). Differentiated integration is categorized in three orders, ranging from least to most legally formal methods of integrating at different speeds. However, it is doubtful that this type of exclusion, based on objective ability of the Member State, i.e. simply prolonging into infinity what was essentially envisaged as an exception,<sup>XII</sup> does not seem to fall into any of the categories described by Stubb. If anything, these are “zero order” methods of differentiated integration, posing as temporary exceptions, but *de facto* establishing or modifying projects of differentiated integration.



## 5.2. Brexit: traces of a further example?

Brexit has not yet offered very obvious examples of how the latest of the crises to beset the EU could make differentiated integration contingent, from the perspective of an individual Member State, on its objective ability rather than political will to participate. Splitting the rump EU up, and consequently avoiding having to negotiate with the bloc as a whole rather than individual Member States, may have been how ardent Brexit supporters had envisioned the negotiations. A month before the referendum David Davis, currently the minister in charge of exiting the EU, dreamed of a post-Brexit “UK-German deal [that] would include free access for their cars and industrial goods, in exchange for a deal on everything else...” (Stone 2016). However, by and large, the leaders of EU27 have not even discussed dismantling the current external trade system in the aftermath of the ‘Leave’ vote in the UK.

But the first, almost knee-jerk response to result from the 23 June referendum was nevertheless a meeting of the foreign ministers of the *six founding States* of the EU to discuss the referendum decision. The others protested: the four Visegrad Group countries made the reasonable demand that the future of Europe in light of new facts be discussed by *all* Member States.<sup>xiii</sup>

Ministers meeting, and discussing, does not necessarily construe differentiated integration of any kind; when ministers of the “Founding Six” met earlier in 2016, exactly one year before the 60<sup>th</sup> anniversary of the Rome Treaty to “discuss setting up a very informal group of “core” countries prepared to push the EU forward” (Palmeri 2016), nobody held their breath. When they met a day or two after the UK electorate decided that for the first time, a Member State was going to leave the Union, the nature of such a meeting was legitimately questioned. Was this the unformal, but *de facto* “crisis headquarters” of the EU? Or the beginning of the battle for the survival of the fittest – fittest in terms of objective ability to deal with the incoming crisis?

Given that questions on the nature of the crisis meeting of the Six remain unanswered, and that it also seems that the “core” activity of the Six seems to have since subdued, no real analysis can be undertaken to assess whether their initiative was leading towards something more stable and formalized or institutionalized, and whether it would indeed serve as a further example of differentiated integration contingent on objective ability of the “candidate” State.



## 6. Differentiated integration contingent on objective ability and the centre-periphery optic in the European Union

It is nevertheless clear that despite the embryonic form of this new potential project of differentiated integration, the example of the Six reflecting upon Europe's destiny can serve as an example of the increasingly visible divide between the centre and the periphery of the EU.

This divide is not, as one might be quick to conclude, a divide between Brussels as the purported capital of the Union on the one hand and the national capitals on the other hand. The divide, as was particularly persuasively described in the work of Damjan Kukovec (2014), is between economically strong and economically weak Member States. This finding is not affected by the fact that there might be several rich states and rich cities; the centre of the EU may well be in a number of States with the highest GDP per capita.

The centre-periphery divide is not a new phenomenon, and is not solely linked to the crises that the EU has undergone in the past few years. In fact, Kukovec's discussion on the centre-periphery reality of the Union is based on the pre-crisis social rights case law of *Viking and Laval*, with the divides along the lines of the differences in economic power - between the West (by which we mostly mean the "old" Member States of the EU-15) and the East (the post-socialist countries of Central and Eastern Europe that joined in 2004, 2007 and 2013).

After the crisis, the West-East divide was joined by divides set along differences between debtor countries (mostly in the South) and creditor countries (mostly in the North). The centre-periphery optic seems to have strengthened significantly.<sup>XIV</sup> The exclusionist, "objective ability" logic, which furnished differentiated integration projects with an air of competition and struggling, seems to be in a relationship of mutual strengthening with the deepening centre-periphery cleavages. The atmosphere of competition out of desperation is both a consequence of the widened gap between centre States and periphery States as well as a factor that reinforces the centre-periphery gap.



## 7. Differentiated integration contingent on objective ability: a federalist critique

We draw here on the theory of federalism to present a critique of this possible development. In more precise terms, the federalist critique of the trend of differentiated integration contingent on objective ability relies here on the work of Daniel J. Elazar, and on the view of federalism that he developed in his seminal monograph “Exploring Federalism”.

In “Exploring Federalism”, Elazar contrasted the centre-periphery model with the matrix model, expressing a clear preference for the latter. The centre-periphery model could not serve as an adequate tool to conceptualize federal systems; but moreover, with a reference to Pierre-Joseph Proudhon, Elazar also discounted it altogether as an appropriate “basis for organizing democratic polities” (Elazar 1987:36). In contrast with the centre-periphery model, there is no single centre in the matrix model, from which all power would flow to the surrounding periphery. Rather, the matrix model consists of a number of centres of power, not centres of higher or lower power, but “larger or smaller arenas of political decision making and action”. There are a number of formal and informal lines of authority in the matrix model, which “crisscross” each other: authority may be exercised by local over federal government and vice versa, etc. (Elazar 1987:37).<sup>xv</sup>

Of course, we must be cautious not to confuse the different functions that these concepts can implement. It is imaginable, of course, although probably not very common, that on a normative level someone would wish for a society, or an organization to be built upon the logic of centre v. periphery. However, the vocabulary of centre-periphery will more often serve as a lens through which to observe, analyse or critique a society or organization. In contrast, the matrix model is much more of a normative ideal. Among the three discussed in his account, it seems to be the one that Elazar advocates, given that it is seen as the prerequisite for functioning federalism.

In the present account, the concept of centre vs. periphery is applied as a lens through which the reality of the relationships within the EU (between its Member States) is observed. At the same time, on a more normative level, the widening of the gaps between the centre on the one hand and the periphery on the other, is seen as undesirable as it ultimately leads to the creation of second-class Member States and second-class Europeans, and thus to the



negation of the values that we consider to be the fundament of the project of European integration: freedom from discrimination on the basis of citizenship.

Elazar's federalism, in this account, serves as a counterpoint. This is based on the normative ideals that Elazar's federalism pursues. These normative ideals, we claim, are reflected in what we understand the goals of the European integration project to be. First, federalism strives to achieve a workable combination of self-rule and shared rule. More precisely, it allows the "peoples and publics" to "do so within the context of limited rule" (Elazar 1987:233). Second, federalism "involves both the creation and maintenance of unity and the diffusion of power in the name of diversity" (Elazar 1987:64). This idea can of course be seen to echo in the Union's official motto, "United in Diversity", described by Schwarz (2016:196) as a "federal maxim".

It should be made clear that way this account uses the word "federalism" is very remote from the common usage of this term in the discussions on Europe. The widespread meaning of "federal" when referring to the EU evokes the visions of a "super-state", of the obliteration of national states and their sovereignty, together with, most likely, cultural and linguistic diversity of the Continent. In the "upper echelons of European politics", writes Stefan Oeter (2006:54), using the "dirty F-word" has been "the equivalent of breaking a taboo". Accordingly, federalism is usually either a flag proudly flown by the most ardent advocates of deeper integration or reserved for the labelling of what are perceived as horror scenarios by adversaries of the federalists.

The reference to the word federalism in the present account, inspired by Elazar's theory, draws upon an idea of federalism that is very remote to the projects of "super-state" either desired or feared by the more radical sides of the discussion on the future of Europe. Crucially, Elazar's federalism encompasses a range of subjects that is much broader than just states.<sup>xvi</sup> The emphasis is not on a "particular set of institutions" – it is on the relationships among the participants in political life and the institutional structure that these relationships assume:

Consequently, federalism is a phenomenon that provides many options for the organization of political authority and power; as long as the proper relations are created, a wide variety of political structures can be developed that are consistent with federal principles. (Elazar 1987:12).



The recognizable similarity of the normative ideals as well as the wide applicability of the theory that does not presuppose a certain form of political organization (i.e. a nation state) speak for the applicability of Elazar's particular vision of federalism to the present discussion.

## 8. Critique from Elazar's federalism

A central concept in Elazar's theory that can be applied in the present account is *non-centralization*.<sup>XVII</sup> In line with Elazar's rejection of a hierarchical and centre-periphery ways of understanding and organizing federal society (as well as democratic polities more broadly) is also the establishment of a stark difference between non-centralization on the one hand and decentralization on the other (see also Burgess 2012:186). A true federal system does not feature the processes of decentralization: the latter is "a matter of grace, not of right". Decentralization is the centre deciding alone whether to relinquish powers to the periphery (Elazar 1987:34).

Non-centralization is a wholly different idea: in a non-centralized system, not only is there a matrix of power (discussed above),<sup>XVIII</sup> there is also a constitutional guarantee of a dispersion of power, leading to the power being "so diffused that it cannot be legitimately centralized or concentrated without breaking the structure and spirit of the constitution" (Elazar, 1987:34-35). The different sites of power (national government, governments of the constituent units) can share their powers to a considerable extent, however "the authority to participate in exercising them cannot be taken away from either without their mutual consent" (Elazar, 1987:166).

It can be noted that it seems that in the early nineties, Elazar probably saw the ills of federalism in the European Union in its strong centralism. He criticized the rising popularity of subsidiarity as a potential key tool that would supposedly preserve a balance between the Union and the Member States. He pointed out that subsidiarity was essentially and historically an instrument of decentralization, a channel through which the centre can vest powers in the hierarchically inferior (constituent) units (Elazar 1991).<sup>XIX</sup>

But in 1991, just before the ratification of the Maastricht Treaty, what Elazar saw as the centre, that would then claim the powers for itself, were the institutions of the EU. The centre-periphery gap against which this account claims to caution, is among the states themselves: the core states v. the periphery states. Nowadays the ills of federalism do not



seem to lie in the *one* centre that would amass great powers, relinquished by *all* (or almost all) of the constituent units. The issue is no longer (to borrow and paraphrase Elazar's words again), whether the authority to participate in the exercise of previously relinquished powers is revoked from the constituent units. No. In a European Union of differentiated integration, contingent upon objective ability, the threat to Elazar's federalist ideal of non-centralization lies in the revocation of the chance to participate in the common project. It may at first only be one element of the common project, or what would be perceived as only part of the integration project. However, it may end up as a revocation of participation from the parts of the project that most adversely affect the population of a Member State, or, indeed, a slow exclusion from the European project altogether.

## 9. Federal *process* and the discussion on the future of Europe

When a situation presents itself that threatens to reverse or prevent the establishing of a non-centralized democratic polity, can we turn to federalist theory for answers on how to counter the situation? In other words: what might federalism have us do in a situation such as the one we have described in this account?

The reason we can look at federalism as a sort of an overarching structure from the aspect of which a certain development between the Member States of the EU can be observed and critiqued is that there is a constitutive quality to federalism. Federalism is "beyond easy renegotiation", it constitutes a framework within which negotiations and compromises between federal partners take place (Halberstam 2008:143). That is also why it is legitimate for us to ask: what are the deficits of federalism as we live it in Europe today that make possible a development such as the one described in the previous sections?

In searching for the answer, we turn to Elazar and his emphasis on the limits of a structural approach to federalism. The construction of structures that resemble a federal system does not, by itself, suffice to shape a democratic polity as a non-centralized one, based on a matrix model. The building of the structures (e.g. a bicameral legislature representing the constituent units in the upper house, institutions of judicial review, etc.) has to be accompanied by 'federal process' if it is to result in the establishment of a true federal polity.





Of course, in 1987, when “Exploring Federalism” was published, this observation by Elazar (1987:68) captured well the quasi-federal systems such as the USSR or the countries in Latin America. To discuss federal structure v. federal process in the European Union of today is a much more complex task: for one, while an imperfect federal structure is in place and available, often the projects of differentiated integration (e.g. Economic and Monetary Union) reside on the margin of these structures.

In addition to that, it is as always impossible to predict whether, in the near future, the structure will only undergo minor changes, radically change or remain intact but eschewed by “those who want and can”. What lingers in the air in the present is the not particularly felicitous phrase from the White Paper (2017:15), explaining why it deliberately omits to mention deliberately legal or institutional processes: ‘form will follow function’.

Even if the federal structure is not an issue that could be delved deeper into, a discussion on the federal process is highly warranted, if risks to a non-centralized development of the Union in the future are to be averted. In particular, the trend of differentiated integration contingent on objective ability has to be contrasted against the required elements of a federal process, which include

a sense of partnership among the parties to the federal compact, manifested through negotiated cooperation on issues and programs and based on a commitment to open bargaining between all parties to an issue in such a way as to strive for consensus or, failing that, an accommodation that protects the fundamental integrity of all the partners (Elazar 1987:67).

Parallels can be drawn here to the discussion above on non-centralization: the trend of differentiated integration contingent upon objective ability does not put into jeopardy the quest for consensus among the partners but rather an exclusion of some of the partners from consensus-seeking altogether. In case of exclusion of a partner from a project of differentiated integration, not on account of their lacking political interest, but of their objective inability, there is no ‘accommodation protective of the fundamental integrity of all the partners’ that is demanded by Elazar’s definition.

But the quest for consensus or protective accommodation of a partner’s integration are only manifestations of the essential element of the federal process: a spirit of partnership. Surely, partnership is a broad concept, and it evokes an image of many different relationships



between individuals. But on most readings thereof, a situation where a partner would be denied participation in a narrower activity pursued by the corporation or team, based on his inability, would make one doubt the true spirit of such a partnership, not to mention its durability.

## 10. ‘Here I stand, warts and all’: federalism and weakness<sup>XX</sup>

‘All successful federal systems have been rooted in the recognition of man's dual capacity for virtue and vice’, writes Elazar (1987:86), ‘and have sought to respond accordingly’. In the first place, federalism is tasked with ‘harmonizing human capacity and human weakness’. Elazar is referring here to the weakness of human beings to stray from the moral and legal standards of living in a society, abusing their rights or powers and corrupting the system. The control of the different sites of authority over each other (constituent units control the central government, and vice versa, etc.) is to prevent the abuse, the violations, the corruption.

But there is another side to this requirement. Not only are human weaknesses to be kept under control, federal systems must also provide the institutional and legal tools that enable people to exercise their capacity for self-government to the maximum and even grow in that capacity. In a different situation, in Europe in 2017, can federalism not also be tasked with harmonizing capacity (for self-government) and inability (to live up to the certain challenges of the moment)?

In other words: if human weakness in the sense of the ‘inherent deficiencies in human nature’ (Elazar 1987:86), that lead us to abuse power can be (or indeed has to be) recognized as a necessary evil, with institutions built to manage it and limit it, can the same not be demanded as far as weakness in the sense of failure, inability and limited resources is concerned?

## 11. Justice, power and federal fidelity

Our critique, and demands for the collective of participants in the European federalist project to accommodate the shortfalls of the weaker and poorer partners, may of course be difficult to accept by the richer and stronger Member States; these might perceive the kind



of federalist demands as laid down in this account as disguised requests for additional financial assistance and excessive solidarity. In response, it might be pointed out that Elazar's federalism itself takes "hard realities" into account. In any given federal project, with all the negotiations and bargaining that goes on between the partners and the sites of authority, the content of federalism is not only justice, i.e. the integrity guaranteed to all the partners, the mutual forbearance and self-restraint demanded by Elazar (1987:154). On the contrary: federalism is a combination of the real and the ideal, with the two limiting each other. Federalism cannot only emphasize concern for justice, abandoning concern for power and its relationship to justice. (Elazar 1987:85).

Preventing the more powerful and more objectively able partners from casting aside the weaker partners as they move forward to integration in new fields (or as they consolidate existing projects of differentiated integration) can be interpreted as a limit on their power that they exercise within a constitutional arrangement. This leads us to a decision that needs to be made in the balancing between justice and power as the two elements of every federalism (Moots 2009:395). In searching for the limits that can be set on the exercise of power in the name of justice within a federal system, we can turn to two conceptual explanations. First, the one put forward by Daniel Halberstam and his account of the morality of federal systems; and second a conceptual explanation which draws further on the thought of Daniel Elazar and his idea of covenantal federalism.

Halberstam juxtaposed entitlement-based federalism, on the one hand, and fidelity-based federalism on the other. Under the entitlements approach, all units (constituent and central) are free to use all regulatory instruments that they have at their disposal as per the rules of the constitution: at will, and to further their political interests. It is not that the entitlements approach rejects co-operation between the units and levels; but whether to co-operate is an autonomous decision that one of the units will adopt on its own (Halberstam 2004:732). On the other hand, federalism rooted in "federal fidelity" ("*Bundestreue*" in the German doctrine) demands that "an institution must temper its political self-interest with a general concern for the federal enterprise as a whole". Depending on the interpretation of 'general concern', conservative fidelity can be distinguished from liberal fidelity. In the former version of federal fidelity, a unitary view of the general concern is (super-)imposed upon the actors with legal regard for the democratic diversity present within the system (Halberstam 2004:736). In the liberal version, however, actors engage in democratic struggles and conflicts through



which the general concern of the federal system is dynamically articulated rather than predefined. However, federal actors' use of regulatory instruments is nevertheless not at their behest: in using them, they pursue the general concern (Halberstam 2004:737).

In his account, Halberstam (2004:735) showed that contrary to commonly accepted perceptions, federalism in the United States is not entirely entitlements-based, nor is German federalism exclusively linked to conservative fidelity, just as the European institutions may not be as devoted to liberal fidelity as is often thought. Federal systems, insofar as the role that general concern for the wellbeing of the entire system plays, converge much more than is usually perceived. Halberstam also put forward a normative claim, relevant to the present account. According to Halberstam (2004:821), liberal fidelity can serve as an appropriate approach to resolving the problems and allocation of power disputes within federal systems where the partners join in a common enterprise of governance.

This can be applied to the problem discussed in the present account as well. Pursuing liberal fidelity would mean acknowledging the reality of existing struggles between competing visions and interests of federal partners. The Member States do see the causes and remedies for the crises discussed differently, and are occasionally tempted to impose their understandings of the situation onto other Member States. However, the limit on any individual unit's power to pursue its vision and interest should be set at decisions that would lead from exclusion or relegation to second-class membership of another Member, despite their willingness to participate and co-operate.

Elazar's account can also help us identify the interpretational guide, that is to be consulted when there are too many possible interpretations of what the spirit of partnership, and the appropriate balance of justice and power, is supposed to be in the federal arrangement of the European Union. This interpretational guide will assist us in clarifying the composition of the requirement that the partners exercise self-restraint and mutual forbearance, also when it comes to reacting the objective inability of another partner.

## 12. Europe and its federal covenant

In the interpretation of Elazar's federalism as developed in the present account, this role of such an interpretational guide is fulfilled by a *covenant*. The idea of a covenant is an important tenet of Elazar's understanding of federalism. In his account, federal polities do



not come together by way of force (or *conquest*), nor do they develop ‘organically’, by *accident*. There is a deliberate *choice* behind the creation of a federal polity (Elazar 1987:3). However, the deliberate choice of the partners to participate in a federal project does not only find its expression in a *contract*. Clearly, there are contractual arrangements between them, but a contract is, according to Elazar, limited to the legal dimension. There is something more, something deeper, something that endows the agreement to participate with an ethical dimension: a covenant (Moots 2009:394).<sup>xxi</sup>

In Elazar’s thought, there is a further difference between contracts and covenants: contracts are secular. Covenants have a religious dimension or connotation and Elazar (1987:5) traces their history back to the biblical partnership of the people with God. Indeed, God is considered a participant in the agreement that leads to a covenant (Burgess 2012:207). The way the concept of covenant is understood in this discussion, however, does not include its religious dimension. The simple argument, specifically for the context of the European Union, is that the constitutional secularity in many of the Member States would prevent basing a deep-reaching accord between them on a religious foundation. With Elazar himself discussing the possibilities of new postmodernist covenantal arrangements appearing, particularly in the inter-state sphere (Burgess 2012:203), we will permit ourselves to continue and conclude our discussion with what Burgess (2012:207) refers to as a ‘modern secular form’ of the federal covenant:

Without the Divine spirit it is much more a binding moral commitment between participating individuals, groups, or other entities who voluntarily become partners in creating a new political community.

### 13. Conclusions

We will posit here that there is in fact a binding moral commitment between the peoples of Europe that have joined to create the European Union. We will reach one last time to Elazar’s federalist thought and draw on his insight regarding the constitutions of the constituent units of a federal system, which translated to our discussion are the constitutions of the Member States of the Union. Elazar (1987:174) lamented that they are often neglected and demanded that they are recognized as constitutions ‘part and parcel of the total



constitutional structure of federal systems'. Constitutions of the Member States thus play a 'vital role in giving the system direction'.

The constitutions of the Member States, as a whole, are a potent expression of the rejection of the horrors of war and totalitarian regimes in XX century Europe. Not all of the constitutions of the Member States were direct consequences of the fall of a totalitarian regime (as were the constitutions adopted in Germany, Italy, Spain, Portugal, countries of Central and Eastern Europe). Other, older constitutions have undergone a transformation on account of the post-war European Convention of Human Rights (Albi 2018). Hence there is a common premise to European Constitutionalism post-WWII and it is a firm 'Never Again' to totalitarianisms, pointless killings and destruction and denial of human dignity.

Agustin Menéndez (2012:72) speaks of the 'deep constitution of Europe', the collective of the national constitutions as well as the common constitutional law of the Member States. The claim in the present account is that this deep constitution of Europe is the common constitutional law of the Member States that is an expression of the values on the basis of which totalitarianisms were rejected and a peaceful Europe, respectful of constitutional democracy, rule of law and of course civil and political rights, was built. This is the binding moral commitment between the peoples of Europe that can serve as the federal covenant of the European Union, informing the interpretation of both the Union's constitution and the 'contract' concluded between the peoples of Europe. It ought to give federal Europe direction, especially at times of crises and post-crisis. And to apply this thought to the problem at the beginning of the present account, it should inform the rationale and the criteria of the path of differentiated integration that the Union might take in the future.

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<sup>I</sup> Referendum took place on the 23rd June 2016, and the Article 50 notification to the European Council was made on the 29th March 2017.

<sup>II</sup> Between the moment of writing up the first draft of the article and the moment when it was revised, Sebastian Kurz's People's Party emerged victorious from the Austrian parliamentary elections after an election campaign that focussed on nationalist, migration-averse rhetoric. See Somek (2017) for an analysis.

<sup>III</sup> European Commission, White Paper on the Future of Europe: Reflections and scenarios for the EU27 by 2025, COM (2017) 202. It ought not be overlooked, also, that later the same month, the "leaders of 27 member states and of the European Council, the European Parliament and the European Commission" issued the "Rome Declaration", pledging to work towards a list of objectives such as "a safe and secure Europe" etc. Indeed, the White Paper understands itself as a prelude to the summit of the leaders (p. 3).

<sup>IV</sup> More optimistic on the combinability of the scenarios, seeing the latter as "intellectual tools", is Cuyvers



(2017).

<sup>v</sup> In the words of the White Paper (2017:15): “Too often, the discussion on Europe’s future has been boiled down to a binary choice between more or less Europe. That approach is misleading and simplistic. The possibilities covered here range from the status quo, to a change of scope and priorities, to a partial or collective leap forward.”

<sup>vi</sup> Matej Avbelj is right, for example, that “Carrying On” is not really an option, and I think there is indeed a wide consensus on that point. The “*illusionary viability of the status quo-ante*” (Avbelj 2017:9) of the scenarios offering a retracting of the European Union (Scenario 2: “Nothing But the Single Market”) is perhaps much more an issue of the political point-of-view of the observer, but it is at the end of the day true that any such operation would be linked to costs and risks of dismantling the existing structures beyond the narrow core of the Union that it would probably not be undertaken.

<sup>vii</sup> Compare European Commission, Press release: Meeting on the Western Balkans Migration Route: Leaders Agree on 17-point plan of action, Brussels, 25 October 2015, [http://europa.eu/rapid/press-release\\_IP-15-5904\\_en.htm](http://europa.eu/rapid/press-release_IP-15-5904_en.htm).

<sup>viii</sup> All temporary reintroductions of border controls within the Schengen area are listed on the website of the European Commission [https://ec.europa.eu/home-affairs/what-we-do/policies/borders-and-visas/schengen/reintroduction-border-control\\_en](https://ec.europa.eu/home-affairs/what-we-do/policies/borders-and-visas/schengen/reintroduction-border-control_en).

<sup>ix</sup> The news appears in Austrian media, see for example the article in Der Standard (4 May 2017), available at: <http://derstandard.at/2000056966972/Doskozil-will-Grenzen-laenger-kontrollieren-duerfen>

<sup>x</sup> Regulation (EU) 2017/458 of the European Parliament and of the Council of 15 March 2017 amending Regulation (EU) 2016/399 as regards the reinforcement of checks against relevant databases at external borders, OJ L 74, 18.3.2017, p. 1–7

<sup>xi</sup> See the parliamentary question to the Commission posed by Croatian MEP Jakovčić, 9 May 2017 (O-000040/2017), <http://www.europarl.europa.eu/sides/getDoc.do?type=OQ&reference=O-2017-000040&format=XML&language=EN>.

<sup>xii</sup> See Agamben (2005), for a discussion of how states of exception (suspensions of juridical order) are becoming permanent arrangements.

<sup>xiii</sup> See, for example, the article that appeared on the website of Radio Poland (“V4 countries want all EU member states to discuss Brexit”) (27 June 2016), available at <http://thenews.pl/1/10/Artykul/259050,V4-countries-want-all-EU-member-states-to-discuss-Brexit>.

<sup>xiv</sup> Avbelj (2017:3), on post-crisis Europe: “We have witnessed an unprecedented language of the EU’s core and the periphery.”

<sup>xv</sup> Elazar (1987:35) also discusses (and rejects) the third, hierarchical/pyramidal model where power relations are organized vertically, with the national/central government are represented as the peak of the pyramid, followed by the lower levels of intermediate and local government.

<sup>xvi</sup> See a similar point in Burgess (2009:34), or Börzel (2003:2).

<sup>xvii</sup> Federalism, posits Elazar (1987:64), “is not to be located on the centralization-decentralization continuum but on a different continuum altogether, one that is predicated on non-centralization”.

<sup>xviii</sup> The many centers among which the power is dispersed are usually to be sought in the constituent polities. (Elazar 1987:166)

<sup>xix</sup> Daniel Halberstam (2011:13), however, sees “what Europeans call ‘subsidiarity’” as the key theoretical concept of a general theory of federalism while at the same time warning of equating federalism and decentralization (Halberstam 2011:12).

<sup>xx</sup> The phrase ‘warts and all’, ascribed to Abraham Lincoln, is used by Elazar (1987:86) as a metaphor for human weakness.

<sup>xxi</sup> The third tool of deliberate partnering is a *compact* (see for example Elazar 1987:33) with a similar role to play as the covenant, however they ‘do not explicitly include a divinely transcendent dimension and instead rely on mutual pledges and a secular legal grounding’ (Moots 2009:393). Perhaps the term ‘covenant’ as we use it here is most correctly placed somewhere between Elazar’s covenant and compact.

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# **Eurosceptic Federalism: Paradoxes and Relevance of a long-running Critique of European Integration**

by

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## Abstract

In recent political debate, the association between national *souverainisme* and Euroscepticism is considered a natural one. From Marine Le Pen to Matteo Salvini, there is a unanimous affirmation of the necessity to defend national sovereignty against the threat of Brussels. But if we take a more in-depth look, we can see how European Integration has fed two different approaches to European federalism: the first began in 1951, a concrete path on which a kind of European federation was progressively built, while the second has considered the same path to be an obstacle in the attempt to move towards a possible European federation. According to the first group the process of integration has been better than nothing while, the opinion of the second is that the same process has been worse than nothing. Such Eurosceptic Federalism finds its roots in the anti-cosmopolitan federalism of the interwar debate and unifies, paradoxically, radical libertarians and convinced communitarians.

## Key-words

Euroscepticism, federalism, European integration, Alain de Benoist, Gianfranco Miglio



The recent political debate presents the association between anti-federalist nationalism and Euroscepticism<sup>I</sup> as the ideological core of the Anti-EU discourse. From Marine Le Pen to Nigel Farage, and Geert Wilders and Matteo Salvini, there is a unanimous affirmation of the necessity to defend national sovereignty against the threat posed by Brussels bureaucracy and institutions. A good example is this quote by Marine le Pen who considered “*L’Europe de Bruxelles*” as a “*Super-Etat eurocratique*” that ruins the lives of millions of Europeans. In her view, France must “*renégocier les traités*” in order to “*mettre fin à l’asservissement de la France, de restaurer notre souveraineté nationale dans l’ensemble des domaines où elle a disparu, de nous rendre le pouvoir*”. A “*ministère des Souverainetés*” would be in charge “*pour restaurer la souveraineté nationale dans l’ensemble des domaines où elle a disparu*”.<sup>II</sup> In this case, it is evident that the choice to fight for national sovereignty brings this kind of Eurosceptic discourse to the antipodes of any possible kind of “European federalism”.<sup>III</sup> But a more in-depth examination – below the surface of daily national struggles and rhetoric – will reveal that the history of European Integration has been intertwined with two different approaches to European federalism: the first – present in the Schuman declaration itself<sup>IV</sup> – has its foundations in the process begun in 1951, a concrete path on which a kind of European federation was progressively built,<sup>V</sup> while the second – present in different and heterogeneous political movements<sup>VI</sup> - considered the same path to be an obstacle in its attempt to move towards a possible European federation. According to the first group the process of integration has been better than nothing while, in the view of the second, the same process has been worse than nothing, because it prevented the realisation of an authentic European federation. With reference to this second group, it is possible to speak about an authentic “Eurosceptic European Federalism”.

## 1.

Considering the juncture of such a paper, I would like to give a glimpse of the history of such an approach, in order to briefly pass onto a couple of interesting case studies. The idea of avoiding functional and international integration or governance in order to preserve the possibility of true European federalism found its roots in the critique of cosmopolitan and international projects of liberal democracies elaborated, in the context of the Thirties,



by different intellectuals such as Pierre Drieu La Rochelle, Eugeni d’Ors, and the *Ordre Nouveau* group among others. In the Thirties, after showing interest in the Briand Plan for European Federation, Pierre Drieu La Rochelle considered capitalism to be close to death and hoped to see a new Fascist League of Nations, “une Genève des fascisms”, that would substitute the existing one, incapable of stopping the European path towards a new war.<sup>vii</sup> From his point of view only fascism could federate Europe, realising that a “European Union”, where capitalist democracies failed, and the creation a League of Nations, were just too exposed to national interests to create a true economic federation.<sup>viii</sup> For him, Nazi Germany, by abolishing the national frontier, had worked in its creation of the only possible path towards the federal reunification of Europe (moreover also granting it a new organising principle - spiritual and racial) (Drieu la Rochelle 1973: 188-190; Visone 2014: 134-141). Also fascinated by fascism – although more so by the Italian version (Visone 2015: 342-343) – Eugeni D’Ors criticised the Liberal Europe of the SND and the Communist International, hoping to realise a true federal-corporative Europe. He saw this as synonymous with an “empire”, or a unity capable of putting together various levels of government in a supranational and multinational space - able to join nations, regions, cultures without destroying their differences (Martínez Carrasco 2014: 72). This was seen in direct contraposition with the cosmopolitanism of liberal organisations that just melt and liquefy nations and diversities (D’Ors 1920: 1). Or we can consider the case of the *ministes* proudhonian federalists who wrote for the “*Ordre Nouveau*” review and considered it impossible to proceed with projects such as the Paneurope of Coudenhove Kalergi, and the League of Nations, that continued to have at their centre the nation-state. As written by Alexandre Marc, it was vain and useless to proceed with these projects because their will just masked the horrible reality of the nation-state. Thus, it was necessary to promote something else, such as a federation of communities that started at the local level and aimed to reach the people (Glady 1934: 8-20).<sup>ix</sup> In any case, these criticisms of liberal internationalism and federalism were directed towards contesting the enduring role of the nation-state within and the cultural (and racial, according to Drieu La Rochelle) homologation created by such liberal universalism. These ideas would go on to play an important role in criticism aimed at the process of European integration during the second half of the XX<sup>th</sup> century.



## 2.

After the second world war, different radical criticisms were directed towards the process of European integration from a federalist perspective. One in particular, that of ethno-federalism, had a political relevance. According to one of its main theorists, the French jurist Guy Héraud,<sup>x</sup> the idea of proceeding towards a confederation of states following the functionalist approach is a form of “right wing deviationism” that did not solve the issue of nationalism. Thus, following such a view, the supporters of ongoing European integration cannot be considered as true federalists (Héraud 1959: 3). Héraud would develop, in the Sixties, an approach that he defined as “ethno-federalism” which sought to reunify Europe, starting with ethnic communities or regions created through referendums destined to reunify peoples with the same ethnic roots (for example, South-Tirol people with Austrian people).<sup>x1</sup> These regions/communities had to be the centre of a new process of integration, opposed to the process developing under the control of sovereign states. From Héraud’s stand point, these were simply the result of violence and diplomacy, distant from the people’s will. Thus, he stood for a “people’s federation” rather than a “state’s federation”, with the idea of destroying national-sovereignty through a radical fragmentation of power that would be recomposed at European level (as a European sovereignty) following the subsidiarity principle (Héraud 1963; 1968; 1973). Héraud’s ideas achieved a certain success in the ideological landscape of the time, that in any case presented other similar tendencies. If we consider the Seventies review “Junges Forum” that was directed by Henning Eichberg, a German theoretician of ethno-pluralism, or the French review entitled “Nouvelle École” – the *Nouvelle Droite* magazine – you find, alongside several articles by Héraud (also in the *comité de patronage* of *Nouvelle École* in 1971), several criticisms of the liberal and “antifederal” EEC. Similar ideas were published by “Intereg” - (*Internationales Institut für Nationalitätenrecht und Regionalismus* - an institute advocating for the rights of ethnic groups and regionalism), a Bavarian think tank founded by CSU through the *Bayerische Landeszentrale für Politische Bildungsarbeit*; publications such as the Review “Europa Ethnica” (Ruge 2003, 2015: 90-104). These ideas gained ground in the Mittle-European and Northern European right-wing, post-fascist, regionalist, and ecologist landscape, becoming part of the political programme of parties such as “La Lega Nord” in Italy, the FPÖ in Austria, the “Vlams Bloock” in Netherland, etc (Luverà 1996a; 1996b;



1999).<sup>xii</sup> All these movement shared, especially between the 80s and the 90s, a critical idea of modern nation-state sovereignty founded on the individual as the centre of the political pact, a radical form of Euroscepticism, refusal of liberalism and “marketism”, and a positive view of a form of ethno-federalism for the whole of Europe. At this point, it is interesting to briefly consider two approaches that could be considered representative of the two main evolutions of such a form of “Eurosceptic federalism” in the post-Maastricht Debate: communitarian (as in the case of Alain de Benoist) and libertarian (such as Gianfranco Miglio).

### 3.

Alain de Benoist is a French philosopher, author of dozens of books, considered the main exponent of the “Nouvelle Droite”, and one of the most controversial and debated figures on the European intellectual landscape. Coming from the extreme right environment – with which he still retains a certain dialogue and sentiment – he decided during the Seventies to move beyond right and left, theorising an original form of communitarian federalism which opposes nationalism, modern state sovereignty, capitalism, globalisation and liberalism.<sup>xiii</sup> In the opinion of de Benoist – who has always remembered his European roots and stands for European federalism as the political solution for the old continent – the EU, far from being an answer to the problems of our time, is in itself one of the problems. The reasons are to be found in its history that has focused on market integration,<sup>xiv</sup> and the refusal to centre the debate on political and cultural integration. The result, for Benoist, is that it misses the meaning of integration and creates just one void and centralised bureaucratic system. Such a system takes only the worst from modern politics,<sup>xv</sup> achieving the opposite of the “integral federalism” model which, following the thought of Althusius (de Benoist 2000: 25-58), would begin from the lowest communitarian levels in order to build a continental frame of symbiotic communities.<sup>xvi</sup> From this point of view, the EU is simply the negation of all federalism, and the achievement of a form of Jacobinism:

“La dénonciation rituelle par les souverainistes de l’Europe de Bruxelles comme une «Europe fédérale» ne doit donc pas faire illusion: par sa tendance à s’attribuer autoritairement toutes les compétences, elle



se construit au contraire sur un modèle très largement jacobin. Loin d'être «fédérale», elle est même jacobine à l'extrême, puisqu'elle conjugue autoritarisme punitif, centralisme et opacité" (de Benoist 2014 a).

Such a system is the logical offspring of functionalism, and progresses directly towards its unconscious self-destruction. Far from destroying the centralistic logic of the nation-state it just exasperates it, causing a reaction within the member states that can bring about a rupture of the system in a condition of accentuated nationalism, as the case of Brexit shows. After the UK referendum, according to de Benoist, the ruling elite governing the European Union does not want to call into question the ongoing integration path:

“the only lesson that they took from this vote is that is necessary to do the utmost to avoid people expressing themselves. Who said that madness consisted of always doing the same thing hoping to obtain different results? Considering that the same causes provoked the same effects, they will continue to pour petrol on a fire which will up consuming everything” (de Benoist 2016: 6).

As we saw, de Benoist considers this path to be just the opposite of that towards true European federalism. Far from being just a reflection of the last few years, such criticism of the EU has been developed by de Benoist since the 90s, and he has been interested in federalism since the 70s (having also been in contact with Guy Héraud).<sup>xvii</sup> Indeed, by way of confirmation, in 2012 he reprinted in English – with Charles Champentier – the “Manifesto for the European Renaissance” that was originally published in 1999 in the “Éléments” review. This “Manifesto” sums up his ideas about Europe and European Civilisation. An explicit “position” of the book is entitled “Against Jacobinism; for a Federal Europe” (Champentier and de Benoist 2012: 38). Such opposition towards a centralised state – thoughts on the model of the modern nation-state – found (and still finds) a paradoxical common ground with libertarians that contested the EU as incapable of breaking the hated logic of sovereignty.

#### 4.

For that reason it is interesting to focus on the thoughts of Gianfranco Miglio, an Italian historian and political scientist who, for many years, studied the German classics





concerning the theory and history of the state.<sup>xviii</sup> During the 80s and 90s he developed a vision of federalism that, founded on the *Mittle-Europa* experience, aimed to be a radical alternative to the modern state model. In his view the epoch of the huge, united, modern, nation-state reached its apogee with the growing scientific criticism of the myth of nation and the substantial impossibility for the united-state to satisfy the different exigencies of millions of citizens. The same success of the market economy - and of the private over the public sphere - accelerated the process and transformed the old state into an obsolete reality (Miglio 2016a: 59-64). It is important to note that contrary to de Benoist – and several of the previously quoted authors – he was not a critic of capitalism and market economy, but considered them as being intimately connected to the logic of his “neo-federalism”.<sup>xix</sup> Precisely for that reason he believed socialism to be the opposite of federalism, defining socialism as essentially intertwined with the modern, centralised, and unitary state (Miglio 2016b: 69-70). At the same time, he was attracted by the political experience of the “Lega Nord” that he considered a revolutionary force able to open the perspective of a Europe of regions beyond the nation-state experience.<sup>xx</sup> During the 90s he developed a radical critique of the EU that was founded on three fundamental aspects: 1) the EU did not break with the nation-states, considering that “political fractions inside the nation states were firmly decided to conserve their privileges”; 2) the ruling perspective of European integration was that of “L’Europa di Bruxelles” or of a European super-nation-state that applied the worst aspect of nation-state bureaucracy; and 3) the EU moved towards paralysis because the reunification of Germany broke up the old balance in the European nation-state, introducing an hegemonic actor that pushed other powers (like America) to adopt a suspicious and antagonistic attitude towards the process of European integration (Miglio 2016c: 183-186). Against such nation-states in Europe, Miglio proposed a “Europa delle Regioni”, or a union founded on macro-economic regions and cities connected each to another within a network of federal relations (Miglio 2016d: 186-187). In this “neo-federal” union:

“le istituzioni europee (e dunque le leggi che le regoleranno) dovranno essere il risultato di accordi negoziati, piuttosto che di diktat di organi sovrani ... come ogni sistema federale la comunità europea sarà composta di minoranze ... La loro protezione implica che nei loro riguardi non si potrà mai invocare l’ipotetico diritto di maggioranza ...”



In his opinion, majority rule could only be used if all attempts at negotiation failed, and then only through using a principle of qualified majority. Furthermore:

“Tutte le decisioni importanti dovranno inoltre essere accompagnate da una clausola di non partecipazione, per preservare il diritto della comunità a dire “no”” (Miglio 2016c: 191-192).

According to this understanding, true federalism was where the territorial units that constitute the federation directly express government as a form of direction (following the Swiss example). Consequently, the kind of European Federalism directly inspired by Alexandre Hamilton (as that of Altiero Spinelli) was a false federalism, secretly influenced by the passion for unity that informed the whole history of the modern state.<sup>XXI</sup> A federal state, according to the “profesùr”, was always an “ossimoro” that tried to bring together two models of politics that were totally opposed. In this sense he criticised the EU’s damaging attitudes in its alternative response to unitary logic of the nation-state (at the level of Brussels for some politics, and in its inter-governmental attitude for the others); consequently Miglio remained a convinced supporter of constitutional pluralism as being the fundamental feature of federalism.

## 5.

What do these different “Euro sceptic federalist” approaches have in common? They fundamentally reject all the traditions of the European sovereign state, as a history of centralism and violence, contest the possibility of a Federal State – which in their view is not a true federation – and eschew any integration that will, in any way, keep alive the existing nation-state. Concisely, they refused the path of a “European rescue of [the] nation-state” (Milward 1992) or a confederative approach that would allow the nation-state to survive by merely sharing some power in particular spheres. They also question the other, more common, federalist approach –which the EU considers as “better than nothing” - about the nature of their federalism, and the possible conception of other solutions to the issue of sovereignty (different from the Althusian<sup>XXII</sup> or just “a-sovereign” one<sup>XXIII</sup>) and the consequences that such a reflection would eventually entail on their



evaluation of EU. This stand enabled them to see things from another perspective that, nowadays, remains “merely” theoretic. In effect, in the light of this conceptual weakness in contemporary political debate on the future of Europe, it is also possible to verify how the birth of the European integration process had substantially unified - with notable exceptions - the field of Euroscepticism with that of nationalism, confirming a harsh defeat for those federalist alternatives that even in the 90s could count on the support of relevant parties/foundations. So, in what way is it useful to be reminded of such an approach?

## 6.

First, it is relevant to better define the complexity, plurality, and non-homogeneity of the history of both “European federalism” and “Euroscepticism”, allowing us to also better evaluate the particularity of the current epoch compared, just as an example, to that of the 80s and the 90s. Second, it could be useful to help formulate some relevant questions, which will allow us to better define some main issues that will shape the European political landscape. What is the relationship between the EU, federalism, and the modern state? Must the EU make a choice between one or the other or does it just have to find a new path to allow federalism and the modern state to become entangled with one another? Is it possible to manage a single continental capitalist economy without any form of State mechanism around it? And can any possible continental and federal democracy survive through a crisis without any form of state that is able to organise it? And last – but not least – is it true that in the long run European functional integration, as has been experimented with until now, can bring about, as a reaction, a return to nationalism (and consequent disintegration, Zielonka 2014)<sup>xxiv</sup>? Considering the fundamental challenges that will be faced by the EU over the next three years – starting with Brexit and culminating with a probable discussion about a new European treaty –underestimating the political relevance of these questions is not a viable option. The same “pro-EU” federalists will benefit from a renewed, and serious confrontation, with these issues in order to find advanced and coherent solutions to problems that, in any case, will be decisive for the future of Europe.<sup>xxv</sup>

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<sup>I</sup> The word "Euroscepticism" means such a discourse and/or action that promotes "opposition and doubt [in]to the process of European integration". See Taggart (1998: 365). In the particular perspective of this paper – focused on a "principle opposition" to a particular path of European integration, developing historically since 1951 – the only possible "Euroscepticism" is that which Paul Taggart and Aleks Szczerbiak called "hard Euroscepticism". See Taggart and Szczerbiak (2002: 7). For criticisms concerning the concept of "Euroscepticism" and its uses see Pasquinucci and Verzichelli (2016).

<sup>II</sup> Marine Le Pen, *Speech of the 19th November 2011*, quoted in Lanathoua (2012: 1). See also the criticism developed by Marine Le Pen towards the perspective of European federalism in Le Pen (2012: 56).

<sup>III</sup> In this paper the expression "European federalism" is intended to mean any political perspective that strives for the creation of a federation capable of covering the European space. From this broad and analytic point of view, it matters not which kind of definition of federalism is the original or theoretically correct or which definition of Europe is, spatially or philosophically, "the right one". What matters here is the joint and related discursive use – with a precise political aim – of the words federalism/federation and Europe in a particular context that is one of the political debates of XX<sup>th</sup> and XXI<sup>st</sup> century Western Europe. On the history of federalist thought, see Kincaid (2011); Ward and Ward (2009); Levi (2008); Malandrino (1998).

<sup>IV</sup> "By pooling basic production and by instituting a new High Authority, whose decisions will bind France, Germany and other member countries, this proposal will lead to the realization of the first concrete foundation of a European federation indispensable to the preservation of peace". *Schuman Declaration*, 9 May 1950.

<sup>V</sup> Regarding the concrete impact of such federalism on the process of European Integration, see Burgess (2006).

<sup>VI</sup> As a paradoxical and border case it is interesting to consider the same Union of European Federalist – Uef – in a peculiar moment of its history (1957-1962). During this period the Uef was split into two parts: ones, consisting of the Germans, Dutch and a part of the French federalist movement (European Federalist Action, 1956), critically supported the perspective of a functional integration opened with the Treaties of Rome, while the others – the majority – opposed this, considering the Common Market as a "step back" (Constantinescu 1959: 1) towards the creation of a true supranational federation. This majority finally transformed the Uef into the "Supranational Federalist Movement" (1959), which was engaged in the anti-functional campaign concerning the "Congress of European People". See Pistone (2008: 131-154). In the same period, Altiero Spinelli wrote a second federalist manifesto (1957) in which he labelled as "false European solutions" those proposed by functionalism and Europeanism, affirming that all these solutions "expressed the secret dream of the exploiters/profiters of the national sovereignties and of their political representatives" (Spinelli 1957: 57-65).

<sup>VII</sup> Drieu La Rochelle (1934: 17). On the life of Pierre Drieu La Rochelle, see [Cantier](#) (2011). On his political thought, see Rocca (2000). On the connection of such thoughts with his novels, see the interesting interpretation of Solé Castells (2004), and the reconstruction by Bruneau (2011).

<sup>VIII</sup> See Drieu La Rochelle (1973: 189-190; 217-218). In 1939 he observed in his "Journal," "*c'est l'agonie de l'Europe: à Genève on voit la bassesse de cette Europe des petites nations... Et si Genève a échoué, l'hégémonie anglo-française, il faut bien qu'une autre s'offre. Il faut bien faire les Etats-Unis d'Europe par la violence*" (See Drieu La Rochelle, 1992: 80).

<sup>IX</sup> About the "Ordre Nouveau" perspective, see also Roy (1999), Hellmann (2002), and Visone (2012: 181-196).



<sup>X</sup> Who was also candidate for the European Federalist Party (against the candidature of Jean-Claude Sebagn, representative of the European Federalist Movement that was in favour of strengthening the supranational aspects of EEC), in the French Presidential Elections of 1974 (with a regionalist programme for France). During these elections he defined “federalism as a form of anti-centralism, as an auto-managing socialism”, as outlined in this recorded declaration now available on YouTube <http://www.ina.fr/video/CAF94054982/guy-heraud-video.html>.

<sup>XI</sup> In his opinion, a commission of ethnologists, historians, geographers, and linguists had to determine the territory in order to consult such a referendum.

<sup>XII</sup> In 1993 Bossi, Haider and Héraud appeared as authors in the same book dedicated to “ethno-federalism” (Hatzenbichler – Mölzer 1993).

<sup>XIII</sup> On his biography and thought, see Andriola (2014); Weber (2011); Sissa (2010); Böhm (2008); Stara (2007); Dard (2006: 125-135); Preve (2006); Germinio (2002); Taguieff (1994).

<sup>XIV</sup> For such a topic, see also the recent writing of de Benoist (2015).

<sup>XV</sup> In fact, it is his view that the EU, even if centralised for economic policy, cannot undertake any kind of foreign policy because of the role of nation states inside the same EU: “*La politique étrangère est le revers de la souveraineté nationale. L’Union européenne ne constituant pas un corps politique, il ne peut évidemment pas y avoir de politique étrangère commune, mais tout au plus un agrégat conjoncturel de diplomatie nationales assorti d’une politique «extérieure» dérivée des compétences «communautaires». Que ce soit à propos de l’intervention américaine en Irak, de la guerre en Libye, au Mali ou en Syrie, que ce soit à propos de la Russie ou du Proche-Orient, de la Palestine, du Kosovo ou plus récemment de la Crimée, les Européens ont toujours été incapables d’adopter une position commune, la majorité d’entre eux se contentant de s’aligner sur les positions américaines. Ne se percevant pas d’intérêts communs, ils ne sauraient avoir non plus de volonté commune ou de stratégie commune*” (de Benoist 2014a).

<sup>XVI</sup> From this point of view, de Benoist is a harsh critic of Bodinian and Hobbesian sovereignty (or an exclusive sovereignty) and in favour of a divided, Althusian sovereignty (See de Benoist 2002). On the issue of sovereignty in connection with his criticism of the EU, see also de Benoist (2014b).

<sup>XVII</sup> During the 90s, de Benoist also conceived – as d’Ors did in the 30s – a federal model for Europe as an Imperial model or a reunion of diversities around an idea, a principle (See de Benoist 1995: 173-175). On the relationship between Pierre Drieu La Rochelle’s thought, fascism, ethno-federalism, and Alain de Benoist’s perspective, see Spektorowski (2016: 115-138).

<sup>XVIII</sup> Regarding his biography and thought, see Ferrari (1993); Campi (1996); Palano (2005: 289-450); Di Capua (2006); Romano (2010); Malandrino (2012: 90-99); Bianchi and Petroni (2013).

<sup>XIX</sup> “... per capire il cambiamento di fine secolo, dunque, è necessario comprendere la vocazione al contratto, al pluralismo e al federalismo che nasce dall’impossibilità di gestire altrimenti i bisogni dei governati. Questi infatti sono talmente vari che possono essere soddisfatti solo nel libero mercato” (Miglio, Barbera 1997: 31).

<sup>XX</sup> He was also a senator with the Lega Nord from 1992 to 1994: when it broke up, passing to the “gruppo misto”.

<sup>XXI</sup> In several publications, Miglio defined American federalism as a “degenerate federalism” and the German one as a “false federalism” (See Malandrino 2012: 91). On the criticism to Hamilton and the idea that the American “anti-federalists” were “the true” federalists, see also Bassani (2009).

<sup>XXII</sup> “... Althusius divides the public association into particular and universal. The particular, in turn, is divided into the city and the province, and the universal is identified as the commonwealth (‘res-publica’), or realm (‘regnum’). The particular association does not possess sovereignty, while the universal does. It should be noted, however, that the city of Venice, because it possessed sovereignty, had the status of a commonwealth. Furthermore, while a city is composed of families and collegia, the province is formed of various kinds of local community ranging from the rural hamlet to the metropolis, and the commonwealth is constituted of provinces and such cities as have the rights and responsibilities of provinces in the assemblies of the realm (...) The commonwealth, as previously noted, differs from the city and province in that it alone possesses sovereignty. This is to say, only the commonwealth recognizes no human person or association as superior to itself. But where in the commonwealth does this sovereignty reside? Jean Bodin, to whom Althusius was highly indebted for so many of the characteristics of his political system, attributed it to the ruler. Althusius disagreed. His position, which followed consistently upon the principles he had already elaborated in smaller associations, was that sovereignty is the symbiotic life of the commonwealth taking form in the ‘jus regni’, or in the fundamental right or law of the realm. Since the commonwealth is composed not of individual persons but of cities and provinces, it is to them when joined together in communicating things, services, and right that sovereignty belongs. Therefore, it resides in the organized body of the



commonwealth, which is to say in the symbiotic processes thereof. This organized body was also known to Althusius as the people” (Carney 1965: XVII-XX). On the thought of Althusius, see also Malandrino (2016).

<sup>XXIII</sup> That was the opinion of Carl J. Friedrich who wrote “No Sovereign can exist in a federal order system; autonomy and sovereignty exclude each other in such a political order ... No one has the last world” (Friedrich 1968: 7). A different solution was that of James Wilson who argued in the Ratifying Convention of Pennsylvania (1787) that “the supreme power ... resides in the PEOPLE, as the fountain of government ... They can delegate it in such proportions ... as they think proper ... to the governments” and “to the government of the United States” (See Levi 2013: 25-26).

<sup>XXIV</sup> Phenomenon which can entail the direct disintegration of the Union or the disintegration of member states with indirect – but serious – effects on the nature and the functioning of the EU. It is no accident that – to give an example of the new “Europeanist nationalisms” - Catalan independentism considers EU full-membership as one of its fundamental targets.

<sup>XXV</sup> From this point of view, it is interesting to read the reflection of a pro-EU federalist scholar, contained in Fabbrini (2017).

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# A Federal Turn? The European Union's Response to Constitutional Crises in the Member States

by

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## Abstract

The EU has not yet found effective answers to constitutional crises in its Member States, in particular Hungary and Poland. Due to systemic problems of compliance with the common values of Art. 2, the legitimacy of the EU constitutional order and its smooth functioning are under threat, but the EU lacks instruments of direct enforcement and coercion. Several authors have therefore proposed to ‘federalize’ EU mechanisms and to guarantee to EU institutions, in particular the Court of Justice, more powers to intervene *vis-à-vis* Member States. However, the current Treaty framework presents a series of obstacles to federal-like enforcement. Solutions to national crises must ultimately respect the constitutional balance between the Union and the Member States.

## Key-words

European Union, federalism, international organisation, rule of law, Hungary, Poland



## 1. Introduction

Between the spring and summer of 2017, the adoption of controversial pieces of legislation in Hungary and Poland once again stirred the debate on how the EU could ensure that Member States respect common European values.<sup>I</sup> The approval of the ‘Higher Education Law’ and of restrictive measures against NGOs in Hungary, and the radical reforms of the judiciary proposed by Law and Justice in Poland,<sup>II</sup> have met with harsh criticism from key European actors. Consequently, there has been a renewed call for stronger action by EU institutions. All EU institutions intervened in the debate: the European Parliament;<sup>III</sup> the Commission, which has launched infringement procedures against Hungary<sup>IV</sup> and Poland,<sup>V</sup> and has adopted, under the Rule of Law Framework, a new (the third) Rule of Law Recommendation directed at the Polish government;<sup>VI</sup> and even the Council has for the first time formally discussed the situation of the rule of law in Poland,<sup>VII</sup> after a long period of inaction (Oliver and Stefanelli 2016).

While these recent developments may signal that EU institutions are increasingly willing to tackle on-going constitutional crises in the Member States, until today the EU’s reaction has been widely considered insufficient and ineffective.<sup>VIII</sup> Thus, many proposals have been formulated with the aim of strengthening the EU’s capacity to respond to constitutional crises in the Member States.<sup>IX</sup> Several of these proposals seem to have been inspired, explicitly or implicitly, by mechanisms available in federal systems to enforce federal ‘values’ and the federal constitution *vis-à-vis* their sub-national entities. In particular, there has been an emphasis on strengthening of *judicial* procedures, and much of the discussion has been conducted in terms of *enforcement* of values (Jakab and Kochenov, 2017).

The aim of this paper is to understand whether ‘federal solutions’ – that is, replicating mechanisms and procedures available in federal systems - may help the EU in addressing constitutional crises in its Member States. The paper posits the question with reference to two possible models for the EU’s intervention: federal systems, and regional and international organisations (IOs) engaged in democracy and human rights’ protection. Both types of entities aim to uphold the basic values of their polities, but follow contrasting models. First of all, the nature and relevance of the challenge these entities face depends on



whether problems arise in a federal state or in an IO. Secondly, the mechanisms and procedures of these entities diverge in many ways. This work contrasts the EU's structure with the two systems and then reflects on whether the Union could and should aim to replicate the solutions developed in federal systems. It will be argued, however, that there are several obstacles to the transformation of EU values' *oversight* (Closa and Kochenov, 2016) into federal-like *enforcement*.<sup>X</sup> Thus, the conclusion of this work discusses other possible avenues for the shaping of a system that can better safeguard the founding values of the Union.

## 2. Upholding values in multilevel systems: the nature of the question

It is a traditional exercise in European studies to present (con)federal states and IOs as two alternative models to conceive and understand the EU (Von Bogdandy 2012). However, both types of systems have a common element, in that they often affirm in their founding documents – constitutions, statutes, charters, and so on – a set of *political-constitutional* values, which are deemed to be shared by all the actors of the systems. Democracy, the rule of law, and human rights feature most prominently among these common values.

For federal states, this is a traditional and perhaps essential feature of their constitutions (Gavison 2002).<sup>XI</sup> However, in international and regional organisations, references to democracy and other shared political values are a more recent phenomenon. Only some organisations, such as the Council of Europe (CoE) or the United Nations (UN), have been committed to the protection of human rights and to other political objectives since their inception. For several other IOs with a more limited mandate, as well as for regional organisations originally born as regional trade agreements – the EU itself is an example (de Burca 2012) – this development came about only years or even decades after their inception. Several factors may have led to this: the new geopolitical context triggered by the end of the Cold War; the spreading of democracy and the rule of law as 'global goods' (Franck 1992, Carothers 1998); a normative concern for the protection and promotion of democracy and human rights; and the desire of regional organisations to broaden their originally limited mandate (Closa 2017, Duxbury 2011).



In most cases, federal constitutions, and statutes or other protocols of IOs, first introduce a general clause, where they refer to the concrete values shared by all members of the entity. Then they establish procedures through which the central organs can intervene in order to guarantee these values. Whilst the objective is similar – upholding the common values of the system - both the way in which the general clauses are framed, and the procedures that are put in place, are crucially different. This section looks at the general clauses and aims to understand *why* both types of systems require their Member States' to respect those political values, while section 3 focuses on procedures and mechanisms of enforcement or oversight.

Exploring IOs' clauses first, the best example is Art. 3 of the CoE Statute, which affirms that 'Every member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms'. Other regional organisations, in Latin America,<sup>xii</sup> the Caribbean,<sup>xiii</sup> and Africa,<sup>xiv</sup> contain similarly phrased clauses (Closa et al. 2016, Closa 2017). On the other hand, Art. 4 of the UN Charter contains a more generic formulation: 'Membership in the United Nations is open to all other peace-loving states which accept the obligations contained in the present Charter'. It is in any event argued that these obligations include the human rights norms of the Charter and those created by the other universal UN human rights documents. In several IOs, these clauses are to be found outside the original constitutive documents, in Charters or Declarations attached to them.<sup>xv</sup> The fact that they are located in successive documents shows the evolution of the mandate of the relevant organisation and also indicates that the inclusion of these clauses is a relatively recent phenomenon. The provisions are often framed in terms of requirements for acquiring membership of the organisation,<sup>xvi</sup> or as unspecified commitments undertaken by the organisation and its Member States.<sup>xvii</sup> They almost never define in detail the values to which they refer, nor do they provide clear standards to be respected by the Member States of the organisation.

Within federal systems, one of the basic functions of national constitutions is to declare the basic values of the polity as well as to offer protection for human rights, as seen above. This is true for unitary,<sup>xviii</sup> regional,<sup>xix</sup> and also of course federal states. The following analysis covers specifically the latter type of entities. In an analogous way to other state systems, federal constitutions in most cases begin with an enunciation of the basic rights



and values of the polity, as in Art. 1 of the German Constitution on human dignity, Section 1 of the Spanish Constitution,<sup>xx</sup> and the well-known preamble of the US Constitution. In addition, federal constitutions often contain other provisions positing more precise requirements for the organisation of power in their sub-entities. Good examples of this are Germany and the United States. The German Basic Law states in Art. 28: ‘The constitutional order in the *Länder* must conform to the principles of a republican, democratic and social state governed by the rule of law, within the meaning of this Basic Law’.<sup>xxi</sup> The US Constitution provides in Art. IV Section 4: ‘The United States shall guarantee to every State in this Union a Republican Form of Government’.<sup>xxii</sup> Other constitutions are less explicit but contain similar provisions which expect sub-entities to respect democratic requirements.<sup>xxiii</sup>

When it comes to the EU, the Treaty of European Union (TEU) proclaims in Art. 2 the founding values of the organisation. These values, Art. 2 continues, ‘are common to the Member States’. Moreover, according to Art. 49 of the TEU, respect for the values of Art. 2 is a condition for acquiring membership of the EU: ‘Any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union’. Moreover, Art. 49 affirms that ‘the conditions of eligibility agreed upon by the European Council shall be taken into account’. This is a reference to the Copenhagen criteria, including the political criterion of ‘stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities’.<sup>xxiv</sup>

At a general level, the provisions of federal systems, IOs, and the EU share some basic features. First of all, they contain a similar message: the members of those entities must be committed to the set of common values affirmed in the basic document of the system. Secondly, the values proclaimed in the documents mentioned above are conceptually similar - democracy, the rule of law, and human rights – and they are rarely defined in detail in the founding documents of the organisations. The exception is the concept of human rights: federal constitutions often provide a legally binding bill of rights, and IOs too may contain binding human rights charters or conventions – as in the EU, the CoE, and the Organization of American States (OAS) – or list more specific rights in other documents.<sup>xxv</sup> Finally, as shall be seen later, procedures are put in place in order to



guarantee respect for these general clauses. On closer examination however, the systems may be said to have some significant differences.

In the first place, whereas IOs present their values as requirements for membership, federal states do not make this connection explicit. Even where they still regulate possible accession of new members, such as in Article 4 Section III of the US Constitution,<sup>xxvi</sup> they do not pose specific conditions for membership. The fact that accession of new entities has been, in most cases, out of the question for decades (at least in ordinary circumstances), has prevented further development of clear policies on the topic.

More significantly, the provisions of the two systems are different in nature, as indicated by the different theoretical frameworks the doctrine has attached to them. In international and regional organisations, the concept most often used is that of ‘democracy-protecting clauses’ (Closa 2016). In federal states, the reference is to the concept of ‘constitutional homogeneity’ and the provisions are thus defined as ‘homogeneity clauses’, a term derived in particular from the German literature (Schmitt 2008).<sup>xxvii</sup> What the two concepts evoke is that the role of the provisions is not identical, despite the similarities in terms of general message and content. More specifically, the two expressions denote different perspectives: IOs adopt an ‘external’ perspective, while federal systems have a more ‘internal’ one. In sum, this suggests a different extent of engagement with, and intrusion into, the activities of the sub-entities.

The term ‘democracy-protecting clauses’ essentially suggests that these provisions are in place to offer an *external* guarantee to national democratic systems when the latter experience some difficulties. Thus, they offer to international organisation the possibility to intervene – via the procedures analyzed in Section 3 – in cases of crisis, such as military and civil *coups d'état*, or similar events. Whilst the effects of such a crisis are felt mainly within that particular Member State, the regional or international organisation may claim to have an interest to intervene in order to uphold democracy as a shared value of the system. However, a national crisis does not directly affect the functioning of the organisation itself, nor other Member States and their citizens. At most, taking measures is a matter of credibility for the organisation and the Member States, which may want to distance themselves from an ‘illiberal’ state, run by authoritarian figures.

In federal states however, a democratic crisis at the sub-national level affects the entire system more profoundly. The very functioning of the federal system depends on the



preservation of the degree of cohesion implied by the concept of ‘constitutional homogeneity’. Due to the higher level of interdependence, all the actors of the system feel the effects of a sub-national problem: the central government, other sub-entities, as well as *all* citizens of the state.<sup>xxviii</sup> The functioning of the whole body of federal law is undermined in these circumstances, and so is the legitimacy of the exercise of power by any authority within the system. This is thus an *internal* perspective: federal institutions are called to address the crisis primarily to defend their own authority and legitimacy.

The two types of frameworks have been applied to the EU, as the Union shares some characteristics of both systems.<sup>xxix</sup> For example, the TEU establishes that the values of Art. 2 are a requirement for membership, through the reference contained in Art. 49. This is a trait similar to IOs. Similarly, as will be discussed in Section 3, the Art. 7 system envisages a limited intervention of EU institutions in Member States’ domestic affairs. The remarkable diversity of the Member States’ constitutional systems must also be taken into account.<sup>xxx</sup> Some writers that argue that the concept of constitutional homogeneity cannot be applied to the EU make reference precisely to the heterogeneity of current constitutional models (Von Bogdandy 2009, Schroeder 2016). According to this line of thought, there would be no *homogeneity* in terms of constitutional values in the EU. Moreover, while in federations there is a clear principle of hierarchy of federal norms over state ones,<sup>xxxi</sup> which applies also to constitutional norms proclaiming the values, under EU law, the principle of primacy is confined to areas ‘within the scope of EU law’. The values of Art. 2 are however considered to be, mainly outside the scope of EU law *stricto sensu*, as the EU does not possess a general competence to legislate on democracy, the rule of law, or human rights, but only more specific, limited legal bases.<sup>xxxii</sup> Therefore, there is no clear hierarchy in this respect.

Looking at the effects of a Member State’s breach of values, the EU again shows similarities with both systems. Yet the effects of a national problem are more severe here than in any other IO. In the first place, there are the obvious symbolic consequences. The credibility of the EU as a project committed to the ideal of constitutionalism – reflected in the expression ‘a Union of values’ – is undermined if a Member State fails to respect the values of Art. 2 of the TEU. *Prima facie*, this is similar to other IOs, which are also committed to protecting and promoting the same values, as the CoE or regional organisations in South America and Africa. However, the consequences of non-adherence





are more severe and typical to the EU. The Union has in fact put in place a strict policy of human rights and democratic conditionality in its external relations, in particular in its development, neighborhood and enlargement policies (Cremona 2011, Larik 2016). A question that arises then is: how credible and effective can external policies be if the EU demands of third countries what its own Member States fail to guarantee?

However, the consequences of national violations of Union values go beyond the symbolic level. Some authors have argued that the ‘all-affected principle’ is applicable to the EU system too (Closa 2016; Muller 2016). The idea is that the ‘externalities’ of a Member State’s constitutional crisis are felt throughout the entire Union, at various levels: EU institutions, other Member States, and EU citizens. As provided by Art. 10 of the TEU, the democratic legitimacy of the entire EU system rests on a double channel: citizens are represented directly through the European Parliament, but also by the governments in the European Council and in the Council. Thus, the functioning of the EU democratic system depends on the functioning of *all* national democratic systems. Democratic failures of just one Member State affect the entire framework because they interrupt the democratic channels of representation and thus affect the legitimacy of the organisation.<sup>xxxiii</sup> Consequently, EU institutions, other Member States, and all citizens of the Union, both in their capacity as national citizens and as EU citizens, are affected by democratic and rule of law problems even in a single Member State. From this point of view, the effects are more akin to a federal system, as described above. The EU constitutional order shows in this respect a level of interdependence similar to federal systems.

Finally, there is another set of consequences which is unique to the EU system. The functioning of key elements of the EU legal order depends on Member States’ respect for the values of Art. 2 of the TEU. Many fields of EU law, from the internal market to the Area of Freedom, Security and Justice, are based on the principle of mutual recognition, which demands to national authorities to recognise each other’s administrative and judicial decisions. The system of mutual recognition, in turn, is predicated on the existence of mutual trust between Member States. What implies and justifies mutual trust, as held by the Court of Justice of the European Union (CJEU), is the ‘fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU’.<sup>xxxiv</sup> In



EU instruments based on mutual recognition, this premise is translated into a presumption that all Member States respect the values of Art. 2 and thus they can trust each other. However, if and when systemic problems of compliance with Art. 2 arise in a Member State, the whole system is put under pressure. This has been shown in cases such as *N.S.*<sup>xxxv</sup> and more recently *Aranyosi*,<sup>xxxvi</sup> where the CJEU, under the influence of European Court of Human Rights (ECtHR) jurisprudence,<sup>xxxvii</sup> was forced to recognise that the mutual trust presumption is rebuttable in certain, limited circumstances. In the medium term, however, if systemic problems remain widespread throughout the Union, and if the EU is unable to adequately address them, the very existence of the general presumption may be called into question, thus undermining the whole mutual trust–mutual recognition structure. In simple words: systemic problems of compliance with the values of Art. 2 – democracy, the rule of law, human rights – may disrupt the smooth functioning of EU legislation. This is possibly the most distinguishing feature of the EU as compared to traditional IOs within the ambit of this paper.

To summarise the findings of this section, both IOs and federal systems proclaim in their basic documents their aim to uphold a set of political-constitutional values: most often, they refer to democracy, the rule of law, and human rights. In regional and international organisations this is a recent and growing phenomenon. Provisions of constitutions, statutes, and charters specify conditions for sub-entities. In the case of IOs, this is generally done by establishing membership requirements, while federal states are more explicit in setting conditions for the exercise of authority at the local level. These provisions are however often understood differently. In IOs, they are categorised as ‘democracy protecting clauses’, while in federal systems as clauses of ‘constitutional homogeneity’. The concepts envisage two distinct types of intervention and a different extent of central intervention into local systems. Both types of framework have been applied to the EU, which seems to share some characteristics of both models. However, it is not entirely comparable to either of the systems. Compared to IOs, the consequences of Member States’ constitutional crises are more severe and affect the entire system of the EU. Whilst there are some elements common to federal systems, the EU seems to lack the homogeneity typical of federations and more generally the ‘subordination which places the centre above the periphery and empowers it to make demands of the latter’ (Hanschel 2017: 265). So, while there is a ‘federal dimension’ to the crises the EU is facing in Hungary



and Poland, the questions raised pose some specific and distinctive dilemmas for EU institutions.

### 3. Upholding values in multi-level systems: mechanisms

In addition to the general clauses outlined in the previous section, IOs and federal states also put in place concrete procedures and mechanisms to safeguard democracy, the rule of law, and human rights. This part of the work describes the main models adopted by the two types of bodies and compares the EU procedures to both systems.

Regardless of the diverse institutional arrangements, the procedures of IOs share a number of fundamental features.<sup>xxxviii</sup> First, the procedures created are *political* ones. The political bodies of the organisations representing Member States' national governments take crucial decisions, which in most cases require (at least) a qualified majority.<sup>xxxix</sup> Judicial bodies, even where these exist, are not involved in the deliberations on democracy protection. Human rights courts, such as the ECtHR in the CoE or the Inter-American Court of Human Rights can only decide on specific cases of breach of individual rights, but are not called on to deliberate on the overall democratic and rule of law situation in a Member State. Secondly, the procedures can be activated only in cases of *qualified* violations, such as 'serious' violations<sup>xl</sup> of the common values, or in even more circumscribed cases. For example, the African Union allows the suspension of a Member State only when a government takes power 'through unconstitutional means'.<sup>xli</sup> In their concrete practice, the African Union, the OAS and the Commonwealth have intervened mostly in cases of military coups.

The third, and most relevant, common element of democracy-protecting systems is the type of intervention they envisage. The procedures are based on an approach that envisages sanctions, suspension, and/or expulsion of the Member State responsible for the breach of the common values. The aim is to isolate the Member State from the organisation and from the other states. In the CoE, for example, according to Art. 8 of the Statute, the Committee of Ministers can suspend the rights of representation of the Member State, demand its withdrawal, and if the latter request is not complied with, provide for its expulsion. Similarly, the UN Charter provides for the possible suspension and expulsion of a Member State,<sup>xlii</sup> while the OAS<sup>xliii</sup> and the African Union<sup>xliiv</sup> can only call for



suspension. The paradigm is thus clear: the organisation and the other Member States distance themselves from the ‘undemocratic’ one, hoping that political and diplomatic isolation from regional partners would force the government in question to desist from undermining the common values of the organisation. There is no form of direct intervention or enforcement on the ground, but merely the hope that international intervention would mobilize internal opposition. Finally, it must be said that all the institutional designs mentioned above leave a wide margin for states to exercise their discretion on whether or not to tackle a specific breach and eventually apply sanctions. The discretion is evident also in the fact that often the procedures do not provide detailed steps to be followed, but are phrased rather generically. The concrete practice is therefore all but coherent, with frequent accusation of double standards when sanctions are used (Duxbury 2011: 280).

The range of instruments available to federal systems is radically different. First, federal constitutions put in place a combination of political and legal mechanisms. Judicial actors, in particular federal constitutional courts (or federal supreme courts), therefore play a key role in ensuring that local actors comply with basic values affirmed in the constitution. Secondly, intervention is allowed even in ordinary cases. This is to say that a violation does not need to be qualified as ‘serious’. Finally, a wide range of instruments of enforcement are available, allowing for a more direct interference with the sub-entities. Rather than imposing sanctions, federal systems aim to enforce the common obligations directly and do not rely on the will of the party in question. Mechanisms of coercion are available, as the common values affirmed in the constitution are often considered binding federal law and can be enforced both in ordinary ways, as any other piece of legislation, and also with special procedures. In most cases anyway, it is unnecessary to make use of the special procedures, which are clauses to be used *ultima ratio* in extreme circumstances. Questions on the enforceability of federal law against local authorities are treated as ordinary questions of compliance, rather than special ones. This, as shall be seen, is not (yet) the case for the EU.

The system in place in Germany offers an adequate illustration of these three fundamental differences. There are of course political channels, which can be used to resolve any conflict between the two levels, both informal and formalized. One of these formal channels is the possibility of ‘federal oversight’, according to which the Federal



government can supervise the implementation of legislation by the *Lander*.<sup>XLV</sup> But the Federal Constitutional Court (FCC) plays a crucial role in ensuring respect for the common constitutional values too. The Court can verify whether a *Land* laws comply with the Basic Law,<sup>XLVI</sup> including the human rights proclaimed in the constitution, the principles of *Rechtsstaat* and human dignity, and any other provision affirming the common values of the organisation. The jurisdiction of the FCC does not depend on whether a matter falls within the competence of the federal state or the *Lander*, as is the case for the CJEU. Moreover, the supremacy clause of Art. 31 of the Basic Law (BL) does not present any exception. Similarly, the bill of rights of the German constitutional court is *always* applicable, irrespective of which authority exercises its powers in a concrete case.<sup>XLVII</sup> Furthermore, the FCC has at its disposal a typical instrument of ‘militant democracy’: banning political parties.<sup>XLVIII</sup>

There is also an emergency clause in Art. 37 of the Basic Law – the ‘federal execution’ or ‘federal coercion’ clause -, according to which, if and when a *Land* ‘fails to comply with its obligations under [the] Basic Law’, the Federal Government ‘may take the necessary steps to compel the *Land* to comply with its duties’, after obtaining the consent of the *Bundesrat*. This is another political mechanism, as is often the case with federal emergency clauses. Art. 37 has never been used and is intended only as a last resort emergency provision. It is nonetheless relevant as it explains extremely well how federal emergency measures differ from those of IOs. As the second section of Art. 37 clarifies, there are in the system of federal execution strong elements of coercion, allowing for direct intervention in the affairs of the *Land*, which in the most extreme circumstances may even permit the deployment of police and/or armed forces on the ground.<sup>XLIX</sup> The concrete measures which can be taken, in any case, are not specified in the provision, thus leaving the Federal Government with a wide discretion to take the actions it considers most appropriate to addressing the problem.

A provision modeled on Art. 37 BL can also be found in another European semi-federal system, that of Spain. Art. 155 of the Spanish Constitution allows the Government to intervene when a community ‘does not fulfill the obligations imposed upon it by the Constitution or other laws, or acts in a way seriously prejudicing the general interests of Spain’. The system envisages two phases: the first is a simple request to abide by the Constitution and other obligations, whilst the second allows for real enforcement. In the



latter phase, coercion is possible and resistance against federal intervention may constitute criminal disobedience (López-Basaguren, 2017). The provision was activated for the first time in October 2017 against Catalonia, in the aftermath of the crisis generated by the independence referendum.<sup>L</sup> Moreover, Spain has in place a similar system of human rights' protection and the Central government has the power to challenge enactments and decisions of the Autonomous Communities before the Constitutional Court.<sup>LI</sup> Finally, there are instruments of militant democracy, including the power to ban political parties.<sup>LII</sup>

The US Constitution provides for a combination of judicial and political mechanisms too. The 1791 Bill of Rights, which originally covered only the action of federal actors, through the doctrine of 'incorporation' (Sullivan and Feldman, 2013) has become binding on state authorities and is today judicially reviewable by the US Supreme Court. Section V of the Fourteenth Amendment allows federal congress to enforce the provisions of the amendment, including the obligations provided by the first Section. On the other hand, the guarantee clause of Art. IV Section 4 is not justiciable, and poses an 'essentially political question', as the US Supreme Court held in *Luther v Borden*<sup>LIII</sup> and then confirmed in *Baker v Carr*.<sup>LIV</sup> It is therefore the responsibility of political actors – President and Congress - to intervene to ensure that every State maintains 'a Republican Form of Government'. Furthermore, Art. IV Section 4 contemplates another form of federal intervention. *Ultima ratio*, there is the option for the President of the United States to federalize the National Guard, placing it under the direction of federal officials, 'in order to ensure the execution of the laws of the United States',<sup>LIV</sup> as happened in several cases relating to the enforcement of de-segregation decisions between the end of the 1950s and the beginning of the 1960s.<sup>LVI</sup> However, the threat of military intervention, despite still being in the background, does not play a real role in current disputes on the enforcement of national law (Tushnet 2017).

In federal systems – even in those formally based on the principles of exclusivity and equality between the federal level and the federal units, such as Belgium<sup>LVII</sup> - there is ultimately a clear hierarchy between the federal constitution, where the basic values of the polity are affirmed, and the statutes and laws of the sub-entities. Moreover, and most significantly, all the federal systems analysed provide for instruments through which central authorities, both political and judicial, can take direct action in the local entities. All things considered, these instruments show the position of superiority of the central state.



How does the EU system compare to the two models outlined above? It is widely known that the main instrument that the EU has at its disposal to protect values in Member States is provided by Art. 7 of the TEU (Sadurski 2010). Art. 7 contains two separate mechanisms. Art. 7(1) establishes a preventive procedure, according to which the Council, voting at a four-fifths majority and after obtaining the consent of the European Parliament, may determine the existence of ‘clear risk of a serious breach’ of the values of Art. 2 of the TEU. According to Art. 7(2), on the other hand, the European Council can establish at unanimity, prior consent of the EP, that a Member State has breached EU values in a ‘serious and persistent’ manner. Following a first determination under 7(2), the Council, acting at qualified majority, can impose sanctions on the Member State in question. Art. 7(3) offers merely one example of the type of sanctions which can be imposed, namely suspending the voting rights of the Member State in the Council.<sup>LVIII</sup>

The mechanism shares several characteristics with the procedures of IOs discussed in the previous paragraphs. It is indeed a political procedure (Sadurski 2010, Kochenov and Pech 2015), controlled by EU political actors – Council and European Council, and the Parliament – and almost completely excluding the Court of Justice, which can only review the respect of the procedural stipulations of Art. 7.<sup>LIX</sup> Moreover, it puts in place extremely demanding voting thresholds, even higher than some other IOs: four-fifths of the votes in the Council for a simple determination of a risk of a breach, and unanimity for Art. 7(2).<sup>LX</sup> There are also similar substantive thresholds for action: a ‘clear risk of a serious breach’ in Art. 7(1) and a ‘serious and persistent breach’ in Art. 7(2).

However, the EU system does present some peculiar traits. Art. 7 does not allow for the expulsion of a Member State, something that is possible in several IOs, including the Council of Europe and the United Nations. In an even more distinctive manner, it does not allow for the full suspension of a Member State. The Council may only suspend ‘*certain* of the rights deriving from membership’.<sup>LXI</sup> Moreover, when it decides on sanctions, the Council ‘shall take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons’.<sup>LXII</sup> Thus, whilst it is true that the EU endorses the ‘sanctions approach’ of other IOs and lacks a form of direct intervention in the political and legal order of the Member State, the concrete sanctions system is specific to the EU. The clause on the rights and obligations of natural and legal persons is also unique and hints at the extreme interdependence of the EU system, indirectly referring to



pillars of EU law such as free movement and Union's citizenship. It is not hard to imagine how a decision taken under Art. 7 might interfere with the legal position of EU citizens or businesses that are somehow linked with the Member State in question. Finally, the involvement of the Court in the procedure, although limited, is also a remarkable aspect of the EU system as compared to other IOs.

It remains that the Art. 7 system does not have the same capacity to intrude into national legal systems as the 'traditional' EU law enforcement mechanism. One of the main strengths of the EU legal order is indeed the combination of institutional enforcement via the infringement procedure of Art. 258 of the Treaty of the Functioning of the EU (TFEU), with individual enforcement in national courts – supported by the CJEU in preliminary rulings – thanks to the doctrines of primacy and direct effect of EU law. This combination of instruments has made the EU 'the most effective international legal system in existence, standing in clear contrast to the typical weakness of international law and courts' (Alter 2003: 1). These mechanisms are however available only *within the scope of EU law*.<sup>LXIII</sup> Since the EU does not have a general competence to regulate the organisation of national democratic and rule of law institutions, or to adopt general human rights norms, several potential breaches of EU values cannot be tackled through a Commission infringement action or through individual cases before national courts. Outside the scope of EU law, Art. 7 is the only formal option, because it is applicable across the board, irrespective of whether or not a Member State is acting within the scope of EU law.<sup>LXIV</sup> However, there is a range of softer political instruments, the most important of which is the Commission Rule of Law Framework.<sup>LXV</sup>

Hence, whilst within the scope of EU law the EU has at its disposal federal-like systems of legal enforcement, when a situation is not covered by substantive EU law, institutions can only protect the values of Art. 2 through the procedures of Art. 7. The latter shares several characteristics with comparable systems of international and regional organisations, despite the presence of some traits specific to the EU legal order. Outside the scope of EU law, the EU lacks any possibility of direct intervention: the European Union Charter of Fundamental Rights (EUCFR) is not applicable, there are no instruments of militant democracy available, and of course the EU does not have an army to deploy on the ground. Ultimately, it relies for coercion on the authorities of its Member States.





The analysis conducted in these two sections explain the difficulty that the EU faces in protecting its founding values. On the one hand, the EU is obliged to intervene effectively, because constitutional crises in the Member States may affect its credibility, legitimacy, and the very functioning of its political and legal order. This necessity is matched by growing expectations that the EU is able to respond firmly and effectively. On the other hand, the mechanisms that EU institutions have at their disposal are significantly weaker than those available within the scope of EU law. The EU is thus stuck in the middle between more traditional IOs and federal states; whilst the difficulties it encounters may present some federal dimensions, the procedures are largely international in nature. This reading of the current crises has led several authors to suggest a federalization of the system in order to better protect democracy, the rule of law and human rights.

#### 4. A federal turn? Ideas and obstacles

It remains to be seen whether federal procedures such as those mentioned above can provide a platform for strengthening the EU's mechanisms, what the likely obstacles to the development in a federal sense of EU values' oversight are, and the possible alternatives to a federal transformation. This fourth section of the paper reflects on a possible reconfiguration of the EU system in a federal sense, assessing its feasibility and desirability. The analysis conducted moves from the constitutional framework offered by the current Treaties: of course, a fully-fledged 'federal (r)evolution' would certainly be possible in abstract, but the current political climate makes it rather unlikely. Thus, the paper considers possible federal developments within the current Treaty framework.

Among the several proposals formulated by institutional and academic actors, as a reaction in particular to the Hungarian and Polish constitutional crises, many seem to have been inspired, explicitly or implicitly, by mechanisms available to federal systems. There has been a certain emphasis on strengthening *judicial* procedures to ensure common values, broadening the mandate of the CJEU and/or of national courts *as EU courts*. Reliance on legal actors – mostly constitutional courts – is a feature which has been described as common to federations, and absent in IOs. Thus, some scholars have attempted to find ways to improve the *enforcement* of values, once again adopting a formulation closer to



federations rather than IOs, where the emphasis tends to be on political and diplomatic *sanctions* (Jakab and Kochenov 2017).

The most explicitly federal proposal has been suggested by Andras Jakab, who argues that the EUCFR should become applicable to all domestic cases, irrespective of questions concerning the scope of EU law and any cross-border element (Jakab 2017). The CJEU, the argument goes, should judicially re-interpret Art. 51 of the Charter, making the rights contained therein applicable even in purely domestic cases. The Charter would thus become ‘a real and fully fledged bill of rights in the European Union’ (Jakab 2017: 194), constructing a system of semi-centralized judicial review, in which local courts could use the ‘federal’ bill of rights in purely domestic cases, and the Court of Justice would be called to support them by interpreting the Charter via preliminary references. The proposal takes as a starting point the idea that sanctioning or expelling a Member State does not truly contribute to resolving the problems on the ground. Such an approach fails to offer adequate protection to the human rights of citizens affected by the policies of the government in question. Jakab thus suggests a radical federal transformation of the entire European project – a ‘fresh step towards federalization’ (Jakab 2017: 197) – considering the centralizing effects that a universally applicable bill of rights may have (Lenaerts. 1996; Eeckhout 2002).<sup>LXVI</sup> Indeed, ‘there is hardly anything that has greater potential to foster integration than a common bill of rights, as the constitutional theory of the United States has proven’ (Cappelletti 1989: 395). Therefore, making the federal bill of rights directly applicable to domestic cases would be a clear shift of the integration process towards the creation of a true European federation.

While the idea suggested by Jakab is certainly the most explicitly federal project and would produce the most far-reaching effects in terms of transformation of the European project, other proposals could also have a comparable impact on the integration structure. The much-discussed ‘Reverse Solange’ doctrine is certainly one of those (Von Bogdandy et. al 2012).<sup>LXVII</sup> The proposal similarly relies on national courts, supported by the CJEU via preliminary rulings. However, it does not claim that the EUCFR should *always* be applicable in purely internal situations, but only when there are systemic problems threatening respect for the ‘essence’ of fundamental rights. Thus, in an ordinary situation, the limits of Art. 51 of the EUCFR would still apply, because there is a presumption that Member States comply with the common values of Art. 2 of the TEU: this is the ‘Solange’



part, a reference to the Solange doctrine of the German Constitutional Court on the fundamental rights' review of EU legislation. In this way, the EU and the CJEU would show a form of deference to national legal orders, according to the proponents of 'Reverse Solange'. This presumption is however rebuttable when systemic problems are not adequately addressed at the national level.

The doctrinal ground for the proposal is the concept of EU citizenship, in particular, as interpreted by the CJEU in *Zambrano*.<sup>LXVIII</sup> In the latter the Court held that EU citizenship rights may be applicable in purely internal situations when the 'genuine enjoyment of the substance of the rights' is at stake.<sup>LXIX</sup> According to the Reverse Solange doctrine, in cases of systemic deficiencies, the concept of respect for human rights – an EU founding value as per Art. 2 of the TEU – is *de facto* divested of any concrete meaning, thus prompting a call for an application of the EUCFR as an emergency measure. The federal impact of such a development would be felt in two distinct senses. First, there are the considerations seen above in relation to Jakab's proposal. Despite its more careful dogmatic construction, Reverse Solange still implies radical overhauling of the limits of Art. 51 of the Charter. Besides, due to the rather open-ended nature of the concepts of 'essence of fundamental rights' and 'systemic problems', it may in the medium-term produce a similar transformation of the Charter in a universally applicable bill of rights, following a series of expansive readings by the CJEU. Secondly, it would give a significant boost to the concept of EU citizenship, possibly fulfilling its 'destiny' as 'the fundamental status of nationals of the Member States'.<sup>LXX</sup> A transformation along these lines would be radical. In the most precarious situations, where their human rights are (systematically) violated, citizens of Member States would rely not on national law or on the national constitution, but on EU citizenship and EU fundamental rights. This would be possible even in the absence of any cross-border element. The impact of such a solution would be relevant both symbolically, with the EU offering protection where national authorities fail to do so, and from a more technical point of view, as it would obfuscate the existing limits to the scope of application of EU law.

Finally, a third proposal to be considered is Kim-Lane Scheppele's 'systemic infringement procedure' (Scheppele 2016). While the idea in itself is not explicitly federal, and in fact relies on a traditional EU law enforcement mechanism, it would arguably entail a significant transformation of the current state of affairs. The proposal argues that the



Commission should bundle together, in a single infringement action, a series of breaches of EU values, directly on the basis of a breach of Art. 2 of the TEU. If the Member State in question does not adequately address the observation of the Commission in the pre-contentious stage, the Court of Justice would then declare that the state has breached EU values in a systemic manner.<sup>LXXI</sup> The Member State would thus be called on to remedy the systemic breach of EU values, and financial sanctions could be imposed via Art. 260 TFEU's procedure if it failed to do so. Scheppele suggests that financial sanctions could also involve the suspension of structural funding to the Member State.

This procedure would therefore entrust the Court of Justice with further competences in monitoring Member States' compliance with EU common values. Whilst this would not transform the nature of the EUCFR as such, it is likely that due to the vagueness of the other values mentioned in Art. 2 of the TEU, the Charter would be used as a benchmark to assess whether a Member State has breached EU values, thus indirectly overcoming the limits of Art. 51 of EUCFR. The proposal would also weaken the traditional separation between matters falling within and outside the scope of EU law. As discussed earlier, the principle of primacy of EU law only applies within the scope of EU law, where there are substantive norms and legislation. In the current framework, the values of Art. 2 are largely outside the scope of EU law, and thus the concept of primacy is not applicable to the provision. However, if EU values are transformed in legally binding obligations and therefore in 'traditional' EU law they would also enjoy primacy over any national constitutional norm. This would bring to the EU system a clear element of hierarchy, typical of federal systems, where the federal constitution is superior to statutes and laws of the sub-entities. In addition, as is often the case in federal systems, it would be a court – the CJEU – to supervise respect for constitutional values.

As may already be evident from the illustration of the proposals, the current constitutional framework presents several obstacles to the deployment of 'federal means' in order to protect the Union's common values. These obstacles are both legal and theoretical. Firstly, there is Art. 7 itself, which, as seen above, does not employ a federal paradigm and almost completely excludes the CJEU from the system. In relation especially to the proposal of systemic infringement actions, it can be argued that Art. 7 works as a *lex specialis* for the protection of Art. 2 values, thus excluding other traditional mechanisms of enforcement of EU law – including Art. 258 TFEU<sup>LXXII</sup> - when a situation falls outside the



scope of EU law. Hence the different model of Art. 7 and the roles it assigns to EU institutions would be called into question if the Art. 258 procedure is used through the backdoor.

Then there is Art. 51 of the EUCFR. During the drafting of the Charter, the Member States, were acutely aware of the potential federal effect of such a document, and were careful in limiting the scope of its application. They therefore stressed that the Charter ‘does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties’. Moreover, Art. 51 added that ‘The provisions of this Charter are addressed ... to the Member States only when they are implementing Union law’. The language of Art. 51 suggested a scope of application more limited than the traditional case law of the CJEU, which had already declared that its jurisdiction extended to reviewing Member States’ measures *derogating* from Union law. The situation was clarified by the CJEU in *Akerberg Fransson*, when it was held that ‘where national legislation falls within the scope of European Union law, situations cannot exist which are covered in that way by European Union law without those fundamental rights being applicable’.<sup>LXXIII</sup> To put it simply, where EU law applies, the EUCFR applies. However, the clarification is limited, because it remains difficult and controversial to ascertain when EU law applies (Fontanelli 2013). Even in the absence of a clear answer to this question, there are no doubts that Art. 51 still poses limits to the scope of application of the Charter. In other words, there will still be cases where the Charter does not apply, because the matter does not fall within the scope of EU law.<sup>LXXIV</sup>

It may be too simplistic to say that the proposals illustrated above do not take into sufficient account what the law is, but the limitation of Art. 51 of the EUCFR is so explicit that it can hardly be ignored, even more so when considering that the intention of the drafters of the provision was clearly to limit the applicability of the Charter. Jakab’s rebuttal (Jakab 2017: 199) is not entirely convincing: while it is true that the CJEU in other leading cases has gone against the apparent wording of a Treaty provision,<sup>LXXV</sup> in this context there is no ambiguity and there is the obvious desire of the drafters to prevent that effect. The Court of Justice would go explicitly *contra legem*, and its legitimacy would most likely be severely affected, were it to take that decision. On the other hand, the Heidelberg group attempts to square the provision of Art. 51 with their Reverse Solange doctrine, via Union



citizenship and the concept of ‘essence’ of fundamental rights. In practice, however, the proposal would also envisage an application of the Charter to cases currently excluded by Art. 51, and it is questionable whether the Court has the authority and the legitimacy to take such a step.

Finally, there is a set of theoretical arguments relating to the current nature of the EU and of the integration process, supported by the provision of Art. 4(2) of the TEU, protecting the national and constitutional identity of Member States. As seen in Section 2, some authors have argued that the framework of constitutional homogeneity is not applicable to the EU framework, since there is a great diversity in terms of the institutional organisation of the Member States, and the EU does not have a general competence to harmonise national constitutional systems. Hence Art. 4(2) of the TEU is in place precisely to protect the existing diversity of constitutional choices, excluding a convergence towards a single model. Armin von Bogdandy himself suggested the use of the more nuanced concept of ‘structural compatibility’, which accordingly demands a lower threshold than ‘homogeneity’ (Von Bogdandy 2009). This understanding of the integration process and of the nature of the relationships between the EU and the Member States calls into question a complete federalization of EU oversight, which would be entrusted to a Court with far-reaching competences to decide on any breach of fundamental rights in the Union or on the compatibility of constitutional arrangements with rather un-defined EU values. Expanding the jurisdiction of the CJEU would have the centralising and harmonising effects which Art. 4(2) of the TEU seems to exclude. It must be emphasized that these limits do not necessarily derive from a constitutionally pluralist view (Avbelj and Komarek 2012). More simply, this is what the current constitutional framework prescribes, imposing limits to EU’s judicial oversight of fundamental rights and providing a *political* rather than a *legal* procedure for upholding common values. In this framework, values are not simply imposed from the centre to the peripheries, but constantly co-determined between the two levels.<sup>LXXVI</sup> EU values are informed by national conceptions and at the same time they aim to shape the development of national values. This is in contrast to federal experience, where the monopoly of the interpretation of constitutional values rests with constitutional or supreme courts, and a common uniform conception is sought and then exported to the sub-entities. In the EU, however, it seems hardly desirable to transform this conception of



the integration process through judicial procedures, in the absence of a conscious political choice.

In conclusion, the federal solutions proposed seem to be not only legally infeasible, but also undesirable at the moment. To be more precise, it is not desirable that these solutions are adopted without explicit political deliberations. The traditional ‘integration through law’ model as shaped by Court’s decisions does not seem fit for this type of constitutional questions with a strong political component.

## 5. Conclusions: Upholding values and the EU constitutional balance

While a federal turn may be neither a feasible nor a desirable solution, EU institutions still have the responsibility to offer effective answers to on-going constitutional crises. The question has a crucial importance for the EU legal and political order, as recognised in section 2 of this work. But solutions cannot be imported from other contexts, either from federal systems or from the experience of other international and regional organisations. The EU and its own institutions should strive to find distinctive solutions, which acknowledge and respect the current constitutional balance between the Union and the Member States.

It is not the aim of this work to offer a detailed analysis of new solutions, but more modestly to identify some guidelines, which may contribute to finding a possible pattern for EU’s intervention. In the first place, the EU should make full use of existing procedures and frameworks. This includes both the more political mechanism, including Art. 7 and especially its preventive arm, and legal ones. It is precisely a combination of the political and legal instruments available that may produce better results than those achieved so far. This combination has not been attempted until very recently; the Commission followed different approaches in Poland, where it deployed the Rule of Law Framework, and in Hungary, where it pursued more limited infringement actions on technical aspects of the reforms. A more comprehensive strategy, involving not only the Commission but also the Council and the Parliament, would arguably be beneficial in fostering cohesiveness and coherence. Nevertheless, there are some positive signs: all institutions are finally participating in the debate, including the Council. Furthermore, the Commission has for the first time combined the two approaches *vis-à-vis* Poland: it has finally activated Art. 7(1),



adopted several Rule of Law Recommendation, but also launched an infringement action on the ‘Law on Ordinary Courts’. The combination of approaches and the mutual cooperation between institutions is one of the strengths of the EU legal and political order and may produce more positive results in fighting constitutional crises too.

Furthermore, even within the current constitutional framework, there is arguably room for infringement actions which are less narrowly framed, where substantive concerns regarding compliance with EU values emerge more directly.<sup>LXXVII</sup> This is possible especially in cases of systemic human rights problems. The Commission could rely more intensively on the Charter in infringement actions, as a support to an infringement of another provision of EU law or even as the *main* ground for the action in cases falling within the scope of EU law. Until today, the Commission has almost never done so (Lazowski 2013), but this is merely an institutional choice and not a limit imposed by Art. 51 of the Charter. There are some positive signs in this respect too. In the recent actions against Hungary and Poland, the Commission has referred to several provisions of the Charter as grounds for infringement. This allows the Commission to construct the action in less narrow terms, and consequently, if the CJEU were to find a breach of EU law obligations, the Member State would be forced to comply not only with the technical requirements, but would also have to ensure respect for EU fundamental rights.

Future reforms and changes to the system, if not undertaken within the context of a broader process of Treaty change, should also respect the limits of the current framework. Much could still be improved even without a fully federal ‘twist’. In the first place, the EU could create a comprehensive monitoring scheme, as suggested by the European Parliament with its ‘Values Scoreboard’.<sup>LXXVIII</sup> The Commission Rule of Law could be strengthened, extending it to *all* Art. 2 values and possibly making the activation of Art. 7 automatic if the state in question fails to take action after a Rule of Law Recommendation. Structural funds’ conditionality is an option to be considered and studied, although it raises complex constitutional and technical questions. But also, and perhaps more significantly, the EU could aim to identify clearer standards and develop common conceptions of the values of Art. 2. ‘Mainstreaming’ values into secondary law is one option to be pursued, but the EU may also aim to draft guidelines or a checklist similar to the one approved by the Venice Commission.<sup>LXXIX</sup> It is important, however, that the process involves national actors, and it is not perceived as an imposition from the center to the periphery.





Finally, it should be acknowledged that finding an effective solution to current challenges requires more than legal or doctrinal tricks, or a ruling of the CJEU. Upholding constitutionalism requires an intervention in the societal and cultural dimension too.<sup>LXXX</sup> The EU is not the only player in the field. It is therefore crucial that national actors perceive its intervention as legitimate and objective, otherwise it may become counterproductive. In order to avoid this, EU institutions should be careful not to overstep the boundaries of the current constitutional settlement, including the principle of national and constitutional identity.

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<sup>I</sup> See Art. 2 TEU: ‘The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail’.

<sup>II</sup> Whilst President Duda’s veto temporarily halted the adoption of two of the three reforms, the whole package was ultimately approved in December 2017.

<sup>III</sup> See European Parliament, Resolution of 17 May 2017 on the situation in Hungary, Doc. 2017/2656(RSP). For further analysis of the Art. 7(1) procedure, see Section 3.

<sup>IV</sup> European Commission - Press release - Hungary: Commission takes second step in infringement procedure on Higher Education Law, Brussels, 13 July 2017; and European Commission - Press release, Infringements - Hungary: Commission launches infringement procedure for law on foreign-funded NGOs, Brussels, 13 July 2017.

<sup>V</sup> European Commission - Press release, European Commission acts to preserve the rule of law in Poland, Brussels, 26 July 2017.

<sup>VI</sup> In December 2017, the Commission adopted a Fourth Rule of Law Recommendation and issued for the first time a reasoned opinion under Article 7(1) TEU, calling the Council to establish a ‘clear risk of a serious breach’ of EU values.

<sup>VII</sup> See Council of the European Union, Outcome of the Council Meeting, Brussels, 16 May 2017, Doc 9299/17: ‘The Commission informed the Council on the state of play of its dialogue with Poland on the rule of law. Ministers emphasised the importance of continuing the dialogue between the Commission and Poland’.

<sup>VIII</sup> See most of the contributions in Closa and Kochenov 2016. Specifically on the Hungarian case, see Pech and Scheppele 2016..

<sup>IX</sup> The main academic proposals, including Jan-Werner Muller’s ‘Copenhagen Commission’, the ‘Reverse Solange’ doctrine developed in Heidelberg, and the systemic infringement actions’ idea of Kim Lane Scheppele, have been collected in Closa and Kochenov 2016, and Jakab and Kochenov 2017. On the institutional front, the European Parliament has drafted a EU Mechanism on Democracy, the Rule of Law and Fundamental Rights: see EP, Resolution of 25 October 2016, Doc. 015/2254(INL).

<sup>X</sup> More on the distinction in Sections 4 and 5.

<sup>XI</sup> See e.g. Gavison 2002: the ‘basic values and commitments’ of a community are one of the traditional features of almost any constitution worldwide.

<sup>XII</sup> See Inter-American Democratic Charter, Arts. 2-3.

<sup>XIII</sup> See CARICOM Charter of Civil Society.

<sup>XIV</sup> See African Charter on Democracy, Elections and Governance, Art. 2.

<sup>XV</sup> As for example in the Inter-American Democratic Charter for the Organization of American States (OAS) and the African Charter on Democracy, Elections and Governance for the African Union.



- xvi As in CoE and UN, for example.
- xvii An example is Art. 2 of the Inter-American Democratic Charter.
- xviii See for example the Preamble of the Irish Constitution.
- xix See Art. 1 of the Italian Constitution.
- xx Admittedly, it is still controversial whether Spain may be considered a fully federal system. The paper does not take aim to take a stance in the discussion and will only consider it ‘federal’ for the purpose of this work. On the debate: see Sala 2013.
- xxi On the content of these principles, see Art. 20 of the Basic Law.
- xxii See also Amendment XIV.
- xxiii Art. 51 of the Swiss Constitution: ‘Each Canton shall adopt a democratic constitution’.
- xxiv European Council, Conclusions of the Presidency, Copenhagen, 21-22 June 1993, SN 180/1/93 REV 1.
- xxv See CARICOM Charter of Civil Society.
- xxvi See also previous Article 23 of the German Basic Law.
- xxvii On the origins of the concept of *Verfassungshomogenität*, see Schmitt 2008.
- xxviii This is defined as the ‘all-affected principle’: Goodin 2007.
- xxix See Closa 2016, for the qualification of the provisions as democracy protecting clauses. On the other hand: Mangiameli 2013; Delledonne 2016.
- xxx See for example on the rule of law: Loughlin 2010, Chapter 11: “Rechtsstaat, Rule of Law, l’État de droit”.
- xxxi See for example Art. 31 of the German Basic Law.
- xxxii See for example Art. 19 TFEU on non-discrimination.
- xxxiii On the issue, see Scharpf 2007; the concept of *democracy* developed by Nicolaidis offers another illustration of the “democratic externalities” in the EU system: see for example Nicolaidis 2013.
- xxxiv CJEU, Opinion 2/13 *EU Accession to the ECHR*, ECLI:EU:C:2014:2454, para 168.
- xxxv CJEU, C-411/10 *N. S. and others v Secretary of State for the Home Department and M. E. and Others* ECLI:EU:C:2011:865.
- xxxvi CJEU, Joined Cases C-404/15 and C-659/15 PPU, *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen* ECLI:EU:C:2016:198.
- xxxvii ECtHR, *M.S.S. v Belgium and Greece*, Application No 30696/09, Judgment of 21 January 2011; ECtHR, *Tarakbel v Switzerland*, Application no. 29217/12, Judgment of 4 November 2014.
- xxxviii As noted by Closa, the ‘institutional design of suspension mechanisms and provisions does not demonstrate significant divergence’; see Closa 2016: 387. There has been an ‘institutional mimeses’ as provisions has been frequently translated to different contexts.
- xxxix Examples of qualified majorities: Art. 20(d) CoE Statute: two-thirds vote of the Committee of Ministers, representing a majority of the CoE members; Art. 21 Inter-American Democratic Charter: two thirds of the Member States.
- xl See Art. 8 of the CoE Statute.
- xli See Articles 4 and 30 of the Constitutive Act of the African Union, adopted in 2000 in Lomé. The same principle is affirmed in the African Charter on Democracy, Elections and Governance, in Articles 2 and 3 – the procedure is then regulated in Chapter 8. Similarly, the Inter-American Democratic Charter provides (Art. 20) for the activation of sanctions “in the event of an unconstitutional alteration of the constitutional regime that seriously impairs the democratic order in a Member State”
- xlii See Articles 5 and 6 of the United Nations Charter.
- xliiii See Art. 21 of the Inter-American Democratic Charter, requiring a two-thirds vote of the Members of the OAS. After regional organizations in America follow a model similar the OAS: see MERCOSUR, Protocol of Ushuaia I and II; Andean Community, and the Union of South-American States.
- xliiv See Art. 25 of the African Charter on Democracy, Elections and Governance.
- xlv See Art. 84(3) and (4) of the German Basic Law.
- xlvi See Art. 93(2) of the German Basic Law.
- xlvii See Art. 93(4)(a) of the German Basic Law.
- xlviii See Art. 21(2) of the Basic Law. On the concept of militant democracy see Loewenstein 1937; more recently, Sajó 2004; Müller 2012.
- xliv Art. 87(a)(4) of the German Basic Law.



<sup>L</sup> This paper has been conceived and concluded before the Catalan independence referendum and for reasons of time cannot deal with such events in a detail manner. This is the only reference to the Catalan crisis offered in this work.

<sup>LI</sup> Art. 161(2) of the Spanish Constitution.

<sup>LII</sup> See Articles 6 and 55 of the Spanish Constitution.

<sup>LIII</sup> US Supreme Court, *Luther v Borden* 48 U.S. 1(1849).

<sup>LIV</sup> US Supreme Court, *Baker v Carr* 369 U.S. 186 (1962).

<sup>LIV</sup> 10 US Code 12406 National Guard in Federal Service.

<sup>LVI</sup> In 1957, during the Little Rock school crisis, the State governor resisted desegregation and ordered to close schools, deploying the national guard of the state to prevent the enforcement of the Supreme Court decision in *Brown v Board of Educators*, 347 U.S. 483 (1954). The President sent first a federal injunction against the use of the national guard and then deployed federal troops to enforce the federal courts' orders. For a more detail account: Freyer 1984.

<sup>LVII</sup> See Art. 169 of the Belgian Constitution.

<sup>LVIII</sup> Sanctions can then be removed via Art. 7(4).

<sup>LIX</sup> See Art. 269 TFEU.

<sup>LX</sup> The EP votes at qualified majority too: two-thirds of the votes cast, according to Art. 354 TFEU.

<sup>LXI</sup> Art. 7(3), italics added.

<sup>LXII</sup> Ivi.

<sup>LXIII</sup> As confirmed by the Commission in European Commission, 'A new EU Framework to strengthen the Rule of Law', Brussels, 19 March 2014, COM(2014) 158final/2.

<sup>LXIV</sup> See European Commission, Communication on Art. 7 of the Treaty on European Union. Respect for and promotion of the values on which the Union is based, Brussels, 15 October 2003, COM(2003) 606 final.

<sup>LXV</sup> Other options are Resolutions of the European Parliament and the Council Rule of law Dialogue, as well as the general activity of the Fundamental Rights Agency.

<sup>LXVI</sup> See also Opinion of Advocate General Sharpston in C-34/09 *Zambrano* ECLI:EU:C:2010:560.

<sup>LXVII</sup> von Bogdandy et al. 2012.

<sup>LXVIII</sup> CJEU, C-34/09 *Zambrano* ECLI:EU:C:2011:124.

<sup>LXIX</sup> Ivi, para. 42.

<sup>LXX</sup> CJEU, C-184/99 *Grzelczyk* ECLI:EU:C:2001:458.

<sup>LXXI</sup> Escaping thus the problem of creative and symbolic compliance emerged during the infringement actions against Hungary: see Batory 2016.

<sup>LXXII</sup> With the latter being of course the *lex generalis* for the enforcement of 'ordinary' EU law.

<sup>LXXIII</sup> CJEU, C-617/10 *Akerberg Fransson* ECLI:EU:C:2013:105, para 21.

<sup>LXXIV</sup> The 'humanitarian visa' decision offers a concrete example: see CJEU, C-638/16 PPU, *X and X* ECLI:EU:C:2017:173.

<sup>LXXV</sup> Such as in its decisions on direct effect of directives: see e.g. CJEU, C-41/71 *Van Duyn* ECLI:EU:C:1974:133.

<sup>LXXVI</sup> For example, common constitutional principles, now explicitly recognised in Art. 6 TEU as one of the 'sources' of fundamental rights in the EU, have inspired the case-law of the CJEU and led the development of fundamental rights' protection in the Union.

<sup>LXXVII</sup> As opposed to more 'indirect' forms of protection: see Dawson and Muir 2013.

<sup>LXXVIII</sup> European Parliament, Resolution with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights (Strasbourg, 25 October 2016) Doc. 2015/2254(INL).

<sup>LXXIX</sup> Venice Commission, 'Rule of Law Checklist' (Strasbourg, 18 March 2016), Doc. CDL-AD(2016)007.

<sup>LXXX</sup> With specific reference to Central and Eastern European states, see Blokker 2014.

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**The implementation of EU law  
by national administrations: Executive federalism and  
the principle of sincere cooperation**

by

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## Abstract

This paper explores the similarities between the EU's system of administrative implementation of its legislative acts, and the German and American systems of administrative implementation of their respective federal laws. The article will also study the connection between the principle of sincere cooperation, established in the EU Treaties, and equivalent principles which exist in federal legal orders, namely the "Bundestreue" principle. The EU system appears to be closer to the German model of federalism than the US. Despite the federal inspiration, one cannot say that the principle of sincere cooperation is a federalising influence on the EU.

## Key-words

executive federalism, European Union, principle of sincere cooperation, administrative implementation, European Union Law





## 1. The principle of sincere cooperation and the European Union

The principle of sincere cooperation is, in a general sense, linked to the creation of complex, decentralised, decision-making structures with different levels of action (and different actors) and, in particular, to the need to ensure coherence and harmony in the absence of a hierarchical relationship between these different levels. This principle has, as its common feature, a general duty of cooperation, which binds the various actors in relation to each other. In this sense, this principle is typically found in multilevel power structures, such as federations and, in some cases, supranational international organisations.

The European Union (EU) is a good example of one of these multilevel structures and the principle of sincere cooperation, expressly established in Article 4 (3) of the Treaty of the EU (TEU), is broadly recognised as a general principle of EU law, occupying a central role in its legal order. One can also find this principle and its normative content, which is inherent to the EU constitutional structure laid down in the Treaties, through the interpretation and the global (systematic) weighting of various EU primary law rules. It is a deductive effort of interpretation as opposed to a general principle of EU law extractable through a comparative effort of law (Kahl 2002: 446).

In this context, the principle of sincere cooperation guarantees the existence, through actions or restraint, of general mutual duties of respect, assistance, articulation, and non-contradiction – of coherence of action – between all the public entities covered by the EU legal order, both at the national level of Member States and at the supra-national EU level. The principle of sincere cooperation applies both horizontally, between Member States and between institutions, and vertically, between Member States and the EU, and covers all areas in which the EU has jurisdiction (although, in the area of the common foreign and security policy, taking into account the limitations of the jurisdiction of the CJEU, its development is non-existent).

Some of the most important premises of European economic and political integration are the harmonisation of the different legal systems (of the Member States and of the EU),



and cooperation between the legal entities involved, in order to achieve the objectives and goals established in the Treaties, without any of them losing their distinctive characteristics.

The realisation of the European integration project is ultimately based on the creation and maintenance of mutually loyal relations between the Member States and the EU. In EU law, because of the principle of sincere cooperation, the Member States and the institutions must adopt behaviour which is not only compatible with the 'Treaties' obligations but which ensures optimised compliance with them, with the EU legal order, and with the objectives of the Union.

In the absence of a general rule, expressly provided for in the Treaty, governing relations between Member States and the (then) European Communities, the CJEU recognised the principle of sincere cooperation, as a unifying legal principle, initially on Article 5 of the Treaty of the European Economic Community (TEEC), later Article 10 of the Treaty of the European Community (TEC) – and today, Article 4 (3) of the TEU. To the extent that this provision of the Treaty was understood as enshrining a general obligation, given its broad wording, it was left to the CJEU's case-law to build the substance of the principle and the general and specific co-operation duties which flowed from it to the various actors, in particular, the Member States.

The case-law of the CJEU on the principle of sincere cooperation has evolved through time (Kahl 2002: 441.). The stages of its case-law accompany the very evolution of the construction of the European project, and the very nature of litigation brought to the CJEU. At the outset, as the Member States controlled the Community legislative process, avoiding measures contrary to their interests through the central role of the Council; hence, non-compliance was not so much due to fundamental differences, but for reasons of convenience. However, with the evolution of the Treaties, and the legislative procedure rules (with the Council's loss of influence vis-à-vis the European Parliament, and amendments of rules on majority voting), non-compliance seems now to have become a strategy for some Member States. With the change to the initial balance, there seems to have been a need to affirm a cooperative relationship and a spirit of loyalty of Member States towards the EU and its institutions (Hirschman 1972: 19; Weiler 1991: 2464 ss.).

At the outset, the importance of Article 5 TEEC was not obvious. It appeared to be too generic a provision, and similar to many others in International Law. Thus, in the first



judgments in which the CJEU expressly referred to the provision, it did so as confirmation of arguments or conclusions which it had already reached, or in the context of the application of other principles or parts of the Treaty (Lang 2007: 1484; Klamert 2013: 65 ss.).

The *Deutsche Grammophon* judgment established a new line of case-law on the principle of sincere cooperation. In the decision, the Court stated that Article 5 TEEC establishes a “general duty for the Member States, the actual tenor of which depends in each individual case on the provisions of the Treaty or on the rules derived from its general scheme” (ECJ, Case 78/70, *Deutsche Grammophon v Metro-SB-Großmärkte*, 1971 ECR 489, n° 5). Thus, while accepting the existence of a general duty of sincere cooperation, it would only bind the Member States, or institutions, to the extent that it is complemented by specific duties under EU law (see also ECJ, Case 9/73, *Schlüter v Hauptzollamt Lörrach*, 1973 ECR 1135, n° 39; Case 229/83, *Leclerc v “Au blé vert”*, 1985 ECR 1, n° 46 ss., n° 48; Case 231/83, *Cullet v Leclerc*, AG Opinion, 1984 ECR 306, n° 3, § 4; and Lang 1986: 505). Accordingly, Article 5 TEEC was not recognised as having an immediate or direct effect, given its general and imprecise nature, its indeterminate wording and the necessary discretion of the Member States, being dependent on the establishment of specific duties (ECJ, Case 9/73, *Schlüter v Hauptzollamt Lörrach*, 1973 ECR 1135, n° 39; Case 229/83, *Leclerc v “Au blé vert”*, 1985 ECR 1, n° 20; Case 44/84, *Hurd v Jones*, 1986 ECR 29, n° 46 ss.; and Kahl 2002: 449).

Gradually, the CJEU adopted a different approach. In a number of fisheries-related cases, motivated by measures adopted by the United Kingdom, the CJEU used Article 5 TEEC as a source from which to draw a set of duties applicable to Member States, such as the duty to provide information to the Commission and to act in accordance with the Community interest when it acts within the framework of this legal order (ECJ, Case 141/78, *French Republic v United Kingdom*, 1979 ECR 2923; Case 32/79, *Commission v United Kingdom*, 1980 ECR 2403 ; Case 804/79, *Commission v United Kingdom*, 1981 ECR 1045). The view that Article 5 of the EC Treaty, by its indeterminate and general nature, could not establish any direct duty to the Member States, eventually become obsolete (ECJ, Case C-213/89, *Factortame*, 1990 ECR I-2433; Case C-285/96, *Commission v Italian Republic*, 1998 ECR I-5935, n° 19; and Koopmans 1991: 502; Lück 1992: 107; Jarass 1994: 9; Kahl 2002: n° 15 ss; Danwitz 2008: 474-475, Bogdandy 2014: n° 10 ss.; Hatje 2012: n° 1).

The case-law of the CJEU has thus taken this Treaty provision as a way of reinforcing the effectiveness of other obligations under Community law, and as a basis for limiting the



exercise of powers by the Member States in the event of non-existence of a specific Treaty obligation (Constantinesco 1987: 110-11; Klamert 2013: 62 ss.). The Court started to allow an expansive force (or broad interpretation) of the general duty of cooperation envisaged in this provision, especially the obligation of each Member State to “*facilitate the achievement of the Union's tasks*” and to refrain to “*from any measure which could jeopardise the attainment of the Union's objectives*”. For example, the Court held that “*if the implementation of a provision of the Treaties or of secondary community law or the functioning of the community institutions were impeded by a measure taken to implement (...) an agreement concluded between the Member States outside the scope of the Treaties (...) the measure in question could be regarded as contrary to the obligations arising under the second paragraph of Article 5 of the EEC Treaty*” (ECJ, Case 44/84, *Hurd v Jones*, 1986 ECR 29, n° 39; and Blanquet 1994: 306 ss.). Currently the prevailing view is that this provision, when certain requirements are met, may establish autonomous duties for Member States or for institutions not expressly provided for in EU law. Thus, even where there is no specific provision establishing a Member State's duty to cooperate, its conduct may still infringe the duty of sincere cooperation laid down in Article 4 (3) TEU.

Some examples will illustrate the evolution. First of all, in the context of Competition Law, in the words of the CJEU, “while it is true that Article [101 TFEU] is directed at undertakings, nonetheless it is also true that the Treaty imposes a duty on Member States not to adopt or maintain in force any measure which could deprive that provision of its effectiveness” – these are obligations for Member States, arising from the principle of sincere cooperation, which are not expressly provided for in the Treaty text (ECJ, Case 13/77, *INNO v ATAB*, 1977 ECR 2115, n° 31). In another example, the Court distinguished between the obligation to transpose directives, which derives directly from Article 288 TFEU, and the obligation to adopt a series of additional or consequential acts, whether normative or not, to ensure their application and effectiveness in the internal legal order, arising from Article 4 (3) TEU and the principle of sincere cooperation (Lang 2003: 1937-1938; Craig 1997: 519-538).

The wording of Article 4 (3) TEU is still extremely relevant in this matter. This rule consists of three paragraphs. The first paragraph establishes the duty of respect and mutual assistance between the Member States and the EU in “carrying out tasks which flow from the Treaties”. In the second paragraph and in the first part of the third paragraph, we find



positive obligations (or general obligations) of the Member States regarding the EU. The former can be considered as an obligation of result - in the sense that the Member States must take measures capable of ensuring compliance with the obligations arising from Union law - and the latter an obligation of means - Member States are obliged to make available all the necessary means to “facilitate the achievement of the Union's tasks”. In the second paragraph, we find a reference not only to the obligations arising from the Treaty, but also to acts of the EU institutions - legislative and non-legislative acts of all institutions. In the final part of the third paragraph a negative obligation (or general prohibition) can be identified, preventing Member States from adopting “any measure which could jeopardise the attainment of the Union's objectives”.

This means that, in accordance with the principle of sincere cooperation, the Member States have the duty not only to implement EU law, but to ensure its effectiveness. Also, in this context, the duty to implement EU law covers the entire corpus of EU law (the French “*bloc de légalité*”), including all EU law (e.g. the EU Treaty and the TFEU) and all secondary legislation (e.g. international agreements EU, regulations, directives and decisions).

In so far as the principle of sincere cooperation involves a duty of the Member States to respect EU law and to assist the EU in the pursuit of its objectives, this results in a limitation of the Member State's autonomy. In fact, since the autonomy of the Member States has to be reconciled and balanced with its duty to cooperate with the EU, the principle of sincere cooperation can be seen as an integration tool (Pernice 1999: 742) and the counterpoint, to some extent, to the principle of autonomy of Member States (Moreno Molina 1998: 44; 2000: 152).

However, the principle of cooperation is two-way: not only are the Member States bound by it, but also the EU. It applies to the mutual relationship between them, also guaranteeing that the EU institutions are obliged to respect the autonomy of the Member States and to ensure the coherence of their joint action. This can also be seen in Article 4 (2) TEU, which establishes the duty of the Union to respect the national identity and diversity of the Member States.

EU institutions and bodies, in the decision-making processes, have a duty to take into account the Member State's responsibilities and powers by virtue of the principle of sincere cooperation (Lenaerts *et al.* 2005: 415). The institutions must not neglect their duty to



cooperate with the Member States on the basis of their privileges and immunities, since they are of a purely functional nature (ECJ, Case C-2/88, *Zwartveld*, 1990 ECR I-4405, n° 21). This includes the powers of the Member States as members of EU institutions, such as the European Council or the Council. For example, the CJEU has on several occasions considered that the European Parliament should respect the power of the Member States in determining the seats of the institutions - directly or indirectly invoking the principle of sincere cooperation (ECJ, Case 230/81, *Luxemburg v European Parliament*, 1983 ECR I-255, n° 38; Case 294/83, *Parti écologiste 'Les Verts' v European Parliament*, 1986 ECR 1339, n° 25; Case C-345/95, *French Republic v European Parliament*, 1997 ECR I-5215, n° 31). Likewise, in a situation where, in the absence of action by the Council, it is the Commission which acts, it must do so through effective cooperation with the Member States (ECJ, Case 325/85, *Ireland v Commission of the European Communities*, 1987 ECR 5041, n° 15-17). However, the CJEU has also ruled that the adoption of a legislative act by the Council could not result in breach of the duty to cooperate even if it were to run counter to the interests invoked by a Member State (ECJ, Case C-63/90 and C-67/90, *Portuguese Republic and Kingdom of Spain v Council of the European Communities*, 1992 ECR I-5073, n° 53). Thus, the regular exercise of the powers of the institutions cannot be regarded as an infringement of the principle of sincere cooperation.

Despite this mutual nature, it is undeniable that the case-law of the CJEU has more significantly developed Member States' duties of cooperation, support and respect of EU law, in particular the duty to implement EU law.

The scope of the principle of cooperation also encompasses the relationship between national and EU legal systems. In the absence of a specific Treaty rule governing the relationship, it is Article 4 (3) TEU which ultimately serves that purpose (Lang 2003: 1905-1906), guaranteeing the unity of the EU legal order.

Indeed, the autonomy of the various agents (Member States or EU institutions), and of the various legal systems, can pose a threat to the effective and coherent application of EU law throughout the single market. Legal and political conflicts between the agents, arising from the tension generated between the need for unity and their institutional autonomy, require the existence of adequate response mechanisms – and one of these mechanisms is the principle of cooperation. In providing a legal basis for the solution of possible normative conflicts and tensions between the several states' legal systems and the Union's legal system,



the principle of sincere cooperation has a function which is similar to, and indeed comparable with, the principles that, in a federation, regulate the relation between federal law and state law (ensuring the prevalence of former over the latter).

In the more specific dimension of the regulation of the action of the administrations of the Member States and of the EU it is the principle of sincere cooperation which lends the EU its constitutional and administrative cooperative nature (Kahl 2002: 445; also Häberle 1978: 141-177; Schmidt-Aßmann 1996: 270–301).

## **2. Administrative implementation of EU law and the principle of sincere cooperation**

The duty of the Member States to implement EU law falls on all their public bodies and powers. There are legislative, judicial and administrative spheres of implementation of EU law. The rules applicable to the first two cases are not, however, easily applicable in the third case.

Regarding the legislative power, when, according to the principles of attribution, subsidiarity and proportionality, a given subject falls within the EU's legislative sphere of competence, conflict situations between EU legislative provisions (regulations, directives or decisions) and rules of the Member States (laws or regulations) should be resolved by the principles of primacy, direct applicability and direct effect. In relation to the judiciary, there is a separation of spheres of action and control of validity between EU and national courts, but it is mandatory for national courts to apply EU law as interpreted by the CJEU (Cassese 2004a: 35; Ruffert 2011: 277-306).

None of these scenarios is necessarily repeated in the administrative field. In a multilevel structure with the power to adopt legislative acts, such as the EU, one of the questions that need to be addressed is the distribution of (administrative) implementing powers through the various entities involved.

Generally, the EU relies on Member States' public administrations for the administrative implementation and safeguarding of EU law. This solution was expressly enshrined in Article 291 (1) of the Treaty on the Functioning of the EU (TFEU) by the Lisbon Treaty. The same Treaty introduced the express recognition that the Member State must assure the “effective



implementation of Union law”, which is considered “essential for the proper functioning of the Union” (Article 197 (1) TFEU). The public administrations of the Member States are thus tasked with ensuring the administrative implementation of EU law in cooperation with the EU institutions, specially the Commission, and this administrative execution depends on them, primarily (*v.g.*, Danwitz 2008: 302-303, 309, 469; Estella De Noriega 2000: 97; González-Varas Ibáñez 2012: 33 ss.; Schwarze 2009: 29 ss.; Cassese 1991: 769-774; Widdershoven 2002: 265-269). One should bear in mind that the normative implementation of EU legislation (namely through delegated acts or implementing acts, established in Articles 290 and 291 TFEU) is different from the administrative enforcement of rules – this paper focuses in the latter.

Even before the Lisbon Treaty, which introduced the provision, this task of the Member States’ administrations was recognised by the CJEU, as a consequence of the principle of sincere cooperation, within the duty of Member States to ensure the full effectiveness of EU law, provided for in Article 5 TEEC – today, Article 4 (3) TEU (*v.g.*, ECJ, Case 94/71, *Schlüter & Maack v Hauptzollamt Hamburg-Jonas*, 1972 ECR 00307, p. 10; Cases 205 to 215/82, *Deutsche Milchkontor GmbH and others v Federal Republic of Germany*, 1983 ERC 2633, p. 17 e 19; Case C-290/91, *Johannes Peter v Hauptzollamt Regensburg*, 1993 ECR I-02981, p. 8; Case C-285/93, *Dominikanerinnen-Kloster Altenbohenau v Hauptzollamt Rosenheim*, 1995 ECR I-4069, p. 26; Case C-292/97, *Kjell Karlsson and Others*, 2000 ECR I-2737, p. 27; Cases C-231/00, *Cooperativa Lattepiù arl v Azienda di Stato per gli interventi nel mercato agricolo (AIMA)*, C-303/00, *Azienda Agricola Marcello Balestreri e Maura Lena v Regione Lombardia and Azienda di Stato per gli interventi nel mercato agricolo (AIMA)*, and C-451/00, *Azienda Agricola Giuseppe Cantarello v Azienda di Stato per gli interventi nel mercato agricolo (AIMA) and Ministero delle Politiche Agricole e Forestali*, 2004 ECR I-2869, p. 56). This provision commands Member States to “take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union” (Danwitz 2008: 302-303, 307, 309, 469; González-Varas Ibáñez 2012: 33 ss.; Schwarze 2009: 29 ss.).

The CJEU has already stated that, “in the fields covered by European Union law, (...) the public authorities of the Member States are bound by a duty of sincere cooperation. Under that principle, they must take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the European Union and refrain from any measure which could jeopardise





the attainment of the European Union's objectives" (Case C-518/11, *UPC Nederland BV v Gemeente Hilversum*, ECLI:EU:C:2013:709, p. 59). Consequently, all duties arising from Article 4 (3) TEU - obligations to implement European Union law, whether through actions or omissions, of ends and means – are included, and are applicable in the administrative implementation of EU law by the Member States. In general, the principle of loyal cooperation may be considered a general obligation of the Member States to pursue and safeguard the interests of the Union - and of European citizens – at least in the same way or in a similar way in which they pursue and protect their own interests (Bogdandy 2011: 50 ss.).

Despite the historical recognition of the central nature of Member States national administrations in EU law enforcement, the real extent of their role and importance has deepened over time, culminating in the current wording of Article 291 TFEU (Danwitz 2008: 307; Widdershoven 2002: 267 ss.). The duty laid down in Article 291 (1) TFEU is therefore a consequence of the principle of sincere cooperation, which implements and complements it.

The importance of the principle of sincere cooperation is, in this context, clear. On the one hand, the legal obligation or general duty of the Member States to implement EU law is based on this principle (Keessen 2009: 85; Schütze 2012: 251). On the other hand, in the absence of a general duty of cooperation, Member States could block EU action in a significant number of areas, even unintentionally, for example by the inactivity of their administration – by not implementing EU law.

National public administrations are hence obliged to implement - enforce and apply - EU law. This duty applies even when their national law states the contrary of what is established by European legislation or when the Member State concerned would prefer not to apply the rule. The legal force of the cooperation principle surpasses the political will of the Member State. Strictly speaking, it is possible for a national administrative authority to act, solely based on powers provided on a rule of EU law, even if national law does not provide for it.

From a functional point of view, national administrative authorities operate as if they are part of the European administration, almost as a type of decentralised European administration (Bogdandy 2014: n° 43; Moreno Molina 1998: 38 ss.; 2000: 176; Schmidt-



Aßmann 2002: 1375 ss.; Schütze 2012: 55). This is a functional split (“*dédoublement fonctionnel*”) - the public administrations of the Member States must assume the dual role of national administration and EU administration (Moreno Molina 1998: 38 ss.; 2000: 176) because they are bound by the duty to apply national and EU law *ex vi* principle of sincere cooperation (Verhoeven 2010: 26-27; 2011: 45 ss.). The national public administrations of the Member States are “Europeanised” in this way. Thus, the administration of EU legislation is characterised as a multi-level administration, combining the EU administration and the various administrations of the Member States in a variety of ways and through multiple types of procedures.

The “*dédoublement fonctionnel*” of national administrations poses extremely complex problems. First of all, because national administrations themselves are bound by a much larger set of legal rules (“*bloc légal*”), and must not only continue to pursue the national public interest but also - in the same way - the public interest of the European Union. This may give rise to conflicts as to the relevance of the public interests in question - since the public interest which must be pursued at the EU level may be different from that which the national law determines (Kadelbach 1999: 32-35).

Why does the EU entrust the task of administrative implementation of EU law, as a rule, to the Member States?

Several reasons seem to contribute to this legal solution.

According to Sabino Cassese, for instance, there are three reasons for this: (i) constitutional: to avoid an expansion of the European administrative machinery that offends the prerogatives of national executives; (ii) functional: with the practical impossibility of direct execution due to lack of Community staff; (iii) cultural: Administrative Law, culturally, was understood as a strictly state function (Cassese 2006: 117; 2002: 291 ss., p. 293).

One must explore further possible reasons.

A pragmatic motive can be also be developed as an explanation. The national public administrations of the Member States, when compared with the public administration directly dependent on the EU institutions, bodies, offices, or agencies, are somewhat larger and have more means at their disposal for the fulfilment of their tasks. It would not be possible for the EU administration to achieve the same level of administrative



implementation of EU laws and policies (in terms of efficiency and results) which national administrations are able to achieve (Schütze 2012: 25-27). It was therefore considered more efficient to entrust this task to national administrations, given the difficulties that the EU administration would have if it alone took on the burden of administrative implementation of all EU legislation, especially taking into account the complexity of the tasks and the financial cost inherent in such an undertaking (*v.g.*, Moreno Molina 1998: 43). The ability to administrate the implementation of EU law is sometimes considered the Achilles heel of EU law – because the EU is dependent upon Member States to ensure its effectiveness (Keessen 2009: 85).

This means that the Union depends on the action of national public administrations, within the context of EU law, for the implementation of its own policies, and to reach its objectives as provided in the EU Treaties (Hofmann *et al.* 2011: 260 ss.). National administrations must therefore assume the role of implementing EU law, because without them, EU laws and policies would not, simply put, be effectively implemented.

But practicality is not the only reason: a further argument derives from the principle of subsidiarity. This is a fundamental pillar of the functioning of the EU, whose normative content indicates that decisions should be taken as closely as possible to the citizens. This principle is enshrined in Article 5 TEU, together with two others considered essential for decision-making at European level: the principles of conferral and proportionality. This set of rules is applicable to the EU's actions. Firstly, according to the principle of conferral, the EU can only act if the action in question is part of the powers conferred on it by the Treaties (Article 5 (2) TEU). Secondly, it follows from the principle of subsidiarity that, within shared competences between the EU and Member States, European action is only possible if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, because of the scale or effects of the proposed action, be better achieved at Union level (Article 5 (3) TEU). Finally, it follows from the principle of proportionality that the content and form of EU action cannot go beyond what is necessary to achieve the objectives set out in the Treaties (Article 5 (4) TEU). Subsidiarity and proportionality are corollary to the principle of conferral. They determine the extent to which the EU can exercise the powers conferred on it by the Treaties.



The principle of subsidiarity regulates the distribution of competences between the EU and the Member States, primarily in terms of legislative power. However, the same normative content - the same criterion - can also be applied to executive powers: in principle, the implementation of EU legislative acts should belong to the level of power which is closest to the citizens - the level of the Member States - except in exceptional situations where that implementation should be at EU level (Lucia 2012: 17-45, 23).

What was said above does not mean that the EU has no powers of administrative implementation of EU law.

In fact, the implementation of EU law can fall - in a secondary, subsidiary or exceptional way, - to the EU institutions (Schütze 2012: 55 ss.; Moreno Molina 1998: 45). This was established in Article 291 (2) TFEU, which provides that “where uniform conditions for implementing legally binding Union acts are needed”, the legislative acts in question should “confer implementing powers on the Commission, or, in duly justified specific cases and in the cases provided for in Articles 24 and 26 of the Treaty on European Union, on the Council”. In this way, it is recognised that the Union can implement its legislative acts when the adoption of “uniform conditions of implementation” is necessary, which can be interpreted as a reference to the principles of subsidiarity and proportionality.

It is in these circumstances that the EU’s own public administration becomes evident: the administrative apparatus that is accountable to the institutions, and the EU bodies and entities that have the attribution and competence of administrative enforcement of EU law in particular.

Where there is EU competence to implement EU law, the body responsible for such implementation will, as a general rule, be the Commission. In matters of common foreign and security policy it is the Council which has the implementing powers – as well as in “duly justified specific cases”. It was the Treaty of Lisbon which expressly recognised, for the first time, the executive powers of the Commission, regardless of the Council's delegation (unlike what was provided by Article 202 TEC before the Lisbon Treaty). Despite this innovation, it can still be said that the EU’s own implementation of EU law is based on a “dual executive” logic (Schütze 2012: 225), with the Council and the Commission being responsible for administrative implementation, albeit with the intervention of the Council mainly concerned with matters of common foreign and security policy.



The Commission's exercise of the powers of administrative implementation of EU legislation may, in accordance with the legislation in question, follow comitology procedures. Comitology procedures, in the proper sense, are procedures of implementation of EU law in which the Commission is required to act together with intergovernmental committees, composed of representatives of the national administrations of the Member States. The adoption of comitology procedures does not follow a pattern, and depends on how EU law regulates its own implementation.

In the context of the administrative implementation of EU law, comitology procedures are therefore an embodiment of the principles of sincere and vertical cooperation, allowing the cooperation of national administrations in the procedures (Craig 2006: 104 ss.). The comitology procedures, by involving the establishment of dialogue and contacts between national public administrations between themselves and with the Commission, contribute to the establishment of (formal and informal) relations of cooperation (Chiti 2011: 187; Keessen 2009; Parejo Alfonso 2000: 55 e 56.; Vos 2000: 1116-1117; Haibach 2000: 186; Schäfer 2000: 16.).

The organisation of the “*European Administrative Union*” is thus based on a multi-level structure deriving from Article 291 (1) and (2) TFEU: the national administrations of the Member States (dealing with the ordinary implementation of EU law) and the EU's own administration (when justified by the interests of the EU and the application of the principles of subsidiarity and proportionality). In the latter case, it is dual, as it includes both the Commission and the Council. In this context, one can classically distinguish between: (i) direct implementation of EU law, carried out by the EU's own administrative bodies; and (ii) indirect implementation, when it is carried out by the administrative authorities of the Member States (Danwitz 2008: 607 ss.; Kadelbach 2002: 167-207; Moreno Molina 1998: 33 ss.; Schwarze 2009: 29 ss.; Ziller 2007: 235 ss.; Cassese 1997: 7 further distinguishes between “instrumental implementation”, which is the province of the EU administration, and “final implementation” which would be up to the national administrations).

Beyond this strict dichotomy, there is a progressive emergence of EU law enforcement procedures in which both administrations (national and EU) participate jointly. There are



areas where the level of cooperation between administrations is so high that it challenges the typical categories of direct and indirect implementation (Danwitz 2008: 122 ss., 609, 612).

Indeed, in the implementation of EU law, some procedures were established with links between administrations of Member States and the Commission (vertical cooperation) and between administrations of Member States (horizontal cooperation), in particular through the provision of composite or multi-level administrative procedures.

In the case of vertical cooperation, the link between the various levels of administration is aimed at enhancing the advantages, and reducing the disadvantages, of direct and indirect implementation. In fact, the objective is to strike a balance between the guarantee of a consistent and uniform application of EU law, best achieved by the EU's own administration (through direct implementation), with the implementation by the Member States, which are the ones closer to the citizens (respecting the principle of subsidiarity) and that ensures greater effectiveness, since this level has more and better means of execution (Danwitz 2008: 609-610; Schmidt-Aßmann 1996: 270 ss.). Combining these advantages reduces or compensates for the implementation deficit which may arise from the fact that the executive level is alternately distinct or shared by the EU administration itself and the administrations of the Member States.

One can find complex or joint procedures of implementation of EU law, where national administrations and the Commission participate (in vertical cooperation and/or horizontal cooperation between Member States) at different procedural stages. The establishment of these complex administrative procedures, combining elements of direct and indirect implementation, is especially noteworthy in areas such as Environmental law, Agricultural law, or the approval of new products entering the single market (Danwitz 2008: 607-609, 612; Chiti 2011: 240; Martín Delgado 2010: 151). One possible example is the procedure established in Regulation (EU) No 1151/2012 of the European Parliament and of the Council of 21 November 2012 on quality schemes for agricultural products and foodstuffs for PDO (Protected Designation of Origin) and PGI (Protected Geographical Indication). This is a vertical joint procedure, since there are two distinct phases, one national and one supranational. Complex horizontal and vertical cooperation mechanisms, with the possible involvement of administrations from other Member States, and a dialogue with the Commission. The Commission begins by acting as a mediator between the Member States, but in the absence of an agreement between them, it takes the final decision on registration



(Article 52) – with the application of a comitology procedure (Article 57 (2) (Cassese 2004a: 27 Cassese 2004b: 39; Franchini 2004: 191.)

With regard to horizontal cooperation, Sydow suggests that, in parallel with classic indirect implementation, dispersed across Member States, and with vertical centralisation in the case of direct implementation, there is also the potential for horizontal centralisation through the transfer and concentration of decision-making powers in a single Member State (Sydow 2006: 66 ss., 71). These are cases where EU Law establishes its implementation through national administrative procedures, leading to administrative decisions of the Member States with transnational effects throughout the EU (either directly or after a recognition procedure), usually associated with horizontal cooperation mechanisms (Cananea 2007: 6 ss; Keessen 2009: 27 ss.; Maduro 2006: 131 ss., 167; Sydow 2006: 122-123; Ruffert 2001: 453-485; Schmidt-Aßmann 1996: 270 ss.). One example of the establishment of a transnational European administrative decision can be found in Article 26 of the Union Customs Code (Regulation (EU) No 952/2013 of the European Parliament and of the Council), which states that “*Except where the effect of a decision is limited to one or several Member States, decisions relating to the application of the customs legislation shall be valid throughout the customs territory of the Union*”.

Finally, it is necessary to mention procedures in which EU institutions delegate their own implementing powers to national administrations, thus depending on their cooperation for the enforcement of EU law. Examples can be found both in the management of EU funds by national administrations, and in the area of Competition Law (Regulation (EC) No 1/2003 of 16 December 2002).

This therefore means recognising an autonomous type of enforcement of EU law, with a focus on cooperative (vertical or horizontal) mechanisms - joint implementation or co-administration - involving procedures in which the EU administration and national administrations cooperate to meet the common interest in the application of EU law. The notion of administrative cooperation in joint implementation may cover distinct doctrinal concepts such as: multi-level administration, association of administrations or administrative federation (*Verwaltungsverbund*) or mixed administration.

In short, the regime of administrative implementation of EU law is complex and composite.



In certain areas, the implementation power of national authorities prevails, but in others it is up to the supranational level authorities to execute EU laws, which complicates the coordination between administrations. The emerging situation of mutual dependence can only be resolved through the principle of sincere cooperation (Cassese 2004a: 23; 2004b: 33-34). Thus, in the administrative function, problems arise from the need for joint action (or, at least, not incoherent action) between Member States' administrations and the EU's own administration.

To solve these problems, cooperation models between the EU and Member States in EU law implementation procedures were adopted. Links have been developed between national administration bodies of Member States and between them and the EU administration, in particular through the setting up of committees or working groups with representatives of the administrations of the Member States and the Commission.

Similarly, administrative procedures were created which intertwined the EU level and national level (Cassese 2004a: 23-24; 2004b: 34-35), namely through mechanisms of cooperation to ensure the effectiveness and uniformity of EU law administrative implementation. Even when implementation is the responsibility of the national administrations of the Member States, the Commission still has a role to play, at least in terms of monitoring national compliance with EU law.

### 3. The inspiration for the principle of sincere cooperation

The CJEU's gradual construction of the principle of sincere cooperation, and its ramifications, does not appear to have been significantly challenged by the Member States or institutions. The principle has been peacefully applied not only by the Court but also by the other institutions of the EU and by the Member States.

This process raises the following question: what was the inspiration for the CJEU in the initial formulation of the principle and its subsequent evolution? The correct answer seems impossible to find, not only because it was a gradual construction, but also because of the specific characteristics of the CJEU. This is not just because it is a collegiate body (like so many other judicial bodies), but especially because of its system of functioning. In particular, it is impossible to know in which way Justices decide (the secrecy of their deliberations is particularly rigid), and why, with the same applying to the rules of procedure. The Opinions





of the Advocates-General, addressing the principle and its wording, also provide no clue as to their origin.

It is therefore believed that the most likely answer will come from multiple origins; here inspirations from both principles of International Law and from the principles of “federal loyalty”, recognised in federal states, can be listed.

One can point out the principle of good faith (*bona fides*) as well as the principle of *pacta sunt servanda* in International Law as inspirations for the principle of sincere cooperation. Both these principles and the principle of sincere cooperation imply a limitation of the sovereignty of States and of their discretion. Article 2 (2) and (5) of the Charter of the United Nations, or Article 26 of the Vienna Convention on the Law of Treaties, signed on 23 May 1969, are normally mentioned as examples of this International Law inspiration for the wording of Article 4 (3) TEU (Witte 1995: 140 ss.; 2000: 83-101, p. 87).

It is not unusual for treaties of international organisations to incorporate reinforced dimensions of the principles of good faith, and *pacta sunt servanda* as an institutionalised form, to ensure the pursuit of the organisation’s ends. The scope of these legal principles (and their implications) depends, to a large extent, on the capacity of the legal system in which they are inserted to ensure compliance with them - notably through effective judicial instruments. This is the distinctive character of the principle of cooperation within the EU. Furthermore, the principle of sincere cooperation’s scope extends not only to the Member States, but also to the EU itself and its institutions, thus becoming a principle concerning the internal organisation and functioning of the Union. It is particularly relevant that the principle of sincere cooperation, as embodied in the case-law of the CJEU, is driven by the objective of ensuring the effectiveness of the Treaties. The guarantees of the effectiveness of EU law and the principle of sincere cooperation are not comparable with the mechanisms of other international conventions. Indeed, the creation and development of the principle of sincere cooperation in the EU depended largely on the existence of a judicial system to ensure compliance with the obligations arising from the Treaties, inter alia, by the Member States.

So, despite the importance of International law, and the good faith and *pacta sunt servanda* principles, the main inspiration seems to have come from the federal *Bundestreue* principle.



The principle of sincere cooperation is, thus, a kind of duty of “Community solidarity” (*Gemeinschaftstreue*).

The German Constitutional Court (BVerfG) considered the principle of federal loyalty (*Bundestreue*) to be one of the implicit constitutional norms (*immanenten Verfassungsnormen*) that regulate the relationship between federation (*Bund*) and states (*Länder*), imposing reciprocal duties of mutual respect, cooperation and joint action, irrespective of the concrete cooperation duties of the *Grundgesetz* (GG) (BVerfGE 6, 309, *Reichskonkordat*, 361). In fact, for the BVerfG, as the Federal Republic is a federation (Article 20 (1) GG), it follows from the federal principle that there is a constitutional duty of reciprocal loyalty and mutual understanding between its members (horizontal, between states, and vertical, between these and the federation). According to the BVerfG, “*the essence of the constitutionally-mandated*” federalism “*which binds them means that they must cooperate and contribute to the strengthening and guaranteeing of the vested interests of the federation and its members*”. This means that inherent in a federal state is the existence of a constitutional duty of behavior of its constituent elements “*in a friendly way towards the federation*” (“*bundesfreundlichem Verhalten*”) (BVerfGE 1, 299, *Wohnungsbauförderung*, 315; the BVerfG in this case finds historical roots for its reasoning, quoting R. Smend 1968: 247 ss., 261; see also BVerfGE 1, 117, *Finanzausgleichsgesetz*, 131; and 3, 52, *Weihnachtsgeld*, 57).

The principle of *Bundestreue* is not seen as the establishment of a new legal relationship between subjects, but can support, modify or limit the respective powers and duties within the existing legal relationship. It has a negative dimension (duties of omission) and a positive (duties to aid and assistance) - which shows its proximity to the general principle of cooperation (Stern 1984: 755).

#### 4. Does the EU follow a “cooperative federalism” paradigm of administrative implementation of EU law?

How to qualify, then, the administrative implementation system of EU law?

There are several models of administrative enforcement of legislation. As for the EU, given its multilevel structure, it is interesting to take into account the models adopted by federal systems for the administrative implementation of federal legislation. In fact, as in a federal state, the enforcement of federal legislation may be the responsibility of the federation



or the states, in the EU the enforcement of EU law may be the responsibility of the Union or the Member States – in both cases one can find two levels: a state level and a supranational level. These models, however, are not directly and incontestably transposable to the context of the EU, since its classification - between a supranational international organisation, a federal state, a confederation or a *tertium genus* – is still an open question (d’Atena 2005: 195-212; the BVerfG classified the EU as a “*Staatenverbund*” in its Maastricht Decision: BVerfGE 89, 155). Irrespective of this question, the truth is that the normative regime established by the Treaties sometimes seems to be inspired by institutions typical of federal constitutionalism.

The instruments and mechanisms for implementing the legislation produced by the supranational level are therefore at least comparable to the EU ones.

Classically, two models of federal systems can be presented with respect to the separation and balance of powers between the entities involved - dual federalism and cooperative federalism (Schütze 2009: 5).

Dual federalism is based on the idea of “dual sovereignty.” The Constitution divides sovereignty into two exclusive sets of powers and assigns one to the federation and the other to the federal states. The federal level and the state level hold sovereign spheres of action, acting independently and sometimes concurrently – ideally, no interference between the two spheres exists. The tasks and competences of the federal level are those expressly established in the Constitution, conferring all others to the states. As a result, the relationship between these two levels is one of tension rather than co-operation. Federal and state powers should be absolutely distinct and clear - the federation dealing with national affairs and states of local affairs - as a layer cake, hence the alternative name of “layer cake federalism” (Grodzins 1966: 190; Volden 2005: 327-348, 328).

Cooperative federalism is based on the idea that, given the complexities of today’s world and the vast public powers, the clear divisions between the various levels of government do not exist or are diffuse, with areas of overlapping or shared competence (*i.e.* an interpenetration of competencies) being foreseen. Thus, as federal and state powers must be seen as interdependent and deeply interconnected, and the objectives pursued by both of them, to a large extent, the same, it would be best to adopt cooperation as a preferential mode of action: the federal and state levels must interact, cooperating and acting collectively,



avoiding conflict or competition. Instead of the existence of two or three levels, or layers, perfectly distinct, - the aforementioned layer-cake – one must recognise that the powers of the federal, state and local authorities intersect and blend, depending on the matters in question, being closer to the image of the mixed layers of a marble cake. The notion of layer cake federalism is therefore opposed by that of marble cake federalism (Grodzins 1966: 8-9, 174; Volden 2005: 327-328).

German federalism can be considered to be cooperative (“*Kooperativer Föderalismus*”); it is an expression of federalism in which the various entities present in a federation must cooperate and carry out their tasks together. Since the federation has a significant share of the legislative function and the *Länder* have a predominant administrative role, there is a natural need for cooperation. This conception of cooperative federalism is the opposite of the idea of competitive federalism (“*Wettbewerbsföderalismus*”). According to this conception, states should have a wide discretion of action and decision, which creates a competition between them that will reward the most efficient (Hildebrandt *et al.* 2008: 11-21; Schatz *et al.* 2000; Zenthöfer 2006: 33 ss.).

In this context, and related to this distinction, the doctrine traditionally distinguishes between two models of enforcement of federal legislation: the centralised model and the decentralised model.

According to the first, the enforcement of federal legislation rests with a federal public administration. In this case, the federation establishes its own administration, autonomous of the states’ administrations, and with a jurisdiction coinciding with the scope of its legislative attributions. It is a model more easily derived from dual federalism, because it allows a separation of spheres of federal and state action by reason of matter. This is the model originally adopted by the USA (Schütze 2012: 244 ss.).

In the case of the decentralised model, the implementation of federal legislation is the responsibility of the public administrations of the federal states, the federal administration being of a residual nature and having a small size. There is no correspondence between the legislative powers and the administrative powers of the federation - in principle, the administrative sphere of competence is smaller than the legislative sphere. It is a model close to cooperative federalism, in that it implies interconnection between different levels. This



model, combined with a mechanism of representation of the states, through their executive branches, in the second chamber of the federal legislature, is called executive federalism (*Exekutivföderalismus*) and is adopted, for instance, by the Federal Republic of Germany (Laufer *et al.* 1998: 259-260). This system allows for substantial integration and complementarity between the federal legislative organs and the executive organs of the federal and state level, but gives a relatively minor importance to the *Landtage* (state parliaments) (Dann 2004: 135 ss.).

The links made between the models of dual federalism and centralised implementation, on the one hand, and cooperative federalism and decentralised implementation, on the other hand, only represent a trend. In fact, it is possible to adopt the model of cooperative federalism, despite the fact that the administrative implementation of federal legislation is exclusively reserved to the federal administration. In this case, the existence of a cooperative relationship can be observed in other aspects. This is what happened in the United States during a phase of its history, when cooperative federalism was adopted during the New Deal, for instance. It is also theoretically possible to set up a model of dual federalism in which there is a rigid separation between legislative and administrative activities - although in this case it is more difficult to classify such a system as pure dual federalism.

When comparing the EU with federal models, it should be noted that the European model departs from US federal doctrine.

It is the American Constitution that regulates the balance of power between the federation (the Union) and the states and between their respective legal systems - although much of this depends on interpretation. Its Article VI, paragraph 2, establishes the Supremacy Clause: the prevalence of federal law (the US Constitution, its laws and international conventions). The X Amendment to the US Constitution, which is part of the bill of rights, is the constitutional seat of the principle of American federalism, stating that all powers that are not attributed to the federation by the Constitution, and not prohibited by it, belong to the states or to the people. This Amendment, which clarifies the limits of the powers of the Union - its powers are only those provided for in the Constitution - is nevertheless regarded as redundant by the Supreme Court of the United States (Supreme Court or SCOTUS), which has already stated that this amendment “*added nothing to the*



[Constitution] *as originally ratified*” (SCOTUS, *United States v. Sprague*, 1931, 282 U.S. 716, 733). On the Amendment, the Supreme Court also stated that “*The amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved power.*» (SCOTUS, *United States v. Darby*, 1941, 312 U.S. 100, 124).

Despite these norms, the American Constitution does not expressly define many of the reciprocal boundaries between the state and federal powers. It follows that one of the characteristics of American federalism is the existence of a fluid relationship between the powers of states and federal levels, depending on the interpretation of the Constitution; hence the importance of the Supreme Court’s case-law.

In the field of the administrative implementation by the states of federal law, and based on the system of dual federalism, the jurisprudence of the Supreme Court established the *anticommandeering principle*, for example, in the *Printz v. United States* case (SCOTUS, *Printz v. United States*, 1997, 521 U.S. 898, 918-919, 935). According to this principle, Congress is prevented from imposing or requiring that the executive authorities of states enforce federal law. The federal authorities cannot issue directives that require the federal states to address specific problems or give orders to the administrative bodies or officials of states or their administrative divisions to enforce federal legislation. The states cannot be treated as mere instruments of implementation of federal policy. This rule is absolute and does not involve any balancing of interests (Tribe 2000: 880 ss. criticises this position).

The *anticommandeering principle* had already been established for the legislative implementation of federal policies in the *New York v. United States* case (SCOTUS, *New York v. United States*, 1992, 505 U.S. 144). According to the Supreme Court, the Union cannot establish an obligation for a state to perform a legislative act implementing a federal program. Similarly, the federation cannot force a state to execute a federal law by officials of the state, entities belonging to its administration or any of its territorial subdivisions, as this would be a way of circumventing the prohibition established by the *New York v. United States*. The states can only be encouraged to adopt a certain behaviour through financial mechanisms (the Union’s “spending power” - for instance, establishing conditions for receiving federal funds; e.g., SCOTUS, *South Dakota v. Dole*, 1987, 483 U.S. 203) or directly regulating the matter in



the place of the states through federal legislation, using the “commerce clause” (which establishes the power of the US Congress to regulate the “commerce (...) among the several states (...)).”

The central reason for this jurisprudential construction is to ensure the effective autonomy of states and the accountability of their political bodies, preventing them from responding politically to actions that have been ordered by the federation.

From this perspective, there is a fundamental difference between the EU and US legal systems. In the USA, it is understood that when a specific subject is attributed to either the federation or the states, their competences in that matter are not only legislative or normative - they are “comprehensive” competences, which cover the administrative implementation of laws and their enforcement. This means that if the competence of the federation covers a particular subject, it includes not only the power to legislate on it, but also the power to execute those federal legislative acts by an autonomous federal administration and by an order of federal courts of its own.

Conversely, in the EU, Article 291 (1) TFEU imposes on the Member States a positive duty to implement EU law (Schütze 2012: 55). Although the administrative jurisdiction of the supranational level may coincide with its legislative powers (as in the USA) in some areas, that is an exception. The task of administratively implementing and executing the EU legislation rests primarily on the shoulders of the Member States. This is a fundamentally different reality from the US federalism. In the absence of a *prima facie* correspondence between the legislative powers and the administrative powers of the EU, the scope of its administrative sphere of competence will generally to be more restricted than the legislative sphere, and is also limited by the principles of proportionality and subsidiarity.

On this point, the principle of subsidiarity defines, in areas outside the exclusive competence of the EU, the circumstances in which the Union, rather than the Member States, should act. Its aim is to ascertain if EU action is justified, not necessarily to protect the freedom or discretion of the Member States. The principle of the autonomy of Member States, established in Article 4 (2) TEU, defines the areas that remain within the sovereignty of the States and thus fall outside the scope of the jurisdiction of the EU, not establishing a prohibition equivalent to the anticommandeering principle. Another clear difference is that the EU’s principle of procedural autonomy of the Member States stipulates that, when



national administrations are implementing EU Law, national procedural law is applicable to the extent that EU law does not regulate the matter, with the double limitation of the principles of equivalence and effectiveness.

The existence of cases of joint implementation – of national administrations and the EU – also represents a disagreement between the US and EU models of implementation. In this case, not only are the national administrations of the Member States still bound to implement the legislation of the supra-national level, but are also integrated in common procedures. This would be unacceptable in the context of the American constitutional doctrine because of the mandatory nature of the powers imposed on the Member States.

From these differences between the two models, two conclusions can be drawn. On the one hand, the autonomy of the federal states in the US is - in this respect - broader than the autonomy of the EU Member States. On the other hand, recourse to the US legal system as a source of inspiration for legal solutions in the EU should always take this structural difference into account. At least in this area, the EU does not represent a European version of the US.

The EU model of administrative implementation of legislative acts is closer to the cooperative federalism model, inasmuch as it involves the establishment of cooperative relations between different levels of government. In fact, both with regard to the system of division of competences - where some of the characteristics of executive federalism are present, with the administrative implementation of EU law being seen, in general, as a duty of the Member States - and the organisational structure - with the Council of the EU to assume the role of legislative body representing the Member States, close to a Federal Senate (for instance, the German *Bundesrat*) - the solutions contained in the Treaties and the interpretation of them by the CJEU seem to be the result of a “federalising” inspiration.

To the extent that the powers transferred to the EU are mostly legislative powers - there being no general provision for the transfer of national administrative powers to the EU - it must be concluded that the EU has a strong legislative (and not administrative) element (Danwitz 2008: 307). The implementation powers are generally left to the states.





In this sense, the EU model of administrative enforcement of supranational legislative acts is closer - consciously or unconsciously - to the German model of executive federalism, although with some adaptations (Schütze 2012: 225).

The closeness derives from the fact that in the Federal Republic of Germany, it is a duty of the states (the *Länder*) to implement federal legislation, as its own attribution (*“als eigene Angelegenheit”*) - as if it were state legislation - unless otherwise provided by the Constitution (Article 83 GG – the exceptions can be found in Articles 86 to 90 GG). This is in line with the general rule, established in Article 30 GG, which states that the exercise of public powers belongs to the *Länder*, unless otherwise specified. The administrative function in Germany therefore includes three situations: (i) the *Länder* (*Landesverwaltung*) enforces state legislation; (ii) the administrations of the *Länder* are also, in principle, responsible for enforcing federal legislation; (iii) the federal government (*Bundesverwaltung*) implements federal legislation in matters covered by the GG. In the cases referred to in (ii), the execution of federal legislation by the *Länder* may occur as provided for in Article 83, or by delegation of powers (*Bundesauftragsverwaltung*), when GG permits it, as provided for in Article 85 GG.

However, the possibility of joint implementation procedures, where the national and supra-national levels intervene, is EU specific, with no correspondence to the German federalist model.

The German and European regimes seem to resemble each other in that, in both cases, the legislative function is divided between two levels of power structures - national and supranational - with a functional complementarity between them (Pernice 1999: 724-725) and, in both cases, the administrative function, even of supranational normative acts, tends to belong to the national sphere. There is a vertical separation of powers between the EU and the Member States, similar to the one which exist in federal states with an “executive federalism” model (Parejo Alfonso 2000: 45; Pernice 1999: 724-725; Schütze 2012: 251). The system of “executive federalism” adopted is not, however, pure. Indeed, the popular view that European standards are adopted centrally in Brussels, and implemented at national level - as would be the case in a system of pure “executive federalism” - represents an oversimplification of the system. The power to implement EU legislative acts belongs to both the Union and the Member States (Bignami 1999: 454; Keessen 2009: 85; Schütze 2012: 251) - and sometimes to both levels, acting in the same procedure.



This means that, even though the EU structure of implementation bears some similarities to the German federal model, it has also distinct features.

## 5. Is the principle of sincere cooperation a “federalising” influence?

As discussed, the principle of sincere cooperation seems to be inspired, at least in part, by the normative solutions found by federations in ensuring the implementation of supra-national legislation. Here, as the EU chose to resort to the national administrations of Member States, it adopted a model analogous to the German— and eschew the US model. In this sense, the creation by the CJEU of the principle of sincere cooperation appears to have been inspired by the imposition of the duty of execution drawn from the German principle of *Bundestreue*. But does the closeness of the EU’s administrative implementation system with a federal one necessarily imply acceptance of the federal nature of the EU?

The answer is no.

The EU cannot be considered a federal state, because it does not possess the elements necessary for recognition of a State - people, territory and political power (*e.g.*, Feige 1973: 89 ss.).

The principle of sincere cooperation is associated with the functioning of complex decision-making structures - in the sense that they are decentralised - with various levels of action and, especially, in the absence of a hierarchical relationship between the various levels. In this sense, the principle applies not only to federations but to several other non-federal realities, such as regional states, and must not be considered, by itself, as a federalising element.

To the extent that the Union is a complex power structure which involves decision-making processes involving the participation of various levels, the principle of sincere cooperation must be recognised as essential to guaranteeing the survival of the Union. This is especially necessary as there is no hierarchical relationship, either between the Union and the Member States, or between the EU and national legal orders (Bogdandy 2011: 11-55, 41-42; Zuleeg 2011: 763-786, 774-775). In fact, the principle of sincere cooperation has as one of its objective to provide flexible solutions to the various conflicts that may arise in a



political system with multiple levels, such as the Union (Witte 1995: 142; Bogdandy 2011: 51).

The principle of sincere cooperation therefore corresponds to general mutual obligations of the Member States and the EU, in which the specific content depends on each particular case, the provisions of the Treaty or the rules resulting from its general system (Case 78/70, *Deutsche Grammophon Gesellschaft mbH v Metro-SB-Großmärkte GmbH & Co. KG*, 1971 ECR 487, p. 5; Case 2/73, *Riseria Luigi Geddo v Ente Nazionale Risi*, 1973 ECR 865, p. 4; see also Lang, 1986: 505).

The parallel established between the principle of sincere cooperation (as *Gemeinschaftstreue*) and the federal *Bundestreue* does not require resistance to a transformation of the EU into a federal state; this does not imply the permanent and unlimited growth of the competences of the EU which could only result from the exercise of the constituent power of the European peoples. It is restricted to aspects of “fidelity” to the supra-national organisation in which the States agreed to be part.

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# The role of the Capital Markets Union: towards regulatory harmonisation and supervisory convergence

by

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## Abstract

The Council is a crucial intergovernmental institution of the European Union. However, the complex, opaque and consensual character of the decision-making process in the Council puts its legitimacy into question. Intergovernmentalist theory posits that it is sufficiently legitimised, indirectly, by the member state governments. Constructivist research, on the other hand, suggests that socialisation might disturb the relaying of positions from the national to the supranational level, as the former approach implies.

This paper aims to explore these issues, in particular related to representation and consensus. It contains an analysis of material generated in in-depth interviews. The Capital Markets Union (CMU) initiative serves as an umbrella term for regulatory changes directed at the overall development of European capital markets. As such, when analysing the legal framework of the CMU, it is important to note that this involves an undertaking which goes beyond the regulation of financial systems, also aiming to achieve supervisory convergence throughout the member states of the European Union. Indeed, it is perhaps one of the clearest examples of federal implications within the EU. All the synchronous movements enacted into law, leading towards harmonisation and supervisory convergence, show us that the CMU is an foundational piece in a collective journey towards ever greater integration in terms of economic governance and economic policies. Nonetheless, even if the CMU is one of the few cross-country risk-sharing mechanisms available to the EU, its implementation faces difficulties (as well as the looming Brexit) that demand careful analysis.

## Key-words

Capital Markets Union, economic federalism, risk sharing, supervisory convergence, free movement of capital





## 1. Capital Markets Union and the notion of a federal European Union

The free movement of capital within the European Union, as prescribed by articles 63 to 66 of the Treaty on the Functioning of the European Union, is a broad endeavor; it can probably be best described as one, overarching, all-encompassing, provision. Even if there are doubts about the legal provisions of its breadth of application, everyone can agree on the tremendous difficulties in achieving the enforcement of this freedom beyond the mere principle. Crafting such a freedom demands types of legal harmonisation, translated into expectations, and requirements concerning all activities relevant to the movement of capital across all member-states.<sup>I</sup> More importantly, as an exhaustive principle, establishing the free movement of capital for citizens of the European Union demands, from every member-state, the type of union-wide imposed harmonisation that encroaches on their ability to regulate their own sphere of competences.

Within the organisation of constitutional powers amongst member-states, demanding a freedom of capital flows implies a high (the highest?) level of legal and political integration in economic and related policy areas. In short, a full liberalisation of capital movements within Member States, as introduced by the Maastricht Treaty, goes much further than the mere expectation that member-states simply remove restrictions to the extent necessary for the functioning of the common market. But this desired end goal has already involved, and will involve many more, intermediate steps.

As economic and political circumstances gradually changed, globally and in Europe, the stage became set, step by step, for the realisation of an Economic and Monetary Union (EMU). At this time, EMU exists in practice (as several steps have been taken towards more coordination of national economic and monetary policies),<sup>II</sup> but only in part. Its full realisation is currently a matter of theory and legislative intent. In this movement towards free movement of capital, built upon the notion of free movement of goods and services, a common EU capital market,<sup>III/IV</sup> is, both in name and in practice, a necessary element to achieve the concept of a European Single Market (of goods and services).<sup>V</sup>

From a macro-economic point of view, monetary policies can aim for either an expansionary or contractionary focus. Different intentions underpin the decision to either increase or curtail the supply of money provided to the economy, which means that, across



the EU, different economic zones present differing demands in terms of these policies, and, within the EMU, a balancing act is difficult to achieve. In fact, considering current circumstances, such as Euro related interest rates close to zero, and the impossibility of using expansive fiscal policies due to the frail economic situations of most member-states, little can be done in the field of monetary policies in order to appease to everyone involved. Instead, the focus must be placed on deepening structural reforms that overhaul the functioning of the market in order to make it more amenable to investors, and competitive in comparison to that offered by third party states. In this regard, the Capital Markets Union (CMU) can be understood as one of the possible answers to these limitations (Fernández 2016: 4-5).

The idea of the CMU immediately calls to mind another EU legislative project, now a reality, the European Banking Union. Launched in 2010, the initiative aimed to provide a three-pillar answer to systemic risk posed to banks within the European Union (especially due to the state debt they held).<sup>VI</sup> If we were to compare the Unions (European Banking and Capital Markets), it is possible to argue that the CMU will not involve a profound change to financial markets in the short-term. But, although there are no significant changes to the overall organisation and functioning of the system, its implications are more pervasive, and long-term focused.

Instead of trying to alter the relevant framework, the CMU entails considerable expectations of harmonisation, and more efficient rules being implemented, with the aim of establishing firm foundations for the development of EU capital markets and the diversification of the sources of financing available to EU companies. Still, the CMU's scope is larger as its provisions are applicable to all member-states, whereas the European Banking Union is only implemented in member-states that have the Euro as their currency.<sup>VII</sup> Hence, we can conclude that the CMU boasts a distinct end from that of the European Banking Union. Where one aimed to centralise the banking policy framework, providing an adequate supervisory system (Véron 2014: 4-5),<sup>VIII</sup> the other seems not to be so intent on a movement towards centralisation, instead leaning towards a diverse set of objectives for development.<sup>IX</sup> This broader scope is also visible in the fact that there are no indications of a supervising body for CMU implementation being established. That decision seems to be rooted in the fact that, as we will see, the CMU implies a change in a heterogeneous group of subjects, with considerably different expectations of harmonisation in each one.



### 1.1. Free movement of capital and capital market development

Achieving the free movement of capital, and capital market development, does not represent a truly new objective for the EU. In fact, a common market for capital was one of the goals of the Treaty of Rome, where it was one of the tenets of ever advancing European integration. Yet, the crisis in 2008 brought a screeching halt to the process of development of European capital markets, as investors' confidence in capital markets in general plummeted. From 2008 to 2014, legislative changes in this regard were focused on attempts to re-establish confidence and trust in the European financial system.<sup>x</sup>

While addressing the European Parliament during his nomination process in 2014, Commission President Jean-Claude Juncker announced one of the objectives of his tenure: to remove all the barriers and blockages that prevent cross-border investment within the European Union, aiming to ensure the goal of free movement of capital through several initiatives that would be put under the umbrella of a "Capital Markets Union". Progress on that front has been relatively swift, with the publication of a Green Paper on "Building a Capital Markets Union" in February of 2015,<sup>xi</sup> after which the Council adopted conclusions on this initiative,<sup>xii</sup> prompting the Commission to launch its Action Plan on September 30th 2015.<sup>xiii</sup> The Commission's position, according to the Action Plan, was that a CMU would mobilise capital and channel it to companies and infrastructure projects, by allowing for different funding sources all across Europe. This would lead to increased cross-border risk-sharing and more liquid markets, which would deepen financial integration, lower costs and increase European competitiveness.

As investors' confidence and trust in capital markets was felt to have been re-established at the time, the objective was now to increase capital markets' efficiency and its ability to provide financing to European companies. Since then, a more complete set of goals has been put in place to create deeper, more integrated capital markets across the EU, which, in turn, should lower costs for investors and enhance market resiliency.

A financial system is comprised of a set of institutions and markets that allow for certain contracts and services, that then make it possible for economic agents to desynchronise both their risks and the time when those risks manifest. Within a fully implemented CMU, cost of capital would tend to be equal throughout the EU, facilitating or promoting investment market value for all relevant dimensions of activity (investment funds, SME funding, long



term investment – i.e. infrastructure projects - and many others), as member-state borders would become mostly irrelevant in terms of investors' choices. Capital could then flow between states with reduced intervention by financial intermediaries or service providers in general. In fact, amongst other aims, a CMU would empower investors to provide significant funds for investment across the Single Market without any barriers.

At the time the CMU was proposed (and, as it seems, at the time of writing), the financial system of EU member-states was thought to be overly reliant on bank financing for companies (Véron, Wolff 2016: 131-132).<sup>xiv</sup> SMEs in particular have limited access to financial markets. Few companies are able to access venture capital or even take part in regulated capital markets. For example, share and bond issuance by SMEs is uncommon across the EU and, when it exists, the offer is mostly confined to the domestic market, as the issued securities are, predominantly, not freely offered across different member states – mostly due to the differing rules and standards on their prospectuses,<sup>xv</sup> or the placement agent lacking authorisations to operate in different jurisdictions.

To this, one must add that there is hardly any appetite from investors to take the risk of acquiring capital or debt of companies (especially SMEs) located in different jurisdictions, where one simply has no assurance of access to reliable company information, necessary for the investor to base his decision, and where an investor would then have no clear way of knowing what would happen to his investment if something were to go wrong (in terms of establishing his claim in a different jurisdiction).<sup>xvi</sup>

Conversely, and focusing our argument on the type of corporate entity that has the greatest difficulties to overcome in order to access capital markets, SMEs are mostly reliant on bank financing; a fact cannot be changed at whim or by legislative action. This means that their access to capital markets will always be limited by their (usually high) exposure to bank financing, and thus demands specific considerations.

Even if we were to discount the limiting effect on SMEs resulting from their dependency on bank financing, the EU has a very fragmented capital market infrastructure which must somehow be consolidated. In November 2016, there were, within the EU, over 100 regulated markets, about 150 multilateral trading facilities, 20 central counterparties, 42 central securities depositories and securities settlement systems and 6 trade depositories (Meijer 2016). To address this challenge, settlement (CSDR),<sup>xvii</sup> market infrastructure (EMIR)<sup>xviii</sup> and cross-border settlement (T2S)<sup>xix</sup> have all been subjected to harmonisation, which has



made things simpler in the post-trade segment.<sup>XX</sup> Legislation was also put into place to provide a framework for investment intermediaries that provide services to clients for shares, bonds, units in collective investment schemes and derivatives, as well as the organised trading of financial instruments.<sup>XXI</sup>

As noted, the EU legislative body has already taken action towards the enactment of a CMU. Such a broad scope of subjects organised under a simple acronym (the CMU) implies that judging the effects and results of these concerted actions will be hard. In fact, different indicators can be used to analyse the results of the implementation of the Capital Markets Union, and the Commission has proposed a substantial set of objectives of the CMU that we evaluate against certain indicators.<sup>XXII</sup>

It must first be noted that, in general, capital markets in the European Union show an amount of capitalisation in percentage of GDP that is smaller than most comparable markets<sup>XXIII</sup> (in part, explained by the overwhelming presence of bank financing), and that value is set to decrease with the upcoming Brexit. That being said, the Commission aims to meet the following general objectives with the CMU initiative:

- Financing for innovation, start-ups (high innovation companies) and non-listed companies:<sup>XXIV</sup> Towards this objective we find the revision of venture capital regimes, attempts to correct information asymmetries concerning companies' financial situation (which prevents investors from correctly gauging the risk involved in investment) and the regulation of new forms of financing for companies (i.e. crowdfunding);
- Making it easier for companies to raise funds on public capital markets:<sup>XXV</sup> Simplifying the prospectus regime,<sup>XXVI</sup> improving the market for bonds (mostly by promoting the liquidity of those markets), and examining the best way to provide SMEs with access to capital markets;<sup>XXVII</sup>
- Promoting investment in long-term, sustainable projects and infrastructure projects:<sup>XXVIII/XXIX</sup> Fostering retail and institutional investment, mainly by revising capital demands for financial entities and insurance companies;
- Leveraging banking capacity to support the wider economy, namely financial services and in the insurance sector:<sup>XXX</sup> The first by supporting new FinTech developments and the second by evaluating possible changes in the insurance industry (namely,



establishing European pensions schemes and revising limits in investment in risk capital or company issued debt for insurance companies), as well as trying to facilitate the cross-border commercialisation of investment funds. More importantly, the CMU will entail a new legal regime for titularisation,<sup>xxxI</sup> based on the tenets that form the STS acronym (simple, transparent and standard) in order to make it easier to communicate to investors the characteristics of certain products;

- Facilitating cross-border investing:<sup>xxxII</sup> Namely by harmonising relevant civil law and fiscal law provisions to promote, as much as possible, cross-border commercialisation of investment funds, as well as reducing (eliminating) cross-border fees. On this subject, relevant progress has been made, for example, in terms of promoting the harmonisation of insolvency law across the EU.<sup>xxxIII</sup>

While these objectives and indicators are interesting tools and relevant benchmarks, one must mention that they are not clear-cut, as European capital markets are subject to several other factors, the effects of which cannot be removed from these, or any other, indicators.

While economic activity demands, for example, the existence of commerce, capital markets are, in fact, not a necessary part of economic activity. Economies can make do with alternatives to provide funding; banks, for example, can act as intermediaries replacing the need for capital markets. Their concern, linking borrowers and lenders, makes capital markets competitive and impersonal (whereas banking might be based on mutual trust between the parties). Investment in capital markets occurs only when it is advantageous for investors. This means that fostering capital market development, while desirable,<sup>xxxIV</sup> must stem from agreeable market conditions and legislative initiatives, which ensure their attractiveness. Otherwise, they will be underdeveloped and not sufficiently liquid; prerequisites that, in turn, must be accompanied by a regulatory and supervisory framework under which financial stability risks are under control.

In considering the importance of securities law in general as the plethora of legal rules that govern and conduct capital markets, for example outlining the requirements that must be met for firms to access investors and raise money, we must also consider that evolving technology has created new possibilities in the functioning of capital markets, namely generating global liquidity. If a certain jurisdiction imposes onerous regulatory costs on access to capital markets, firms might simply make investments available elsewhere and investors might simply choose to invest somewhere else. Due to this global liquidity, those



decisions would mean, in themselves, that investment simply would not take place in the markets that are less attractive,<sup>xxxv</sup> losing to others that are more appealing.

## 1.2. Risk-sharing and the implementation of the Capital Markets Union

The implementation of the CMU project is one of the clearest examples of federal implications within the framework constituted by the juridical entities of the European Union, with several elements, characteristic of federalism, being deeply ingrained in the framework. One of the greatest challenges in working towards a CMU is the regulatory aspect. There is a tremendous diversity of non-bank finance legislation across EU member states. As we know, EU law takes precedence over national legal orders and member-states' courts; administrative authorities must ensure that national law does not conflict with its provisions.<sup>xxxvi</sup> This means that a top down approach, such as the one being implemented, is possible given existing Treaty provisions. Nonetheless, regulation of CMU requires justification on how it would benefit the Union as a whole.

Capital markets integration, or financial integration in general, has the relative advantage of supporting risk-sharing between strong and weak sections of the entity. In the case of the EU, this means that the risk-sharing (here in the sense of smoothing of consumption)<sup>xxxvii</sup> between countries counterbalances risks that are specific to each part of the whole. In other words, it increases the union's welfare by hedging state-specific risks within the totality of member-states. In the EMU and, in particular, in the euro area, a single monetary policy is unable to react to asymmetric shocks (problems arising in certain portions of the EU when other portions are having no difficulties due to disjointed business cycles). This means that risk-sharing is key in mitigating the effects of those shocks. If consumption can be, and is, positively influenced due to the existence of risk-sharing mechanisms (for example, robust market or fiscal mechanisms), the overall volatility of aggregate consumption is also reduced, providing the welfare gains as discussed. This applies not only to countries ultimately affected by shocks, but to all of the EU, as any macroeconomic adjustments required to compensate for the effects of the shock are not as brutal.

When considering this mechanism of risk-sharing, the case of the EU is special. Labour mobility, for example, is possible, but made harder by the existence of different languages within the EU. A tax system at the supranational level is also unrealistic at this point of time, at least from a political point of view. Furthermore, limits on fiscal deficits<sup>xxxviii</sup> also limit



member-state governments in their attempts to smooth large shocks. In fact, as Furceri and Zdzienicka (2013: 16-17), risk-sharing mechanisms in the euro area appear to have been particularly ineffective during financial crises and severe downturns, significantly less so than in other federations.

As Vitor Constâncio puts it:

*“Ideally, the CMU should achieve the completion of the single market for capital within a common-currency union. This completion is vital to reap the full benefits of risk-sharing across borders and not be limited by border effects from past institutional legacies. Overcoming these border effects is to be achieved through regulatory and non-regulatory actions, including the harmonization of key legislation related to financial products. While the regulatory and non-regulatory actions will be instrumental in capturing market-provided risk-sharing, deeper capital markets have a particularly high potential to smooth risks across national borders (...) Broad objectives such as capital market development, deepening financial integration and achieving risk-sharing should be at par with specific proposals such as facilitating funding for corporates in general and for SMEs in particular. Key areas such as securitization, insolvency regimes, securities holders’ rights and tax legislation need to be prioritized. All these are important to ensure equal treatment of users of capital markets across Member States, the very essence of a CMU” (Constâncio 2016).*

As long as the principle of equal treatment of users across member-states is respected, a CMU aimed at developing European capital markets is one of the few cross-state risk-sharing mechanisms that can be used by the EU.

### 1.3. A testing ground for supervisory convergence

In the EU, supervision of banking, insurance and securities markets is characterised by a multi-layered system of authorities organised by both sectoral area and level (European or national) of supervision and regulation. This layered structure demands the existence of coordinating bodies and instruments as well as some form of coordination between all entities. Although several actors form the European System of Financial Supervision, we will focus on securities and markets supervision.<sup>xxxix</sup> Such supervision is achieved through a complex, interconnected, system consisting of the European Securities and Markets Authority (ESMA),<sup>xl</sup> the joint Committee of the European Supervisory Authorities<sup>xli</sup> and, finally, national supervisory authorities.

For the CMU specifically, at the EU level the European supervisory authority is ESMA, set up with the scope of covering securities markets and participants (exchanges, traders,





funds, etc.). Despite that scope, ESMA is solely afforded responsibility for the registration and supervision of credit-rating agencies and trade repositories, as well as recognising third-country central counterparties. Here national administrative authorities are only represented within the European supervisory authority; they can provide input, and any form of necessary collaboration is made easier by this constant contact.

At the micro-prudential level (the supervision of individual institutions), day-to-day supervision is done at a national level by competent administrative authorities. At the macro-prudential level,<sup>XLII</sup> we find the European Systemic Risk Board (ESRB),<sup>XLIII</sup> which is directed at preventing systemic financial stability risk in the EU, taking note of all relevant macro-economic developments. Its main functions involve the collection and analysis of relevant information as well as identifying and prioritising risks, to issue warnings and recommendations and monitoring their follow-up (namely, confidential warnings directed to the Council when an emergency situation may arise). In practice, these functions are performed in an analogous fashion to those of the ECB, as the President of the ECB is also the Chair of the ESRB.<sup>XLIV</sup>

Overall, we find a layered structure that is strongly fragmented and, practice shows, was unable to provide a concrete and structured approach to financial crisis. We can once again draw comparisons with the European Banking Union. In this initiative, from 2012, integration and cooperation problems were addressed with the implementation of the Single Supervisory Mechanism, a Single Resolution Mechanism, and the European Deposit Insurance Scheme (*at the time of writing, to be implemented*), with the three structures enforcing a top-down implementation of a single supervisory handbook. In contrast to the European Banking Union's actions, the CMU does not involve the same level of regulatory integration for EU capital markets and, as such, no single supervisory mechanism is envisioned. Instead, the intention is that the relevant European Supervisory Authorities (ESMA and EIOPA) will be better funded to enhance their capacity to act, and the relevant extant administrative authorities (European and national) expected to work in tandem, with greater cooperation and convergence, to ensure that CMU provisions are properly enacted and applied by the agents of a united EU financial system, without significant differences between them.

As such, in what regards the CMU, we find a different approach. The CMU took on a bigger goal – in answering the financial crisis of 2008 and the challenges of the following years, and answered it with a structured overhaul of the financial regulatory framework,



component by component. Going forward, after implementing new banking supervisory rules (including the resolution mechanism), the Commission has been pushing for the CMU. But tackling the bigger goal does not stop here: The Commission is currently preparing a review of the EU's macro prudential framework in order to promote financial stability (by tackling macro-prudential risk).<sup>XLV</sup>

Concerning CMU implementation, the most important topic in this context is still supervisory convergence, in particular the question of whether or not the European Supervisory Authorities need to be reimagined.<sup>XLVI</sup> The European Parliament has emphasised that both legal and supervisory frameworks will play a fundamental role in the CMU, as only the supervising entities can assure that all reform is brought into the day to day activities of financial intermediaries and other economic agents.<sup>XLVII</sup>

In advancing supervisory convergence, ESMA published, on 31 May 2017, an Opinion with nine general principles to be followed by national authorities in the context of the authorisation and supervision of regulated entities, especially when part of the management functions is delegated or outsourced to a third country entity,<sup>XLVIII</sup> namely taking into account the context of Brexit and the necessary relocation of entities. ESMA's objective is to ensure a harmonised approach by all national level supervisory authorities. Without entering into the day-to-day activities of those authorities in these matters, ESMA has set clear limits for the application of the relevant legal provisions.<sup>XLIX</sup>

Although a strong capital markets union project demands an active role from the authorities responsible for supervision, changes made to the powers and responsibilities of those authorities remain to be seen. As far as the implementation of the capital market union initiative is concerned, we note an intention to ensure that little to no idiosyncratic legal provisions are added by national entities during the transposition phase of directives (so-called *gold plating*). In fact, that might explain the preferred option of establishing most applicable new rules in the form of directly enforceable European regulations, to ensure EU-wide regulatory consistency. If EU securities regulations are to be enforced in similar fashion across the CMU, ESMA probably must be afforded greater regulatory responsibilities over national entities, namely with some enforcement powers.

In conclusion, by analysing the legal framework that attempts to bridge the CMU, one finds a scenario fraught with a sense of overarching control and centralisation that must be deemed characteristic of a federalist approach to regulation.



## 2. What about Brexit?

Despite the looming Brexit, it seemed clear that no other country could expect benefits from the CMU greater than those in store for the UK's financial industry; the UK hosts Europe's largest capital markets.<sup>1</sup> Assuming, as seems more and more probable at the time of writing, that the UK will be denied access to the European Single Market, British capital markets will not be part of the CMU. This means that the most established fund management location, the city of London, would be out of the equation, and different prime capital markets hubs have to be found (Stander 2016: 5-7).<sup>11</sup>

In the absence of the UK, already on a path to leaving the European Union, the remaining member states face a rather different cost-benefit allocation among them. As Philip Stander notes, on the one hand several financial centers could benefit from a relocation of UK-based firms and activities and, on the other, member states would have to compensate for the loss of market depth to cushion the economic consequences on capital market funding (Stander, 2016: 6-10). The consequences of Brexit on the CMU project are dependent on future political decisions, and hinge on whether (i) the EU decides to accelerate its efforts to implement the CMU to counter the absence of the UK, (ii) the EU feels that the project is not warranted as much attention due to the absence of the UK or, even, (iii) whether Brexit negotiations allow for a deal to be struck where the UK's financial industry retains the ability to obtain "passports" for their firms to perform financial services within the EU. All signs point, quite clearly, to the first hypothesis.<sup>111</sup>

Taking into account the consultation on the CMU back in 2015,<sup>1111</sup> discussed above, the remaining member-states stance concerning the CMU can be categorised in three groups. Most supportive of the initiative were Ireland, the Netherlands, Sweden and Luxembourg (member-states with highly developed financial markets); several other member states recognised the promise of the initiative, namely in the way it could improve financing conditions for SMEs and other business in smaller member-states; and France and Germany seemed to present limitations to the initiative, questioning the desirability of adopting a model of financial intermediation that reduces, in part, the importance of banks. One can imagine how different this positioning might have been if the consultation had been made in the absence of the UK as a member-state. Without London, the role to be played by all



member-states would have changed. Both groups, those who have particularly developed financial markets, and France and Germany, would have a far more important potential position to assume, namely in terms of providing financial services in the absence of UK based firms.

### 3. The current implementation of the Capital Markets Union

The CMU was originally based on an implementation framework spread over several years, and already in motion (2015-2019). By 2017, the Commission intended to have completed the first phase of CMU measures, namely STS securitisation,<sup>LIV/LV</sup> prospectus rules to facilitate access to capital markets,<sup>LVI</sup> and the overhaul of both the venture capital funds regulation and the social entrepreneurship funds regulation. Next in line would be the EU personal pension product,<sup>LVII</sup> increased availability of green funds (climate action), developing and supporting EU green bonds standards, supporting the development of FinTech firms through regulatory guidance and adequate treatment of policy implications of innovations, a market for covered bonds, removing barriers for cross-border investment, reducing barriers in the post-trading environment, increasing supervisory convergence through the actions of ESMA,<sup>LVIII</sup> and more. In fact, all of these actions were mentioned in one communication from the Commission on the CMU, titled *Capital Markets Union – Accelerating Reform*.<sup>LIX</sup>

This illustrates how the CMU now stands for a large group of initiatives and regulatory changes, serving as an umbrella term for the overall development of European capital markets. As such, when analysing the overall framework of the CMU, it is important to note that this is a comprehensive initiative and only with the passage of time will the actual priorities become clear.

More recently, the Commission issued its Mid-Term Review of the Capital Markets Union Action Plan,<sup>LX</sup> where the main priorities are identified as being: Strengthening the effectiveness of supervision to accelerate market integration; enhancing the proportionality of rules to support initial public offerings and investment firms; harnessing the potential of FinTech; using capital markets to strengthen bank lending and stability; backing sustainable investment<sup>LXI</sup> and cross-border investment; as well as supporting the development of local capital market ecosystems. It is hard to imagine that a broader set of priorities could exist, all



directed at enabling the development of new forms of funding and also facilitating the access to the market by SMEs in order to decrease the EU's economy reliance on bank lending.

#### 4. Closing remarks and challenges yet to be addressed

The poor development of EU capital markets has determined that EU companies have a greater dependence on bank financing than would be ideal,<sup>LXII</sup> a problem which prompted, in part, the project of creating the CMU. This initiative is important and necessary, but for European companies to reap the benefits can only work if all elements of the equation are assessed.

Alongside a reimagined Economic and Monetary Union, all the synchronous movements enacted into law towards harmonisation and capital flows within EU capital markets show us that the CMU is an fundamental element in the movement towards ever greater integration in terms of economic governance and economic policies in general. However, this integration is not free from difficulties, not the least of them the challenges of coping with ever greater European legal requirements that in time will come to supersede almost all manifestations of regulation by member-states. This ongoing economic and financial integration could be limited by the protection of constitutional principles at a national level, ensuring that the federal construct does not become so overbearing that it turns pernicious in nature.

The distinctive characteristics of each member-state suggest that the effects of the CMU on each part of the whole could be wildly different. One must not forget that markets are not a redistributive mechanism. Capital markets, from this point of view, reward the strong and penalise the weak.<sup>LXIII</sup> This focus on the implementation of the CMU will surely bring about positive change and growth for EU capital markets. But its advantages must be accompanied by countervailing actions consistent with a federalist view of the European Union, namely in terms of economic policy, or funding, both directed towards supporting the member-states who might not reap the benefits of that activity (even if the investments return is made possible by economic activity within its borders). Only if the circle is closed in this manner, so to say, will the existence of the CMU be translated into a smoothing of the effects of risk-sharing inside the EU.



Even if, with Brexit, most member-states operate in comparable financial systems (bank based, instead of market based as seemed to be the case in the UK), several conceptual and practical hurdles must still be overcome to achieve a CMU, such as eliminating the high level of segmentation in market agents; consolidating the information on transactions - and offers – at an European level, as well as issuer information (namely the debt they hold and ensuring that accounting and auditing standards are comparable within the EU); a single tax regime for capital movements, both for borrowers and issuers; harmonising national level supervision practices; or preparing centralised infrastructures for disclosure of financial information, relevant facts for investors and also conflicts of interest that might exist.

Taking all this into consideration, if any doubts were to be had at this point, the prevalence of the CMU leaves no room for a notion other than that of a Federal European Union. Still, the path must be that of subsidiarity whenever possible, in assuring supervisory convergence and, step by step, making sure that the CMU builds enough improvement into the regulatory framework and its implementation by member states to, over time, fulfill the CMU's goal. Increasing capital markets' prevalence also means increasing the risk of those markets, a growth that must be met by adequate action by both regulators and supervising authorities.

Although it is clear that national level solutions cannot alone fulfill the aims of the CMU,<sup>LXIV</sup> the solution must not be to adhere to the other extreme - a European level exclusive *status quo* in terms of both regulation and supervision.<sup>LXV</sup>

Nonetheless, Brexit brings the need to relocate the European Banking Authority and, with it, the temptation to prepare legislative reform that would involve a rearrangement of the three ESAs, placing all supervisory and regulatory powers at the EU level, hoping to overcome cross-border barriers by means of extensive harmonisation of rules and centralisation of supervision. Considering what has been written up to this point on the particularities of the CMU, this solution hardly seems a better option, and would undermine the steady progress of the initiative.

Looking at the current development of the CMU, the critique can be made that the initiative seems to be intent in creating the conditions for large financial institutions to further concentrate investment and expand their offer of products and services (Thomadakis 2017: 6).<sup>LXVI</sup> Still, if the overall result of the initiative proves to be increased transparency in capital markets, increasing accessibility to those markets by businesses, increasing market liquidity



and the promotion and implementation of FinTech developments,<sup>LXVII</sup> the CMU will have greatly contributed to achieving freedom of capital within the EU's single market. And that is, in itself, of immense value for the future development of the EU under the auspices of a federal economic arrangement.<sup>LXVIII</sup>

In closing, it must be mentioned that the Commission has already made staunch declarations on the need to accelerate the implementation of CMU, prioritising the harmonisation of insolvency law and supervisory matters.<sup>LXIX</sup> In particular, in the light of Brexit, the CMU presents an opportunity to determine whether or not supervisory competences are, in their current state, what they need to be, while, simultaneously, ensuring the enactment of several harmonisation movements that will reduce barriers to free movement of capital. Nonetheless, the completion of the CMU by 2019 seems to be a considerable challenge to meet. Perhaps, acknowledging this, the Commission's intention is to put into place the building blocks of the CMU by that date.<sup>LXX</sup> In fact, regulatory reform is but one of the first steps in achieving the CMU, only time will bring about the financial circuits, market conventions and technical infrastructures that take advantage of this revamped legal framework towards more efficient union-wide capital markets.

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<sup>I</sup> Annex I of Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty provides us with the definitions encompassed within the expression "movements of capital". It can mean very different things, such as securities investment, financing, real estate investments or purchases.

<sup>II</sup> The Treaty prohibits any restriction on capital movements and payments, both between Member States and between Member States and third countries. The principle was directly effective, i.e. it required no further legislation at either EU or Member States' level.

<sup>III</sup> In general, a market can be defined as a mechanism through which buyers and sellers of a certain product meet to determine the price and quantity of that product (normally, by gauging offer and demand). In capital markets, lenders are met with borrowers (either by banks, dealers, money markets or investment funds). In this sense, lenders and borrowers, through their intermediaries, trade in risk and time.

<sup>IV</sup> Capital markets, in the context of the Capital Markets Union, should be understood as shorthand for a long list of market segments and specifically excludes bank lending.

<sup>V</sup> Free movement of capital is one of the freedoms the European Single Market presupposes. Considering capital markets in particular, one must mention the Financial Services Action Plan of 1999 [COM (99) 232], the dawn of the EMU - mostly implemented in the beginning of the century, the Report of the High-Level Group on Financial Supervision in the EU Chaired by Jacques de Larosi re in 2009 and the creation of the European Supervisory Authorities in 2011.

<sup>VI</sup> Several works treat these matters in a comprehensive manner. In short, we are referring to firstly, the Single Rule Book, which established full harmonisation of banking regulation for banks operating within the European Union and the concentration of supervision powers in the European Central Bank, with mere participation of the national supervisors (in a manner comparable to the European System of Central Banks for the execution of monetary policies). Second, the creation of the Single Resolution Mechanism, separated from other supervising entities, in order to avoid possible conflicts of interest (see Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010). Third, a European



deposit guarantee scheme would constitute a third pillar of the European Banking Union. The Commission presented a legislative proposal and the European Parliament has been working internally on the steps to its realisation (see COM (2015) 586, which intends to amend Regulation (EU) 806/2014, and the Working Document by the Committee on Economic and Monetary Affairs on the European Deposit Scheme dated of 16.6.2016).

<sup>VII</sup> A remark that becomes less impressive when we consider the forthcoming Brexit.

<sup>VIII</sup> Which, before the implementation of the European Banking Union, was fragmented at the national level. It can be argued that said fragmentation proved dysfunctional at a federal level, because the incentives of individual national supervisors to be driven by banking nationalism collided with their prudential mandate.

<sup>IX</sup> All signs point towards the CMU's focus being not the financial sector but instead the development of the European economy in general.

<sup>X</sup> For example, establishing a framework for alternative investment fund managers (Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010), in an attempt to limit wrongdoing, as well as efforts to improve market infrastructure resiliency which will be mentioned later on.

<sup>XI</sup> COM (2015) 63. This paper attempted to diagnose the current situation of EU capital markets through consultation of private and public agents. Over 400 contributions were received in a public consultation that was closed in May 2015. See also COM (2015) 630.

<sup>XII</sup> 9852/15 (Council conclusions on a Capital Markets Union – 16 June 2015).

<sup>XIII</sup> COM (2015) 468.

<sup>XIV</sup> Although this dependence on banks, coupled with the lack of alternative financing channels, is now signaled as one of the significant features of the European crisis and the lack of diversity in the financial system one of the obstacles to its resolution, this prevalence was once seen by policymakers as a factor of stability.

<sup>XV</sup> Where given the option, Member-states have implemented in different ways Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading. The EU Prospectus Directive will be repealed in 21 July 2019 by Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017.

<sup>XVI</sup> The so-called “home bias”, caused by differences in language, regulatory and legal practice, tax and infrastructure. See ANDERSON *et al* (2015: 5).

<sup>XVII</sup> Regulation (EU) No 909/2014 of the European Parliament and of the Council of 23 July 2014 on improving securities settlement in the European Union and on central securities depositories and amending Directives 98/26/EC and 2014/65/EU and Regulation (EU) No 236/2012 (CSDR) was published in the Official Journal on 28 August 2014, and entered into force on 17 September 2014

<sup>XVIII</sup> Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories

<sup>XIX</sup> Among participant Central securities depositories, TARGET2-Securities (T2S), is an European platform for securities settlement in central bank money, effectively eliminating the need for cross-border settlement. Migrations to the system are being done by waves and according to schedule.

<sup>XX</sup> Clearing, settlement, custody.

<sup>XXI</sup> Usually known as MiFID II, the second instance of the Markets in Financial Instruments Directive is the EU legislation that regulates firms who provide services to clients linked to ‘financial instruments’ (shares, bonds, units in collective investment schemes and derivatives), and the venues where those instruments are traded (Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU). changes are currently set to take effect from 3 January 2018 and also include extensive regulation (which, as a whole, is denominated the Markets in Financial Instruments Regulation - MiFIR).

<sup>XXII</sup> As per the Action plan on Building a Capital Markets Union. The analysis of the state of implementation of those measures (using the indicators mentioned in the following notes) can be found on the European Financial Stability and Integration review (European Commission, Banking and Finance, April 2016), available at: [https://ec.europa.eu/info/system/files/efsir-2016-25042016\\_en.pdf](https://ec.europa.eu/info/system/files/efsir-2016-25042016_en.pdf).

<sup>XXIII</sup> Namely, the USA, Japan, China and Switzerland.

<sup>XXIV</sup> Indicators: Volume of crowdfunding, business angel investment, venture capital investment, private equity (assets under management).

<sup>XXV</sup> Indicators: Bank loans as a % of total liabilities of Non-Financial Companies (NFC), Bonds as a % of total liabilities of NFCs, NFCs' bonds (outstanding volumes), Number of bond issuances by NFCs, NFCs' stocks (outstanding value), Approved prospectus, SME Growth Markets, Companies listed on SME Growth Markets.





XXVI Proposing a material change in the way that information is addressed within a prospectus, centering it on the existence of specific risks relevant to the investor. In fact, Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 establishes that the prospectus must only mention specific and material risk factors, makes it easier to incorporate information by reference (if it is already published elsewhere) and a shorter (“user-friendly”) prospectus summary. Alongside a fast-track approval mechanism (Universal Registration Document), the Regulation demands the creation of a central prospectus database, where all prospectuses will be available for free. See also note xv. Many of these changes are directed at establishing easy disclosure rules so that more SME entities begin issuing financial instruments as a manner of financing.

XXVII Either by facilitating their access to public regulated markets or by instituting strong multilateral negotiation systems.

XXVIII Retail investment indicators: Infrastructure deals completed (global value), European project bond issuance, European project loan issuance, PPP transactions, Number of projects supported by EFSI, EIB financing for EFSI-supported projects, Expected total investment in EFSI-supported projects, ELTIFs, ELTIFs, Green bonds issuance (global value);

Institutional investment indicators: Households financial assets, EUR (% of GDP), Share of financial assets other than currency and deposits, EUR (% of GDP), Total assets of investment funds by investment policy (bonds, equity, mixed, MMFs, real estate, hedge funds), EUR (% of GDP), Total assets of insurance corporations and pension funds by investment policy, EUR (% of GDP).

XXIX The revision of the Solvency II regime as well as the revision of Capital Requirements Regulation were enacted as a way to fulfill this objective.

XXX Indicators: Volume of securitisation outstanding, Volume of securitisation gross annual issuance, Outstanding volume of covered bonds.

XXXI COM/2015/0472 final - 2015/0226 (COD).

XXXII Indicators: Efficiency of insolvency frameworks in EU Member States, Annual cost of burdensome withholding tax procedures, Capital mobility coefficient, Indicator of consumption risk sharing.

XXXIII Towards harmonisation of insolvency law, see Proposal for a Directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU, published on 22<sup>nd</sup> November 2016. Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) establishes rules when cross-border insolvencies take place.

XXXIV The development of capital markets, translated into a better matching of lenders and borrowers could lead to increased efficiency in fund allocation which would, in turn, support economic growth.

XXXV A relevant comparison can be made with corporate law. Non-competitive or too costly provisions concerning company law make investment in certain jurisdictions harder or less appealing for companies. But forming a company or some sort of subsidiary is an advantageous step to access that market as an economic agent that is given certain characteristics (mostly, limited liability). Differently, in capital markets, investors are particularly concerned with returns on investment in absolute terms and the associated risk, not so much with where that capital is applied and how the return on investment was achieved. This argument is further developed by Brummer 2008: 1111-1114.

XXXVI In fact, no national law can be used to judge the validity of EU law, as the European Court of Justice is the only competent authority to do so.

XXXVII Economic theory postulates that, in a perfectly integrated world, full risk-sharing can be achieved where consumption in regions or countries grows at a constant pace and is insensitive to local fluctuations in income and wealth.

XXXVIII Stability and Growth Pact.

XXXIX This focus in capital markets doesn't intend to discount the fact that the insurance sector and pensions are, also and in certain conditions, forms of investment, which are the object of certain parts of the CMU legal reforms.

XI. Regulation (EU) No 1095/2010.

XL.I The European Supervisory Authorities are the European Central Bank (ECB), ESMA and the European Insurance and Occupational Pensions Authority (EIOPA).

XL.II One must mention the existence of a Joint Committee of the European Supervisory Authorities, responsible for overall and cross-sectoral coordination. This includes: financial conglomerates; accounting and auditing; micro-prudential analyses of cross-sectoral developments, risks and vulnerabilities for financial stability, retail investment products; measures to combat money laundering; information exchange between ESRB and ESAs; and the development of relations between these institutions.

XL.III Regulation (EU) No 1092/2010 on European Union macro-prudential oversight of the financial system



and establishing a European Systemic Risk Board and Council Regulation (EU) No 1096/2010 conferring specific tasks upon the European Central Bank concerning the functioning of the European Systemic Risk Board.

<sup>XLIV</sup> Moreover, the ECB provides the secretariat for the ESRB.

<sup>XLV</sup> On 7 November 2016, the Commission held a Public hearing on the Review of the EU's macro-prudential framework which concluded a call for evidence period from 1 August until 24 October 2016, the intention is to enhance monitoring of risks arising from market-based finance.

<sup>XLVI</sup> On 21 March 2017, the Commission launched a public consultation on the operations of the European Supervisory Authorities.

<sup>XLVII</sup> Resolution 2015/2634, 9 July 2015

<sup>XLVIII</sup> ESMA, General principles to support supervisory convergence in the context of the United Kingdom withdrawing from the European Union (ESMA42-110-433).

<sup>XLIX</sup> ESMA also intends, in due time, to establish the Supervisory Coordination Network, which would allow national authorities discuss issues in relation to the relocation of UK market participants, in order to promote consistent decisions between different national authorities. Further measures to support supervisory convergence are being taken by ESMA, namely publishing, on 13 July 2017 three sector-specific opinions (one opinion on the asset management sector, one on investment firms and one on secondary markets).

<sup>L</sup> According to Wright 2016: 7, Brexit would reduce European capital markets depth by about 16%.

<sup>LI</sup> Stander points out quite clearly the dominance of UK based services in EU capital markets, for example, UK venture capital markets account for 36% of total EU activity, UK trading platforms execute 40% of EU trades and UK based firms clear about 70% of euro-denominated trades. The UK only holds a smaller market cap in debt securities, and still stands at 11% of EU capital markets.

<sup>LII</sup> The Commission establishes that “[t]he departure of the United Kingdom from the Single Market reinforces the urgent need to further strengthen and integrate the EU capital market framework . . . it also strengthens the need for further integration of supervision at EU level” (in COM (2017) 292, 8) See § 3.

<sup>LIII</sup> SWD (2015) 184.

<sup>LIV</sup> Through securitisation, a financial instrument is created by pooling assets (for example, a group of loans of the same type) for investors to purchase. This concentration of assets facilitates access to a greater range of investors, increasing liquidity.

<sup>LV</sup> See COM/2015/0472 final - 2015/0226 (COD).

<sup>LVI</sup> See COM (2015) 583.

<sup>LVII</sup> Currently undergoing, Consultation on Capital Markets Union: Action on a potential EU personal pension framework (27.7.2017).

<sup>LVIII</sup> ESMA/2016/203, 11.02.2016.

<sup>LIX</sup> COM (2016) 601.

<sup>LX</sup> COM (2017) 292.

<sup>LXI</sup> As established by the UN 2030 Agenda for Sustainable Development (UN Resolution A/RES/70/1).

<sup>LXII</sup> In fact, this dependence caused the impact of the 2008 crisis to be enormous on EU's real economy, even larger than it was in the USA.

<sup>LXIII</sup> In general, markets can supplement federalism. Their competitive nature, as well as the intent to bear risk generated by activity in them, means that projects which are questionable from a return on investment point of view are generally not accepted for investment (as investors will not be interested investing in such projects). Still, active markets, by increasing the amount of capital available for development, pave the way for an eased burden in terms of federal intervention. Federal power can concentrate in key investments or infrastructure development that might not be considered by the investors in capital markets but are deemed necessary or important in the long term by citizens (this idea is further developed by Hildreth 2005: 41-44).

<sup>LXIV</sup> In fact, one could argue that supervisory convergence greatly reduces the risk of regulatory arbitrage between different member-states of the EU by investors.

<sup>LXV</sup> Hence, each problem to be tackled to the CMU must be met by different types of solutions. As Véron and Wolff put it, “[t]his is best determined on a case-by-case basis. Both the present and the future situations are and will be hybrids between two extremes, in which supervision is, respectively, all-national (an unnecessary step backwards from the status quo) or all-European (an unrealistic and unnecessary prospect that would sit oddly with the subsidiarity principle)” (Véron and Wolff 2016:150), and, because of that need for different types of solutions, some changes to the organisation of the supervisory scheme might be justified.

<sup>LXVI</sup> Moreover, the initiative is also contributing to displace other heavyweight financial interests, as banks are naturally averse to the prospect of legislative and political action aimed at developing alternative financing channels (increasing competition).



LXVII In fact, the financial markets have yet to feel the incoming impact that technological disruptions (caused by technological advances in fields such as big data and artificial intelligence, among others) will surely inflict. LXVIII Perhaps necessary to face other economic behemoths in equal terms, attempting to ensure growth and welfare for all Europeans.

LXIX “*The perspective of the largest EU capital market actually leaving the EU makes this work even more urgent*”, Valdis Dombrovskis speaking to the Financial Times (14 September 2016). This was also the case with Jean Claude Juncker’s speech on the subject (21 September 2016). See JUNCKER 2016.

LXX COM (2017) 292: 18. [ During the final revision of this text, the European Commission has issued, on 12 March 2018, COM (2018) 114, committing to put in place all of the building blocks of the Capital Markets Union by mid-2019, following the publication of, among others, COM(2018) 97 and COM(2018) 109. ]

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## From the Unitary Patent Package to a Federal EU Patent Law

by

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## Abstract

For the last forty years, the European Union has been pursuing the goal of a unified system of patent law, which would make it possible for an invention to be protected, by EU law, throughout the territory of the Member-States, with a single application. This would simplify the patent protection system, making it easier, less costly and more secure, and would facilitate access to the internal market and promote scientific and technological development. However, problems might arise because of the plurality of legal sources that could be involved and due to the fact that not all countries want to be part of this new system. Nevertheless, the involvement of the majority of the Member-States in the Unitary Patent Package, through participating in an international agreement and in using the EU's enhanced cooperation mechanism, is evidence of federalist manifestations of the EU as a *sui generis* organisation.

## Key-words

Unitary Patent System, patents, federalism, European Union



## 1. Introduction

The goal of a unified system of patent law in the European Union (EU) has been pursued, by European institutions and Member-States, over the last forty years. The aim is to have an EU law that protects an invention throughout the territory of the Member-States with a single application. A simplified patent protection system would make the process easier, less costly and more secure. It would also facilitate access to the internal market and promote scientific and technological development, objectives of the EU.

One can easily understand that such a scenario has a number of advantages, both from a legal and an economic point of view, especially in the context of a single market like the European Union, making it more competitive compared to other global powers. Nevertheless, in Europe, the development of patent law has not been promoted by the EU, but, instead, by different European countries as sovereign subjects of Public International Law; this has led us to a patent system which is extremely complex and fragmented.

As an attempt to reformulate and redesign patent law and establish it as EU law, the Unitary Patent Package<sup>1</sup> (UPP) was developed by EU institutions. Clearly influenced by the patent law of the United States of America (USA), the UPP intends to introduce in the EU a unitary patent system which is, in our understanding, a federal manifestation of the post-Lisbon EU.

With this in mind, this paper aims, firstly, to critically compare the UPP and its components with the system currently in force and to explain its probable impact on patent law; and secondly, it will be shown how the UPP is in itself a manifestation of the federalism that characterises the EU as a *sui generis* supranational organisation.

## 2. The dream of a unitary patent system through the years

Even though a well-developed EU patent law is a long-standing objective, dating back to 1973, this process has not been easy due to political and technical issues as well as difficulties with translation. Therefore, there were many steps backwards and forwards. However, although the EU was unable to find permanent solutions to patent law, it does not mean that there were no developments at the European level. Firstly, it is important to note



that different European countries have established national rules to protect inventions in their territories. Moreover, with the adoption of the European Patent Convention<sup>II</sup> (EPC) in 1973, the protection of inventions is guaranteed by the European Patent Office<sup>III</sup> (EPO) for the Contracting States which an applicant has designated; this extends to even non-EU Member-States, such as Norway and Turkey.

From 1973 (when the EPC was adopted) to 2013 (when the UPP was adopted), there were several developments in the evolution of the European Patent System (EPS). In 1975, the Luxembourg Convention was drafted with the aim of creating a European Patent system for the internal market, for trademarks, designs and models, but it did not enter into force. In 1989, a new version of the Luxembourg Convention came into existence, but it was not adopted, as it did not have the support of EU Member States (mainly because of the translation rules). Later, in 2000, the European Commission proposed a Community Patent Regulation, which aimed at creating a uniform patent protection that would be granted by the EPO. However, it was difficult for the EU to join the EPC. In 2003, there was an attempt to establish a unified jurisdiction for litigation of European patents – the European Patent Litigation Agreement by the EPO – but the EU Parliament had concerns about its compatibility with EU law and decided not to go ahead with it. Subsequently, in 2007, the Commission relaunched the initiative to create a single community patent and a single jurisdiction; this culminated with the proposal, in 2009, of the European and EU Patents Court Agreement, which will be presented further in more detail.

Even though national and European levels of protection are important, mainly to inventors and enterprises interested in protecting their patents, they do not help create coherence and cohesion in a field of law that would benefit greatly from such uniformity, especially in encouraging and attracting inventors to seek protection in the EU. Currently, the European Patent System (EPS) is characterised by a multi-level governance that is highly complex and fragile due to its parallel structures of national and European (but not EU) frameworks.<sup>IV</sup> Due to this, the EU has been trying to create its own legislation of patent law, for which the existence of a specialised and common court for the Member-States is essential to decide on any kind of judicial actions related with patent law.

Moreover, one must understand that the creation of a unitary patent title is not something that appears on its own, but is integrated with the *européanisation* of Industrial Property Law. Indeed, in the EU legal order, there are already other unitary industrial





property titles, such as the “European Union trade mark” (Regulation 2015/2424) or the “Community design” (Regulation 6/2002). As such, due to the crucial role that patents have in Industrial Property Law, the importance for the EU and for the functioning of the internal market to have Patent Law regulated by EU Law is evident, since it will allow an invention to be protected all over the EU territory, as it already happens with trademarks and designs.

The path however has not been easy; some proposals have already been discarded, but the most recent development on this subject, the UPP, has been drafted, approved and is ready to enter into force.<sup>v</sup>

### 3. The UPP regime

The UPP contains two EU Regulations (Regulation 1257/2012 and Regulation 1260/2012) and an international agreement, which together create a unified patent court (AUPC). This agreement will only enter into force once it is ratified by thirteen Member-States (including necessarily France, Germany and the United Kingdom, these being the Member-States with the highest number of patents granted in the year preceding the signing of the AUPC, as established by article 89). In addition to that, both EU Regulations will only become applicable when the AUPC enters into force [Article 18(2) of Regulation 1257/2012 and Article 7(2) of Regulation 1260/2012].

The UPP arises from a need to overcome the problems of the EPS, specifically the European Patent Convention. It unifies the patentability requirements and has a unified procedure of granting patents, whereas currently the effects of a patent are national, including the rules regarding infringement and/or the invalidation procedures. The current system consists of a double pillar structure: an intergovernmental EPO, based on the EPC; and a supranational EU, where there is some harmonisation of patent law, such as in the field of biotechnological inventions and remedies for patent enforcement (Baldan and Van Zimmeren 2012: 1542). The ECJ does not have competence to deliver preliminary rulings, and it is up to national judges to decide on the interpretation of national patents. Several problems arise with this system; these are mainly related to a divergence of decisions, an incoherence throughout the system, and the existence of parallel litigations. Additionally, it allows some parties to abuse the system through litigation strategies such as forum shopping, where litigators can choose a jurisdiction likely to be favourable to them, and torpedo



motions, where litigators, in order to impede a resolution, choose jurisdictions known for their long procedures. Moreover, there are some accusations that the Board of Appeal of the EPO lacks judicial independence, which deeply affects its credibility (Baldan and Van Zimmeren 2012: 1529-1533). This has led to the creation of a unitary patent system that attempts to overcome some of these problems, although it might create others.

### 3.1. Regulation 1257/2012

A European patent with unitary effect (European Unitary Patent) is not necessarily a unitary patent; instead, it provides uniform protection to and has equal effects in all the participating Member States [Article 3(2) of Regulation 1257/2012]. Basically, it does not imply the creation of a new legal title, but the effect it has throughout the EU is what changes (Gonçalves 2015: 83-85). Whilst previously the EPS worked through the granting of a bundle of patents (also known as classic European patents), with each and every one of them requiring validation in the designated Member-States as well as translation to the official language of that specific country, currently the system converges at the EPO, through a single application, and is automatically effective in the designated Member-States.

An applicant can file a request with the EPO for the patent to have unitary effect, within a month of the granting of a classic European patent [Recital 18 of Regulation 1257/2012]. If an application is made and if all the requirements are met, then the patent is registered as a European patent with unitary effect in the participating Member-States. However, even without filing a request, an applicant can still have a bundle of national patents that will be subject to the UPC, if the country has adhered to the system.

The prospective European Unitary Patent will be automatically validated in the participating Member States, in the official language of the EPO, in which it will be granted. It will coexist with national patents of Contracting States that do not belong to the EU or that, although belonging to the EU, have not adhered to the enhanced cooperation. Additionally, it does not replace the national patents granted by the Member-States. For example, there can be a unitary patent in participating Member-States, plus a classic European patent taking effect in one or more EPC Contracting States, such as Norway, Spain, Switzerland and Turkey.

This will lead to several layers of protection of patents in the territory of the European Union: (a) national patents, granted by national offices and subject to national jurisdiction;



(b) classic European patents without unitary effect, granted by the EPO and subject to the UPC jurisdiction; (c) national patents that are part of the bundle granted by the EPO and not subject to the UPC (either because the patent owner opted-out, the AUPC has not been ratified in a particular State or the country is not an EU Member); and (d) European Unitary Patents, granted by the EPO and subject to the UPC (Baldan and Van Zimmeren 2012: 1542-1546). Some experts say that this will lead to an even greater fragmentation of the system (Silva 2012: 254-255), as it will involve different judicial reviewers of the patent framework (Baldan and Van Zimmeren 2012: 1542-1546).<sup>VI</sup>

The fees required for the granting of a European Unitary Patent will be paid to the EPO, which will retain 50 per cent and distribute the rest to the Member-States [Article 13 of Regulation 1257/2012].<sup>VII</sup> This requires a delicate balance between the will to make the Unitary European Patent attractive to users/enterprises, and the EPO's budget, without overlooking the funding of national patent offices.

It will also mean that the EPO will take on a number of additional tasks. It will administer patentees' requests for unitary effect; it will also be responsible for collecting and administering renewal fees for unitary patents and for keeping a register of unitary patents, which will include legal-status information such as licences, transfers, limitations, revocations or lapses [Article 9 of Regulation 1257/2012].

### 3.2. Regulation 1260/2012

Additionally, a translation system was created to complement the European Unitary Patent, to ensure that problems arising from the different languages of the Member-States do not hinder an effective application of the UPP.

According to article 14 of the EPC, English, German and French are the official languages of the EPO, and a patent application may be filed in one of the official languages. If it is not filed in one of these three languages, a translation should be made. This entails higher costs for patent applicants, but that has been reduced by the translation regime adopted in Regulation 1260/2012 of the UPP. It provides for a transitional period of 6 to 12 years, where, if the language of the proceedings at the EPO is French or German, then the patent proprietor will have to provide a translation into English; or if the language of the proceedings is English, then the patent proprietor will have to provide a translation into any official language of the European Union. In case of a dispute, either at the request of the



court or of an alleged infringer, the patent proprietor will have to provide a full translation into the relevant language [Article 4 of Regulation 1260/2012].

In an effort to protect inventions, to help technological advance and to make the system attractive for everyone, reimbursements for translation costs will be available up to a certain ceiling, for small and medium enterprises (SME's), individual persons, non-governmental organisations (NGOs), universities and research public entities [Article 5 of Regulation 1260/2012]. Additionally, mechanisms of high-quality automatic translations, called *Patent Translate*, will be put in place to facilitate translations.<sup>VIII</sup> It will ultimately lead to a situation where a European patent applicant will no longer have to fulfil a translation requirement, making it less costly, easier to access and legally secure.

### 3.3. AUPC

As discussed, the UPP includes the creation of a common and specialised court that is essential to guarantee the desired uniformity and coherence in the EPS. This is in accordance with the idea of the UPP, since what has been created is a supranational patent law, whereby national courts are not deemed suitable to decide on the possible disputes that could arise from what is established by the EU Regulations. This is similar to the solution achieved by the Patent Law of the USA, where the federal courts have national jurisdiction over patent disputes throughout the territory of the USA.

The path leading to the UPP has not been easy and this is particularly so in relation to the creation of a supranational court like the UPC. In 2009, EU institutions presented the European and EU Patents Court Agreement (EEUPC); it consisted of an international agreement to be concluded between the Member-States of the EU, the EU in its own legal capacity and third countries who are parties of the EPC. The main objective of this agreement was the creation of a court with jurisdiction to hear litigation related to the European patent and the future Community patent and, consequently, the creation of an extremely complex system of granting patents issued by the EPO.

However, the CJEU found this agreement incompatible with the Treaties of the EU in its *Opinion 1/2009*.<sup>IX</sup> In essence, this decision results from the fact that such a Court would be an international court, neither integrated with an EU judicial order, nor subjected to EU law. Moreover, it would deprive national courts of the power, or, as the case may be, the obligation, to refer questions to the Court for a preliminary ruling in the field of patents.



Thus, and due to the possible negative and unprecedented consequences that such an international agreement could bring to the EU legal and judicial order, the proposal was rejected [*Opinion 1/2009* paragraphs 64 to 73].

Nevertheless, the CJEU did not oppose the creation of a common and specialised court in the field of patent law; its decision only related to the concrete configuration of the EEUPC, namely the threats it posed to the EU legal and judicial order. Accordingly, it is possible to find some guidelines in *Opinion 1/2009* for how, in the perspective of the CJEU, EU institutions could redesign such agreement [*Opinion 1/2009* paragraphs 74 to 88]; and the solution was the AUPC.<sup>x</sup>

The AUPC is an international agreement comprising all the EU Member-States that participated in the enhanced cooperation to create both of the EU Regulations, with the exception of Poland. Its main purpose is the resolution of disputes concerning European Unitary Patents (its exclusive competence is established by article 33 of the AUPC), but, since it is a common court of the EU Member-States, the UPC is subject to the same obligations as the national courts of the Member-States [Articles 20 to 23 of the AUPC].

The institutional aspects of the UPC are established by articles 6 to 14; and it comprises a Court of First Instance, a Court of Appeal with a seat in Luxembourg, and a Registry. The Court of First Instance has a central division (with a seat in Paris and sections in London and Munich) as well as local and regional divisions that can be created at the request of Member-States. Equally significant is Article 24, since it clarifies which legal instruments the UPC should use in its decisions: (i) European Union Law, including the EU Regulations of the UPP; (ii) the agreement itself – Articles 25 to 30 and 62 to 69 are substantive rules; (iii) the EPC; (iv) other international agreements applicable to patents and binding for all the Contracting Member States; (v) national law. Extremely pertinent to the UPC jurisdiction is its transitional regime, established in Article 83, which allows for an opting-out from the jurisdiction of the UPC within seven years, as an attempt of adaptation to this new and innovative legal framework.<sup>x1</sup>

Even though the AUPC is flawed, as it does not count on the participation of all EU Member-States and is based on several legal sources, the purpose of the UPP and specifically the UPC is clear: to have a single, common and specialised court to deal with disputes concerning patent law in the EU, in order to promote coherence and uniformity in this field.



It is ultimately, in our understanding, a manifestation of federalism, as will be explained below.

### 3.4. The advantages and disadvantages of UPP to EU Patent Law

Our analysis of the UPP, with its two regulations and international agreement, is not confined to its shortcomings, but also presents some benefits for the system as a whole.

Firstly, the establishment of a European Unitary Patent would provide for uniform protection in a wide territorial space: the EU. Inventors would be able to apply for a unitary patent that would be effective in the countries that are part of the UPP. This would also be cheaper in terms of the fees and because there would be no need for translations to be made, after the stated transitional period. Correspondingly, a simpler procedure would be established at the EPO, which would not require a validation at the national level, would be less time-consuming and avert the risk of parallel applications.

Secondly, the fact that a unitary and specialised jurisdiction would be created would lead to the improvement of judicial coherence, and consequently ensure the consistency of case law (Baldan and Van Zimmeren 2012: 1565-1571), leading to legal certainty and uniformity of decisions. It would raise the level of trust that inventors would place in the new system, as well as ensuring that their inventions are effectively protected against infringement. Furthermore, it would certify that the same standards of adjudication were met, instead of having different standards for different Member-States. This would truly promote a culture of protection for scientific and technological development, which the EU requires to stand on par with other world economies.

Finally, there are a lot of questions about the EPO's independence, especially considering the Boards of Appeal, which cannot be scrutinised by the CJEU, since the EPO is an intergovernmental organisation outside the EU. With the new system, the EPO would be subject to EU standards, through the aforementioned regulations and the referrals to the CJEU, thus ensuring accountability, as independence of the judiciary is a fundamental human right that cannot be disregarded (Baldan and Van Zimmeren 2012: 1564).

However, the problems that arise from this new system cannot be ignored, mainly due to the coexistence of several layers of protection. As we have said, this new regime is based on the EU mechanism of enhanced cooperation, meaning that only the Member-States that want to participate will ultimately participate and be subject to it. Some countries, such as



Poland,<sup>XII</sup> Croatia<sup>XIII</sup> and Spain,<sup>XIV</sup> have decided not to be included in a part or the whole of the system, leading to difficulties in coordinating the different regimes available to patent applicants and perhaps a greater level of fragmentation than the one that the Member States wanted to avoid when they entered the UPP (Silva 2012: 254-255).

Another criticism of the UPP is that significant parts of the substantive framework of the European Unitary Patent, such as the definition of the rights of the owner of the patent and its limitations, namely Chapter V of the AUPC, are established in the international agreement. By not being established by an EU instrument, these sections cannot be subjected to the interpretation and appreciation of the ECJ, since the ECJ has no jurisdiction over an international agreement; this becomes problematic when considering fundamental rights, as was discussed *supra*. Additionally, unlike EU regulations, an international agreement cannot be altered easily by the EU Parliament, thus putting in question the democratic principle. The AUPC tries to overcome this problem by establishing the primacy of EU law and liability for damages caused by infringements of EU law [Articles 20 to 24 of the AUPC] and also by allowing the UPC to request for preliminary rulings of the CJEU that will be binding to the court [Article 21 of the AUPC]. In regard to the two regulations, they can be subject to the ECJ for a preliminary ruling since they are regular EU instruments.

By minimising the role of the CJEU, through concentrating all case law related to patents in a specialised court, the AUPC prevents national and general courts from deciding on specific matters such as patent law, since national judges do not usually have much knowledge of the particulars of this field. The judges presiding in the UPC will be highly specialised and qualified in this matter and will be vital in standard-setting.

However, national institutions, such as courts, legislators and organisations that deal specifically with patents, have an important role in the Member-States, in particular, to include socio-economic considerations and national needs in their patent policies (Xenos 2013: 253). Not submitting the specialised court to the scrutiny of the CJEU, especially in the interpretation of the AUPC, means that some broader questions related to EU institutional design, to the specific policies of the Member-States and mainly in regard to fundamental rights, can be overlooked in a court specialised in patent law that is not the CJEU.

These issues, along with the plurality of legal sources (international, EU and national) and the non-application of the AUPC to all EU Member-States, are the weak points of the



AUPC. However, it cannot go unremarked that the AUPC was shaped based on *Opinion 1/2009*, which is closely connected with the EU framework, to ensure accountability and standard-setting in the patent field.

This brief exposition of the advantages and disadvantages of the UPP concludes that the system is not perfect. In our opinion, it has some flaws, mainly regarding the different frameworks that will be at play, but it presents benefits for inventors, who ultimately have to be protected and their rights ensured in the EU. The other benefit is to the EU, which, as a single market, will be more competitive than other markets.

## 4. The UPP as a federal manifestation

### 4.1. The USA as a paradigm<sup>xv</sup>

The federal nature of the United States is also expressed in its patent law, where instead of assigning the power to grant and enforce patents to the states, the USA's legal patent framework relies on federal institutions. When an inventor wishes to protect an invention, the request is made to the United States Patent and Trademark Office (USPTO). Once granted, as a product of the harmonisation of international instruments, the protection lasts for 20 years from the filing of the patent; and the patent is effective throughout the United States, USA territories, and USA possessions. The power to enact laws relating to patents belongs to Congress, and patent law is currently codified in Title 35 of the United States Code. This means that patents are exclusively governed by federal law, and state law basically plays no part in patent law.

The USPTO has a number of functions that are similar to the ones the EPO will have when the UPP comes into effect. It administers patent laws, examines applications for patents and grants them when all conditions are met. It also records assignments of patents, maintains a collection of issued patents and records, which the public can access, and supplies copies of records and other documents on request.

However, the USPTO has no jurisdiction over questions of infringement and the enforcement of patents, although, through its Patent Trial and Appeal Board, it has some additional competences in post-grant proceedings.<sup>xvi</sup> When a patent is infringed within the USA, federal courts have exclusive jurisdiction over patent infringement. According to the





rules of procedure, a district court is the starting point, with the possibility of appeal to the Court of Appeals for the Federal Circuit, created in 1982, and then to the Supreme Court.

The pertinence of the USA patent system to this discussion is that it is based on two federal characteristics: patent laws are federal laws and infringement cases are the exclusive jurisdiction of federal courts. In this sense, a patent is granted for the entire of territory of the USA and not only for a designated State; and an infringement can affect the whole of the USA. It would not make sense to for applicants to request a patent and to have it validated in all the 50 States or in the ones it designated; besides being costly, it would also be time consuming and unattractive for inventors. This leads us to conclude that a similar process is being tried out in the EU, with its own characteristics, as might be expected from a *sui generis* organisation.

#### 4.2. Why is the UPP a manifestation of federalism?

It seems certain that, at least from a formal and legal perspective, the EU is not a Federation. Nevertheless, that does not mean that this supranational entity does not have federal manifestations, which are increasingly confirmed with developments in the EU after the Lisbon Treaty.

It is our understanding that one of the major problems in the discussion of the EU as a Federal Organisation is related to comparing the EU with one of the most developed federations: the USA. If that approach is taken, the EU is certainly not a federation: there is neither an elected federal government, nor a President of the EU; the Member-States have their own sovereignty (much wider if compared with the sovereignty of the States of the USA); and it is mainly up to the Member-States to enforce its laws, rather than the EU itself. Moreover, it should not be forgotten that the USA has built itself from scratch as a federation, whilst the continent of Europe has been devastated by sovereign States fighting amongst themselves for centuries and where, since the Roman Empire, there has not been a common political and economic project. Currently, even though there is a European cultural core, there are also numerous cultural, economic and political differences between the nationals of different EU Member-States.

Nevertheless – and that is our starting point – for the EU to be considered as a Federal Organisation, it does not need to be equal to the USA. Additionally, as pointed out by Pierre Pescatore:



'federalism is a political and legal philosophy which adapts itself to all political contexts on both the municipal and the international level, wherever and whenever two basic prerequisites are fulfilled: the search for unity, combined with genuine respect for the autonomy and the legitimate interests of the participant entities' (Pescatore 1982: ix-x).

In a similar sense, Daniel Elazar maintains that the EU is 'already a federalism' (Elazar 1979: 3) and we are in full agreement. From a general point of view, the EU is a federation with its own characteristics, and specifically, the UPP being a clear manifestation of this, since the prerequisites pointed out before are fulfilled.

Even though we agree with such opinion, it is important to see other perspectives, especially those which do not frame the EU as any kind of a federation or those which are sceptical of it. First of all, it is clear that the "federal question" is not consensual amongst EU Member-States; *Brexit* is a classic example, but is not the only one (Hungary's present government or the support that Marine Le Pen obtained in the most recent French elections are also indications of the discontent of some European citizens with EU policies).

One must understand that many countries are unwilling to either give more powers to the EU or to change the decision-making rules, for example, by eliminating the national veto. Some think that further integration is neither needed nor desirable, whilst others believe that the EU is a threat to either national identity or to the security of workers and ordinary citizens, as suggested by the surge of far right and left populists in the last European elections (Borrel, 2015). Moreover, it should be noted that all EU Member-States are not at the same stage of development (something that the recent financial crisis came to accentuate), which does not help as a starting point to achieve complete integration.

Due to these factors, the idea of the EU as a federation could seem a little odd and difficult to conceive, which leads to some preferring a Europe of nations, since 'Europe would be more prosperous and democratic if each nation provided for its own needs' (Hannan, 2014). As such, we must be aware that there are not only those who refuse to see the EU as a federation (even though conceptually different from the federalist paradigm), but there are also those who are against the federal manifestations. In essence, those that do not desire more federal elements argue that there is not a *demos* to European democracy,



since there is neither European people, nor a European identity (akin to national ones), thus not making sense to promote a Federation without those (and others) elements.

Whilst it would be easy to let ourselves fall for these arguments, we are not in agreement with them. Firstly, we believe that there is a European identity, with its core values of freedom, justice and rule of law; and even though a German might be very different from a Spaniard or a Swede from a Greek, there are ties that unite the different nationals of EU Member-States. Besides that, we should not forget that, even in the USA – a classic model of federalism – the “nationals” of the different States are not the same in many respects. Moreover, we do not see those elements as mandatory, instead, we perceive as more important the will of the nationals of EU Member-States in having a more federal EU by democratic expression. Finally, it is important to stress the idea that the EU is a supranational entity with no parallel in world history and, as such, we must not expect that the possible federal course of the EU to be the same as other entities. Nevertheless, what is undeniable is the existence in the EU of federal manifestations, the UPP being one of them.

Returning to Pescatore’s prerequisites, it is our understanding that the UPP fulfils both of them and, as such, it could be framed as an EU federal manifestation. Firstly, it represents a ‘search for unity’, since its main purpose is to provide a mechanism to protect inventions with a European Unitary Patent and, therefore, enforceable all over the EU. Moreover, due to the UPC, the judicial coherence in EU patent law will be promoted with the settlement of a dispute by a common court of the Member-States. With this in mind, it is possible to state that the UPP signifies a way for Member-States to jointly overcome a problem and, by that, promote a uniform legal and judicial system.

Whereas the search for the unity prerequisite must be absolute, since the pursuit of a common objective cannot be subordinated by other principles, the same does not apply to the second prerequisite. The ‘genuine respect for the autonomy and the legitimate interests of the participant entities’ should be pursued, but also balanced with other interests, because if an individual approach is adopted, this becomes an impossible prerequisite to fulfil. This condition must be balanced with the objectives which are subsumed by the search for unity, since in practical terms it is very difficult to coordinate the concerns of all the Member-States. In this sense, it is crucial to respect their interests and autonomy, but it is also important that these are not used to block the search for unity and, thus, the Member-States must adopt a wide perspective to achieve common interests.



The UPP is the result of long and intense negotiations which were only possible due to the mechanism of enhanced cooperation, but with the participation of an overwhelming majority of the Member-States (25 out of 28). This shows that almost all the Member-States are following the same path in relation to patent law, that is, a system of unitary protection.

At the same time, there are some aspects of the UPP, for example, the translation system addressed before, which show a respect for the sovereignty and autonomy of Member-States. In addition to that, it is important to see that the European Unitary Patent is an option and not an obligation, since patent applicants can choose whether or not to submit their inventions to such protection. Finally, article 7/4 and 5 of the AUPC, which allows Member-States to request the creation of local or regional divisions of the Court, shows an effort to integrate the idea of proximity that would be achieved with the federal structure of the UPP.

In sum, the UPP could be framed as federal, since it promotes unity and uniformity for a matter that is relevant to the single market and to the scientific and technological development of the EU by transferring Member-States' powers in this field to the EU, the EPO and the UPC. However, this is done in a comprehensive and progressive way to respect the sovereignty and autonomy of the Member-States, which leads us to the conclusion that the UPP is a manifestation of a *sui generis* federalism that characterises the EU of today.

#### 4.3. What currently stands between full federalisation and the present regime

As pointed out before, uniformity and coherence are significant in an economic and political union such as the EU, since it is important for inventors and enterprises to know that they can protect their inventions throughout the territory, via both administrative and judicial proceedings, as established by the UPP. However, due to the difficult path that patent law has followed in Europe – with national and European, but not EU, protection – the current system, as we have explained, is a highly-fragmented EPS.

One can understand that this starting point is not ideal to promote and achieve the desired objectives under a federal structure, especially because the present European protection provided by the EPC is not exclusive to EU Member-States. It is based on an international convention, which means that the EU does not have powers to revoke it and replace with its own laws. Moreover, it would be unreasonable to dispense the forty years of experience of the EPC and EPO, highly valuable in establishing a new regime. That is why there are several layers of protection that co-exist as discussed earlier.



With this in mind, it is possible to understand that a clear and full federalisation (like the one that exists in the USA) is near-impossible to achieve, with the existing configuration of the EPS, due to the co-existence of different layers of protection. In addition, even if we focus only on the EU, the federalisation process is not complete. For example, some Member-States do not belong to the UPP, such as Spain, Poland and Croatia, affecting the legitimacy of the new regime and imposing obstacles in its path.<sup>xvii</sup> The EU must work to convince these States to join the UPP's framework, where the participation of all EU Member-States would be extensive.

Some authors claim that the coming into force of enhanced cooperation on this issue is a 'dark day for European integration' (Lamping 2011: 36), however, we do not agree. It is certain that a "Europe à la carte" is not desirable, but what is also not intended is a Europe which cannot keep pace with developments in the rest of the world and that does not promote an adequate protection to scientific and technological development. It should be noted that, for obvious reasons, enhanced cooperation is not a solution for all the problems of the EU, especially considering the rupture that the EU is experiencing; nevertheless, in a situation like the one at hand, considering specifically patent law, we think that it is a fair and reasonable solution, especially as a vast majority of Member-States is intent on participating in the UPP, and a few Member-States should not be allowed to impede the interests of a vast majority.

Moreover, the fact that a patent with unitary effect is optional is a potential weakness of the system, since it is left to applicants to decide whether to ask for a unitary effect or not. Although this is true, we cannot ignore the benefits that the regime would bring for businesses, inventors and society as a whole, that will ultimately lead to a choice for unitary application, and consequently a peaceful and complete integration.

There are others concerns, namely *Brexit*, that might jeopardise the effectiveness of the UPP. However, the current EPC-based system will not be affected by *Brexit*, since it is established by an instrument of international law and not EU law, it is not restricted to only EU Member-States, thus allowing the UK to participate. Nevertheless, the AUPC entry into force is dependent on the ratification of the United Kingdom, required for both Regulations 1257/2012 and 1260/2012 to become applicable, as seen before. The UK has already expressed its intention to continue participating in the UPP,<sup>xviii</sup> but this raises some additional issues, since enhanced cooperation is a mechanism of the EU legal order and the



AUPC is a common court of EU Member-States. A new agreement, or some structural changes to the AUPC (Gordon and Pascoe 2016) might be needed to resolve the question of the UK's participation, since the UK is one of the countries with the highest number of patent applications in the EU, and since one of the central divisions (Life Sciences/Chemistry section) of the Court of First Instance will be located in London.

One could conclude that what stands between a full federalisation (if we base our perspective on the paradigm presented by the USA) and the current legal order of the EU are the same aspects that give a federal dimension to the UPP. This could seem contradictory, but it is not. The federalism in the EU is not as it is in the USA, but that does not erase the existence of federalism in the EU: it exists due to the fact that there is a search for unity in this area, balanced with a respect for the different concerns and interests of its Member-States, even if it does appear to have a federal structure as we are used to.

## 5. Conclusion

It is our understanding that federalism should be increasingly discussed in the EU and not treated as a taboo subject regardless of the existence or lack of federal elements. Nevertheless, we must not forget that, more and more, globalisation is reshaping the political, economic and social destinies of the world, with new international actors and, as such, the nations of Europe can only safeguard their prosperity and their social achievements by joining forces and standing together on several key issues. This requires, sooner or later, new steps towards a federal union (Borrel 2015).

Our goal with this paper was to establish a connection with the UPP and with a soaring reality that is the EU, as a *sui generis* federation. Through a solid analysis of the UPP and its integrating components, it is possible to understand the advantages that a reshaped system can bring to the single market and the promotion of scientific and technological developments in the EU. As was demonstrated, it must be reiterated that patents with unitary effect will not be the only unitary title in Industrial Property Law, as it will add to a harmonised system of both EU trademarks and designs, strengthening it, that shows the relevance of this step forward. Nevertheless, it cannot go unnoticed that there are still some obstacles that prevent this system from reaching its true potential. The coexistence with an international agreement, like the EPC, the different judicial reviewers and the non-



participation of all the EU Member-States in the framework of the UPP represent some of these obstacles.

Despite these challenges, the post-UPP European Patent System will be more coherent, uniform and adapted to the single market, which is an economy with even more worldwide impact. As such, the overwhelming majority of EU Member-States are interested in this cooperation, only if complemented with the respect for their sovereign interests (as it is in the present case). In conclusion, and defending an approach which concentrates the subject-matter of a federation in a clear search for unity, we sustain that the UPP is an EU federal manifestation.

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<sup>I</sup> The Unitary Patent Package consists of two EU regulations (European Parliament and Council, Regulation (EU) 1257/2012 of the European Parliament and of the Council of the EU of 17 Dec. 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection, O.J. 2012 L361/1 (hereinafter “Regulation 1257/2012”), Council of the EU, Council Regulation (EU) 1260/2012 of 17. Dec 2012 implementing enhanced cooperation in the area of creation of unitary patent protection with regard to the applicable translation arrangements, O.J.2012, L 361/89 (hereinafter “Regulation 1260/2012”) and an international agreement between EU Member States (Agreement on a Unified Patent Court, O.J. 2013, C 175/1 (hereinafter “AUPC”).

<sup>II</sup> Convention on the Grant of European Patents – (European Patent Convention) of 5 October 1973 as revised by the Act revising Article 63 EPC of 17 December 1991 and the Act revising the EPC of 29 November 2000. It is a treaty to which 38 States, including all the Member States of the European Union (but not the Union itself) are currently parties. Available in: <http://www.epo.org/law-practice/legal-texts/html/epc/2016/e/ma1.html>.

<sup>III</sup> More about the EPO in: <https://www.epo.org/about-us.html>.

<sup>IV</sup> More about the “Current European patent system” see: Baldan and Van Zimmermen 2015: 1541-1556.

<sup>V</sup> As of 15<sup>th</sup> of May 2017, it is expected to enter into force in December of 2017: <https://www.unified-patent-court.org/news/final-preparatory-committee-signals-state-readiness-15-march-2017>

<sup>VI</sup> National courts with respect to national patents; the Boards of Appeals regarding European patents; national courts of the EU Member-States, which did not ratify the AUPC or did not participate in the enhanced cooperation; the UPC deciding on matters related to the infringement and validity of classic European and unitary patents for the Member-States who ratified the AUPC; the European Court of Justice for UPC requests for a preliminary ruling.

<sup>VII</sup> Article 13 Regulation 1257/2012, distribution of the fees, is based on the following criteria: “(a) the number of patent applications; (b) the size of the market, while ensuring a minimum amount to be distributed to each participating Member State; (c) compensation to the participating Member States which have: (i) an official language other than one of the official languages of the EPO; (ii) a disproportionately low level of patenting activity; and/or (iii) acquired membership of the European Patent Organisation relatively recently”.

<sup>VIII</sup> The translation of patent documents is available for 28 official languages of the EPO's 38 member states, plus Chinese, Japanese, Korean and Russian - <http://www.epo.org/searching-for-patents/helpful-resources/patent-translate.html#tab3>.

<sup>IX</sup> Opinion 1/2009 of the Court (8 March 2011) EU:C 211/03 referred to as *Opinion 1/09*.

<sup>X</sup> Too more details on the impact of the *Opinion 1/09* to the AUPC, see Baldan and Van Zimmermen 2012: 1558-1559.

<sup>XI</sup> The aspects of the AUPC here presented are the most significant ones. For more details see, Baldan and Van Zimmermen 2012: 1560-1564; SILVA, 2012: 249-255; VICENTE 2015: 760-767.

<sup>XII</sup> Part of the enhanced cooperation, but not of the AUPC.

<sup>XIII</sup> Entered the EU after the signature of the AUPC.

<sup>XIV</sup> Strongly against the UPP, as seen by the annulment actions proposed in the ECJ: *Spain v. Parliament and*



*Council* (Case C- 146/13 (5 May 2015), *Kingdom of Spain v European Parliament and Council of the European Union*, EU:C:2015:298, referred to as *Spain v. Parliament and Council*); *Spain v. Council* (Case C-147/13 (5 May 2015), *Kingdom of Spain v Council of the European Union*, EU:C:2015:299, referred to as *Spain v. Council*).

<sup>XV</sup> The goal of this paper is not to establish a detailed comparison with the USA's regime, so an exhaustive analysis will not be made. We based our analysis on the website of the USPTO - <https://www.uspto.gov/patents-getting-started/general-information-concerning-patents#heading-1>.

<sup>XVI</sup> To see more about post-grant proceedings in the USA: TURCHYN 2016: 1497-1530.

<sup>XVII</sup> Such as the annulment actions brought to the ECJ by Spain.

<sup>XVIII</sup> <https://www.gov.uk/government/news/uk-signals-green-light-to-unified-patent-court-agreement>, although some delays are now expected, because of the UK's general election.

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## Reconstructing Social Dialogue

by

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## Abstract

The European Social Dialogue, and its output, the European collective agreements, are intended to implement minimum standards of working conditions that bind all Member-States, in a logic of legal harmonisation of the European Union's social objectives.

However, despite some federal traits of the European Union ("EU"), since the beginning European social dialogue has faced numerous challenges, particularly when confronted with the need to balance economic interests, giving social policies a subsidiary role, and when facing the different agendas of each Member-State.

This article proceeds with a historical analysis of the development of European Social Dialogue, its implementation stages, and past and current challenges, which can be divided in three phases: past experience, present experience and current challenges and, finally, an attempt to project what new social policies might hold for the future.

## Key-words

European Social Dialogue, European collective agreements, European social partners, legal harmonisation, minimum standards of working conditions, federalism



## 1. Introduction

Throughout the European Union's life, federalism has been a powerful ideology. The goal for the implementation of a gradual “United Nations of Europe” is an old wish but still an embryonic reality, especially as far as the European Social Dialogue is concerned.

Like any federation, the European Union (“EU”) was born as a consequence of a voluntary, citizen-based, social contract that was originally aimed as a long-term peace-making compromise between European countries.

The EU has obvious federal traits, and yet there is no consensus that the EU is, in fact, a federal union, or even has the vocation to become one.

The financial crisis, still affecting EU Member-States, has promoted a more decentralised and non-supportive EU which enhanced the existing, critical, gap between European social policies. Therefore, even though a European federation has always been the final aim of the European construction ever since the Schuman Declaration, the reality is that it is safe to say that the integration process has fallen short of a full political federation.

However, as Andrew Duff, the former President of the Union of European Federalists (UEF) recently said: *«the “F-word” is back in town»*. The flaws of the European monetary union, made apparent by the financial and economic crisis, and the need to revamp economic and social policymaking and the required democratic backing in the EU, have at least allowed federalism to be debated again (Borrell 2014).

The effects of the worst financial and social crisis in decades are being deeply felt and Member States are undergoing rapid and profound changes, especially in the social field: from demographic ageing to new family configurations, from the speed of digitalisation to new forms of work and the impacts of globalisation.

Despite that, the truth is that the EU has always had a social dimension, closely linked to its economic ambitions and it was in this context that the European Social Dialogue was born as the crucial instrument, means (Perez 1999: 15) or method (Veneziani 1998: 248) to promote both competitiveness and fairness in Europe. It is said that countries with a long tradition of Social Dialogue tend to have stronger, more stable economies and are often



Europe`s most competitive. Hence, acknowledging the importance of the European Social Dialogue as an essential element of the European Social Model (or “Social Europe”) and European Governance is a real challenge that EU is facing, especially when economic interests collide with social ones.

The truth is that founding a “Social Europe” is not an easy task since it has, as stated by Commission, different meanings and importance to different parts of society:

- i. For some people, the term “Social Europe” is empty words and the EU is perceived as the catalyst of global market forces, the vehicle of commercial interests and the threat of “social dumping” by an unrestrained and unchecked Single Market;
- ii. Others contest the very need for a social dimension in the EU, regarding social issues as exclusive matters for their national and regional governments (therefore, EU social policies are perceived as a means to lock out competition);
- iii. And for others still, “Social Europe” is core to the EU`s contribution to democratic, cohesive, culturally diverse and prosperous societies. It means economic and social progress, fighting against discrimination and social exclusion, making Europeans fit for the labour market and allowing them to live fulfilling lives.

As said, there are various and divergent opinions among Europeans that, in practice, cause impediments to full integration, and the acknowledgement of the social dimension of the EU and its Member-State`s needs.

Moreover, the idea of a federal EU is still not well accepted among Member-States, even though there are obvious traits of federalism that have been integral to European history over the years. Indeed, as is typical in many federal states, the EU has a citizens` chamber (the European Parliament) and a states` chamber (the EU council). However, in order to properly speak about federalism, the EU still lacks some fundamental elements: the democratic legitimacy of all its institutions, something that reflects the existence of primary sovereignty, an effective capability in uniform fiscal and social policies, and the ability to act effectively in the international sphere. At the moment, sovereignty still resides largely within the States, especially where social policies are concerned (that are still considered as only *soft law* and, therefore, not legally enforceable).



Notwithstanding its limitations and challenges, the EU is an international innovation, combining intergovernmental/confederal and supranational/federal elements. At best, we can say that the EU is “a federation-in-progress” (Borrell 2014).

Nevertheless, as the Europe of 28<sup>1</sup> looks to the future, the desire already exists to discuss and further improve the social dimension of the EU, and it is important to take a longer-term perspective regarding social policies so that in times of financial crisis, European Member states are better equipped to provide for their citizens.

## 2. The past experience

The first building blocks of the EU were laid by the then French Minister for Foreign Affairs, Robert Schuman, with his Declaration of 9 May 1950, in which he presented a draft, jointly prepared with Jean Monnet, for the unification of the European coal and steel industries in a European Coal and Steel Community. As a result, the first Treaty at European level - the Treaty establishing the European Coal and Steel Community - was created in 1951 with the aims of not only ensuring European peace, but also boosting economic growth and full employment in a Europe destroyed by War. The Treaty was the beginning of the European Union, but also the first sign of a break with the monopoly of national legislation, with efforts being made towards European unification at all levels (legislative, economic and social).

Following this, the Treaties of Rome – which created the European Economic Community (EEC) and the European Atomic Energy Community (Euratom) – enshrined the original economic vocation of EU law as it focused on economic commitments and the idea of free movement. It was in this context that the first references, albeit weak and fragile, to European social policies emerged, with the reference to “*a rapid rise in the standard of living*”. Despite that, the social provisions scattered throughout the body of the Treaty all arose as a consequence or condition of the economic policies of the free movement of workers.

The Treaties of Rome had given social policy a marginal role, that was seen as a reflection of a process of economic integration rather than as an objective to be pursued as such. However, after the Hague Summit of 1969 and, above all, following Werner’s plan for the creation of an economic and monetary union, the focus shifted. The Community’s institutions, and European governments, faced with a rising rate of unemployment and a



serious economic crisis, began to outline the contours of a social policy attentive to the problems of employment, not only as a reflection of the process of economic integration but also as an autonomous objective, implementing numerous initiatives in the area of employment and vocational training.

On 17 March 1971, the Commission published a Social Policy Program entitled “*Preliminary guidelines for a Community social policy program*”, which set out main objectives of European social policy: the improvement of employment policies, greater social justice and improving the living conditions of workers. The European Commission did not intend to carry out an exhaustive analysis of the social problems of Europe at the time, but rather to set goals and objectives in priority areas. As such it was only a contribution to the analysis of European social policies and development coordination, and the harmonisation of the social legislation of the Member States and the EU (Roberts and Springer 2001).

In this context three directives are adopted:

- Council Directive 75/129 / EEC of 17 February 1975 on the approximation of the laws of the Member States relating to collective redundancies;
- Council Directive 77/187 / EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings;
- Council Directive 80/987 / EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer.

At the same time, Social Dialogue at the European level officially began in 1985. The first meetings took place in the Palace of Val Duchesse, Belgium, with the aim of directing the social partners represented by the European Trade Union Confederation (ETUC), the Union of Industrial and Employers' Confederations of Europe (UNICE/BUSINESSEUROPE) and the European Confederation of Public Enterprises (CEEP) towards participation in the internal market process as negotiators (Lyon-Caen 1997a).

Following the speech of Jacques Delors in the European Parliament on 12 March 1985, a new social policy initiative, to be implemented by the Single European Act (SEA), was made explicit. As a stimulus to the economic dynamism of Europe, the President of the Commission proposed the promotion of a new cooperation strategy for economic growth



and employment and the encouragement of Social Dialogue. It was with the SEA, in its added article 118b, that the EEC Treaty for the first time referred to the opportunity for social partners to establish “conventional relations” at the European level as a means of deepening existing Social Dialogue mechanisms.

Reforms to the extension of the scope of the qualified majority principle strengthened the powers of the Commission, and the role of social partners at the European level, emphasising the need for greater social and economic cohesion of the then twelve Member States.

The SEA had set a key objective for European integration: the completion of the European internal market by the end of 1992. In addition, there had been very significant changes in the social sphere, such as a change in the rules for the adoption of qualified-majority directives, and the introduction of the principle of Social Dialogue and conventional relations between the social partners at European level.

Consequently, the EEC Treaty set itself the objective of harmonisation *per se*; harmonisation which did not depend on any other factors to justify its necessity, to be achieved through a new cooperation procedure with the European Parliament (Vogel-Polsky 1989: 177-189).

This level of harmonisation entailed the adoption "*by means of a Directive of the minimum requirements progressively applicable taking into account the conditions and technical regulations in each Member State*", *i.e.*, minimum harmonisation levels. These were minimum, but not minimalist requirements, since the logic of the common minimum requirements aimed to reconcile the ideal of harmonising national legislation with the reality of the diversity of national situations, and as a pre-emptive measure for future enlargements.

This was a new phase of European integration, based on consensus and cooperation between the Member States, but not on releasing them from their social responsibilities.<sup>11</sup>

Before the SEA, the legal basis of European collective agreement was contested. On the one hand, it was argued that without the conferral of a Community mission to the social partners, the principle of territoriality made European collective bargaining unfeasible; on the other hand, the freedom of association and the subsequent rights of organisation and collective bargaining were recognised by the international legal order (which provided for the functioning of the European collective agreement) (Lyon-Caen 1997b: 355). It is in this context that the basis for negotiation for setting working conditions appears alongside





legislative sources (regulation, directive, etc.). In addition, the amendment to the qualifying majority measure resulted in the adoption, after 1987, of 15 directives, which shows a significant increase over previous years.

Another important milestone in the evolution of European Social Dialogue and European social policies was the adoption in 1989 of the Community Charter of the Fundamental Social Rights of Workers.<sup>III</sup> The adoption of this Charter, by eleven of the twelve Member States,<sup>IV</sup> marked a decisive step in the construction of social Europe since it is the first solemn text that recognised and guaranteed a minimum core of fundamental rights to European workers as an affirmation of the European social model and European Social Dialogue. But the Charter also stated that building the single European market must go hand in hand with the creation of a European social space, to eliminate inequalities and avoid social dumping between states (Lamothe 1993: 198).

Subsequently, the creation of what we now know as the EU with the Maastricht Treaty, was a new milestone in the process of European political union. Signed on 7 February 1992, it constituted a turning point in terms of fundamental rights, across various sections, referring to the European Convention on Human Rights and to the European Charter to emphasise the social aspect of European integration.

It was also with this Treaty that an annex – the Social Policy Agreement (SPA),<sup>V</sup> resulted in a broadening of possibilities for collective bargaining at the European level. In substance, under this Agreement, the Maastricht Treaty laid the foundations for European Community legislation as well as European collective bargaining (Lamothe 1993: 199).

The SPA recognised Social Dialogue as the basis for European collective bargaining, by adding rules to the Commission on the submission of proposals and consultations with the social partners, as well as the launch of European action. The SPA also envisaged the transposition of directives into the domestic law of the Member States by means of a collective agreement.

The SPA also stipulated that dialogue at European level between social partners could lead to contractual relations, including agreements. The EU would support and harmonise Member States' action in various fields: working conditions, the protection of workers' health and safety, the promotion and protection of gender equality between workers, etc.



It also gave priority to contractual arrangements for legislation and promoted consultation with social partners at the European level, using all measures deemed necessary to facilitate their dialogue.

Finally, it opened the door to European collective bargaining, particularly at the sectoral level, and the chance to apply collective agreements in the different Member States, as well as the normative element of collective labour agreements<sup>VI</sup> (Coimbra 1994: 72; Coimbra 1999: 150; Lo Faro 2012: 153-156).

Furthermore, the application of these European collective agreements was envisaged, according to the SPA, in two alternative ways:

- a) The European agreements shall apply in accordance with the procedures and rules specific to the European social partners and the Member States, and according to the statement of the eleven Member States annexed to the Agreement, will depend on the collective bargaining procedure and the rules of each State. This modality did not require Member States to apply the agreements directly, or establish rules for the transposition of such agreements, or amend existing internal rules to facilitate their application – it is called the autonomous implementation;
- b) if such agreements involved matters covered by art. 2 of the Agreement they will be implemented by a Council Decision, on a proposal from the Commission, based on the joint requirements of the European social partners – known as the institutional implementation.

Thus, if the Commission projected certain measures, it had first to consult the European social partners – as originally envisaged in Art. 138 (1) and (2) of the Maastricht Treaty and now enshrined in the Treaty of Lisbon in Arts. 154 and 155. The social partners could inform the Commission of their intention to initiate an autonomous negotiation process and the agreements resulting from this process could have had a similar effectiveness to that of Community acts, rather than directives (Biagi:1999).

Following these social measures, one question was raised as to whether the directives that came out would have the value of Community law, which was later confirmed by the Commission.

Finally, EU competence in the social field was required, following the principle of subsidiarity (Langlois 1993: 201-209). Questions were also raised as to the democratic



legitimacy of the social partners' normative action, especially where the problem of representativeness was concerned. In this context, the European Social Dialogue had also emerged as a possible remedy for the democratic deficit through the representativeness of social partners (González 2006: 156-158; González 2011: 110).

Despite the progress made in the Treaty, notably in European social policy, this was not sufficient to meet the urgent need to reform European policy. It was not possible, in fact, to enshrine the objective of a federalist union in the Maastricht Treaty; but it is inevitable that in the long run the EU can develop a strongly federal structure with a principle of subsidiarity (Wessels et. al.: 17-18).

Unlike the SEA and the Maastricht Treaty, the Treaty of Amsterdam was not the result of a political will to give new impetus to European integration. On the contrary, the Treaty represented the culmination of an intergovernmental conference essentially carried out by legislative determination, as it was provided for by the Maastricht Treaty.

The great novelty of the Treaty of Amsterdam regarding social policies was the introduction of the 'principle of flexibility', that is to say, the principle that the Union can move forward in tackling certain areas without having to involve, necessarily, the participation of all Member States. Another new feature of the Amsterdam Treaty on flexibility was the introduction of a general clause in the body of the Treaty establishing the principle of enhanced cooperation between Member States (Ehlermann 1997: 74; Soares 1999: 31).

The Amsterdam Treaty also introduced a new title on employment in the body of its text, where the concept of a coordinated employment strategy, or open method of coordination (internationally known as the Open Method of Coordination - OMC) was significantly developed.

This concept of a coordinated employment strategy set out the method for drawing up employment policies in the form of soft law, *i.e.*, it is the method of drawing up non-binding policies on employment, which do not necessarily change national policies, but which must be considered by the Member State when the latter are drawn up or amended. This resulted in an acceptable alternative to the reluctant delegation of powers to the European institutions by the Member States, where they agree on general guidelines to be applied, under the supervision of the European institutions, in particular the Commission (Regent 2003: 191).



This means that choices about social policies remain the national right of each Member State, and European legislation is explicitly excluded (Adnett 2001: 353-364).

At the same time, however, national choices were defined on the basis of common concerns and objectives in order to reconcile the efforts of the various Member States and achieve optimal overall results. However, the benefits of this method depended, crucially, on the positive commitment of Member States to the promotion of coordinated solutions. As Scharpf explains, if this were the case, then European recommendations could be used as a powerful argument in national policy discourses. Otherwise, national action plans would simply reflect the *status quo* of national policies (Scharpf 2002: 654).

This method, used in employment policies, became an exemplar.<sup>VII</sup> However, the open method of coordination was not restricted to employment policies because it covered areas such as social protection, business policies and immigration. Moreover, although the European Social Dialogue was not institutionally incorporated through this method, it was in practice substantiated as the social partners were consulted in procedures for the formulation of social employment policies.

In fact, a European Social Dialogue can produce guidelines, based on the open method of coordination, which will become framework agreements which, in turn, can be adopted by Member States in sectoral or cross-sectoral Social Dialogue. This "union of forces" was aimed at improving success in the promotion of social policies. However, the success of the open method of coordination differed across the various areas it covered. In the case of employment policy, it is widely recognised that the open method of coordination was successful, especially as it did not benefit from the inherent advantages of the binding nature of hard law. In other cases, the open method of coordination is relegated to a second option, in favour of legal regulation, which demonstrates that the lack of normative and binding power of this method can be both its strength and its greatest weakness (Rogowski 2008: 22).

European concern for economic growth constrains and undermines the objectives of the open method of coordination, since even when Member States comply with the guidelines established by this method, they are constrained by economic integration, which limits their autonomy in the choice of policies to follow. If, for example, national unemployment increases, the objectives set out by the European Economic Area cannot force State aid, and cannot require measures to combat unemployment, since this method is not legally binding.



Therefore, Member States are ultimately restricted by the economic objectives outlined in the Treaty, which cannot be ruled out by recommendations or other soft law instruments. The secret of success or failure of the open method of coordination might be its ability to respond, given its range of options that remain available to each Member State, even in the face of limitations imposed by the international economy (Scharpf 2002: 655-666).

Subsequently, the Treaty of Nice entered into force on 1 February 2003 and made possible the institutional reforms necessary for the enlargement of the EU to include Eastern and Southern European candidate countries, by adopting measures such as limiting the size and composition of the European Commission, the extension of qualified majority voting, re-weighting of votes in the European Council and the relaxation of the enhanced cooperation arrangements.

One year after the Treaty of Nice, the European Council, meeting in Laeken, adopted on 15 December 2001 a “*Declaration on the Future of the European Union*”, also known as the “*Laeken Declaration*”, in which the EU made a commitment to become more democratic, more transparent and more effective.

Four key themes were addressed in this declaration: (i) delimitation and definition of competences, (ii) simplification of the Treaties, (iii) institutional architecture (iv) and the way to adopt a Constitution for European citizens. It was from this Treaty that the debate on a possible European Constitution began, a project eventually carried out, with its signature in October 2004.

However, with the reluctance of the Member States to approve a European Constitution and its difficulty of ratification, this project was eventually abandoned. Therefore, the European leaders decided not to move in the direction of a new attempt at a Constitution, but towards a new reforming Treaty for the EU. It was in this context that the Treaty of Lisbon was signed on 13 December 2007 and entered into force on 1 December 2009, establishing the current Treaty on EU (TEU) and the Treaty on the Functioning of the EU (TFEU).

The TEU is undoubtedly the result of further reflection on the part of the EU after the failure of the Constitutional Treaty, and is therefore inspired by its initial objectives, albeit with some adaptations. Consequently, the TEU introduced, among other things, a new model of division of powers between the Union and the Member States, established a single legal personality of the EU and merged the three pillars of the Union, dissolving the structure



that originated in the Maastricht Treaty. As such, the TEU stated that "*The Union shall be replaced and succeeded by the European Community*", *i.e.* the EU would incorporate the European Community, strengthening the Community method. The TEU also made it clear that the EU's powers originate from the Member States, although in the delimitation of competences, there were exclusive competences of the EU and competences shared between the EU and the Member States (as in the case of social policies) (Vitorino 2012: 17-31).

In terms of social policy, the EU Treaty gave greater prominence to certain social rights as axiological foundations of the EU itself, such as respect for human rights, gender equality and non-discrimination in general, combating social exclusion, and social justice and protection.

The TEU, countering the historic trend towards the enhancement of the economic component of the Union, reinforced the concern for social policies by creating a social clause, explicitly recognising the importance of Social Dialogue. This gave more autonomy to social partners, which quickly bore fruit with the translation of new framework agreements into directives, and also the recognition of the binding legal nature of the Charter of Fundamental Rights, giving it a hierarchy of rules equivalent to that of the Treaties themselves. The Treaty thus ensures that these fundamental rights have binding legal force and that they must be guaranteed and respected by national legal systems, and national and European courts (Ramalho 2012: 57-65).<sup>VIIIIX</sup>

Social policies are matters of shared competence between the EU and Member States, *i.e.* both the Union and Member States can adopt binding legal acts in these areas. In this way, a greater potential for EU intervention in social matters is legitimised.

In this context, another major change of the TEU in terms of social policy was the procedural amendment that allowed the approval of social matters by a qualified majority. The extension of the qualified majority to the social subject of workers made it possible to overcome the obstacles previously created by the rule of unanimity, in particular the difficulties created by the diversity of national systems and their traditions in social matters which prevented the reaching of a consensus to approve certain social policies at European level (Boto 2011: 77-80).

Furthermore, the TEU has broadened the scope of the concept of mainstreaming. This concept was previously adopted regarding the principle of gender equality, with the primary objective of (re) organisation, improvement, development and evaluation of policy



processes, so that the gender equality perspective would be incorporated into all policies, at all levels and at all stages, by actors normally involved in policy-making.

The TEU is particularly concerned with employment issues, noting that the social objectives of the EU are to promote high levels of employment, to ensure adequate social protection, to combat social exclusion, and improve education, training and health.

The promotion of employment, the improvement of living and working conditions, and the strengthening of the Social Dialogue were also foreseen in the Community strategy for 2020, which provides for the implementation of measures which will lead to the fullest use of the potential of Social Dialogue. Matters such as equality, the fight against labour discrimination, and "*flexicurity*"<sup>x</sup> will form part of the themes to be defined and implemented jointly with the social partners. The Commission intends to carry out a cost-benefit assessment of the existing directives to ascertain whether they meet the objectives set, by continuing to promote Social Dialogue with social partners in search of solutions more in line with European needs.

The TEU has brought an original approach to the EU's social problems, alerting the Member States to these issues and reinforcing the guarantees of European workers and citizens in general.

Thus, it can be said that "*social dialogue is a driving force of economic and social reforms*". The normative coverage for Social Dialogue currently given by the TFEU is very broad. Sectoral and inter-trade dialogue between social partners, and Social Dialogue, are clearly and respectively defined in the Treaty, affording the social partners the formal possibility of building a supranational collective bargaining area and intervening in the detailed content of EU decisions.

Therefore, developing and fostering Social Dialogue is considered an essential element of the European Social Model, since it also complements and supports national social dialogue and industrial relations. In addition, as mentioned by Brian Bercusson "*The concept of social dialogue incorporates a principle critical in the EC context. It stipulates a relationship between collective bargaining and law which assumes a multiplicity of forms within Member-States and is extremely flexible in its application within the context of Community social policy. Social Dialogue does not simply equate with collective bargaining. It implies a flexible relationship between social dialogue at all levels and Community and national institutions*" (Bercusson 1996: 73). Therefore, embracing the fundamental role of the European Social Dialogue as a significant component of EU



employment and social policymaking contributes to the formulation of arrangements and instruments that balance the needs of enterprises and workers across Europe.

Nowadays, Social partners have the specific role of shaping legislation in the social field, enshrined in the EU treaty's social policy chapter. The social partners know the reality of Europe's workplaces, understand the needs of workers and companies, and defend their interests. Therefore, involving them at the EU level helps ensure that the concerns of both business and workers are considered in initiatives taken at the EU level.

The Commission's role, on the other hand, is one of support and promotion of the European Social Dialogue. Hence, the Commission consults the social partners prior to any legislative initiative even though social partners can also negotiate agreements on their own, to be implemented in accordance with article 155 TFEU.

Until now, the European Social Dialogue procedure has produced four agreements at cross-industry level, signed by the European social partners, that have then been transformed into directives:

- a) The framework agreement of December 1995 on parental leave gave all employees an individual, non-transferable right to at least three months' parental leave until their child reaches a given age (to be defined at national level) and up to eight years.
- b) In June 2009, the social partners signed a revised version of their 1995 parental leave agreement and altered the minimum mandatory parental leave period from three months to four months per employee, with at least one month being non-transferable between parents.
- c) The framework agreement of June 1997 on part-time work established the principle that part-time workers must not be treated less favourably than comparable full-time workers solely because they work part-time.
- d) The framework agreement of March 1999 on fixed-term work laid down the principle that fixed-term workers must not be treated less favourably than comparable workers on open-ended contracts solely because they have a fixed-term contract.

There have been four autonomous agreements signed by the European social partners at the cross-industry level:

- a) On telework in 2002;
- b) On stress at work in 2004;





- c) On harassment and violence at work in 2007;
- d) And inclusive labour markets in 2010.

Also, autonomous agreements have been concluded at the sectoral and multi-sectoral levels:

- a) On the European license for train drivers carrying out a cross-border interoperability service, in 2004;
- b) On workers' health protection through the good handling and use of crystalline silica and products containing it, in 2006.

In these cases, the social partners established a general framework at the EU level obliging their national affiliated organisations to implement the agreements in accordance with the national procedures and practices specific of each Member-State. That said, these agreements were not legally binding, and hence not enforceable on the Member-States.

European Social Dialogue has also resulted in process-oriented texts, such as frameworks of action, guidelines, codes of conduct, joint opinions, among other tools.

However, outcomes of Social Dialogue can go beyond soft law, in the form of framework agreements transposed by Council decision or binding autonomous agreements. For example, in 2013, the EU cross-industry social partners signed a framework of action on youth employment where they committed to promoting solutions to reduce youth unemployment and called national social partners, public authorities and other stakeholders to also actively work towards that goal (González 2011: 92).

### 3. The present challenges

Despite all the efforts involved in promoting the European Social Dialogue, some obstacles remain to their formal consolidation in the European area and in national legal systems. Obstacles such as tensions between the European and the national, over the harmonisation of social rules and respect for specific social practices, over betting on short-term competitiveness or long-term quality of development.

In this way, the Social Dialogue is faced with obstacles to its consolidation which have been difficult to overcome. The lack of organisation of social partners is one such obstacle; here the low level of trade unionism, and the reluctance of employers to join European employers' organisations, pose the crucial problem of the representativeness of European



social partners in the EU. In addition, there is the problem of the concentration of collective bargaining at the company level and the problem of the diversity of legal systems and the plurality of national social models, which make it impossible to carry out a common and concerted Social Dialogue.

Nevertheless, Social Dialogue is undoubtedly a fundamental instrument for change, because it combines an increase of competitiveness with solidarity. At the national level, as well as at the European level, the information, negotiation and Social Dialogue dimensions need to be developed. Strengthening the European Social Dialogue, in its various forms, could lead to solutions that improve the functioning of enterprises by combining adaptability with security. It should be noted, however, that policy on wage-fixing, trade-union rights, the lock-out and the right to strike remain exclusively national powers, with minor future openings regarding cross-border strikes. However, these material limitations to the EU's competence should be understood as confined to the core of the institutions in question and not to all its collateral aspects, according to the principle *accessorium sequitur principale* (Sciarra 1993: 323; Blanpain 2002: 122; Boto 2011: 81).

Faced with these obstacles, many raise the question of whether there is in fact a genuine European Social Model, which promotes a genuine European Social Dialogue or whether, on the contrary, this model is a myth. Others accept the existence of a European Model, but question whether this model is truly social and European. Still others accept the existence of a European Social Model, but do not bet on its sustainability, as they believe that the challenges that this model must overcome are too great for its weak structure. The challenges facing the European Social Model are, at first glance, the same as those faced by Member States: globalisation, competition, inequalities, enlargements, economic and social developments, aging of the population, etc. (Weiss 1990: 97-108).

In fact, European policies – and social policies are no exception – are regulated within the diverse cultures, languages, semantics, ideologies and policies of the various Member States that are part of the EU. For this reason, the European Social Model and European Social Dialogue are seen in contrasting ways within the EU. For some, they are a source of inspiration and hope for a more united, cohesive and supportive Europe, but for others it is an open door for the loss of national sovereignty, political constraints and unreachable social objectives (Branch 2005).



However, despite the dissenting voices, it seems that in recent decades the European Social Model, and the European Social Dialogue, have been established in the minds of European citizens and are already part of the national political concerns and agendas of the Member States.

The European Social Model could be an aspiration to achieve, but it is not real. It is a vision of society that combines sustainable economic growth with a continuous improvement of living and working conditions. This implies efforts to achieve full employment, good quality jobs, equal opportunities, social protection for all, social inclusion and citizen involvement in the decisions that affect them. For these reasons, social dialogue, collective bargaining and worker protection are key elements in promoting European productivity and competitiveness. This is what distinguishes European and Anglo-Saxon social systems, namely the North-American system, where only a few benefit at the expense of the majority. However, what is meant by sustainable economic growth, full employment or good quality jobs, remains to be defined. These are concepts which, in themselves, vary according to the socio-political view of each Member State and which are easily transmuted according to the economic-social vicissitudes of global Europe.

The current situation of the global economic crisis that has drastically affected Europe, especially the southern countries such as Portugal, has pushed the European Social Model into the background, with preference given to economic growth, often accompanied by measures which undermine the efforts made to promote social policies, in terms of improving working conditions, full employment, better salaries and investment in human capital.

This means that the European Social Model and the European Social Dialogue are still fragile concepts that, despite all the efforts made for their autonomy, continue to be dependent on strong financial performance and the collaboration of Member States. So, what has happened so far is that if the economy declines, and measures are needed to combat the crisis, social policies are the first to succumb to the economic demands that always prevail.

Hence, while we may speak of the improvement of working conditions at a time when unemployment rates are at their highest, and wage and social dumping are being promoted, it remains clear how economic interests can destroy, in a short space of time, all the social ideals that actors have tried to build through the implementation of the European Social Model over the last decades.



Some authors believe that the fragility of the European Social Dialogue and the European Social Model is primarily due to the lack of representative power of the European social partners (Bercusson 1996). In fact, as already mentioned, there are certain matters, notably pay negotiation and strike action, which are beyond the reach of the European social partners, and are reserved for national legislation where national social partners can intervene. In other words, if there is no real Social Dialogue between the EU and Member States, more specifically between the European and national social partners, the European Social Model and the European Social Dialogue can very easily be – or continue to be – sacrificed to the requirements of national economic policies.

Notwithstanding all these obstacles, the European Social Model exists, is a reality and its work has borne positive fruit. Despite the diversity in the European social area, and within the respect of shared competences between the EU and Member States, the European Social Model has consolidated itself as a coherent set of policies, structures and objectives that substantiate its existence. The aim of a "*social market economy*" is to show the European synergy that has been created over the years between the need to merge economic objectives with social obligations within the European area, to create a satisfactory balance for all.

Analysing the principal outputs from the European Social Dialogue, and the implementation of social policies, the majority is related to labour matters, related to the promotion of employment, equality in work, improvement of working conditions, among others. It is already common ground among Member States that social employment policies are the way forward, not only to avoid social exclusion and social dumping, but also to promote long-term social growth, to ensure adequate funding pensions, social security, health and the improvement of living conditions in general (González 2011: 132-135).

However, the European Social Model faces the problem of a lack of institutional effectiveness. Values and principles alone do not make a difference; there is a need for appropriate legislative support, which is only binding on European institutions. In this context, there has been an attempt to promote the harmonisation of labour legislation in the EU, albeit without much success. Firstly, Member States do not welcome the EU's intention to override national sovereignty when it comes to legislating on social issues.

In addition, the diversity of cultures and social objectives in the various Member States of the EU makes it impossible to implement a single institutional model regarding social policies. Thus, the open method of coordination, which took its first steps in the last decades,



has been the method that the Member States have most graciously accepted. This is because policy coordination does not mean harmonisation or unification of policies (Regent 2003: 190-194).

While a policy of harmonisation has been able to achieve the minimum standards, that of coordination is intended to go further. This method leaves effective social policy decisions in the hands of Member States, but attempts to improve these decisions by promoting common goals to be adopted alongside common indicators achieved through the benchmarking of national performances. This promotion of common objectives may be made essentially using soft law instruments, but they are nonetheless European instruments for the implementation of social policies. This means that, even if they lack binding force, these instruments are still instruments that keep Member States on the right track for the implementation of social measures that everyone thinks are necessary. However, there is nothing to prevent Member States from following a different path, since they are not bound by the social policies imposed by the EU, excepting binding framework agreements, implemented in national laws through the transposition of EU directives. Apart from this alternative, the European Social Model depends on the willingness of Member States to collaborate with European institutions and with European social partners, and on the existence of a European social conscience that is stronger than the temptation to regulate states' own interests to the detriment of the European collective interest (González 2011: 129-132).

That said, European Social Dialogue still needs further development, especially in times of economic crisis, where social problems intensify, inequalities increase, social exclusion intensifies, and economic and social interests overlap. The European Social Dialogue is an essential mechanism of the European Social Model, but both are weakened by the lack of institutional autonomy. The greatest challenge of the European Social Dialogue remains its role in the future of European policy and the recognition of the autonomy of social partners. The European Social Dialogue is weakened in its procedure and results. In other words, social partners need to strengthen their autonomy, and, in particular, the respect given to them by the European Commission and other European institutions. European Social Dialogue must go beyond social dialogue at the national level, since it should cover all national social dialogue and not just replicate it, at the risk of losing its useful meaning.



In sum, the European Social Model and the European Social Dialogue are still fragile realities, without proper institutional autonomy (Smismans 2008: 170-178). In fact, the strength of the European Social Dialogue depends to a substantial extent on the efforts of national social dialogue, and the role that national social partners play in their own national arenas. In this way, if the national dialogue falls short of what is expected, it will inevitably endanger the European Social Dialogue.

However, the winds apparently started to change when, in September 2015, President Jean-Claude Juncker (re)stated the Commission intentions for the labour market, as following:

*"We have to step up the work for a fair and truly pan-European labour market. As part of these efforts, I will want to develop a European Pillar of Social Rights, which takes account of the changing realities of Europe's societies and the world of work. And which can serve as a compass for the renewed convergence within the euro area. This European Pillar of Social Rights should complement what we have already jointly achieved when it comes to the protection of workers in the EU. I believe we do well to start with this initiative within the euro area, while allowing other EU Member States to join in if they want to do so."*

The discussion on the social dimension of Europe is part of a broader debate initiated on the future of EU28.<sup>XI</sup> The recent reflection paper on the social dimension of Europe, published alongside the European Pillar of Social Rights, focuses on the profound transformations that European societies and the world of work will undergo in the coming decade, outlining the importance of the renewal of the concept of a Social Europe.

Despite the different impacts the financial and economic crisis has had in various parts of Europe, across the Union, it is the younger generations that have been hit particularly hard – for example, at the end of 2016, youth unemployment rate stood at 18% in the EU and 20% in the euro area. That means that, for the first time since the World War II, there is a real risk that today's young adults – the most educated generation ever in the history of EU – may end up less well-off than their parents, and that would mean that the European project has failed miserably.

In this context, and to invert the damaging process that has been created in the past decade due to the economic crisis, the European Commission recently issued its recommendation on the principles and rights that are essential for a fair, well-functioning labour market and welfare system to address the needs of today's Europe.



The Commission Recommendation for the establishment of a European Pillar of Social Rights, applicable to all Member-States (firstly for the euro area but extensive to all EU Member States) consists of 20 key principles that serve merely as a high-level guide for better working and living conditions in Europe. However, it is presented with both current and future realities in mind.

Even though Europe has shown signs of financial growth, with constantly reducing overall unemployment rates, the effects of the last decade's crisis are still visible in youth unemployment rates and the risk of poverty in many parts of Europe. At the same time, European countries are facing rapid changes taking place in the labour market. Therefore, according to the optimistic and forward looking approach of the European Commission, there are as many challenges as are opportunities of growth.

In this context, the European Pillar of Social Rights is all about delivering new and more effective rights for citizens, even though it is not expected to apply a “*one-size-fits-all*” approach, since the Pillar acknowledges the diversity of social realities amongst European countries (Cavallazzi et al. 2017).

In brief, the principles under the Social Pillar fall into three categories:

- equal opportunities and access to the labour market;
- fair working conditions;
- and social protection and inclusion.

These principles, as the European Commission has already stated, need further legislative or non-legislative initiatives to become effective. However, the main point is that the European Commission is sending a clear message to all Member-States on what is expected of them in the social field.

As specific measures, the European Commission has adopted a new proposal on work-life balance, and launched two social partners consultations: (i) on modernising the rules of labour contracts; (ii) on access to social protection.

In the work-life balance proposals, the European Commission envisages extended paternity, parental and carer's leave, as well as protection against discrimination or dismissal if workers ask for leave or flexible working arrangements.



The social partners consultations will also look at labour contracts, and at how to provide social protection to all workers, including the self-employed or those with “non-standard” work contracts.

Nevertheless, the Pillar is not a rigid document, it gives room for improvement, and social innovations are encouraged from all actors. Also, given the legal character of the Pillar, these principles and rights are not directly enforceable, because they require a translation into dedicated action and/or separate legislation, at the appropriate level.

However, the European Commission not only wants to improve social and labour legislation, but also (and primarily) enhance and raise awareness of existing legislation, promoting its fully implementation and enforcement. In this key aspect, the social partners play a key role, since they are in a privileged position to influence national policies so that these comply, in a harmonising matter, with key resolutions of the European Commission regarding social aspects of EU.

#### 4. What the future holds?

EU leaders, in the Rome Declaration of 25<sup>th</sup> March of 2017, stated that

*“In these times of change, and aware of the concerns of our citizens, we commit to the Rome Agenda, and pledge to work towards (...) a social Europe: a Union which, based on sustainable growth, promotes economic and social progress as well as cohesion and convergence, while upholding the integrity of the internal market; a Union taking into account the diversity of national systems and the key role of social partners; a Union which promotes equality between women and men as well as rights and equal opportunities for all; a Union which fights unemployment, discrimination, social exclusion and poverty; a Union where young people receive the best education and training and can study and find jobs across the continent; a Union which preserves our cultural heritage and promotes cultural diversity.”*

Considering the financial and economic crisis that has swamped the EU since 2008, the current, major aim of the EU is to mitigate the already existent social disparities between Member-States. Linked to this is the aim of promoting convergence towards higher living standards, since this has slowed considerably – if not come to a halt – on the last decade.

Therefore, it is important to create a more cohesive and more stable EU, especially where living and working conditions are concerned. It is also urgent to reconstruct and relaunch Social Dialogue, at national and European levels.





The renewal of a social Europe is not just a social necessity, but also an economic imperative. Employment and social conditions vary widely across the euro area, as result of the crisis, and its consequences impact on the credibility and sustainability of a strong and unified EU.

As pointed in the European Commission`s report, efficient and resilient labour markets promote high levels of employment, and can absorb shocks without generating unemployment which are essential for the smooth functioning of the Economic and Monetary Union. Overtime this will contribute to the convergence of performances between Member-States and promote more inclusive societies.

Since the creation of the Pillar of Social Rights, the main job of the European Commission will be to, at the European level, mobilise the various instruments available: EU law – with an emphasis on the enforcement of the existing rich *acquis*, to be updated and complemented where necessary; Social Dialogue, to engage with and support the work of EU social partners; policy guidance and recommendation; and financial support.

However, elements of resistance are still visible from some European countries that consider that the European Commission promotes a federalist discourse, but that goal could be counterproductive, since it can promote and encourage the exit of other countries from the EU, as the UK recently did.

Nevertheless, looking beyond Europe, a federation might be the only way Europeans have to face challenges that states alone would never be able to overcome, in the global context. Considering the new emerging economies, with millions of inhabitants, such as China, India and Brazil, Europe must remain a relevant international actor in a global context and for that to happen it must become a united international actor.

## 5. Conclusions

The truth is that EU is not a federal union (yet). For some, a Federation – as the institutional representation of federalism as an ideology (King 1982: 20.) - is not only desirable but necessary to establish a more democratic and effective Europe that is needed to play a key role in a globalised world. On the other hand, there are several countries that are not willing to give more powers to the EU or change the decision-making rules.



The renewal of concerns from the EU regarding social policies indicates a new phase for European Social Dialogue, a willingness to reconstruct what was once abandoned for economic interests.

However, this desire is compromised by the mixed feelings the Member States have towards EU intervention in social policies.

Consequently, reconstructing the role of social partners and the European Social Dialogue itself is urgent and necessary, to obtain the best working conditions and employment policies that the Member States are willing and able to implement, in a harmonised way.

It is our understanding that federalism should be increasingly discussed in the EU and not treated as a taboo subject regardless of the existence or lack of federal elements. Nevertheless, we must not forget that, more and more, globalisation is reshaping the political, economic and social destinies of the world, with new international actors and, as such, the nations of Europe can only safeguard their prosperity and their social achievements by joining forces and standing together on several key issues. This requires, sooner or later, new steps towards a federal union (Borrel 2015).

Our goal with this paper was to establish a connection with the UPP and with a soaring reality that is the EU, as a *sui generis* federation. Through a solid analysis of the UPP and its integrating components, it is possible to understand the advantages that a reshaped system can bring to the single market and the promotion of scientific and technological developments in the EU. As was demonstrated, it must be reiterated that patents with unitary effect will not be the only unitary title in Industrial Property Law, as it will add to a harmonised system of both EU trademarks and designs, strengthening it, that shows the relevance of this step forward. Nevertheless, it cannot go unnoticed that there are still some obstacles that prevent this system from reaching its true potential. The coexistence with an international agreement, like the EPC, the different judicial reviewers and the non-participation of all the EU Member-States in the framework of the UPP represent some of these obstacles.

Despite these challenges, the post-UPP European Patent System will be more coherent, uniform and adapted to the single market, which is an economy with even more worldwide impact. As such, the overwhelming majority of EU Member-States are interested in this



cooperation, only if complemented with the respect for their sovereign interests (as it is in the present case). In conclusion, and defending an approach which concentrates the subject-matter of a federation in a clear search for unity, we sustain that the UPP is an EU federal manifestation.

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<sup>I</sup> Or, being more precise, the EU27 after the conclusion of "Brexit".

<sup>II</sup> It should be borne in mind, however, that before this stage social policies were the sole responsibility of the Member States, and that this amendment promoted an extension of the powers of the Community institutions and increased cooperation between Member States.

<sup>III</sup> Notwithstanding the political and social value that its approval had, the Charter is not binding.

<sup>IV</sup> The United Kingdom abstained.

<sup>V</sup> Not endorsed by the United Kingdom, which had always taken the position that social issues fall under the exclusive competence of national rights

<sup>VI</sup> However, the obligation of transposition lies with the Member States, and is normally fulfilled through appropriate legislative and administrative activity. Any Member State can rely on the social partners, at their joint request, to conclude agreements aimed at "ensuring the results" imposed by the respective directives.

<sup>VII</sup> At the aforementioned Luxembourg Summit in November 1997, better known as the "Luxembourg Process", where the method of coordination was exhaustively specified and developed and anticipated, it was stated that the objective of this strategy was to reduce unemployment, significantly, in Europe within five years. The strategy established a multilateral surveillance framework comprising inter alia a joint annual report on employment, employment guidelines on which the national action plans developed by the Member States.

<sup>VIII</sup> These principles already resulted from the TEU (Nice version), in its arts. 1<sup>o</sup>-A and 2<sup>o</sup>, but it is with this TUE that they gain a more comprehensive dimension.

<sup>IX</sup> Although most of these principles already result, in general, from articles (1a) and (2) of the Treaty of Nice, the norm is now more comprehensive, with references to non-discrimination in general and minorities as a novelty.

<sup>X</sup> *Flexicurity* is considered "an integrated strategy for enhancing, at the same time, **flexibility and security** in the labour market. It attempts to reconcile employers' need for a flexible workforce with workers' need for security – confidence that they will not face long periods of unemployment". See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Towards Common Principles of Flexicurity: More and better jobs through flexibility and security (COM/2007/0359 final).

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**The voting systems in the Council of the EU  
and the Bundesrat – What do they tell us about  
European Federalism?**

by

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## Abstract

The Treaty of Lisbon introduced a new system of weighted votes in the Council, which radically departs from the principles on which the distribution of votes between the Member States of the EU was based for more than half a century. At the same time, the system of double majority is fundamentally different from the assumptions on which voting systems in federal states are based, including in the Bundesrat. Systems used in federal states are usually based on a compromise between the equality of states, and the equality of citizens. Consequently, in the Nice system, smaller Member States in the EU had relatively greater power compared to their populations than smaller federal units in the German Bundesrat. The results presented in this paper indicate that the Lisbon system of voting in the Council differs significantly from voting systems in federal states.

## Key-words

Council of the European Union, Bundesrat, voting power, Nice voting system, double majority voting system



## 1. Introduction

Is the European Union evolving towards a federal system? Evidence speaking for the European Union being similar to a federation includes: EU institutions taking over competences previously held by states; the principle of supremacy of European law and its direct effect in national law; and cooperation between federal institutions and the constituent units in executing various tasks.<sup>1</sup> What speaks against this thesis is: the lack of a European constitution; of the right to impose taxes; as well as the fact that states retain their membership in international organisations, such as the UN.

The EU's possible evolution towards a federation can also be examined from the perspective of changes in the voting system. We are interested in seeing whether the system of voting in the Council, introduced in the Treaty of Lisbon, brings the EU system closer to a federal system, or indeed departs further from it. The 1 April 2017 marked the end of a transitional period in which states could request voting in the Council on the Nice weighted voting system. Because states had to consider that any member of the Council could demand a vote count in accordance with the Nice system, they assessed the chances of creating a blocking coalition for this particular weighting method. For most countries, the formation of a blocking coalition was much easier under the provisions introduced by the Treaty of Nice. The end of the transitional period, and the unconditional application of the Lisbon double majority system will change the balance of power in the Council.

The double majority system introduces solutions that significantly differ not only from the Nice weighted voting system in the Council, but also from the way in which the weight of votes of constituent states is usually established in federal states. A voting system in which the size of the population is reflected proportionally constitutes a departure from the experience of federal states. Of course, the European Union (EU) is not a federation, although some researchers identify certain similarities. The EU political system is not classically divided into the executive, legislative and judiciary branch. In particular, the Council and European Commission both perform executive and legislative functions (Conway 2011; Ziller 2008; Lenaerts 1991). On the other hand, the role attributed to the Council of the EU is by some scholars seen as evolving towards that of a second chamber of parliament (Burgess 2000; Fabbrini 2012: 29).





Specifically, the European Union is compared to Germany, which has two parallel levels of governance: the national (federal) level and the level of constituent states, making law in different policy areas and jointly governing the country (von Dosenrode 2007). The German equivalent of the word *foedus* is *Bund*. Germany's system is that of 'cooperative federalism', where sovereignty is shared and central authorities and constituent elements cooperate, working jointly in the same areas. Law making is a competence of the central authorities, while its implementation is the task of the constituent units. This differs from dual federalism, as seen in the United States, where the exclusive competences of the federal centre and the constituent units are set forth in the constitution and where the two levels act independently of each other.

The article compares the double majority voting system in the Council with the Nice system and the method of weighted votes in the German Bundesrat. The aim was to find out how these solutions affect the indirect voting power of the inhabitants of EU Member States and residents of the Federal Republic of Germany.

The first part of the paper will discuss the principles of decision-making in the Bundesrat. A simulation will show how the voting power of the various German constituent states, or *Länder*, would change if the Bundesrat were to employ a double majority system analogous to the one employed on the EU level. The second part will analyse the voting system that functioned in the European Union under the Nice system. The third part will be dedicated to analysing the double majority system that has been used since the entry into force of the Treaty of Lisbon. The article ends with conclusions.

The analysis is founded on the assumption that both the Bundesrat and the Council of the EU represent a two-tier decision-making system, in which the indirect power of each citizen's vote is equal to the product of the direct power of the citizen's vote in his/her voting constituency and the power of the vote of his/her representative in the council concerned. Every citizen belongs to a single voting constituency and independently expresses his/her own opinion on the initiative discussed in the council as if in an opinion poll in which he/she has a single vote and can only vote 'for' or 'against' the initiative in question. The distribution of citizens among the individual voting constituencies is random in terms of their views on the issues that can be decided by the council. The constituency representative votes 'for' or 'against' the initiative depending on what the majority of the citizens in the given constituency have chosen. Representatives in the council vote independently of each other, and how they



vote is only determined by the results of the polls in the individual constituencies (Felsenthal and Machover 1998: 65-68).

The influence that each citizen has on the outcome of the voting process in the council will be equal when the power of the vote of a given constituency is proportional to the square root of its population (Felsenthal and Machover 1998: 63-78; Kirsch 2007; Penrose 1946). The square-root system is based on the principle of representativity, which means that every citizen, regardless of which Member State he/she is from, has the same voting power. In academic literature this system is considered fair (Scientist for a Democratic Europe 2004; Baldwin and Widgrén 2004; Felsenthal and Machover, 2004; Plechanovová 2004).

It could be questioned whether the application of the square root of the population, in counting the indirect power of every citizen's vote in a council, is a proper solution. When there is a strong correlation of citizens' preferences in individual constituencies and at the same time clear polarisation in their preferences between constituencies, the method could lead to 'dictatorship' of the minority (Felsenthal and Machover, 1998: 71).

We could therefore arrive at the conclusion that in a situation when the communities of various constituencies are homogeneous in terms of preference, with polarisation of preferences between communities, the voting power of the constituencies in the council should be proportional to their population. Consequently, a system in which the voting power of a given constituency in a council is proportional to its population can be deemed more appropriate because it reflects lasting differences in preferences between the individual constituencies. When the distribution of citizens between individual voting constituencies is random, as regards the views on the issues that could be decided on by the council, the voting power of their representatives in the joint decision-making body should be proportional to the square root of the population of these constituencies (Kirsch 2007: 357-380; Felsenthal and Machover 1998: 68-72).

Both for the Bundesrat and the Council of the EU, it seems more justified to assume that there is no significant correlation of citizen preferences in individual constituencies (German constituent states, EU Member States) and to consider the square-root system. One should agree with Kirsch (2007: 373) that designing a non-homogeneous voting system for a constitution or a treaty is not a simple task, even if we know the correlation structure of the countries in question. The correlation of preferences of citizens in particular constituencies varies depending on the issue being considered, and changes over time, while



the constitutional voting system is generally expected to be applicable for a long time. Therefore, it seems reasonable to assume that there is no correlation between individual voters, even though it is an idealistic assumption. In order to determine the voting power of each player, we have used the Normalized Banzhaf Index (Banzhaf 1965).

The usefulness of voting power analyses has come under question from proponents of the non-cooperative approach. Albert (2003, 2004) denies the usefulness of voting games in the study of social and political realities because, in his view, they do not make it possible to gain empirical knowledge and, therefore, do not have any cognitive or prospective value. Garret and Tsebelis (1999a, b) criticise the application of power index approaches to the EU because they ignore the preferences of actors, the institutional rules that govern legislative processes, and the functioning of institutions other than the voting body which is the subject of an analysis. According to Barry (1980), as a result of ignoring the preferences of actors in voting games, they do not measure power, but luck - understood as a chance of finding oneself in a situation in which most of the other co-decision makers will have the same or similar preferences.

The use of the Normalised Banzhaf Index in the present study is not intended to assess the ability of members of a given voting body to influence the outcome of a decision-making process; it may not be reduced exclusively to voting power, as Garret and Tsebelis (1999a, b) rightly point out. The Normalized Banzhaf Index was used as a tool for comparing voting rules. As a consequence, we model the voting system as an "abstract shell" (Linder 2008: 593), ignoring all information apart from the voting rule itself *inter alia* the preferences of actors, other institutional rules in the legislative process, or political culture.

## 2. The voting system in the German Bundesrat

Germany is a federal state composed of 16 constituent states, the *Länder*. The Bundesrat is the organ of the Federation which ensures that the constituent states participate in the adoption of laws and in federal administration. The Bundesrat is tasked with representing the interests of the constituent states and protecting them from excessive intervention of federal authorities (Foster and Sule 2010: 207-210; Roberts 2009: 100-107).

The members of the Bundesrat (69 in total) are delegated by the governments of the constituent states. The German constitution specifies the minimum and maximum number



of votes that the *Länder* may have – from three for the least populous to six for the most populous. Resolutions are adopted by majority vote. Voting takes place in accordance with the guidelines provided by the governments of the individual *Länder*, and the position is agreed upon before the Bundesrat meeting. An imperative nature of the mandate requires that all delegates from a given constituent state vote the same, otherwise the vote of the entire delegation is considered void (Schmidt 2016: 285-293; Rudzio 2015: 288-289; Gunlicks 2013: 343-346). This means that the vote of a state is indivisible.

The number of votes in the Bundesrat is therefore not directly proportional to the population. Democratic legitimacy does not stem from the direct equality of citizens guaranteed by the voting system. Less populous constituent states have a stronger vote than that which would arise from their population. The least populated ones have three votes, the middle-sized ones have four, except for one which has five, and the most populous ones have six votes. Bremen, which has 660 000 inhabitants, has three votes, as does Hamburg, which has two and a half times more inhabitants. Lower Saxony, with 8 million inhabitants, has six votes, the same number as North Rhine-Westphalia, which has more than two times as many inhabitants.

The table presented below (Table 1) shows the number of votes of each constituent state in the Bundesrat, the share of each constituent state in the total number of votes, the population, and the share in the total population.

We can clearly see that for the states that have six votes, the greater the population the greater the underestimation of the weight of their vote, calculated as the ratio of the share in total population to the share in the total number of votes. For example, for Lower Saxony the ratio is 1.11, and for North Rhine-Westphalia it is 2.5 (vote weight is 2.5 times lower than the share in total population). The opposite is true for the group of *Länder* that have three or four votes in the Bundesrat. There is a distinct regularity here that the lower the population the greater the overrepresentation of a *Land* in the number of weighted votes. For Bremen, it is more than five times greater than its share in total population.

Table 1: population of the German *Länder* and the number of votes in the *Bundesrat*

Land	Number of votes in the Bundesrat	Share in the total number of votes	Population	Share in total population
North Rhine-Westphalia	6	0.0870	17638098	0.2172
Bavaria	6	0.0870	12691568	0.1563
Baden-Württemberg	6	0.0870	10716644	0.1320
Lower Saxony	6	0.0870	7826739	0.0964
Hesse	5	0.0725	6093888	0.0751
Saxony	4	0.0580	4055274	0.0499
Rhineland-Palatinate	4	0.0580	4011582	0.0494
Berlin	4	0.0580	3469849	0.0427
Schleswig-Holstein	4	0.0580	2830864	0.0349
Brandenburg	4	0.0580	2457872	0.0303
Saxony-Anhalt	4	0.0580	2235548	0.0275
Thuringia	4	0.0580	2156759	0.0266
Hamburg	3	0.0435	1762791	0.0217
Mecklenburg-Vorpommern	3	0.0435	1599138	0.0197
Saarland	3	0.0435	989035	0.0122
Bremen	3	0.0435	661888	0.0082
Total	69		81197537	

Source: Own calculations. The population of the *Länder* as on 31 December 2014 on the basis of Destatis data, [http://www.statistik-portal.de/Statistik-Portal/en/en\\_jb01\\_jahrta1.asp](http://www.statistik-portal.de/Statistik-Portal/en/en_jb01_jahrta1.asp) (accessed on 8 April 2016).

A more comprehensive analysis can be conducted using the Normalized Banzhaf Index (NBI), which illustrates the share of a given player (e.g. a constituent state) in the total number of swing votes of all states (Banzhaf 1965; Felsenthal and Machover 1998: 32-51). It shows the probability of a given constituent state becoming a pivotal player, in other words, of a situation when the decision whether a proposal will be passed or rejected by the Bundesrat will be entirely up to this state. A constituent state has a pivotal position when its withdrawal from the winning coalition means that the coalition is no longer winning because the sum of votes of its members is lower than the voting threshold.

To calculate the NBI, it is first necessary to identify the pivotal players in all the possible winning coalitions and then calculate the total number of situations for each player in which it would be the swing member of a coalition. The NBI for each player is determined as the ratio of its swings to the total number of swings. Table 2 presents a sample game with a voting threshold of  $q=6$ . The total number of swings of all players is five ( $a=3$ ,  $b=1$ ,  $c=1$ , respectively). As a result, the NBI takes the following values:  $a=0.6$ ;  $b=0.2$ ;  $c=0.2$ .

Table 2: coalitions in a game with a threshold of  $Q=6$  and players weights  $A=5, B=4; C=1$ 

Coalition	Coalition weight	Coalition type	Pivotal players
a	5	B	—
ab	9	W	a,b
ac	6	W	a,c
abc	10	W	a
bc	5	B	—
b	4	L	—
c	1	L	—
$\emptyset$	0	L	—

W- Winning L- Losing B- Blocking

The NBI indicates that the vote weighting system in the Bundesrat gives preferential treatment to the *Länder* with the lowest populations, and is disadvantageous to those with the largest populations. In the German system, voting power shifts from the three most populous constituent states, mainly to those with populations lower than 3 million, especially Saarland and Bremen. This is clearly visible in the values of the ratio of voting power to the square root of population. The ratio of voting power to population was calculated using the  $(\eta S)/(Hs)$  formula (Felsenthal and Machover 1998: 166), where:

$\eta$  – the number of swings of a given player (country, *Land*) in a given voting system;

H – the sum of swings of all players (countries, *Länder*);

$s$  – the square root of the player's population (countries, *Länder*);

S – the sum of square roots of the populations of all players (countries, *Länder*) in the council.

When the ratio equals 1, it means that the voting power of the *Land* is proportional to the square root of its population. When it is less than 1, then the voting power of the given *Land* is smaller than its population would suggest. When it is greater than 1, the voting power is greater than the population of the *Land* would suggest. Thus, the ratio describes the disproportion between the player's voting power and its participation in the total population of all the constituent states.

As shown by the data presented in Table 3, the voting power of the five most populous constituent states is underestimated to various extents, while the voting power of eleven states is overestimated compared to their population. The state that is most strongly affected



by underestimation is the most populous one—North Rhine-Westphalia, and the one most strongly affected by overestimation is the least populous one – Bremen.

Table 3: analysis of the voting system in the *Bundesrat*

Land	Number of votes in the Bundesrat	Share in the total number of votes	Population	Share in total population	Number of swings ( $\eta$ )	NBI	Ratio of voting power to the square root of population (A)	A-1
North Rhine-Westphalia	6	0.087	17638098	0.2172	8974	0.0882	0.689	-0.311
Bavaria	6	0.087	12691568	0.1563	8974	0.0882	0.812	-0.188
Baden-Württemberg	6	0.087	10716644	0.132	8974	0.0882	0.884	-0.116
Lower Saxony	6	0.087	7826739	0.0964	8974	0.0882	1.034	0.034
Hesse	5	0.0725	6093888	0.0751	7630	0.075	0.997	-0.003
Saxony	4	0.058	4055274	0.0499	5830	0.0573	0.934	-0.066
Rhineland-Palatinate	4	0.058	4011582	0.0494	5830	0.0573	0.939	-0.061
Berlin	4	0.058	3469849	0.0427	5830	0.0573	1.009	0.009
Schleswig-Holstein	4	0.058	2830864	0.0349	5830	0.0573	1.117	0.117
Brandenburg	4	0.058	2457872	0.0303	5830	0.0573	1.199	0.199
Saxony-Anhalt	4	0.058	2235548	0.0275	5830	0.0573	1.257	0.257
Thuringia	4	0.058	2156759	0.0266	5830	0.0573	1.280	0.280
Hamburg	3	0.0435	1762791	0.0217	4342	0.0427	1.055	0.055
Mecklenburg-Vorpommern	3	0.0435	1599138	0.0197	4342	0.0427	1.107	0.107
Saarland	3	0.0435	989035	0.0122	4342	0.0427	1.408	0.408
Bremen	3	0.0435	661888	0.0082	4342	0.0427	1.721	0.721
Total	69		81197537		101704	1		

Source: Own calculations. The population of the *Länder* as on 31 December 2014 on the basis of Destatis data, [http://www.statistik-portal.de/Statistik-Portal/en/en\\_jb01\\_jahrstab1.asp](http://www.statistik-portal.de/Statistik-Portal/en/en_jb01_jahrstab1.asp) (accessed on 8 April 2016).

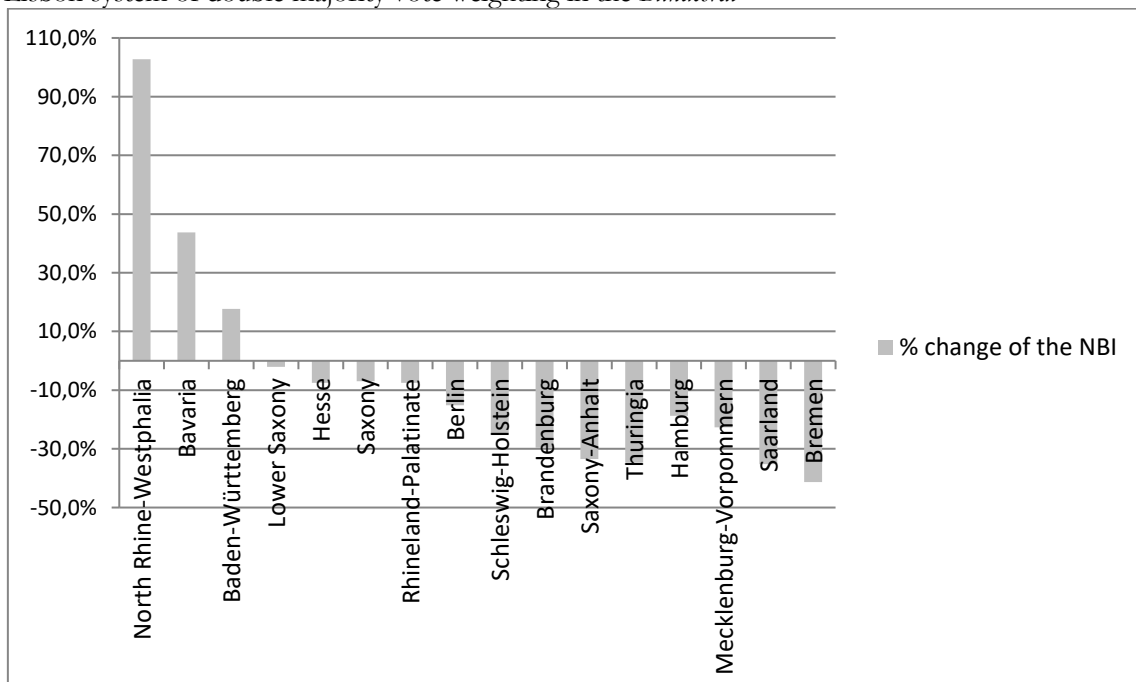
The German system combines egalitarian legitimacy of the Bundesrat and federal legitimacy of the Bundestag. The voting system is therefore not based on purely egalitarian, democratic legitimacy. The former President of the European Parliament, Martin Schultz, highlighted this by saying that in the German federal system the governments of the 16 states send their representatives to the second chamber, the Bundesrat, where North Rhine-Westphalia, with its 18 million inhabitants, has six votes, just as Baden-Württemberg, although the latter is inhabited by only 11 million people; Bremen, in turn, has three votes in the Bundesrat, although it only has 600 000 inhabitants, which means that only 200 000 is enough to get a single vote in the Bundesrat, while in North Rhine-Westphalia three million inhabitants are needed for a single vote (Schulz 2014: 50-51). If we were to understand a



democratic system as strict majority rule, then we should be asking ourselves the question whether Germany meets the criteria of a democratic state (Schönberger 2009: 1212). Indeed, the German system may be criticised for the overpowering role of ideological divisions within the Bundesrat and the potential of obstruction.

We can also analyse how the power of the individual *Länder* would change if the double majority voting system, analogous to the one established under the Treaty of Lisbon, were introduced in the Bundesrat. We have performed a simulation assuming that passing decisions in this institution would require the support of 55 per cent of the constituent states representing at least 65 per cent of the population of Germany. The results are presented in Table 4 and in Graph 1.

Graph 1: change of the voting power of the German *Länder* (measured in NBI) when applying the Lisbon system of double majority vote weighting in the *Bundesrat*



Source: Own calculations.





Table 4: the voting power of the German *Länder* when applying the double majority vote weighting system in the *Bundesrat*

Land	Population	Share in the total number of votes	Normalized Banzhaf Index (A)	Normalized Banzhaf Index in the Bundesrat system (B)	Value change of the Normalized Banzhaf Index (A-B)	Ratio of voting power to the square root of population (C)	C-1
North Rhine-Westphalia	17638098	0.2172	0.1789	0.0882	0.0906	1.397	0.397
Bavaria	12691568	0.1563	0.1269	0.0882	0.0386	1.168	0.168
Baden-Württemberg	10716644	0.1320	0.1038	0.0882	0.0156	1.040	0.040
Lower Saxony	7826739	0.0964	0.0864	0.0882	-0.0018	1.013	0.013
Hesse	6093888	0.0751	0.0694	0.0750	-0.0056	0.922	-0.078
Saxony	4055274	0.0499	0.0534	0.0573	-0.0040	0.869	-0.131
Rhineland-Palatinate	4011582	0.0494	0.0530	0.0573	-0.0043	0.868	-0.132
Berlin	3469849	0.0427	0.0486	0.0573	-0.0087	0.856	-0.144
Schleswig-Holstein	2830864	0.0349	0.0432	0.0573	-0.0141	0.842	-0.158
Brandenburg	2457872	0.0303	0.0403	0.0573	-0.0170	0.844	-0.156
Saxony-Anhalt	2235548	0.0275	0.0381	0.0573	-0.0192	0.836	-0.164
Thuringia	2156759	0.0266	0.0375	0.0573	-0.0198	0.838	-0.162
Hamburg	1762791	0.0217	0.0347	0.0427	-0.0080	0.856	-0.144
Mecklenburg-Vorpommern	1599138	0.0197	0.0330	0.0427	-0.0097	0.856	-0.144
Saarland	989035	0.0122	0.0277	0.0427	-0.0150	0.913	-0.087
Bremen	661888	0.0082	0.0251	0.0427	-0.0176	1.011	0.011
Total	81197537		1	1			

Source: Own calculations. The population of the *Länder* as on 31 December 2014 on the basis of Destatis data, [http://www.statistik-portal.de/Statistik-Portal/en/en\\_jb01\\_jahrstab1.asp](http://www.statistik-portal.de/Statistik-Portal/en/en_jb01_jahrstab1.asp) (accessed on 8 April 2016).

Unsurprisingly, in the situation in question there is a considerable shift of voting power to the three least populous *Länder* at the expense of all the others. In the case of North Rhine-Westphalia, the NBI value increased by more than 100 per cent. In the case of Thuringia, Saarland and Bremen, the NBI value fell by more than 30 per cent. The double majority system functioning in the European Union would probably be deemed unnatural and unjust in the German political system.

We shall begin the analysis of the European Union from the system referred to as the Nice system, which was functioning before the reform implemented by the Treaty of Lisbon.



### 3. The Nice voting system

The voting system in the Council of the EU, set out in the Treaty of Nice of 2001, was based on voting principles introduced by the founders of the European Communities, essentially analogous to those employed in the Bundesrat. In this system, vote weight was only related to population to a certain extent. For a decision to be passed in the Council of the EU, on the initiative of the European Commission, it is necessary for two criteria to be met: the majority of members (at least 15 out of 28 states) and 260 out of 352 weighted votes, which is approximately 73.86 per cent of their total number. At the same time, every member of the Council of the EU may request verification of compliance with the optional criterion of a minimum 62 per cent majority of the total EU population (Protocol No 36, 2012, Article 3).

Given these prerequisites, the key goal was to achieve the threshold of weighted votes, as then it was rather unlikely that the other conditions would not be met. In this system, there are 5,032,111 possible winning coalitions. If only weighted votes were considered in decision-making, the number of winning coalitions would be 5,032,534. This means that among all the coalitions that meet the criterion of weighted votes, only 423 do not meet the majority of states and 62 per cent of the population requirement.<sup>II</sup>

Calculations analogous to those performed for the Bundesrat can also be performed for the Nice voting system. In this system, the difference between the least and most populous countries is similar to that between the least and most populous German constituent states. The columns of Table 5 present this analysis showing the number of votes held by the individual countries, the share of each country in the total number of votes, the population and the share of each country in total population.

As we can see, in this case the underestimation of the voting power of Germany compared to its population is less than the underestimation of the voting power of North Rhine-Westphalia, and similar to that of Bavaria. However, the overestimation of the voting power of the least populous countries – Cyprus, Malta and Luxembourg – is greater than the overestimation of the voting power of Bremen. Considering the fact that the number of EU Member States (28) is much bigger than the number of German constituent states (16) and that there are much greater differences in population size between the members of the Council of the EU than between the members of the Bundesrat,



Table 5: analysis of the Nice voting system in the Council of the EU

EU Member State	Population	Share in total population	Number of weighted votes	Share in total number of weighted votes	Number of swings ( $\eta$ )	NBI	Ratio of voting power to the square root of population (A)	A-1
Germany	81089331	0.1593	29	0.0824	4079453	0.0759	0.8338	-0.1662
France	66352469	0.1304	29	0.0824	4079413	0.0759	0.9218	-0.0782
United Kingdom	64767115	0.1273	29	0.0824	4079403	0.0759	0.9330	-0.0670
Italy	61438480	0.1207	29	0.0824	4079385	0.0759	0.9579	-0.0421
Spain	46439864	0.0912	27	0.0767	3893839	0.0725	1.0517	0.0517
Poland	38005614	0.0747	27	0.0767	3893769	0.0725	1.1625	0.1625
Romania	19861408	0.0390	14	0.0398	2242131	0.0417	0.9260	-0.0740
Netherlands	17155169	0.0337	13	0.0369	2096013	0.0390	0.9314	-0.0686
Belgium	11258434	0.0221	12	0.0341	1938141	0.0361	1.0632	0.0632
Greece	10846979	0.0213	12	0.0341	1938141	0.0361	1.0831	0.0831
Czech Republic	10419743	0.0205	12	0.0341	1938141	0.0361	1.1051	0.1051
Portugal	10374822	0.0204	12	0.0341	1938141	0.0361	1.1075	0.1075
Hungary	9855571	0.0194	12	0.0341	1938141	0.0361	1.1363	0.1363
Sweden	9790000	0.0192	10	0.0284	1629099	0.0303	0.9583	-0.0417
Austria	8581500	0.0169	10	0.0284	1629099	0.0303	1.0236	0.0236
Bulgaria	7202198	0.0142	10	0.0284	1629099	0.0303	1.1173	0.1173
Denmark	5653357	0.0111	7	0.0199	1149831	0.0214	0.8901	-0.1099
Finland	5471753	0.0108	7	0.0199	1149831	0.0214	0.9047	-0.0953
Slovakia	5403134	0.0106	7	0.0199	1149831	0.0214	0.9105	-0.0895
Ireland	4625885	0.0091	7	0.0199	1149831	0.0214	0.9840	-0.0160
Croatia	4225316	0.0083	7	0.0199	1149829	0.0214	1.0296	0.0296
Lithuania	2921262	0.0057	7	0.0199	1149829	0.0214	1.2382	0.2382
Slovenia	2062874	0.0041	4	0.0114	659619	0.0123	0.8453	-0.1547
Latvia	1986096	0.0039	4	0.0114	659619	0.0123	0.8615	-0.1385
Estonia	1313271	0.0026	4	0.0114	659619	0.0123	1.0594	0.0594
Cyprus	847008	0.0017	4	0.0114	659617	0.0123	1.3192	0.3192
Luxembourg	562958	0.0011	4	0.0114	659613	0.0123	1.6181	0.6181
Malta	429344	0.0008	3	0.0085	497259	0.0093	1.3968	0.3968
Total	508940955		352		53715736	1		

Source: Own calculations.

which to a certain extent explains the slightly bigger range, we can conclude that the Bundesrat system and the Nice system are strikingly similar in terms of the privilege they give to inhabitants of smaller constituents, be it the German *Länder* or the EU Member States, in terms of voting power.



#### 4. The Lisbon double majority voting system

Pursuant to the voting rules introduced by the Treaty of Lisbon, which have been in force since 1 November 2014, vote weight is directly proportional to population size. For a decision to be passed, on the initiative of the European Commission or the High Representative of the Union for Foreign Affairs and Security Policy, a double majority is required: of 55 per cent of Member States and 65 per cent of EU's population. An additional provision requires that any blocking minority must comprise a minimum number of members of the Council, representing more than 35 per cent of the population of the participating countries, plus one additional member - in the full make-up of the Council, it must be at least four states.<sup>III</sup> Just as it is the case in the Bundesrat, the vote of each country in the Council is cumulated and indivisible, which means that its position always represents the entire population of the country.<sup>IV</sup> The transitional period, in force until 31 March 2017, provided for an option to apply for a voting pursuant to the old vote weighting system. The calculation of voting power in the double majority system has been conducted in the same manner as the calculations for the Bundesrat and the Nice system; the effects are presented in Table 6.

Some researchers believe that in this system the vote of an inhabitant of a less populous country is stronger than a vote of an inhabitant of a more populous country (Neyer, 2010: 171). In fact, however, the NBI and the share of individual EU Member States in the total population are clearly different. This shows that the criterion of the majority of states in the double majority system influences the voting power of the players. Compared to the Nice solution, this system gives preference to countries that base their voting power mainly on one of the two vote weighting criteria.



Table 6: analysis of the vote weighting system in the Council of the EU (the double majority system)

EU Member States	Population	Share in total population	Number of swings ( $\eta$ )	Normalized Banzhaf Index	Ratio of voting power to the square root of population (A)	A-1
Germany	81089331	0.1593	22596065	0.1019	1.1193	0.1193
France	66352469	0.1304	18721721	0.0845	1.0252	0.0252
United Kingdom	64767115	0.1273	18325465	0.0827	1.0157	0.0157
Italy	61438480	0.1207	17540493	0.0791	0.9982	-0.0018
Spain	46439864	0.0912	13745229	0.0620	0.8997	-0.1003
Poland	38005614	0.0747	11243003	0.0507	0.8135	-0.1865
Romania	19861408	0.0390	8382835	0.0378	0.8391	-0.1609
Netherlands	17155169	0.0337	7752715	0.0350	0.8349	-0.1651
Belgium	11258434	0.0221	6421841	0.0290	0.8537	-0.1463
Greece	10846979	0.0213	6329559	0.0286	0.8573	-0.1427
Czech Republic	10419743	0.0205	6233077	0.0281	0.8613	-0.1387
Portugal	10374822	0.0204	6222927	0.0281	0.8618	-0.1382
Hungary	9855571	0.0194	6106315	0.0276	0.8676	-0.1324
Sweden	9790000	0.0192	6091487	0.0275	0.8684	-0.1316
Austria	8581500	0.0169	5819419	0.0263	0.8861	-0.1139
Bulgaria	7202198	0.0142	5509353	0.0249	0.9157	-0.0843
Denmark	5653357	0.0111	5159793	0.0233	0.9680	-0.0320
Finland	5471753	0.0108	5118931	0.0231	0.9762	-0.0238
Slovakia	5403134	0.0106	5103491	0.0230	0.9794	-0.0206
Ireland	4625885	0.0091	4928019	0.0222	1.0221	0.0221
Croatia	4225316	0.0083	4837807	0.0218	1.0498	0.0498
Lithuania	2921262	0.0057	4542713	0.0205	1.1856	0.1856
Slovenia	2062874	0.0041	4347777	0.0196	1.3503	0.3503
Latvia	1986096	0.0039	4330409	0.0195	1.3707	0.3707
Estonia	1313271	0.0026	4177525	0.0188	1.6261	0.6261
Cyprus	847008	0.0017	4071339	0.0184	1.9733	0.9733
Luxembourg	562958	0.0011	4006721	0.0181	2.3821	1.3821
Malta	429344	0.0008	3976187	0.0179	2.7069	1.7069
Total	508940955		221642216	1		

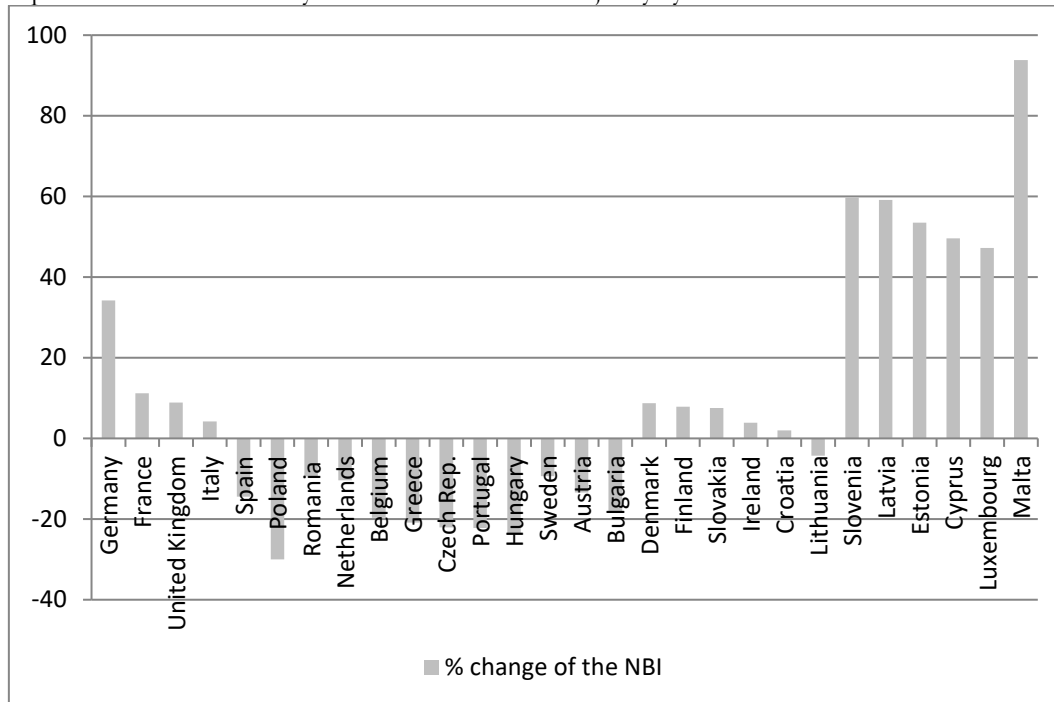
Source: Own calculations. Population data on the basis of *Council Decision (EU, Euratom) 2015/2393 of 8 December 2015 amending the Council's Rules of Procedure*, “Official Journal of the European Union” L332, 18.12.2015.

As a result, the system favours countries with the largest populations, especially Germany, and the six countries with the lowest populations, at the expense of the other Member States. In the case of the four smallest states, increased formal voting power results



from the need to achieve a 55 per cent majority of Member States to adopt a decision. The scale of the shift of formal vote power between the members of the Council following the replacement of the Nice system by the double majority system is presented in Graph 2.

Graph 2: change of the voting power of the members of the Council (measured in NBI) due to the replacement of the Nice system with the double majority system



Source: Own calculations.

It should be stressed that we are using the category of inhabitants (or population), not citizens, because pursuant to current laws, the weighting method takes into account the usually resident population of a Member State at the reference time: the citizens of this Member State as well as citizens of other Member States and people from outside the European Union (Regulation (EU) No 1260/2013, 2013, Article 4(1)). This system favours the countries of the ‘old Union’, in which the number of immigrants is relatively higher: for example, in Germany it is almost 9 per cent, in Spain more than 10 per cent, while in Poland it is only 0.27 per cent of the population.<sup>v</sup>

As shown in Table 7, the shift of formal voting power between the players – compared to its distribution proportionally to the square root of the population – is considerably greater in the Bundesrat system and double majority than in the Nice system.



Table 7: differences in the voting power of players in the *Bundesrat*, Nice and double majority systems in relation to voting systems in which the power of players would be proportional to the square root of the number of represented inhabitants

	Bundesrat system	Bundesrat according to the double majority system	Nice system	Double majority system	
Land	Difference between NBI and NBI proportional to the square root of population	Difference between NBI and NBI proportional to the square root of population	Difference between NBI and NBI proportional to the square root of population	Difference between NBI and NBI proportional to the square root of population	EU Member State
North Rhine-Westphalia	-0.0398	0.0508	-0.0151	0.0109	Germany
Bavaria	-0.0204	0.0183	-0.0064	0.0021	France
Baden-Württemberg	-0.0116	0.0040	-0.0055	0.0013	United Kingdom
Lower Saxony	0.0029	0.0011	-0.0033	-0.0001	Italy
Hesse	-0.0002	-0.0059	0.0036	-0.0069	Spain
Saxony	-0.0041	-0.0080	0.0101	-0.0116	Poland
Rhineland-Palatinate	-0.0037	-0.0081	-0.0033	-0.0073	Romania
Berlin	0.0005	-0.0082	-0.0029	-0.0069	Netherlands
Schleswig-Holstein	0.0060	-0.0081	0.0021	-0.0050	Belgium
Brandenburg	0.0095	-0.0075	0.0028	-0.0048	Greece
Saxony-Anhalt	0.0117	-0.0075	0.0034	-0.0045	Czech Republic
Thuringia	0.0125	-0.0073	0.0035	-0.0045	Portugal
Hamburg	0.0022	-0.0058	0.0043	-0.0042	Hungary
Mecklenburg-Vorpommern	0.0041	-0.0055	-0.0013	-0.0042	Sweden
Saarland	0.0124	-0.0027	0.0007	-0.0034	Austria
Bremen	0.0179	0.0003	0.0032	-0.0023	Bulgaria
<b>Total shift of voting power</b>	<b>0.0799</b>	<b>0.0745</b>	-0.0026	-0.0008	Denmark
			-0.0023	-0.0006	Finland
			-0.0021	-0.0005	Slovakia
			-0.0003	0.0005	Ireland
			0.0006	0.0010	Croatia
			0.0041	0.0032	Lithuania
			-0.0022	0.0051	Slovenia
			-0.0020	0.0053	Latvia
			0.0007	0.0073	Estonia
			0.0030	0.0091	Cyprus
			0.0047	0.0105	Luxembourg
			0.0026	0.0113	Malta
			0.0495	0.0674	<b>Total shift of voting power</b>

Source: Own calculations.



In the case of the Bundesrat, however, more than half of this shift is generated by underestimating the voting power of North Rhine-Westphalia, which has a much larger population than the other German constituent states. The Bundesrat system and the Nice system particularly underestimate the voting power of the most populous players, while in the double majority system there is a relatively large shift of power towards Germany as well as Malta and Luxembourg.

When applying the double majority system to decision-making in the Bundesrat, there is a considerable shift of voting power towards the two most populous *Länder*, resulting in an overestimation of the voting powers of their inhabitants.

However, the influence of the most populous EU Member States on the decision-making process is much greater than what would result from their formal voting power.

It happens very often that the stance of these countries, or at least the majority of them, is what determines the framework within which it is possible to reach an agreement. In a vast majority of cases, decisions in the Council are made on the initiative of the European Commission – especially when they concern the adoption of legislation. Only in extremely rare cases does the ‘Guardian of the Treaties’ come up with an initiative that would not be backed by the majority of Member States.<sup>VI</sup> This means that in practice a blocking minority has to be developed on the basis of the criterion of population.

Member States’ voting power in the Council affects their positions in three ways: (1) by having an impact on their ability to force the adoption of decisions, (2) by having an impact on their ability to block decisions and (3) by having their position taken into account to a greater extent in the process of selection and aggregation of interests at the drafting stage, provided that they do not take extreme positions. These mechanisms would also work on the level of the federal state, and in the case of the Bundesrat it would increase the ability of the *Länder* that have relatively large populations to enforce and block decisions.

Under the double majority system, when a decision in the Council of the EU is made by qualified majority on the initiative of the European Commission or the High Representative of the Union for Foreign Affairs and Security Policy, with 28 Member States of the European Union, the blocking minority requires at least four members of the Council, representing more than 35 per cent of the population of the Member States.<sup>VII</sup> The six most populous countries (21.43 per cent of the Member States) account for more than 70.36 per cent of the





population of the European Union, and the remaining 22 countries (78.57 per cent of the Member States) account for only 29.64 per cent.

Spain or Poland are unable to form a blocking coalition of a maximum of 12 members (above 12 the criterion of 55 per cent of the Member States would not be met) if none of the other six most populous countries joins it. On the other hand, in this situation it is possible to form a blocking coalition if it includes the United Kingdom, France, Italy or Germany. It would have to be, however, between 10 and 12 members, or 8 in the case of Berlin. In practice, therefore, it is rather unlikely that a blocking coalition comprising no more than 13 Member States would be formed, if it is to include only one of the six most populous Member States. At the same time, it is extremely rare for two of the six most populous Member States to be outvoted by qualified majority when proceeding on legislative acts.

Further differences can also be found in the ability of the individual countries to form a strict minimum blocking coalition<sup>VIII</sup> with a small number of members, as presented in Table 8.

Table 8: the ability of the EU Member States to form strict minimum blocking coalitions with a small number of members under the double majority system

No. of coalition members	No. of possible coalition combinations for selected EU Member States				
	Germany	France	Poland	Portugal	Luxembourg
4	215	168	90	14	10
5	415	280	269	120	6
6	1772	1020	654	632	74
7	5195	3932	2366	2884	548

Source: Own calculations.

It is clear that in terms of the number of combinations of strict minimum blocking coalitions that can be formed by a member of the Council, with between four and seven members, Germany is better off than the other Member States, including France, second in terms of population. On the other hand, for countries with populations equal to Austria or smaller, the ability to form blocking coalitions composed of four or five members is only illusory as it requires the support of at least two or three of the six most populous countries,



especially Germany. In practice, for qualified majority voting in the Council, the situation in which three of the six most populous countries are outvoted never happens. There are very rare cases when a decision is passed despite opposition from two of the six most populous Member States (Kleinowski 2012: 42-43). This suggests that the influence of the most populous members of the Council on decision-making is greater than would result from their formal voting power, and that a joint position of the majority of these countries determines the framework in which it is possible to reach an agreement. When the European Commission proposes an initiative that is supported by the majority of the Member States, including 4–5 of those with the largest populations, it is rather unlikely that the decision will be blocked in the Council – provided that there is a need to achieve a qualified majority of votes.

## 5. Consistency

In order to answer the question about the consistency of the systems analysed, we shall calculate the diversity of distribution using the average absolute deviation of the ratios of voting power to the square root of population of the individual players from the value of this ratio equalling 1 (full proportionality). We shall use the following formula:

$$D = \frac{\sum_{i=1}^n |x_i - 1|}{N}$$

where:

$x_i$  – ratio of voting power to the square root of population of the individual player  $i$

$N$  – the total number of the players

The greater the value of  $D$ , the greater the average absolute deviation of the ratio of voting power to the square root of population of all the players. This shows how big, on average, the disproportion is between the voting power of a representative of a community in a council, and the square root of the population of the inhabitants or citizens he/she represents, and thus indicates how much on average the voting power of an inhabitant or player (country, *Land*) deviates in absolute terms from the vote weighting system in which the voting power of all inhabitants is equal (when all the prerequisites listed at the beginning of the article are met).



For the Bundesrat system  $D=0.1834$ , for the Nice system  $D=0.1305$ , and for the double majority system  $D=0.27$ . As the average is sensitive to extreme values of the examined data set – as is the case when determining  $D$  for the vote weighting systems discussed in this article – we need to calculate its value excluding 15 per cent corresponding to the elements (statistical units) of the general population with extreme values. In this case, for the Bundesrat system  $D_{-15\%}=0.1578$ , for the Nice system  $D_{-15\%}=0.1083$ , and for the double majority system  $D_{-15\%}=0.1849$ .

As we can see, the value of  $D$  for the Nice system is significantly lower than for the others, both including and excluding the 15 per cent. This means that the absolute deviation of the ratio of voting power to the square root of the population of all the players is smaller. In other words, the formal voting power of countries in the Nice system is more proportional to the square root of their population than it is in the Bundesrat system and the double majority system.

## 6. Conclusions

In the German model of federalism, the division of powers between the federal state and the *Länder*, and the existing institutional solutions, make it necessary to constantly seek consensus as otherwise it would be very difficult to pass legislation. The *Bundesrat* is the cornerstone of the cooperative model. At the same time, the way votes are weighted in this institution considerably boosts the role of smaller *Länder* in the decision-making process. On the other hand, however, there is considerable risk of falling into the joint-decision trap (Scharpf 1988).

It could be argued that the European Union is clearly a much more complicated body than Germany, so some control is necessary to balance the influence of smaller member states. As a consequence, the increased efficiency of the decision-making process in the EU was recognised as a priority in the Treaty of Lisbon, which resulted in the abandonment of the Nice voting system, and in a significant increase in the scope of cases where decisions in the Council are adopted by a qualified majority (Miller and Taylor, 2008: 79-85).

The double majority voting system in the Council, introduced by the Treaty of Lisbon, lowers the decision-making threshold and consequently makes it easier to form a winning coalition. The criterion of population favours large countries, giving them the power to block



decisions they deem unfavourable; this even creates situations in which such decisions are simply impossible. In this system, smaller countries help larger ones to block decisions in exchange for specific benefits. Medium countries, in turn, find it difficult to form a blocking coalition without the support of large countries because of the small populations of the coalition's members. As a result, this could be moving the political system of the European Union away from the model of cooperative federalism.

In communities such as federations granting certain favours to smaller members is admissible, as is the case in the Bundesrat. It is commonplace that the smaller members of the federation are privileged: the vote of a citizen of a smaller state in the federation has greater weight than the vote of a citizen of a larger state. Voting systems are based on a compromise between the equality of states and the equality of citizens. Our analysis has shown that the voting system applied in the Bundesrat and the Nice system reflect this compromise. The smaller elements of the federation in the first case and the smaller Member States in the second case had relatively greater power compared to their populations.

The Nice system and the voting system in the Bundesrat are not different in qualitative terms. The voting system in the Bundesrat has not raised any concerns, probably because Germans treat themselves as a *demos*, a political community understood as the common good, ruled by solidarity. Consequently, Germany introduced voting solutions in which less populous constituents of the federation receive preferential treatment. The European Union is not treated in this way by its citizens in view of the absence of collective identity and a European *demos*.

The institutional reform introduced by the Treaty of Lisbon affects the legitimacy of the EU political system. The aim was to compensate for the weakness of input legitimacy and to reduce the deficit of democracy in the EU,<sup>IX</sup> by increasing the EU's problem-solving capacity. As Sharman (2008: 6-7) writes, "both forms of legitimacy express public assessment of the worth of an institution, but input legitimacy is a matter of the design of the institution, while output legitimacy must be earned by the institution's performance". The double majority voting system allows for a faster decision-making process in the Council, and for reaching an agreement in inter-institutional negotiations since, in the case of most countries, it considerably hinders the construction of a blocking coalition. It makes possible to adopt decisions which are not supported by a relatively large number of Council members. The field of possible compromise is determined to an even greater extent by the consistent



position of the majority of the six largest EU Member States. Striving to increase the effectiveness of the decision-making process by reducing the readiness to seek compromise may however adversely affect the level of identification of citizens of the Member States with the EU.

A political community is indispensable for discipline, imposed by democratic rule of the majority, to be accepted. At the state level, the minority accepts the decision of the majority because both the majority and the minority are parts of the same nation. In federal systems, less populous constituent states usually receive preferential treatment, to a certain extent, in terms of representation. At the EU level this is no longer the case after the change of the voting system. The system introduced in the Treaty of Lisbon breaks with the idea of voting principles advantageous for less populous states, which have existed in the EU for half of century.

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<sup>I</sup> A similar position is presented by, for example, Poirier and Saunders (2015).

<sup>II</sup> Own calculation performed using the programme POWERGEN 3.0 by Marcin Kleinowski.

<sup>III</sup> Treaty on European Union (consolidated version), Article 16(3). Treaty on the Functioning of the European Union (consolidated version), Article 238(2).

<sup>IV</sup> For more see: Czaputowicz (2014).

<sup>V</sup> Own calculations on the basis of Council Decision (EU, Euratom) 2015/2393 (2015) and Eurostat (2015).

<sup>VI</sup> An analysis of European Union legislative proposals withdrawn by the European Commission or rejected by the Member States between 2013 and 2015, which required achieving a qualified majority in the Council of the EU, shows that the annual number of such proposals can be estimated at between a few and a dozen or so cases, of which only some were opposed to by most of the Member States. Most cases when an initiative of the European Commission gave rise to opposition of a large number of Council members, concerned non-legislative proposals related to admitting genetically modified food to the market or the application of certain substances, especially in the food industry (Pollack & Shaffer, pp. 144–164; Kleinowski, 2012, pp. 33-34).

<sup>VII</sup> Treaty on European Union, Article 16(3); Treaty on the Functioning of the European Union, Article 238(2).

<sup>VIII</sup> A winning or blocking coalition is referred to as a strict minimum coalition when none among the subcoalitions have equal voting power, so they cannot ensure the adoption of a decision or block it, respectively.

<sup>IX</sup> More on the definition of input and output legitimacy, cf. Easton (1965), Schmidt (2010).

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# Socialisation and legitimacy intermediation in the Council of the European Union

by

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## Abstract

The Council is a crucial intergovernmental institution of the European Union. However, the complex, opaque and consensual character of the decision-making process in the Council puts its legitimacy into question. Intergovernmentalist theory posits that it is sufficiently legitimised, indirectly, by the member state governments. Constructivist research, on the other hand, suggests that socialisation might disturb the relaying of positions from the national to the supranational level, as the former approach implies.

This paper aims to explore these issues, in particular related to representation and consensus. It contains an analysis of material generated in in-depth interviews and concludes that more effort is invested into reaching a more inclusive compromise in the Council than one would expect if it were to decide by qualified majority. Socialisation is weakening the input legitimacy of decisions made in the Council, while at the same time enhancing their output legitimacy by favouring genuine consensus.

## Key-words

indirect legitimacy, input legitimacy, output legitimacy, consensus, national officials



## 1. Introduction

The Council is at the centre of the decision-making process in the European Union (EU), both in legislative and non-legislative matters. Empirical research on how the Council decides is well-established in the literature; it tackles various issues such as voting power (e.g. Thomson 2010), coalition formation (e.g. Mattila 2010), communication patterns (e.g. Beyers and Dierickx 1998), socialisation (e.g. Lewis 2007), transparency (e.g. Laursen 2013). Research suggests that the Council is neither solely a place of typical interstate bargaining, nor a second chamber of a EU federal assembly united by a common understanding of European interests. This ambiguous status, accompanied by wide decision-making powers, puts into question the relevant sources and mechanisms of legitimacy.

The intergovernmentalist approach (Moravcsik 2002, 2008) argues that the indirect legitimacy conferred by member states is sufficient for the European Union, especially when it is coupled with output-oriented legitimising arguments. One assumption behind this reasoning, which seems to be particularly important, is that intergovernmental EU institutions function as undisturbed relays of positions established within national political systems. The positions are transferred (via instructions) to the EU level, where intergovernmental negotiations take place and agreement is reached. Thus, the accountability and legitimacy of EU decision-making can be traced back to the parliamentary accountability of governments and the democratic input legitimacy of national political systems.

However, many scholars, in particular constructivists, do not share such an understanding of the EU's political processes. Constructivist research on decision-making in EU institutions suggests that social processes which occur in intergovernmental EU institutions might disturb the relaying of positions described above (Aus 2010; Lewis 2010b; Juncos and Pomorska 2011). This begs the question of how these disruptions affect the problem of legitimacy. In this regard, a normative inquiry regarding the democracy and legitimacy of the EU needs empirical research, to clarify the extent to which socialisation influences legitimacy intermediation, as well as the character of the disruptions it supposedly causes. Moreover, because of the apparent consensual quality of decision-making in the Council, it is important to inquire into the meaning of consensus in this regard and the ways it is reached.



The objective of this paper is to establish links between empirical research on socialisation and decision-making in the Council, and normative questions regarding democracy and legitimacy of governance at the EU level. In order to do so, the paper first outlines the characteristic features of decision-making in the Council, in particular its complexity, lack of transparency and the prevalence of consensus, despite an increasing scope of issues which could be decided by qualified majority. The third section then enquires into the role the Council plays in providing legitimacy to the EU, and the fourth describes the potential consequences of socialisation of national officials in the Council. The remainder of the paper aims to answer two research questions by analysing empirical material generated in in-depth interviews: first, how can legitimacy intermediation through the Council be disrupted by normative and behavioural changes among socialised national officials? Second, does the process of reaching consensus in the Council help provide output legitimacy, or undermine it? The paper concludes by summarising the results and discussing them, which directs to further questions and avenues for research.

## **2. Decision-making process in the Council: complex, opaque, consensual**

The decision-making process in the Council is highly complex; its features result from several factors – the three most important concern the structural characteristics of the Council and its engagement in shaping EU decisions. First, the Council deals with a wide variety of matters, which requires a horizontal division of labour, i.e. there are diverse bodies (or multiple individual configurations of a formally singular body) for different substantial policy areas. Second, the Council is a multi-layered structure composed of numerous organs: from working parties and committees up to ministerial configuration. The former, called preparatory bodies, gather national officials of different ranks and act as filters to ensure that latter (the ministers who constitute the top layer, or the Council in the strict sense) only have to deal with issues that would not find a reasonable solution without their engagement (Häge 2008; Kirpsza 2011; Grøn and Salomonsen 2015). Third, decision-making in the EU has become more complicated as a result of the developments of European integration: the European Parliament (EP) plays a more important role, the number of member states is growing, and so is the scope of EU policies. These changes have caused the Council to



expand its informal procedures, and similar processes can be observed in interinstitutional relations (Fabbrini and Puetter 2016).

Despite the complexity of its structure, functions and relations, the Council is a productive decision-maker; member states reach agreement by trading concessions, persuasion, finding compromise solutions to common problems, allowing for opt-outs or exceptions, or delegating details to the implementation phase (Warntjen 2017: 966–967). The relative importance of each of these (and other) approaches is debated in the literature. Some authors distinguish several normative modes of negotiation, which differ in the extent of cooperative behaviour between the parties and might depend on substantive, issue-specific, or institutional structural factors (Warntjen 2010; Cross 2012). Others analyse variation among the actors, e.g. how much do they rely on argumentation, how generous do they tend to be, or with whom do they cooperate most often (Naurin 2009, 2015; Naurin and Lindahl 2010).

One of the characteristics of the decision-making process in the Council which draws considerable attention is its lack of transparency. Despite pro-transparency reforms of the 1990s (Hillebrandt *et al.* 2014) the details of what takes place within the Council remain hidden from the public. The opacity is particularly pronounced in non-legislative issues, but manifests itself when the Council acts in its legislative capacity as well. In the latter case, transparency is reduced by a reliance on informal communication between the representatives of member states, and institutionalised, albeit informal, forums of either intra- or inter-institutional negotiation (e.g. Hillebrandt and Novak 2016; Reh *et al.* 2013). Much of the interest in transparency stems from the belief that it contributes to legitimacy, responsibility and accountability – or, more generally, from the idea that it is a constitutive part of democratic rule and good governance (Hillebrandt *et al.* 2014: 4–5).

On the other hand, parties sceptical towards transparency invoke the need for a ‘space to think’ away from an audience (Hillebrandt and Novak 2016: 527–529). They claim that without such space intergovernmental institutions would be unable to efficiently resolve issues facing the EU. In fact, some studies give credit to such notions, e.g. James Cross (2013) shows how transparency induces polarisation of negotiators positions, while Stéphanie Novak (2013: 1104) warns against deeper forms of secrecy, which could be devised in response to strong formal transparency provisions. Moreover, Jenny de Fine Licht and her colleagues’ (2014) interesting experimental research casts doubt on the premise that



increasing transparency of a decision-making process results in proportional increase in its legitimacy – a notion apparently substantiated by the continuous crisis of legitimacy of the EU.

Transparency is often studied along with the consensual quality of decision-making in the Council<sup>1</sup> – another feature of interest to many scholars and linked to the issue of legitimacy. Some decisions in the Council formally require unanimity, but a growing number of issues can be decided by qualified majority. However, the voting record shows much lower dissent than might be expected (König and Junge 2010), and while a government sometimes opposes a decision which does not fit its position, most of the time member states refrain from voting against it, or even abstaining (Høyland and Hansen 2014; Kleinowski 2012). In cases where unanimity is required, governments rarely block proposals (Smeets 2016).

One of the problems here is how to define consensus. There is a difference between unanimity as a method of taking decisions and consensus as either a process of negotiating compromise solutions, or an outcome in which no participant openly opposes a given proposal (Payton 2010; Novak 2013). The latter might be considered a minimal definition of consensus, but even then, the question of how is it attained remains. Why do the member states decide not to oppose decisions going against their interest?

Three major lines of explanation of prevalence of consensus in the Council can be distinguished in the literature. First, because member states have an interest in EU policies operating smoothly, they might prefer to avoid being blamed for obstructing the decision-making process, and also want to ensure that the decision will be implemented by all member states (Häge 2013: 485–486). To achieve this goal, they could engage in reciprocal concessions, including vote trading on specific issues, as well as more diffuse forms of reciprocity. In effect, they would be ‘insured’ against decisions violating their core interests (Naurin 2015). This might also be achieved by reducing precision in particular provisions, giving each member state more leeway in implementing EU policies (Tsebelis 2013), as well as by introducing exceptions or transitional periods suited to particular needs or expectations of a member state (Warntjen 2017).

Second, the institutional organisation of decision-making in the EU might foster consensus in the Council. Externally, the Commission could be said to only introduce proposals which have a good chance of passing in the Council (Häge 2013: 485). Moreover, co-decision with the European Parliament could be an incentive for the member states to



avoid showing internal disagreements, in order to be better positioned in inter-institutional negotiations (Hillebrandt and Novak 2016: 536–537). Internally, according to Frank Häge (2013), coalition building coupled with a high qualified majority threshold is producing consensus regardless of other considerations.

Third, many scholars who study consensus focus on relevant norms and their socialisation (Heisenberg 2005; Aus 2010; Häge 2013: 486; Ławniczak 2015). Such norms are often analysed as relating to cooperative behaviours among member state representatives during formal and informal stages of negotiation in the Council (Lewis 2010a; Smeets 2015; Kaniok 2016). There is also a current which explains consensus as a result of a deliberative mode of decision-making (Risse and Kleine 2010; Puetter 2016; Niemann 2010).

### 3. The Council and EU legitimacy

This paper builds on current research reviewed above, in particular taking into account consensus as a norm and practice within the complex structure of the Council. The focus in this section will turn to legitimacy. In short, legitimacy ‘ensures voluntary compliance with unwelcome exercises of governing authority’ (Scharpf 2007: 3). Because the Council is not directly elected or accountable to a European electorate, its legitimacy has to be derived from the legitimacy of each member state government. In other words, decisions taken by the Council are legitimised indirectly. This requires that both the legitimacy of the governments is undisputed, and that mechanisms exist which can guarantee successful intermediation of legitimacy by intergovernmental institutions (see below). Some authors argue that both could be assumed with sufficient certainty (e.g. Moravcsik 2002), while others contend this notion, claiming indirect legitimacy is inherently weak (e.g. Lord 2009).

Another way of looking at the problem is based on the distinction between input- and output-oriented legitimacy, developed by Fritz Scharpf (e.g. 2006). Such a distinction, which could also be related to notions on ‘constraint’ and ‘capacity’ (Lord 2009), underlines the dual nature of the relationship between those who govern and the people who are governed. The latter can only be expected to accept and comply with the former’s decisions if they feel the holders of political power are somehow dependent on the people’s voice (input) and willing to provide them with some kind of (tangible or intangible) benefits of their rule (output). The EU and its member states are conventionally seen as sharing these



responsibilities: the member states provide input legitimacy through national politics and elections, while the EU ensures outputs such as higher living standards or opportunities resulting from the free movement of people.

A problem arises if either of these expectations is systematically not met. Vivien Schmidt (2006) calls this division of labour ‘policy without politics’ at the EU level, but also ‘politics without policy’ at the national level. If the member states are unable to solve their problems individually, their citizens expect EU action – if that fails, they become frustrated with such ‘problem-solving gaps’ (Scharpf 2009); as the gaps widen, the whole dual legitimising structure ceases to function properly. But even if the EU is successful in adopting common policies, the problem of ‘selling’ this output to the public remains, especially if it has a distributive impact, as most policies do, despite claims regarding the regulatory nature of many EU policy areas (Føllesdal and Hix 2006; cf. Majone 1998). The Council is a forum of special importance in this regard, as it (ideally) allows for the consideration of the specific constraints of each member state, and produces necessary justifications of adopted provisions (Clark and Jones 2011: 359).

However, the above-mentioned issues of informality and transparency become relevant here. The informal legislative negotiations which occur within the Council and between the Council, the EP and the Commission, are opaque and their participants remain largely unaccountable. Even if we consider the strong position of the directly elected EP in the latter meetings (Roederer-Rynning and Greenwood 2015), such informal decision-making, e.g. trilogues, does not meet minimal standards of democratic legitimacy (Reh 2014). As stated before, transparency might not be directly correlated with legitimacy, but there are theoretical and empirical arguments to expect some forms of (even limited) transparency as necessary to ensure legitimate decision-making (De Fine Licht *et al.* 2014). Consensus can also be seen as detrimental to accountability (Heisenberg 2005), but, as I argue below, it can contribute to legitimacy as well.

#### 4. Socialisation of national officials

Socialisation, ‘a process of inducting actors into the norms and rules of a given community’ (Checkel 2007: 5), is an important feature of the Council as a decision-making forum (or a structure composed of multiple interrelated forums). It is prominently



mentioned in normative explanations of consensus, but what directs me towards it here is that it could potentially put into question one of the two assumptions on which indirect legitimacy stands, i.e. the effective transfer of results of national politics into EU policy-making.

Socialisation is a complex and ubiquitous social process, which occurs whenever individuals find themselves in a new social context – in particular an already established group of people. Social interactions between participants of such situations can lead ‘the novice’ to adopt relevant norms, roles or identities, or adapt their behaviour to fit into the community they interact with (Juncos and Pomorska 2011: 1098; Beyers 2010: 909). This process of (secondary) socialisation is not always successful: there are many factors which determine the extent of change of the behaviours and cognitive properties of the socialised individual.

Research conducted on European socialisation gives mixed results regarding its influence on identity or allegiance of national officials who regularly interact at the European level. While some results confirm the shift of such properties towards the EU (e.g. Drulák *et al.* 2003; Trondal 2004), most authors are cautious regarding this effect. They conclude that even if some sort of loyalty to the EU develops among officials working in the Council or other institutions, their allegiance to the nation state prevails (e.g. Juncos and Pomorska 2011: 1106).

More studies show a specific Council culture which manifests in practices, or behavioural changes among the staff of national permanent representations who take part in the decision-making process. Such adaptations in ways of doing things could, though, be the first step towards more in-depth normative shifts (Orbell *et al.* 1988: 811). Jeffrey Lewis’s (2007) studies of Coreper show how both their practices and identities blend national and supranational components. Others see the national-oriented approaches as more fundamental – they frame and limit the subordinate EU- or cooperation-oriented practices (Chelotti 2016). The latter notion, that EU-oriented behavioural norms and practices are by definition cooperative, is shared in different studies, but remains unproblematised. In fact, successful socialisation does not equal the absence of conflict. Norms can sustain inequality, privilege, exclusion, hierarchy or domination (Beyers 2010: 912).





## 5. Research questions and methods

Taking into account the prior research presented above, the rest of this paper attempts to answer two questions pertaining to the issues of the indirect legitimation of Council decision-making and socialisation of Council officials. First, assuming national governments can provide input legitimacy, how can its intermediation through the Council be disrupted by normative and behavioural changes among socialised national officials? Second, if output legitimacy depends on EU institutions providing added value to the citizens, does the process of reaching consensus in the Council help such goal or undermine it? In other words, is it a genuine consensus built upon the (socialised?) notions of finding common interests and solving common problems, or is it a process aimed at reducing individual governments' accountability for decisions taken at the EU level, i.e. false or ingenuine consensus (which could also be sustained by socialised norms)? Put in a different, more critically-oriented frame, does it protect or subordinate the interests of the weaker member states?

The above questions posit two distinctions: between undisrupted and disrupted (input) legitimacy intermediation, and between genuine, and as such probably fostering output-legitimacy, and ingenuine consensus. This way, there are four possible ideal-type scenarios of how socialisation can affect legitimacy, see Figure 1:

Figure 1. Potential effects of socialisation on legitimacy

		intermediation	
		undisrupted	disrupted
consensus	genuine	high input legitimacy high output legitimacy	low input legitimacy high output legitimacy
	ingenuine	high input legitimacy low output legitimacy	low input legitimacy low output legitimacy

Below I undertake an explorative analysis of ten, in-depth, semi-structured interviews (see Appendix). The interviews were conducted in 2015 among officials who represented Poland at various bodies of the Council. Most of the interviewees worked at the Permanent



Representation at the time of the interviews. They had at least three years of work experience in the Council (working parties, Coreper and ministerial configurations) and represented diverse policy areas.

My main objective here, which follows from the questions stated above, is to make sense of how actors in the Council decision-making process understand and act upon their representative roles and the notion of consensus. In order to do so, after close reading of the whole material, I developed a simple categorisation key based on the distinctions described above, which helped me determine whether the empirical material contained traces of either positive or negative legitimacy-related aspects of behavioural or normative adjustments or internalisations affecting Council officials in regard to representation and consensus. However, gravitating towards interpretive methodology (Schwartz-Shea and Yanow 2012), I remain open and flexible in the analysis, in order not to miss the meaning-making of the interviewees and to capture the nuanced, implicit and contradictory elements of their statements. In the following section, I will quote the important parts of the interviews to aid such approach.

## 6. Socialisation, representation and consensus

As described above, socialisation affects individuals' behaviour as well as their properties (value judgements, roles, identities). My analysis confirms that in the case of Polish officials, socialising into various contexts within the Council, changes regarding their properties do not resemble a deep shift of loyalty away from the national government. The interviewees asserted that they see state interest as their primary goal and recognise that 'every decision must be "sold" at home' (Interview 1). Some of them claimed to be in contact with the capital if negotiations become difficult ('in a difficult situation (...) you need to consult with the capital' – Interview 8), but others emphasised they 'have a lot of freedom' (Interview 10). One of the interviewees admitted that sometimes the representatives do not fully identify with the position they have to represent, but it 'would be unprofessional' to make such attitude visible (Interview 1). Moreover, some of the Council norms seem to have a positive impact on an effective representation of national positions and thus on the indirect legitimisation of Council decision-making. One of the participants claimed that a member state will get its way if 'there is a justified interest behind its position (...) regardless of the



quality of argumentation or if that interest is reconcilable with common [EU] interest' (Interview 2).

There are, however, norms which could disrupt representation. First, there seems to be a bias against outlier positions, irrespective of other considerations – 'extreme positions are dismissed' (Interview 3). Second, and related, there is a norm against objecting. This norm appears to be socially sanctioned, both at individual and state levels. Interviewees admitted that 'no one wants to be the vetoing party, so as to avoid being seen as the one blocking initiatives' (Interview 6). States become less successful in negotiations if they attract the opinion of 'staying in the way' (Interview 5). One must 'swallow one's pride' to avoid being seen as 'the brakeman' (Interview 1). 'The corridors are unforgiving', claims one of the officials, saying that is why you cannot be 'the spoiler' (Interview 1).

These norms couple with another consideration, that of insufficient resources. The size of the administration matters: ('Small administrations are not able to process everything' – Interview 3), as does the time at the disposal of capitals and ministers; the latter 'do what is written for them in the papers' (Interview 2). While 'the papers' are prepared by Brussels-based officials, one could argue that they themselves receive instructions from their capitals. Instructions are the formal way in which national positions move to the supranational level, and as such can be seen as the crucial instrument for providing indirect legitimacy to the decision-making process in the Council. Most of my interviewees did not see the instructions as strict, inflexible directives, though, and admitted that 'in the evolving debate [they] go beyond instructions' (Interview 8) or even claimed that they 'would not get anywhere if [they] always stuck to the instructions' (Interview 9). They expressed frustration with bad instructions, i.e. when they encountered what they identify as ignorance on the part of their domestic administration: 'when things do not go according to our [government's] vision, we [in the working parties] are between a rock and a hard place' (Interview 3). This leads the officials to reinterpret their instructions or openly distance themselves from them in front of their colleagues ('I sometimes separate the position from myself' – Interview 3; 'Sometimes it is apparent that the ambassador has a different idea than the one he presents' – Interview 1). Occasionally officials actively undermine their instructions – admitting informally, in the corridors, they 'have to deliver such and such statement' (Interview 10) but their government will back down if colleagues from other countries press them, so that they can report to the capital that they were alone and would be outvoted.



One additional factor has to do with transparency, or rather the lack thereof. According to one of the interviewees, transparency would undermine the ability of the EU to decide, because it would make representatives of the member states, the European Parliament, and others, less flexible with their positions ('individuals will hold their starting position more strongly (...) This will kill many decision-making processes' – Interview 1).

To summarise this part of the analysis, both positive and negative factors for legitimacy intermediation can be found in the practices of national officials in the Council. However, while they remain generally loyal to their governments, the strong norms against 'being the brakeman' make them less reliable as neutral intermediaries of national positions than the typical pro-indirect legitimacy argument assumes. They go beyond their instructions, reinterpret their mandate and even occasionally undermine the positions of their government in order to reach a reasonable solution, which they can 'sell' to their superiors, at the same time avoiding negative social consequences within the Council.

Significant portions of the interviews were devoted to the ways of reaching decision in the preparatory bodies of the Council, especially the extent to which they are consensual and how are they affected by qualified majority rule. One of the recurring notions was that there is a willingness within the Council to include particular needs of the member states, that there is an attitude of openness and 'a recognition of unique situations, understanding when someone has a problem [with particular proposal]' (Interview 6). In fact, 'when someone has a problem with a rigid position' (Interview 6), especially when it is known that 'something is very important to them' (Interview 9), others attempt to address their reservations, 'to meet them' (Interview 5).

In broader terms, interviewees referred to 'a spirit of compromise' in the Council (same phrase used in Interview 8 and Interview 10) and emphasised that 'you can always get along' (Interview 7). They also stated that the decision-making culture in the Council prohibits humiliating the minority ('there is no culture of humiliation' – Interview 2). It is important to ensure that 'no one is a loser' (Interview 1), so even if there is a qualified majority for a proposal, the presidency tries to 'meet the expectations of a minority' (Interview 9). In this environment, it is crucial whether there is an important, justified interest or problem behind a position or not ('It is crucial to present your own circumstances' – Interview 4) and whether it is properly explained: 'argumentation is important (...), there is a genuine discussion, an argument-based dispute' (Interview 6). The argumentation 'is rather for than against'



(Interview 2), which fits with the bias against opposing described above. The level of confrontation is low, manifest in the language used. Multiple interviewees described how even the negative statements were always softened with some positive message at the beginning (similar descriptions present in: Interview 3; Interview 8; Interview 9; Interview 10).

It is interesting how the interviewees described decision-making under qualified majority voting rule. One said, 'it essentially is a consensus, but of a different kind, which demands more flexibility' (Interview 10). Another assured that, regardless of qualified majority threshold being achieved or not, the objective of negotiation is to 'reach consensus' or at least 'consensus minus one' (Interview 5). According to one of the interviewees, consensus is a legitimating instrument, which 'expresses the sovereignty of the member states' (Interview 3). On the other hand, another official claimed that both the secretariat and the presidency continuously monitor the (hypothetical) distribution of votes and focus their efforts on eliminating blocking minorities ('From the very beginning, the secretariat and the presidency calculate qualified majority and blocking minority' – Interview 1).

Moving towards the delegitimizing facets of consensus, the primary problem, as described above, is whether consensus is in fact a genuine compromise or only a pretence. One interviewee defined consensus as follows: 'consensus does not mean that everyone agrees, but they know what is the blocking minority threshold and will not be voting against in vain – instead they try to earn small concessions' (Interview 2). What follows is that some states might remain deeply dissatisfied with the compromise, but due to different pressures their representatives will not express the dissatisfaction, tacitly accepting 'consensual' decisions.

Another feature of the EU decision-making worth some attention in this context is the content of decisions. Interviewees said that consensus was often 'a rotten compromise', which stemmed from the effort to 'reach consensus by all means' (Interview 6). They claimed that the content of decisions was purposefully written 'ambiguously, with shades of grey' (Interview 4) – such 'European compromise is based on ambiguity which reconciles the parties' (Interview 7). One interviewee observed that this kind of compromise might be useless and cause problems with interpretation in the future (Interview 10).

To summarise, there are mixed results of my analysis regarding the influence of socialisation on the character of consensus in the Council. While several quotations included



above suggest that consensus might be accepted even if it is false or ambiguous, there is no trace of domination by powerful member states or supranational actors. Moreover, there is evidence showing how the normative environment of the Council in fact supports the inclusion of genuine concerns the member states might have, regardless of their voting power. By making interactions softer and more open, socialised behaviours and norms foster the approach to compromise aimed at ensuring there are no big losers. In this way socialisation might support output legitimacy, and also to some extent the indirect input legitimacy of the decision-making process in the Council.

## 7. Conclusions

This article was an inquiry into the ways socialisation of national officials in the Council of the European Union could enhance or undermine the legitimacy of the decision-making process in which they take part. Its point of departure was establishing the complex, opaque and consensual character of the process. The exploratory analysis of interview material followed, meant to answer two main questions – one related to the potential disruption of input legitimacy intermediation through the Council, the other focused on whether consensual practices in the Council provide output legitimacy.

As the results show, there is no simple answer to either of these questions – there are diverse ways in which national officials adopt norms and adapt to behaviours expected of them. However, it is possible to distinguish some tendencies or more prevalent practices among socialised officials, evident from the empirical material analysed.

National officials remain loyal to their governments, but they tend to accept norms against objecting or presenting outlier positions. They reinterpret their instructions and attempt to reach solutions acceptable to both their capitals and their colleagues within the Council. This way, socialisation can be seen as disruptive to legitimacy intermediation through the Council.

There is no evidence for norms sustaining the domination of the strongest players in the Council. The normative environment supports the inclusion of justified requests made by national representatives, regardless of the share of votes at their disposal. Even though consensus is sometimes false, socialised behaviours and norms favour genuine compromise aimed at ensuring there are no big losers among the member states. Socialisation can thus be



said to support the provision of output legitimacy to the decision-making process in the Council.

It is important to note that both sets of socialised norms and behaviours are interrelated. Genuine consensus depends on member state representatives' willingness to transcend their mandates and refrain from objecting, in favour of constructive input. Coming back to Figure 1, the scenario in the top right corner is what the empirical material analysed in this paper supports. However, this does not mean that each Council decision necessarily lacks input legitimacy or is well-legitimised on the output side. This article analysed the influence of socialisation and does not argue for an absence of other factors which work for or against the legitimacy of decision-making in the Council.

Currently, more effort is invested into reaching a more inclusive compromise in the Council than one would expect if it were to decide by qualified majority. If national parliaments get more involved and transparency is introduced, the practices of consensus might weaken, because the governments of the powerful member states would be obliged to vote against other states rather than reach a compromise solution. Such a development could either halt legislation or institute a system of domination by the strongest member states.

More research is needed in particular into the practice of consensus. While the puzzle of consensus in the Council has received considerable attention and a number of explanations, underpinned by various theoretical standpoints, none is clearly more persuasive than others (cf. Ławniczak 2015: 133–134). Moreover, they focus on general logics or mechanisms, in which the participants of the negotiation process play their prescribed roles and are analytically deprived of agency. This paper focused on the practical reality of work in the Council, as accessed through in-depth interviews. Embracing interpretive methodology and moving closer towards the meaning of consensus, as it is enacted by national officials, would provide a richer understating of consensus. This could help to develop existing explanations of consensus, as well as deepen the understanding of the problems related to legitimacy presented in this article.

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<sup>1</sup> Ana Juncos and Karolina Pomorska (2011: 1106) argue that consensual decision-making is dependent on the lack of transparency.



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## Appendix – Interview scenario

The interviews were conducted between March and September 2015 in Brussels (7 interviews) and Warsaw (3 interviews). All interviews were conducted in Polish, each took from one to two hours. Detailed notes were made during interviews. The following interview scenario was applied, with additional questions asked *ad hoc* in order to clarify or deepen particular topics.

The interview consisted of five parts. In the first I presented my research and the purpose of the interview, and then answered any doubts or questions of the interviewee. The second part served to provide information about the professional experience of the interviewee – how long they had been working in the Council, in which organs, how often their meetings were held, and what their responsibilities were. When the interlocutor worked in more than one body, they were asked at this point about the differences they observe between them. The third part of the interview was aimed at the self-definition of the interviewee, defining the role they play in the Council. Taking into account the answers, I asked questions about the relative importance of personal qualities, social relations and the represented state for the perception of an official by others in the Council's preparatory bodies, and what influence an official has on the negotiation process. The fourth part of the interview was a discussion of the changes that take place in the people working in the Council, with the passing of time and the gaining of experience – whether there are differences between the novices and the experienced at all and, if so, what they are and how they manifest. I asked, among other things, about the formation of social ties and their character, the ways of coping with problems, and the attitude towards the instructions which officials get from their capitals. The last section of the interview was the most open and attempted to let interviewees describe particular events from their experience. I asked them to describe the course of a meeting or course of a case, preferably one not in line with expectations. In addition, I asked about the process of reaching compromise with formal rules of unanimity and qualified majority voting.



# The Second-Generation Theory of Fiscal Federalism: A Critical Evaluation

by

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## Abstract

This paper evaluates the second-generation theory (SGT) of fiscal federalism. It spells out the main arguments of the theory and discusses the fiscal architecture of Nigerian federalism with a view to using the case study to work out the strengths and weaknesses of the theory. After arguing that the weaknesses of the theory outweigh its strength, the paper goes on to point out the dangers of using a particular construct of fiscal federalism as a model. It notes that SGT theory is an attempt at reviving and modelling nineteenth century American fiscal federalism as a universal standard.

## Key-words

first generation theory of fiscal federalism (FGT), second generation theory of fiscal federalism (SGT), transfer payments, bailouts, subnational governments, central governments soft budget constraint (SBC), hard budget constraint (HBC)



Central government bailouts of regional governments, and equalisation transfers to economically distressed regions, have become major issues of our time, especially following the global financial crisis of 2007-2008. In the European Union (EU), the creation of the European Financial Stability Facility (later succeeded by the European Stability Mechanism) to assist member states in financial trouble was considered a breach of the Maastricht Treaty's no bailout clause, and was unsuccessfully litigated in the German constitutional court. In the United States, federal interventions during the Obama presidency were considered by some as the collapse of what was once the glory of American federalism, namely, 'a credible commitment against bailing out spendthrift junior governments' (Greve 2012: 18). In Nigeria, monthly federal transfers of oil revenues to the states since the early 1970s have been viewed by a section of the public to be the Achilles' heel of the country's federalism. In the intellectual community, there is the view that transfer payment programmes in Canada have not only kept impoverished areas even more depressed, but are also making the bigger and richer provinces like Ontario and Quebec dependent on the centre for their revenues (Eisen and Lamman 2017). A question to ask then, is whether central governments should provide transfer payments and bailouts to subnational governments? By transfer payments I mean financial transfers from the federal to the regional units of government done under a variety of programmes to tackle vertical and horizontal imbalances. A bailout means 'ad hoc additional funding that is provided' when a unit of government is in financial trouble (Rodden et al. 2003: 8; Watts 2001: 459).

There are two sets of literature that discuss the above question. One is the first-generation theory (FGT) of fiscal federalism that discussed functional and tax assignments between the orders of government. By FGT I refer to the normative fiscal federalism theory of the 1950, 1960s, and early 1970s, which assumed that decision makers are benevolent actors who would intervene to provide public goods efficiently should the market fail to do so (Weingast 2014; Oates 2005; Inman and Rubinfeld 1997). According to the theory, central government is expected to provide national public goods that are deemed necessary, and take a leading role in macroeconomic stabilisation policy and in designing measures for income redistribution. Intergovernmental transfer payments and grants necessary for correcting vertical and horizontal imbalances are inherent in the interventionist roles of the federal order. This vision of FGT has been questioned by another body of scholarship,



generally referred to as the second-generation theory (SGT) of fiscal federalism. Unlike the earlier theory, SGT does not assume that public officials are benevolent actors who seek to maximise public interest (Weingast 2014). Instead, it regards actors as having divergent goals. SGT, therefore, pays attention to the institutional incentives that induce or constrain the behaviour of officials as they interact within and across the tiers of government. One of its central claims is that intergovernmental transfers and bailouts encourage sub-national governments to spend freely and to offload the cost of their profligacy on the central government - actions which undermine macroeconomic stability. Consequently, SGT prescribes minimal intergovernmental transfers and a no-bailout policy. In this paper, I evaluate the arguments of SGT in order to establish that:

- a) there is merit in the claim that intergovernmental transfers and bailouts foster a culture of over spending;
- b) the prescriptions of SGT, while reasonable in some respects, are fundamentally at odds with the peculiarities of a multinational federation founded on a fiscal regime of intergovernmental transfers; and,
- c) SGT theory is an attempt at reviving nineteenth century American fiscal federalism, and modelling it as a universal standard.

I develop the above arguments by drawing on Nigerian fiscal federalism. There are good reasons for using Nigeria as a case study. Africa's oldest federation has a fiscal arrangement that is defined by intergovernmental transfer payments, which SGT considers to be soft budget constraints that breed sub-national fiscal indiscipline and prop up otherwise insolvent governments (Wildasin 1997; Rosas 2006). Secondly, Nigeria experienced sharp declines in export revenues when oil prices collapsed in 2015. The decline significantly reduced monthly intergovernmental transfer payments, and threatened the functioning of state governments, plunging the country into a painful economic recession, and compelling the centre to provide three consecutive bailouts in 2015, 2016, and 2017. Thirdly, Nigeria's public discourse is riven by clamours for what a wide spectrum of local actors refers to as "true federalism". Central to this call is the devolution of fiscal autonomy to the component states of the federation. The clamour for "true federalism" reflect the arguments of SGT for an ideal fiscal arrangement in which sub-national governments have autonomous taxing powers and each takes care of its own fiscal situation, without relying on intergovernmental transfers or



bailouts. In this paper I intend to refute the notion that there is an ideal fiscal model for all federations to follow.

The paper will proceed by firstly briefly defining SGT's normative arguments of fiscal federalism. The second section will discuss the fiscal architecture of Nigerian fiscal federalism (defined by central pooling and sharing of revenues) and the problems it generates. Next, the paper will use the data of the case study to highlight the strengths and weaknesses of SGT. The fourth section will discuss the dangers of generalising a particular model of fiscal federalism, showing that the theory is derived from 19<sup>th</sup> century American fiscal federalism that has since collapsed. The paper ends with a conclusion.

## 1. Second-Generation Theory and Federal Bailouts

Contemporary theories of federal bailouts have their roots in FGT. They could best be regarded as a reaction to the latter's prescriptions regarding the assignment of functional and taxing powers to the orders of government and the resulting vertical imbalances.

In brief, FGT argued that, for reason of efficiency, higher tier governments should provide goods that are non-congestible, meaning those goods that a non-paying individual cannot be prevented from enjoying -- e.g. national defence. Also for reason of efficiency, lower tier governments should have responsibilities over those goods that benefit local consumers, and which residents of their respective jurisdictions prefer, given that the tastes for goods are local-specific, and local authorities may have more accurate information about what the locals want (Tiebout 1961). In cases where the provision of local goods generates externalities, the centre handles the issue by providing subsidies or grants to internalise the benefits (Oates 1972). In respect of what was known as the 'tax assignment problem' (McLure 2001: 339) i.e. which level of government should get what taxing powers, the literature noted that lower order governments would perform their functions in an open economy in which they have no control over prices and employment levels. In this model, low income house-holds would migrate into efficiently run jurisdictions while better-off residents out-migrate. Hence, the theory suggested that income redistribution be assigned to the first order of government. Thus, corporate income taxes and progressive personal income taxes, the main instruments for income redistribution, are assigned to the federal



level while taxes that have little or no consequence for macroeconomic stability (e.g. sales tax and property tax) are assigned to sub-national governments (Musgrave 1959).

Further, FGT was concerned that horizontal jurisdictional differences in the taxation of mobile economic units would make for inefficiencies because the taxed units would relocate to areas with favourable tax jurisdictions. To head off the inefficiencies, the literature suggested that sub-national governments should avoid taxes that do not benefit mobile units; instead they should rely on benefit taxes while the centre should exercise authority over non-benefit taxes. Where there are significant regional economic disparities, the centre would provide equalisation payments to the have-not-jurisdictions so individuals in similar positions would have similar fiscal treatment regardless of their jurisdiction (Mieszkowski and Musgrave 1999; Oates 2004; Buchanan 1950). On the whole, FGT prescribed functional and tax assignments between orders of government on the grounds of efficiency and macroeconomic stability. In cases of vertical fiscal imbalance and of horizontal economic disparities, the centre was required to make transfer payments.

Prescriptions for transfer payments have come under intense questioning by SGT. While accepting the basic premise of FGT regarding the appropriate assignment of functional responsibilities, SGT charts a new direction by emphasising subnational governments' reliance on own resources for their functioning. It argues that horizontal competition between subnational governments can make for economic efficiency and prosperity, if the federal level refrains from interfering in these government's taxing and spending decisions. It regards federal fiscal interventions (equalisation payments, grants, bailouts, etc.) as distortionary policy instruments that inhibit the development of a competitive and efficient economy. The interventions are termed 'soft budget constraints' (SBC), which induce subnational governments to spend excessively, amass unsustainable deficits, and to perpetuate their dependence on the centre for more support (McKinnon and Nechyba 1997). Kornai (1980; 1986) explained the concept of 'soft budget constraint' (SBC) to mean the practice whereby public enterprises perpetually posted losses and were always bailed out with state funds. Such enterprises operating at chronic losses could count on external assistance, an expectation that defined the behaviour of their top management. The concept is applied to subnational governments (Kornai, Maskin & Roland 2003).

SGT emphasises the dangers of SBC in federal political systems. It claims that federal transfer payments are weak incentives for subnational governments to pay attention to their





size, and make prudent fiscal decisions of either saving during good times, or refraining from borrowings that are assumed to be guaranteed by the centre. It is also claimed that the willingness of the centre to bailout subnational governments is an incentive for the latter to opportunistically shift their overspending cost and excessive borrowings to other jurisdictions – the so called common pool problem (Burret and Feld 2014; Oates 2005; Rodden and Wibbels 2002). Thus, SBC creates a moral hazard: the centre acts like a financial insurer which encourages the insured to continuously engage in the same fiscally reckless behaviour. This opportunistic fiscal behaviour is said to have facilitated the Argentine and Brazilian fiscal crises of the 1980s and 1990s as well as the post-2008 debt crises of the weak member states of the European Union (Rodden 2012). Given these problems, the literature prescribes hard budget constraint (HBC) for subnational governments.

The concept of hard budget constraint (HBC) refers to a situation in which entities cover their expenditures from their own revenues and if deficits arise cannot count on external support (Kornai, Maskin & Roland 2003). SGT prescribes market-based and rule-based institutional mechanisms that would create HBC (Ter-Minassian 1997). Market-based institutional mechanisms involve the establishment of an efficient market in combination with a decentralised system in which subnational governments have autonomous taxing and expenditure powers. In this setting, subnational governments could borrow from the credit market but creditors would rate their fiscal performance and reduce credit access if performance is poor. Within this efficient market setting, excessive subnational government borrowing would manifest itself in depreciated property values that could prompt residents to migrate to fiscally sound jurisdictions (Rodden 2012). In contrast, rule-based institutional mechanisms are laws that prohibit deficits, severely limit borrowings, provide for credible no-bailout and minimal inter-governmental transfers, and allow for bankruptcy (Burret and Feld 2014; McKinnon and Nechyba 1997; Oates 2005; Skeel 2001; Ter-Minassian 1997).

This HBC vision has been touted as a force for economic growth and prosperity. For example, McKinnon and Nechyba (1997: 46) emphasised the combination of HBC and the taxing authority of constituent governments as the main force for turning much of the formerly poor southern U.S. states into the ‘prosperous Sunbelt.’ Similarly, Barry Weingast (1995) regarded a decentralised system, in which lower order governments make hard choices about their economic sustainability and the centre refrains from interfering in their affairs, as the source of prosperity not just in the United States but also in China. I examine the



merits and demerits of these theoretical claims, and I begin by laying out the practical Nigerian experience with federal transfer payments.

## 2. The Fiscal Architecture of Nigerian Federalism

Nigerian fiscal architecture is characterised by legally mandated federal levying and collection of broad-based revenue. This fiscal arrangement assigns major revenue sources to the federal government, while subnational governments are left with inconsequential taxation jurisdictions.<sup>I</sup> The taxation arrangement creates vertical imbalance, as the states own generated revenues do not match their constitutional responsibilities. Hence, in Nigeria's fiscal architecture, subnational governments rely on tax revenues raised by the centre.

However, the major tax revenues generated by the centre belong to the entire federation and the constitution requires that they be lodged in a common account, the Federation Account (FA), in the Central Bank for vertical and horizontal sharing among the orders of government. Oil is the most dominant of the tax revenues, consistently accounting for at least 70% of consolidated revenue and 90% of export earnings. Its contribution to GDP has been falling over the years, from 29.92% in 2009 to 15.78% in 2012, 10.80% in 2014, and 6.36% in 2015.<sup>II</sup> Comparatively, corporate and value added taxes (VAT), the next most important revenue sources, respectively accounted for 12% and 7.9% of total revenues in 2014 and 2015 (CBN 2015:310; CBN 2014a: 259; CBN 2013: 365; OPEC 2015).<sup>III</sup> The FA is, therefore, dominated by revenues from oil and gas and is shared by first removing 13% share of derivation for the oil producing states. The remainder is distributed vertically at the ratio of 52.68% Federal, 26.72% State, and 20.60% Local Government.<sup>IV</sup>

The central collection and sharing of revenues is not uncommon in federations: it is the practise in the Argentine, Mexican, Indian, and Russian federations. But Nigeria's architecture is distinctive for pooling all the major revenues in a common basket in the Central Bank from which all the governments are legally entitled to share without any condition attached. In 2013 the common pool supplied 81.2% and 92% of the total annual revenues of the states and federal governments respectively (CBN 2014a: 126; 2013: 163). The figures were 72.2% for the states and 72.5% for the federal level in 2015 (CBN 2015:146 & 153; 2013:158). The state governments have absolute autonomy to spend the funds they receive without any compliance with federal initiatives.



The dependence on a common pool of resources produces incentives for the states to misalign their expenditures with their revenues. Theoretically, subnational governments' autonomy to determine their own public spending is sometimes taken as a measure of the level of fiscal decentralisation and therefore an enhancer of federalism. However, a regime of fiscal commons and expenditure autonomy are a deadly combination. Nigerian state governments spend freely, on the expectation that the Central Bank will automatically funnel funds from the common pool. Indeed, after the country transitioned from military to democratic rule (1999-2000), the price of oil began an upward tick (from \$30 per barrel in 1999 to a peak of \$152 in 2008) and the states began to escalate their budgets in line with transfers from the FA. Between 2001 and 2005, the states ran average annual deficits of 5% of their total revenues. According to the World Bank (2007: 5), some states increased their budgets 'faster' than their proceeds from the FA, 'through domestic borrowing'. The passage of the Fiscal Responsibility Act (FRA) of 2007 was aimed at slowing the automatic pass-through of oil revenues to state spending.

The FRA established the Commodity Reference Price for oil, meaning budgeted national revenue for each year would be based on a predetermined low price of oil. The difference between the actual market price and the low budgeted benchmark would be saved in a holding account, the Stabilisation Account (SA), in the Central Bank. The FRA specified limits on the federal government's deficit-GDP ratio at no more than 3% and required the President, on the approval of the National Assembly, to set limits on the consolidated debt of the federal and state governments. Furthermore, state governments can only obtain external loans through the federal government if their debt servicing does not exceed 40 per cent of their average monthly statutory allocations from the FA. The law authorised the federal government to deduct funds monthly and upfront from a debtor state's gross statutory allocations, with a view to servicing the state government's external loans. And, domestic borrowing by any state had to be authorised by law passed by the state legislature, with the proceeds strictly restricted to long term capital expenditure. Since the FRA could not be imposed on state governments, the latter were incentivised to adopt their own fiscal responsibility laws in line with the 2007 Act. The incentives were financial and technical assistance from the federal government (Federal Republic of Nigeria 2007).

The FRA registered temporary gains. The use of the CRP in annual appropriations helped to slow the automatic pass-through of oil revenues for state spending. Oil proceeds



were directed into the Stabilisation Account (SA, also referred to as the ECA) annually, the amount varying widely from year to year (Table 1). In addition, over twenty states enacted their own fiscal responsibility laws, and five established their own rainy-day reserve fund with the oil-rich Rivers State accumulating \$343.7 million by 2014. The gains did not last.

*The Problem of a Common Pool of Revenue:* In a context where the operations of all tiers of government are dependent on a common pool of revenue, there is no incentive to adhere to prudent fiscal rules that are personally disadvantageous. With the centre serving as a financial insurance company to the state governments, the latter constantly engaged in the same pattern of destructive fiscal conduct. According to an old government report, Nigerians regard allocations from the fiscal common as ‘booty-sharing’ (Fed. Rep. of Nig. 1976: 10). A more recent study has shown that in contemporary Nigeria it is disadvantageous for an official to be self-restrained or to invest in the public good when everyone else is raiding the commons (Olowu and Wunsch 2014). Over four decades since Peter Ekeh (1975: 100) developed the idea of the public realm as an ‘amoral civic public from which one seeks to gain’, state resources are still regarded as the spoils of war available for taking and one is considered a “sucker” for not “eating” up the state. Indeed, the concept of “eating” in African political discourse aptly expresses the opportunistic act of helping oneself to the resources of state and the irrelevance of laid down formal rules (Berman 2004). This common pool problem constrains Nigerian state officials from committing to the fiscal responsibility laws they enacted.

For example, the majority of states that enacted fiscal responsibility laws did not establish the commissions required to implement and enforce these; this made the enacted laws redundant. Also, state governments that established reserve funds quickly depleted them even before oil prices began to decline. Furthermore, the ECA, that was supposed to serve as a rainy-day fund, was regularly drawn-down (Table 1) partly at the request of the thirty-six state governors who also litigated in the country’s courts whenever the Federal Government refused to accede to their requests. As a consequence of their spending, state governments posted average annual deficits of 4.7% from 2006 to 2013 (Table 2). These persistent deficits were consistently financed through domestic banks at high interest rates of 20% and above. Worse still, debtor states provided Irrevocable Standing Payment Orders (sort of pre-authorised automatic debit) authorising the Central Bank to deduct their monthly allocations upfront on behalf of the creditor banks.

**Table 1: Excess Crude Account Annual Proceeds & Withdrawals 2009-2015**

Year	Non-Cumulative Proceeds		Non-Cumulative Withdrawals	
	Naira (billion)	Dollar Equivalent (billion)	Naira (billion)	Dollar Equivalent (billion)
2009	60.4	0.41	812.4	5.43
2010	615.8	4.81	886.5	5.88
2011	1,226.2	8.04	450.0	2.95
2012	2,420.0	15.50	387.7	2.48
2013	50.6	0.32	464.2	2.98
2014	216.0	1.37	76.0	0.48
2015	12.6	0.06	15.6	0.08

Source: National Bureau of Statistics (2012); CBN (2015: 287 & 288; 2013);

\*Exchange rate (N/\$) of 147.27 (2009); 148.51(2010); 152.59 (2011); 156.23 (2012); 156.03 (2013); 157.27 (2014); 196.49 (2015)

By the end of 2015, the 36 states and the Federal Capital Territory (FCT) owed \$12.7 billion in domestic debt and another \$3.4 billion in external debt. These were heavy debts when considered in terms of total revenues received. For example, the total domestic debt of the states and the FCT averaged 91 percent of their total revenues (Table 3). This did not include their external debts. The picture worsens when transfer payments are taken out of the picture, as the states generated an average of 19% of their revenues internally in 2015, upward from 15.3% in 2013.

**Table 2: Summary of State Governments' and Federal Capital Territory Finances (Naira Billion)**



Fiscal Indicator	2006	2007	2008	2009	2010	2011	2012	2013	2014
<b>Total Revenue (TR)</b>	<b>1,543.8</b>	<b>2,065.4</b>	<b>2,934.8</b>	<b>2,590.7</b>	<b>3,162.5</b>	<b>3,410.1</b>	<b>3,572.6</b>	<b>3,905.4</b>	<b>3,672.0</b>
<b>Total Expenditure</b>	<b>1,586.8</b>	<b>2,116.1</b>	<b>3,021.6</b>	<b>2,776.9</b>	<b>3,266.2</b>	<b>3,542.0</b>	<b>3,845.1</b>	<b>4,046.8</b>	<b>3,983.0</b>
Rec. Exp.	894.3	1,217.4	1,505.6	1,426.1	1,648.4	2,055.8	1,664.4	1,948.4	2,120.5
Rec. Exp./TR %	<b>57.9%</b>	<b>58.9%</b>	<b>51.3%</b>	<b>55.0%</b>	<b>52.1%</b>	<b>60.2%</b>	<b>46.6%</b>	<b>49.9%</b>	<b>57.7%</b>
Capital Exp.	584.0	854.8	1,455.7	1,284.2	1,522.4	1,375.2	1,965.3	1,890.4	1,862.5
Ext.-Budget Exp.	108.5	43.9	60.3	66.7	95.4	111.0	<b>215.4</b>	207.97	0.00
<b>Overall Balance</b>	<b>-43.0</b>	<b>-50.7</b>	<b>-86.8</b>	<b>-186.2</b>	<b>-103.7</b>	<b>-131.9</b>	<b>-272.5</b>	<b>-141.42</b>	<b>-310</b>
Financing									
Ext. Loans	00.00	00.00	00.00	8.00	7.6	41.3	10.4	31.48	24.35
Int. Loans	27.0	25.7	60.2	162.3	88.1	170.4	223.4	412.37	261.9
Other Funds	16.1	19.1	-11.69	16.0	8.0	-79.8	38.7	-302.43	24.68
<b>Deficit as % of Total Revenue</b>	<b>2.79</b>	<b>2.45</b>	<b>2.96</b>	<b>7.19</b>	<b>3.28</b>	<b>3.86</b>	<b>7.62</b>	<b>3.62</b>	<b>8.44</b>
<b>Average Crude Oil Price (US\$/b)</b>	<b>66.4</b>	<b>74.96</b>	<b>101.2</b>	<b>62.1</b>	<b>80.8</b>	<b>113.8</b>	<b>113.5</b>	<b>111.36</b>	<b>100.74</b>

Source: CBN 2014b; 2013; 2009.

Table 3: State Governments' and Federal Capital Territory's Finances (2015)



STATE	Domestic Debt (NGN million) *	External Debt (US\$ million)	IGR (NGN billion) *	Total Revenue (NGN billion) *	IGR Total Revenue (%)	Domestic Debt IGR (%)	Domestic Debt Total Revenue (%)
ABIA	33.53	41.5	20	62.2	32.2	167.7	53.9
ADAMAWA	47.2	49.1	4.5	44.7	10.1	1048.9	105.6
AKWA IBOM	147.58	52.7	11.1	178.3	6.2	1329.5	82.8
ANAMBRA	3.58	60.8	9.4	50.4	18.7	38.1	7.1
BAUCHI	57.65	85.3	6.3	74.7	8.4	915.1	77.2
BAYELSA	103.37	37.6	9.3	118.9	7.8	1111.5	87
BENUE	39.94	35.7	6.2	61.1	10.1	644.2	65.4
BORNO	22.34	23.2	2.3	51	4.5	971.3	43.8
CROSS-RIVER	115.52	136.4	11.8	52.1	22.6	979	221.7
DELTA	320.61	38.8	34	175.1	19.4	943	183.1
EBONYI	34.17	47.2	7.6	43.6	17.4	450	78.4
EDO	46.29	168.2	18.1	68.3	26.5	255.7	67.8
EKITI	52.57	55	7.8	46.5	16.8	674	113.1
ENUGU	37.55	71.8	50.1	94.3	53.1	75	39.8
GOMBE	53.45	39.8	3.5	41.9	8.4	1527.1	127.6
IMO	71.74	59.2	5.4	51.6	10.5	1328.5	139
JIGAWA	22.2	34.1	2.9	53.6	5.4	765.5	41.4
KADUNA	49.85	226.4	13.6	66.3	20.5	366.5	75.2
KANO	65.01	57.6	31.1	96.8	32.1	209	67.1
KATSINA	11.5	72.2	4.3	54.3	7.9	267.4	21.2
KEBBI	63.79	45.3	3.6	49.8	7.2	1772	128.1
KOGI	42.04	33.6	3.7	47.2	7.8	1136.2	89.1
KWARA	31.97	51	4.2	40.4	10.4	761.2	79.1
LAGOS	218.54	1208	253.5	369.4	68.6	86.2	59.2
NASSARAWA	40.56	53.1	5.9	42.4	13.9	687.5	95.7
NIGER	21.5	44.8	4.3	51.1	8.4	500	42.1
OGUN	75.92	103.3	39	77.8	50.1	194.7	97.6
ONDO	26.65	52.1	10.2	64.4	15.8	261.3	41.4
OSUN	144.7	76.9	7.7	45.4	17	1879.2	318.7
OYO	47.44	66.6	21.5	69.5	31	220.7	68.3
PLATEAU	96.21	30.5	2.6	44.4	5.9	3700.4	216.7
RIVERS	134.97	46.9	94.5	216.9	43.6	142.8	62.2
SOKOTO	11.66	41.9	13.7	59.8	22.9	85.1	19.5
TARABA	27.65	22.9	15.8	54.3	29.1	175	50.9
YOBE	3.87	30.5	1.8	41.1	4.4	215	9.4
ZAMFARA	46.28	34.9	3.1	43.3	7.2	1492.9	106.9
FCT	133.9	35	11.5	66.2	17.4	1164.3	202.3
<b>Total</b>	<b>2503.26</b>	<b>3370</b>	<b>755.9</b>	<b>2859</b>	<b>18.9</b>	<b>771.4</b>	<b>90.5</b>

Source: Debt Management Office (2015); CBN (2015)

\*Provisional data

Without transfers from the common pool, the majority of states would be classified as heavily indebted. As Table 3 shows, the 2015 average domestic debt of the 36 states and the FCT was 771.4% of their internally generated revenue (IGR), well in excess of the World Bank’s debt sustainability threshold of 200 percent of IGR. No fewer than twenty-nine states have domestic debt-IGR ratio several times above the World Bank’s sustainability ceiling. These include both the oil producing states and the agrarian states in the North and South. Oil-rich Akwa Ibom State has a domestic debt burden that is over thirteen times its domestic



earnings, while the agrarian Plateau State in the middle belt owes over thirty-seven times its local revenue. This heavy debt burden does not include what the states owe to external creditors.

Given the states' unsustainable debt and lack of an independent revenue base, any significant decline in monthly federal transfer payments would impact negatively on their operations. Declines in transfer payment could truly cripple state governments, as recurrent expenditures consume over half of their revenues. As Table 2 shows, in 2014 recurrent expenditure accounted for 57.7% of the total revenue of the 36 states. Over a period of nine years (2006-2014), the average annual recurrent spending was 54.4% of total revenue. Declines in federal transfers could potentially translate into an inability of the states to meet their recurrent bills. That potential became a reality when the global price of oil fell precipitously in 2015. The Federal Government provided \$2.1 billion of bailout loans to enable 27 insolvent states pay their recurrent expenditure bills, in apparent violation of its FRA that specifically limited the application of loans to capital expenditure only. Much of the funds were reported by the country's anticorruption commission to have been either mismanaged or diverted by the governors in most of the recipient states (Independent Corrupt Practices and other Related Offences Commission 2016). The apparent insolvency did not go away, and by April of 2016 several states could not carry out their basic functions of government.<sup>V</sup> Again the Federal Government provided relief by suspending its deductions of debt servicing costs from each debtor state's monthly share of federal transfer payments. It further provided \$324.4 million (NGN90 billion) for the states to meet their recurrent expenditure commitments, even though the previous bailout had been wasted by most of the governors, and regardless of the FRA restriction of loan usage to capital expenditure only. However, accessing the funds was made conditional on the production of a fiscal sustainability plan. The content of the required plan was similar to some aspects of the earlier mentioned rule-based HBC recommended by the SGTFF, but did not include a no-bailout policy or the possibility of states' bankruptcy.

### 3. The Implications of the Nigeria Experience for SGT

The above case study data has implications for SGT as it helps to shed light on the strengths and weaknesses of the theory.





*The Strength of the Theory:* The primary claim of SGT is that transfer payments create a moral hazard as these are an incentive for subnational governments to continuously overfish the common pool of revenue. The Nigerian experience validates this claim. Nigeria's state governments expand their expenditures by building heavy personnel and overhead obligations, operating persistent deficits, borrowing perennially from local banks and then calling regularly on the centre to divide up reserve funds in the ECA to cover these costs. Between 2009 and 2014, a total of \$20.2 billion was taken out of the rainy-day fund (see Table 1). The draw-down occurred at a time when other oil producing countries were building up their reserves (World Bank 2013). According to the Central Bank, by the end of 2015 only \$2.45 billion was left in the ECA (CBN 2015: 137). Former President Goodluck Jonathan (2016) has noted that he was pressured by the state governors to withdraw and share the funds. This was a clear case of overfishing the common pool. Over fishing is logical, given the fiscal arrangement in which the centre has taxation autonomy while the states have expenditure powers. Left to themselves, the states would not reduce their expenditures because public officials (elected and unelected), and residents, regard the states as the primary means of capturing their 'shares of the federal cake' (Olowu and Wunsch 2014; Fed. Rep. of Nig. 1976): 10). It would be difficult to move against decades old vested interests of both public officials and citizens. Reducing expenditure would also be politically costly because the size of government would have to be trimmed, potentially pitching elected officials (who have the objective need to win voters' support) against the organised labour unions. The political consequences of crossing organised unions might constrain the officials from making fiscally prudent decisions that are unpalatable in the short run.

SGT prescribes HBCs as a solution to the above problem. The most pertinent HBCs are the rule-based mechanisms that prohibit deficits, limit borrowings, provide for no-bailout, minimal intergovernmental transfers, and allow states to go bankrupt. According to the theory, a regime of intergovernmental transfers invites and perpetuates a culture of fiscal dependence on the part of the subnational governments. The Nigerian experience *seems* to, but *does not* prove this argument. The country's fiscal arrangement is a sort of division of labour: the centre raises and supplies the revenue while the subnational tier does the spending. Consequently, state governments do not have to engage themselves in the challenging task of sourcing local revenues. Indeed, following successive political restructurings of Nigeria from a regional to multi-state federation, there has been no



deliberate and concerted effort by the states to expand their revenue base. Nigerian policy makers have, therefore, recognised the need to provide state governments with incentives to generate their own revenues. Hence, during the failed Second Republic (1979-1983), independent revenue generation was built into a formula for the horizontal sharing of funds from the FA (Phillips 1991). Yet, there has been no remarkable improvement. Throughout the 1970s transfers from the common pool accounted for 70-90% of the total revenues of the states (Phillips 1991). Four decades on, the figures remain the same. As table 3 shows, only Lagos State generated over two-thirds of its revenue in 2015, largely due to its position as a financial and commercial city state. This city-state also generates 55% of Nigeria's VAT. The next best states were Enugu, Ogun, and Rivers which generated 53.1%, 50.1% and 43.6% of their revenues, respectively. The agrarian Jigawa State generated 5.4%, while the oil producing Akwa Ibom State generated 6.2%.

The states could intensify their revenue generation efforts to reduce their dependence on transfer payments, but only a very few have the industrial and commercial economic base to achieve such autonomy. For most of the states that are agrarian, with smallholder farmers a majority of their residents, not much can be generated through taxation. It would be futile to expect that taxing subsistence farmers would produce the desired result. Heavy taxation could even be counterproductive as the development literature of 1980s and 1990s has since established that the African economic stagnation of the last three decades of the 20<sup>th</sup> century was on account of fiscal policies that overtaxed the agricultural sector and squeezed out farmers (World Bank 1994; Schiff 1992). The agrarian economic orientation of majority of Nigerian states makes it difficult to suggest minimising federal transfer programmes or the prohibition of bailouts.

From the above it would be safe to state that there is merit in SGT's claim that intergovernmental transfers and bailouts create a moral hazards problem, but minimising intergovernmental transfers or prohibiting bailout is not feasible and might not be desirable as I detail below.

*The Weaknesses of the Theory:* The Nigerian experience also helps to understand the problems with SGT. First, the theory views subnational governments as being fiscally profligate and of the centre as being the victims of manipulation. But the Nigerian experience shows that the centre is no less guilty. The federal government's recurrent expenditure is 71% of its total spending and the upper tier accounted for 80.13% of the \$57.4 billion total



debt owed to external and local creditors in 2016. Its deficits are modest (see Table 5), and differ little from those of the European Union; however, they are perennial, prompting the need for foreign loans to fund the country's annual budget. In 2017 the deficit was 2.2% of GDP and was financed through foreign loans. The centre is not as clean as the theory assumes.

**Table 4: Federal Government Fiscal Deficit,  
2009-2015 (% of GDP)**

Year	Deficit
2009	-3.2
2010	-2
2011	-1.8
2012	-1.3
2013	-1.4
2014	-0.9
2015	-1.6

Source: CBN (2015; 2013)

Secondly, Nigerian multistate federalism was created with the clear understanding that central redistribution of oil revenues would be the primary means of sustaining the component governments. At the time of independence in 1960, the federation was tri-regional, with each of the regions having extensive taxing and spending autonomies. The progressive restructuring of the federation from three regions (four in 1963) to thirty-six by 1996 was strictly for the political reasons of 'assuaging the fears of minorities', balancing the size of the constituent units, and guaranteeing 'political stability' (Federal Republic of Nigeria 1976: 10). Nigerian policy makers and the multistate federal engineers explicitly dismissed as 'irrelevant' expert advice that the component states would not be economically viable; instead, they promised 'redistributive action of the Federal Government' as a way of ensuring the operations of the governments (Fed. Rep. of Nigeria 1976: 13). The origins and continuity of the multistate system is, therefore, grounded on intergovernmental transfer payments. A commitment to a no-bailout policy would contradict the fiscal foundations of a multistate federalism such as Nigeria.



Thirdly, Nigeria's fiscal arrangement deliberately aims to avoid asymmetrical federalism. The country's early federal compact was without sensitivity to equality in the size and population of the then regions, an insensitivity that ultimately led to the three-year Biafra secessionist war of 1967-70. Since the 1970s, the country's reinvented multistate federalism has incorporated constitutional rules for minimising deep disparities in the fiscal capacities of the constituent states, disparities that could have made few resource-endowed states economically powerful to the point of dominating the federation. Hence oil and gas revenues are distributed equitably across the country, a distribution that includes the creation of a special ministry for the oil producing region, the establishment of a commission dedicated to providing infrastructure in the region, and the earlier mentioned 13% derivation. Equitable redistribution makes for near-symmetry in fiscal strength, and also guarantees the social solidarity dimension of federalism, the 'idea that different parts, endowed with different fortunes and resources, are to share in a federal commonwealth' (Hueglin & Fenna 2006: 51). SGT's arguments would be at odds with a commitment to social solidarity and nation building, given the theory's insistence on subnational fiscal autonomy, minimal transfer payments and a no-bailout policy. Such insistence would require that important taxing jurisdictions, especially oil and gas, be assigned to the states. In fact, in contemporary Nigerian public discourse, there is a loud and sometimes threatening call for political restructuring that entails full fiscal autonomy for the states. In the view of some of the local actors pressuring for devolution, full fiscal autonomy would enable the federating units to develop according to their abilities, make for competition among the units, and enthrone "true federalism". The problem with this position is that full devolution might generate an unusual asymmetrical federalism in which the few oil-producing states possess enormous financial power and potentially act as creditors to the have-not states. Given the volatile ethnic relations in a country such as Nigeria, and the fact that the federation is of an ethno-federal type, the deep dichotomy of extremely rich versus poor constituent units could generate ethnic resentments that may lead to the untimely demise of the federation.

Finally, in a context where all subnational governments are dependent on intergovernmental transfers and are many in number, the central government would not be in the position to commit to a policy that minimises transfers or prohibits bailouts. To illustrate, the Nigerian FRA prohibits the states from acquiring loans for recurrent expenditure spending. However, when the subnational economic crisis began in 2015, the



Federal Government quickly overlooked its own FRA by providing the cash strapped states with \$2.1 billion bailout loans to settle their backlog of workers' pay. Even though several states wasted the funds, the centre still came up with another bailout facility in 2016 and a third in 2017. The centre could not stand-by and watch because the jurisdictions are many; too many to fail. "Saying no" to them could trigger their economic collapse and a possible political instability across the country. In turn, this would invite charges of administrative incompetence on the part of the governing party in the centre, charges that could lead to electoral defeat and loss of power. The centre has voters to whom it is accountable. The consequences of 'saying no' to jurisdictions in distress are so severe that government could not sensibly commit to such a destructive policy.

#### 4. The Problem of Idealising 19<sup>th</sup> Century American Federalism

What emerges from the preceding discussion is the difficulty of generalising about federal institutions as SGT does. There is no such thing as ideal federalism, as Riker (1969: 146) noted several decades ago when he wrote that the concept is 'a constitutional legal fiction which can be given whatever content seems appropriate at the moment.' Yet, SGT prescribes what amounts to an ideal fiscal regime. Knowingly or unknowingly, some contemporary Nigeria political actors propagate this inaccurate idea when they advocate so-called "true federalism as found in the United States." Federations differ widely in many dimensions and each reflects the features and public culture of its society (Simeon and Conway 2001). For example, egalitarian Australia has little tolerance for horizontal fiscal inequality while the highly individualist United States is indifferent to such inequality. Canada with its tempered individualism fits in between the two extremes. The arguments of SGT amount to disregarding realities on the ground for some abstract ideals. This runs counter to Riker's (1969: 146) counsel that it is best 'to go behind the fiction' of federalism 'to study the real forces in a political system.' Indeed, the Nigerian experience proved that real forces on ground matter, that they actually give content to the concept of federalism.

The ideas propagated by SGT turn out to be derived from a particular federation, the United States. In American federalism, equalisation (solidarity) transfers are non-existent and there was a credible federal commitment against bailout from the 1840s until the 20<sup>th</sup> century. The theory extracted and glorified these features as models for the rest of the world, very



much against Elazar's (1987: 61) observation about the impressive 'variety of federal arrangements . . . in the world'. The prescriptions of SGT are of little value, considering that the features it seeks to universalise no longer apply to the American federation from which they were extracted. For example, it is a fact that equalisation payments remain absent, but cooperative transfer programmes have been institutionalised since the New Deal era – a development that gave rise to the concept of cooperative federalism. In spite of the existence of competitive federalism since the 1980s, the number of US federal aid programmes to the states increased from 327 in 1965 to 608 in 1995, such that overall transfer payments accounted for 29.6% of the states' revenue in the mid-1990s. By 2010, the number of federal aid programmes to the states was 1,122 which amounted to an average of \$2,187 per capita (Edwards 2013: 34 & 38; Watts 2002: 495). Furthermore, the no-bailout policy has also been eroding since the mid-20th and effectively died following the passage of the 2009 American Recovery and Reinvestment Act. The Act provided \$223 billion to state governments (Greve 2012: 31), equivalent to 30% of their revenues for 2009. All American states (except Vermont) are mandated to balance their budgets, but this has been impossible especially since 2008, and states have had to rely on federal transfers to bridge their budgetary gaps (Ter-Minassian and Fedelino (2010).

SGT romanticises features that have disappeared from American federalism. This is reflected in Rodden (2012), Greve (2012; 2011), and Skeel (2011) whose arguments for reviving and bolstering market discipline are rooted in nineteenth century US fiscal policy. Changes in American federalism confirm the well-known idea that federalism is variable. It would, therefore, be a mistake to use a variant at a particular place in the past as a model for others. Like SGT advocates, contemporary Nigerian actors are guilty of this error when they press for "true federalism as practiced in the United States."

## 5. Conclusion

Federal transfers are the very foundation of some federations. This is the case with Nigeria's multistate federalism. It is also true of Canada that has the distinctive character of being a sharing and polite society partly on account of the institutionalisation of transfers since Confederation in 1867 (with equalisation payments formally worked out in 1957). The same is true of culturally egalitarian Australia where transfers were initially designed at the



commencement of the federation in 1901 for the political goal of maintaining the integrity of the country. SGT is somewhat blind to cultural and political differences across countries as it seeks to universalise a pre-New Deal rugged and highly aggressive American individualism. As the Nigerian case study data has shown, adopting the theory could bring some federations to their untimely demise. It is not surprising that no federation with a history of transfer payments has abandoned the arrangement, despite claims that the payments make for inefficiencies. The Australian system, highly criticised for being inefficient (Kirchner 2013) has undergone revisions but never abandoned. Admittedly, the case study showed that transfer payments give rise to fiscal indiscipline among public officials, but such a problem would simply mean that governments ought to align their expenditures with their revenues, instead of abandoning the arrangement as the SGT argues for.

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<sup>I</sup> The centre is assigned with import, export, excise, mining (oil and gas), value added, and company, taxes while the subnational governments are left with property tax (which most of the states do not impose), motor vehicles licenses, land tax, entertainment tax, and market trading licences, among others. The only important revenue source assigned to the subnational governments is personal income tax, excluding tax imposed on personnel in the Foreign Service, military, police, and residents of the Federal Capital Territory (FCT). The tax assignment seems to reflect the ideas of the FGT.

<sup>II</sup> The low figure for 2015 was partly on account of disruption in supplies by Niger delta militants and the dramatic fall in the international price of oil.

<sup>III</sup> It should be noted that revenues from value added taxes (VAT) are required by law to be placed in a separate common account, VAT Account, in the Central Bank for sharing among the governments.

<sup>IV</sup> The states' share of 26.72% is horizontally shared among all the thirty-six on the basis of several factors, namely: equality, population, landmass, terrain, internal revenue generation effort, and social development. The VAT Account is shared in the ratio of 15%, 50%, and 35% to the Federal, State, and Local Governments respectively.

<sup>V</sup> The most affected were: Kaduna, Kwara, Plateau, Bayelsa, Benue, Borno, Yobe, Imo, Taraba, Kogi, Bauchi, Delta, Oyo, Nassarawa and Ogun states.

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*The referenda* for more autonomy in Veneto and  
Lombardia: constitutional and comparative  
perspectives

by

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## Abstract

In a global context where popular referenda are increasingly used to decide contested issues, this paper aims at exploring the framework in which, in October 2017, two referenda took place in the Italian northern regions of Veneto and Lombardia to seek additional forms and conditions of autonomy within the Italian regional state as painted by the Constitution after the 2001 reform. By adopting mainly an analytical perspective, this contribution studies the political and constitutional underpinnings of the two referenda while at the same time providing a cursory comparative account of differential and asymmetric regionalism.

## Key-words

regionalism, referendum, autonomy, Italy, asymmetry



## Introduction

Over these past few years, the use of *referenda* across Europe has become a common tool to democratically decide controversial or contested issues: for example, the withdrawal of the United Kingdom from the European Union (the so-called *Brexit* referendum of 2016) and the more recent referendum for the secession of Catalonia from Spain of October 2017 have monopolized public attention and stirred lively academic, constitutional and political debates in Europe and elsewhere. Within this context, on 22 October 2017, two separate referenda for increased autonomy took place in the Italian Northern regions of Veneto and Lombardia, resulting in an overwhelming support for more regional autonomy (although, at a closer look, the outcome was not perfectly identical in the two regions, as it will be better explained in the remainder of the paper). And while these two Italian referenda are hardly comparable with the *Brexit* and Catalonia examples – because of a quite different overall context – they are worth a more thorough scrutiny as part of the general debate on comparative regionalism. The objective of this contribution is thus to discuss the referenda in the Northern Italian regions and offer an analytical account of their legal and constitutional underpinnings. The article is divided in three parts. Paragraph 1 offers a brief overview of Italian regionalism to help better situate the specific debate on increased autonomy; paragraph 2 extensively studies the two referenda, while paragraph 3 provides a cursory comparative account of differential and asymmetrical regionalism.

## 1. Brief overview of Italian regionalism. The use of referenda

### 1.1. Italian regionalism

In comparative public law scholarship, Italy is commonly defined as an example of *regional* state: in fact, the republican constitution of 1948 created a unitary, yet decentralized, system of government composed not only of central institutions but also of regions, provinces and municipalities, all enjoying autonomous statutes, powers and functions pursuant to article 114(1) Const.<sup>1</sup>

Historically speaking, the regional state was first introduced by the Spanish republican constitution of 1931, considered as the “pioneer text of European regionalism” and later



used by the Italian constituents as the model for the regional state created in 1948 (Bin & Falcon 2012: 26). However, due to the short life of the 1931 Spanish constitution (which, because of the civil war, was never actually applied), scholars generally contend that the regional state was “invented” by Italian constituents in search for an alternative route to the traditional *centralized vs federal* dyad (Bin & Falcon 2012: 48). In fact, the very expression *regional state* was coined by Gaspare Ambrosini, a member of the Italian Constituent Assembly, who had thoroughly studied the 1931 Spanish constitution (which created autonomous communities endowed with legislative powers), as well as the Soviet Union model and the extinct Austro-Hungarian scheme (Bin & Falcon 2012: 48); Swiss federalism and the Weimar Republic were also comparatively studied at the time (Mangiameli 2014: 3; D’Atena 2014: 68). Spanish regionalism (and Central European) federalism thus played a fundamental role in shaping the Italian regional model created in 1948 (D’Atena 2014: 67). Inspired by these experiences, Ambrosini not only invented the expression *regional autonomy* but he also conceived a new entity enjoying legislative powers: the region (Bin & Falcon 2012: 48).

If the historical origins of the *regional* state are pacifically accepted, more controversial is to define or describe a *regional* state as opposed to a *federal* or even a *unitary* one, since the boundaries between these various models are not always so clear. In general terms, we can say that *regional* systems like Italy blend unitary and federal elements, with centripetal forces remaining predominant: consequently, along with the constitutional recognition of forms of autonomy to regions, there is a stronger emphasis on concepts such as the unity or indivisibility of the state and of national (not regional) sovereignty, among other things.

In any event, because of the profound socio-economic, cultural and linguistic differences that characterized Italy particularly in the post-WWII period, the regional system implemented in 1948 created two categories of regions, *ordinary* and *autonomous*, considering that five of the twenty regions were granted *special* or *autonomous* status. These five *special* or *autonomous* regions are listed in article 116(1) Const. and are: Friuli Venezia Giulia, Sardegna, Sicilia, Trentino-Alto Adige/Südtirol and Valle d’Aosta/Vallée d’Aoste. The reasons that explain this autonomous status are rather complex and multifaceted as they blend political, international, historical, geographical, cultural-linguistic, identity and nationalism issues. First, at the time of their creation these five regions were rather peripheral and, consequently, disadvantaged from a geographical standpoint: in fact, Sicilia



and Sardegna are the two major islands in the South, while Friuli Venezia Giulia, Trentino-Alto Adige and Valle d'Aosta are relatively small regions almost entirely nested in the Eastern and Western Alps, respectively. Furthermore, all of them were (and still are) characterized by the presence of a rather strong identity character in the people inhabiting them, with more or less rooted independentist/autonomist movements, with the three regions in the North also presenting linguistic minorities, in particular French-speaking minorities in Valle d'Aosta, German-speaking minorities in Trentino-Alto Adige and Slovenian-speaking minorities in Friuli Venezia Giulia. Most importantly for Northern regions, however, their autonomous status was also linked to international tensions with – and pressures from – countries such as France, Yugoslavia and Austria. For example, in Valle d'Aosta a lieutenant legislative decree issued in 1945 already granted special protection to the francophone minority, a provision that tried to compensate for the policies of assimilation and “Italianization” implemented during fascism (Rolla 2015: 13-14; Bin & Falcon 2012: 72). Historical, linguistic but especially international political pressures were behind the autonomy of Friuli Venezia Giulia as formalized in 1963: in fact, besides the diversity between the eastern and western parts of the region, controversies existed over the definition of the borders and the status of the city of Trieste (Ferrara & Scarpone 2014: 114; Rolla 2015: 13-14).<sup>ii</sup> Finally, international tensions with Austria significantly affected the special status of Trentino-Alto Adige: in fact, the so-called “De Gasperi-Gruber Agreement” (signed in 1946 by Italy and Austria as part of the Paris Peace Conference) granted autonomous legislative and administrative powers to the German-speaking communities in the province of Bolzano/Bozen and to the municipalities of the province of Trento having bilingual (German/Italian) population (Bin & Falcon 2012: 75). Incidentally, Trentino-Alto Adige is further divided into the two autonomous provinces of Trento and Bolzano/Bozen, thus adding an additional layer of specialty to the already differential system in place.<sup>iii</sup> It should also be recalled, however, that special forms of decentralization had already been implemented in some of these territories even before the Constituent Assembly and the enactment of the 1948 republican constitution. For example, in 1944 Sicilia and Sardegna were provided with temporary organs, such as a high commissioner (appointed by the Prime Minister) assisted by a regional chamber representative of the various political, economic, union and cultural organizations (Bin & Falcon 2012: 71; Caretti & Tarli Barbieri 2012: 16); furthermore, in 1946 Sicilia was granted



a regional statute, vesting important legislative and administrative autonomy on the region (Caretti & Tarli Barbieri 2012: 17; Bin & Falcon 2012: 71).

The special status enjoyed by the five regions basically granted them additional powers – mainly in the fiscal ambit – so that they could deal more effectively and more autonomously with their intrinsic disparities: with the significant exception of Sicilia, however, this fiscal autonomy has been a gradual achievement in all of them. Differences between special and ordinary regions exist also with regards to their regional *statuti*: in fact, for ordinary regions, statutes are adopted and amended by the Regional Council with no approval of the central government (see article 123(2) Const.), while the statutes of special regions shall be adopted by constitutional law (article 116(1) Const.).<sup>IV</sup>

While at the time of its implementation it was pacifically accepted, over these past few years the special status of the five autonomous regions has been repeatedly questioned: in fact, in political and academic circles alike, many see this classification between ordinary and special regions as obsolete, especially for the regions in the North, considering that borders and language differences no longer have the importance of the past in the specific context of the European Union, and the Cold War that separated Eastern from Western Europe – of which Friuli Venezia Giulia was one of the bastions – is long forgotten (Rolla 2015: 1-2). However, the five autonomous regions are somehow jealous and proud of their special status and are fighting hard to preserve it: this is particularly true in the North, where the three aforementioned regions – while smaller and less populated than others – are wealthy territories with very high life quality standards that situate them among the richest areas not only in Italy but also in Europe. Most importantly, however, there are legal reasons that make it quite complicated to depart from the *status quo*: in fact, the abolition of the special autonomy would require a constitutional amendment pursuant to the procedure set forth in article 138 Const., not to mention the need to comply with international commitments (especially with regards to Trentino-Alto Adige, as discussed above).

In any event, the regional model created in 1948 was significantly revised and reshaped in 2001 via a constitutional reform that strengthened the legislative and administrative powers of the fifteen ordinary regions, while leaving substantially untouched the powers already vested in the special regions; among other things, this reform intended to reduce the gap in powers and functions between the two groups of regions. The constitutional



reform of 2001 represented the culminating point of a political mobilization (mainly led by the *Northern League* (LN), a political party rooted in the North) begun in the late 1980s-1990s, when the wealthier and more industrialized regions in the North sought to acquire, through increased decentralization and even federalism, more financial and fiscal autonomy, and thus emancipate from the control of the center especially insofar as decisions on economy, infrastructures, taxes and other services were concerned.<sup>v</sup>

## 1.2. Article 116(3) Const. on differential regionalism

In addition to confirming the classification between autonomous and ordinary regions and reshaping the division of legislative powers between central and regional governments,<sup>vi</sup> the 2001 constitutional reform introduced another, very interesting element of distinction that is particularly relevant for the present discussion and which will be the main focus of this contribution. In fact, article 116(3) Const. now allows ordinary regions to negotiate with the central government particular forms and conditions of autonomy in specific subject matters, including all areas of shared jurisdiction between the state and the regions (as detailed in article 117(3) Const.), as well as the following, specific subject matters normally falling within the exclusive legislative jurisdiction of the central state: organizational requirements of the justice of the peace (article 117(2)(l)), general norms on education (article 117(2)(n)), and the protection of the environment, eco-system and cultural heritage (article 117(2)(s)). More precisely, article 116(3) Const. mandates that:

Additional special forms and conditions of autonomy, related to the areas specified in art. 117, paragraph three and paragraph two, letter l) - limited to the organizational requirements of the Justice of the Peace - and letters n) and s), may be attributed to other Regions by State Law, upon the initiative of the Region concerned, after consultation with the local authorities, in compliance with the principles set forth in art. 119. Said Law is approved by both Houses of Parliament with the absolute majority of their members, on the basis of an agreement between the State and the Region concerned.

Some observations on article 116(3) Const. are in order. First, it is important to note that the Italian legislator of 2001 chose to include this provision on differential regionalism in the same article – article 116 Const. – that reiterates the special status of the five regions and two provinces. Furthermore, the constitutional legislator chose to adopt a rather broad approach, by generally referring to all the 20 subject matters or areas of shared jurisdiction





between state and regions and spelled out in article 117(3) Const., in addition to the 3 specific items of exclusive state jurisdiction of article 117(2) Const. (organization of the offices of the justice of the peace; education; environment and cultural heritage), for a total of up to 23 potential areas where ordinary regions might seek additional forms of autonomy. This choice is commendable as it leaves quite some room to the regions to map their priorities through the negotiation of increased legislative powers. In this regard, article 116(3) Const. also details the procedure that needs to be followed in order to implement differential regionalism: this procedure is rather complex, as it requires the concomitant agreement and approval of several different actors who must all concur in the decision: in fact, the initiative must come from the region concerned after consulting with local authorities, followed by a state law (passed by absolute majority by both houses of Parliament) granting additional competences to the region based upon an agreement previously reached between the regions and the central government (what is usually referred to as *differentiation law*). Finally, financial resources are transferred to the region to carry out the new competences, in compliance with the provisions spelled out in article 119 Const. on fiscal federalism. Technically speaking, this provision simply requires that regional institutions initiate negotiations with the central government based upon a consultation with other local entities, institutions or authorities: this means that no popular consultation on the subject (*eg referendum*) is formally required by the Constitution. I will revert to this point later in the paper.

Italian scholars have identified the rationale behind this provision in the fact that differential regionalism can be particularly useful when confronted with a reality of socio-economic asymmetries or diversified preferences towards the federalization process, since this type of solution can help softening conflicts and tensions that may come into play when such reforms are implemented (Zanardi 2006: 2). Moreover, differential regionalism could be linked to the requests coming from the wealthier areas of the country for an “adjustment of the inter-regional redistribution of resources made by the central government” and thus address the autonomist push coming from certain Regions” (Zanardi 2006: 2), considering that not all ordinary regions share the same positive sentiments towards federal or federal-like solutions. Finally, it could propel “forms of experimentation in the formulation and application of public policies” so that each local area is free to devise the most adequate solution for its own reality (Zanardi 2006: 2). While



certainly innovative and original because of its intrinsic flexibility, the provision on differential regionalism enshrined in article 116(3) Const. has regrettably remained *dormant*, almost forgotten, for a long time, as most (but not all) ordinary regions did not seem to be interested in the opportunity offered to them. The reasons that explain why article 116(3) has been neglected for so long are complex and not always easy to identify. Certainly, the procedure set forth in the article to achieve differential regionalism is quite articulate and not easily applicable, thus maybe discouraging regions from pursuing this avenue. Other reasons are linked to the fact that the 2001 constitutional reform was not unanimously well received, and actually many political parties were dissatisfied with it, including the LN that never fully approved the 2001 constitutional reform, as it considered it not “federal” enough (Mazzoleni 2009: 143). This is why, in 2005 the Italian parliament (led by a center-right majority) passed another reform intending to amend 53 out of 139 articles of the constitution (basically almost the entire second part which details the organization of the Italian Republic) (Pinelli 2006: 329-330; Desideri 2014: 51). Never supported by the left-wing coalition (on the ground that it would break up the country and ran counter other fundamental and entrenched principles such as solidarity) (Mazzoleni 2009: 144; Desideri 2014: 51), this proposal aspired to amend certain critical aspects of the previous reform (such as the absence of a “federal” Senate) (Bin & Falcon 2012: 95). However, because the proposal was approved by the Parliament only with an absolute majority (and not with two-thirds) of the votes, it was submitted to popular referendum in 2006 and, eventually, rejected by 61,3% of the voters (Pinelli 2006: 330; Bin & Falcon 2012: 95).

It was only very recently that attention has sparked again around article 116(3), as this provision has represented the constitutional basis for the two referenda in Veneto and Lombardia held in October 2017: in other words, it was in pursuance of article 116(3) Const. that Veneto and Lombardia decided to call a referendum to begin negotiations with the central government for increased autonomy although, as noted above, the constitutional provision does not require this form of democratic consultation. However, before discussing these events more in detail in paragraph 2 of the paper, it is perhaps worth offering a quick overview of the institution of referendum in Italy.



### 1.3. The use of referenda in Italy

In Italy, the institute of referendum is solidly entrenched in the Constitution, and it has been extensively used as a form of direct democracy throughout the years. At national level, the Constitution acknowledges three types of referenda: (i) *abrogative*, used for the abolition – in whole or in part – of a national law (article 75 Const.);<sup>VII</sup> (ii) *constitutional*, used for the approval of constitutional laws and in case of constitutional amendments, if certain conditions exist (article 138 Const.);<sup>VIII</sup> (iii) *territorial*, for territorial changes of municipal, provincial and regional borders (article 132 Const.).<sup>IX</sup>

At regional or local level, article 123(1) Const. simply allows regional statutes to regulate regional or local referenda:<sup>X</sup> as explained by the Italian Constitutional Court (“ItCC”), this means that each region can establish forms and criteria for democratic participation, including the introduction of new types of referenda than those established in the constitution, or the calling to vote of individuals that would not usually be entitled to vote in normal elections or who are not Italian citizens (ItCC ruling 118/2015, par. 6). Building upon some past decisions, the ItCC also explained that regions are allowed to organize *advisory* referenda also on issues falling outside regional competences and boundaries – issues thus having a “national” dimension – but regions cannot take on initiatives exceeding the boundaries set forth by the constitution (ItCC ruling 118/2015, par. 5). In fact, the ItCC pointed out that, even when they are not binding (and thus merely advisory), referenda can still trigger, influence or contrast public decisions, so national and regional referenda alike shall always comply with the provisions contained in the constitution or enacted in pursuance thereof (ItCC ruling 118/2015, par. 5). Finally, the ItCC also contended that regional referenda can never involve constitutional choices even when they are merely advisory (ItCC ruling 118/2015, par. 6, citing past decisions). I will discuss this aspect again with regards to the referendum in Veneto.

## 2. The referenda in Veneto and Lombardia

### 2.1. Veneto

Before discussing the referendum question as presented in October 2017, it is perhaps worth underlying how this was not the first attempt for Veneto to seek more autonomy: in fact, in the aftermath of the constitutional reform of 2001, Veneto and some other



ordinary regions (eg Lombardia, Piemonte, Toscana) attempted to initiate a dialogue with the central government to negotiate additional forms and conditions of autonomy pursuant to the procedure enshrined in article 116(3) Const. on differential regionalism and discussed above: these attempts, however, were not successful. For this reason, in 2014, the regional government of Veneto – under the leadership of its President Luca Zaia of the LN – passed two laws (Law 15/2014<sup>XI</sup> and Law 16/2014<sup>XII</sup>) whose constitutionality was immediately challenged before the ItCC by the Italian government. The ItCC grouped the challenges together and rendered a joint decision in ruling 118/2015, as I am going to better explain in the next sections.

### 2.1.1. Regional Law 16/2014 and ItCC ruling 118/2015

Regional Law 16/2014 was particularly instructive – also in comparative terms – because it set the scheme for an advisory referendum on the secession of Veneto from Italy, so that Veneto could become an independent and sovereign republic.<sup>XIII</sup> In order to understand the reasons behind this referendum question and the desire for secession, it might be useful to point out that, from a historical standpoint, the territory of present-day Veneto was once part of the Most Serene Republic of Venice (*Serenissima Repubblica di Venezia*), an independent and sovereign state that revolved around the leading role of Venice as its major political, cultural and economic center, and that lasted – with alternate fortunes – for about a thousand years from the late VII century until 1797, when its territories were ceded to the Austrian Empire. At the time of utmost splendor, the Republic of Venice included territories that now belong to various Mediterranean states such as Croatia, Albania and Greece. The so-called “Lion of St. Mark” – once the symbol of the Republic of Venice – still prominently displays, in formal and informal settings, in the regional flag of Veneto as a symbol not only of the past splendors of Venice but also of Veneto.<sup>XIV</sup> Immediately before the unification of Italy in the 1860s, the territory roughly comprising the two regions discussed in this contribution – Veneto and Lombardia – and known as *Lombardo-Veneto*, was a province of the Austro-Hungarian empire. In other words, Veneto (as part of the Republic of Venice) has a long-standing and successful history of independent statehood, and nationalism sentiments are still quite strong among certain strands of the population. To be sure, these sentiments have resurfaced only recently, as before the mid-1980s they were rather weak, due to the rise and decline of a



“white” political culture triggered by secularization and the decline of the Christian Democratic party: it was only with the emergence of the LN at national level in the mid-1980s and early 1990s that pro-independence claims reappeared in Veneto.

As expected, Regional Law 16/2014 was declared unconstitutional by the ItCC, mainly because it pertained to fundamental choices of constitutional nature that are precluded to regional referenda as discussed above (ItCC ruling 118/2015, par.7.2). Furthermore, the ItCC continued, the secession question also implied institutional upheavals that are radically incompatible with the fundamental principles of unity and indivisibility enshrined in article 5 Const. (ItCC ruling 118/2015, par.7.2). In fact, this article provides that

The Republic is one and indivisible. It recognizes and promotes local autonomies, and implements the fullest measure of administrative decentralization in those services which depend on the State. The Republic adapts the principles and methods of its legislation to the requirements of autonomy and decentralization (emphasis added).

Recalling a 1988 decision, the unity of the Italian Republic is for the ItCC one of those essential and fundamental values that are not only outside of the scope of regional referenda, but also of constitutional amendment altogether (ItCC ruling 118/2015, par.7.2). Consequently, even if article 5 Const. postulates institutional pluralism and autonomy, regions can never ask citizens via referendum to secede from Italy: in other words, any referendum that is contrary to the unity of the Italian Republic would never be considered legitimate (ItCC ruling 118/2015, par.7.2). In some way, it is surprising that the ItCC considers the unity of Italy as unamendable: in fact, technically speaking, article 139 Const. explicitly excludes from constitutional amendment only the Republican form of State, a choice that was justified in 1948 as a drastic depart from the legacy of monarchical and dictatorial status that had characterized Italy in the previous decades.<sup>xv</sup>

### 2.1.2. *Regional Law 15/2014 and ItCC ruling 118/2015*

Regional Law 15/2014 was slightly more articulated: article 1 provided for a negotiation between the Regional President and the national government to define the contents of an advisory referendum on the acquisition of additional forms and conditions of autonomy for Veneto (ItCC ruling 118/2015, par.8.1). In case of unsuccessful



negotiations, article 2 authorized the Regional President to call for an advisory referendum on five different yet related questions, as detailed herewith below.

Question #1 intended to ask citizens of Veneto whether they would be in favor of additional forms and conditions of autonomy for the region (ItCC ruling 118/2015, par.8.1). Although this question, as penned in Law 15/2014, failed to specify the subject matters on which to seek more autonomy, and made no explicit reference to article 116(3) Const., the ItCC upheld it in its ruling since it echoed – in very basic terms – the tone and wording of article 116(3) Const.: in other words, the fact that the language used was almost identical to the constitutional provision was enough for the ItCC to conclude that the only additional forms and conditions of autonomy that Veneto could seek were those in compliance with the constitutional provision of article 116(3) (ItCC ruling 118/2015, par.8.3). Similarly, an eventual referendum would simply precede – without excluding – the various steps set forth in article 116(3) to seek differential regionalism (ItCC ruling 118/2015, par.8.3).

Conversely, questions #2<sup>xvi</sup> and #3<sup>xvii</sup> were both struck down by the ItCC as unconstitutional: both questions dealt with fiscal issues and delineated a financial scheme whereby revenues levied locally (in the territory of Veneto) or paid by citizens resident in Veneto should be kept locally for at least 80% and, in the portion cashed by the central government, at least 80% should be used locally (ItCC ruling 118/2015, par.8.4). Among other things, the ItCC argued that the two questions would infringe upon the constitutional principles of coordination of public finance and fiscal matters; moreover, fiscal and financial matters are also excluded from regional referendum by an express provision contained in the Veneto regional statute (ItCC ruling 118/2015, par.8.4).<sup>xviii</sup>

Question #4<sup>xix</sup> concerned the removal of all allocation constraints still existing on the financial resources belonging to the region. For the ItCC, this question touched upon article 119(5) Const. on fiscal federalism,<sup>xx</sup> and thus upon a constitutional principle that is excluded from referendum, as discussed above; furthermore, as for the two previous questions, it also falls outside of the scope of regional referenda by an express provision of the regional statute of Veneto as it deals with fiscal issues (ItCC ruling 118/2015, par.8.5).

Finally, question #5 asked whether Veneto should acquire special status and thus be added to the list of existing autonomous regions.<sup>xxi</sup> Also in this case, the ItCC declared the unconstitutionality of this question, as it touched upon a fundamental constitutional issue



falling outside the scope of a regional referendum (ItCC ruling 118/2015, par.8.6). In this regard, it shall be pointed out that, geographically speaking, Veneto borders two autonomous regions, Trentino-Alto Adige and Friuli Venezia Giulia (this three-region territory is also informally referred to as *Triveneto* or *Tre Venezie*) and it has suffered for a lack of special status also considering its past history of independent statehood as Republic of Venice.

### 2.1.3. *The referendum of 22 October 2017*

Regional Law 15/2014, in the part upheld by the ItCC, represents the legal foundation for the advisory referendum of 22 October 2017.<sup>xxii</sup> Among other things, Law 15/2014 set a *quorum* for its validity, as it required the participation of a majority of those entitled to vote and the majority of votes cast in favor. The exact question asked at the referendum was: *Do you want that additional forms and conditions of autonomy be attributed to Veneto?* Because 57,2% of the electors having the right to vote eventually participated in the referendum, the *quorum* was met, with an overwhelming 98,1% of the votes cast in favor of more autonomy.<sup>xxiii</sup>

Incidentally, regional Law 15/2014 also served as the legal basis for another referendum that was held on the same day in the sole province of Belluno, seeking the advisory opinion of citizens to negotiate more powers and fiscal autonomy for this province because of its speciality: also in this case there was an overwhelming majority of votes in favor of autonomy: 98,7% of the votes cast.<sup>xxiv</sup>

According to the *Roadmap for the autonomy of Veneto* (“Roadmap”) prepared by regional institutions, the day after the referendum the regional government created a council for the autonomy of Veneto (*Consulta del Veneto per l’Autonomia*) as a permanent board in support of the regional negotiating delegation.<sup>xxv</sup> On 15 November 2017, the Regional Government passed Bill 43 (*progetto di legge statale*), representing the point of departure for the negotiations with the central government.<sup>xxvi</sup> In this regard, the regional government heard representatives from various entities and bodies, including civil society, associations of specific professions, representatives of local self-governments, etc.<sup>xxvii</sup> As explained in the *Roadmap*, with the aforementioned Bill, the regional government intended to seek the recognition of additional forms of autonomy in all the 23 subject matters listed in article 116(3) Const. However, some subject matters could be given priority and be discussed



first; furthermore, for some areas, the *Roadmap* clarified that Veneto might participate in the discussions already ongoing with other regions.<sup>xxviii</sup>

On 1 December 2017 the regional government of Veneto began negotiations with the central government in Rome at the seat of the Ministry of Regional Affairs to provide the list of 23 subject matters that would represent the basis for further discussions, the objective being to have a final framework document ready by the end of January 2018; in this regard, the plan was to join the discussions already ongoing with Lombardia and Emilia-Romagna (see *infra*) on areas such as the environment, job related issues and education, while healthcare would represent a priority for Veneto.<sup>xxix</sup> In early January 2018, Luca Zaia announced that negotiations were progressing and that the signature of a pre-agreement was expected to take place soon.<sup>xxx</sup> At the end of February 2018, the President of Veneto and representatives of the central government signed a framework pre-agreement: with this document, the central government committed to continue the negotiations to implement differential regionalism in Veneto as soon as the new institutional organs would be formed after the national political elections of 4 March 2018.<sup>xxxi</sup>

## 2.2. Lombardia

Lombardia does not share the same grandiose past of independent statehood as Veneto, but some cities such as Milan, Pavia, Mantua or Monza have historically been extremely vibrant cultural, artistic, political and economic centers, at times enjoying a certain degree of autonomy.<sup>xxxii</sup>

As indicated *supra*, Lombardia was among the group of regions that, in the aftermath of the constitutional reform of 2001, had started unsuccessful negotiations with the central government to acquire additional forms and conditions of autonomy within the constitutional framework of differential regionalism enshrined in article 116(3) Const. Since the answers received by the central government in this regard were considered unsatisfactory, in February 2015 the regional government led by LN member Roberto Maroni passed a bill to hold a referendum for more autonomy, so as to strengthen the democratic legitimacy of these requests and have more negotiating powers before the central government.<sup>xxxiii</sup> Differently than Veneto, however, the Regional Law did not set a *quorum* for the validity of the referendum, meaning that it would be valid regardless of the





voting turnout. The referendum saw the participation of 3.017.707 voters, or the 38.34% of those entitled to vote, 95.29% of which expressed their votes in favor of more autonomy.<sup>XXXIV</sup> Although also in this case there was an overwhelming majority of electors casting a vote in favor of more autonomy, the outcome of this referendum was not identical to that of Veneto – as it might appear at first sight – for at least two reasons: first, the percentage of people who voted was significantly smaller than in Veneto (38.34% vs 57.2%) and, secondly, in the city of Milan (the largest city in Lombardia and one of the most important industrial and economic centers in Europe) only a small percentage of electors casted a vote.<sup>XXXV</sup>

In any event, the question asked at the referendum read as follows: *Considering its specialty, and within the framework of national unity, do you want that Regione Lombardia undertakes the necessary institutional steps to ask the government the attribution of additional forms and conditions of autonomy, with the related resources, pursuant to article 116(3) Const., and on any legislative subject matter for which such procedure is allowed in the aforementioned article?*<sup>XXXVI</sup>

The first thing to note regarding the referendum question in Lombardia is that it was much more articulated and elaborated than the one presented in Veneto. The question opened with an explicit reference to an alleged *specialty* of the region, something that the regional government explained by resorting to the important structural, social, economic, cultural features and numerous potentialities that characterize this territory.<sup>XXXVII</sup> Among the various indicators used to explain this specialty, the regional government particularly emphasized the following: (i) significant fiscal balance; (ii) *per capita* GDP higher than the EU average; (iii) excellent health system; (iv) national export; (v) lowest *per capita* debt; and (vi) efficiency and soundness of public administration at municipal, provincial and regional levels.<sup>XXXVIII</sup> As it is obvious, these indicators refer to the unique socio-economic fabric of the region to explain its specialty or uniqueness, and not to linguistic or otherwise ethno-cultural features. With specific regards to fiscal balance (*residuo fiscale*), this is explained as the difference between the taxes that citizens pay to the central government and the amount that the central state gives back to the regional territory: in Lombardia, this fiscal balance amounts to EUR 54 billion per year (more than double of the current regional budget of EUR 23 billion).<sup>XXXIX</sup> In case of positive voting turnout in the referendum, the objective of the regional government is to keep locally at least half of the fiscal balance



(EUR 27 billion) so as to finance the new competences acquired after successful negotiations with the central government.<sup>XI</sup>

Finally, the referendum question made reference to the framework of national unity: in this regard, the regional government clarified that, differently than Catalonia, what was sought in Lombardia was not secession from the central state but simply the attainment of additional and differential autonomy pursuant to the constitutional provision enshrined in article 116(3).<sup>XLI</sup>

In the aftermath of the referendum, the regional government formally initiated negotiations with the central government: the first step in this direction was taken on 7 November 2017, when the regional government passed Resolution 97 with Decision X/1645, offering the Regional President some guidelines to follow during institutional negotiations, thus setting out the priorities in terms of areas or subject matters where more autonomy is sought.<sup>XLII</sup> More specifically, the information sheet prepared by regional institutions explains that Resolution 97 contains guidelines with reference to the 23 specific competences spelled out in article 117 Const. and grouped them into the following six major areas:<sup>XLIII</sup>

- (1) **Institutional** – comprising subject matters such as international and EU relations of the region; communications; organization of the justice of the peace
- (2) **Financial** – comprising subject matters such as coordination of public finance and taxation system; complementary and supplementary social security; savings banks, rural banks, regional credit institutions, regional land and agricultural credit institutions
- (3) **Environment, territory and infrastructure** – comprising subject matters such as protection and enhancement of the environment and eco-system; disaster relief (*Protezione Civile*); land use planning; national production, transportation and distribution of energy; large transportation and navigation networks; civil ports and airports
- (4) **Economy and jobs** – comprising subject matters such as work protection and safety; scientific and technologic research and innovation; support for productive sectors; foreign trade; professions
- (5) **Culture, education and scientific research** – comprising subject matters such as general provisions on education (article 117(2)(n)); education (subject to the



autonomy of educational institutions and with the exception of vocational education and training); enhancement of cultural properties and promotion of cultural activities; sports

(6) **Welfare** – comprising subject matters such as health protection and nutrition

Furthermore, and similarly to what happened in Veneto, Resolution 97 required a specific commitment towards the relationship with local self-governments and the settlement of the internal institutional system; it also adopted several suggestions made by the parties previously heard, including (but not limited to) *Confartigianato*, *Coldiretti*, *Confagricoltura*, *Confcommercio*, *Confindustria*, *Unioncamere* and *Conord*.

Negotiations between Lombardia and the central government officially started in mid-November 2017 and are ongoing: in this regard, Lombardia joined Emilia-Romagna at the discussion table (later joined also by Veneto, as discussed *supra*).<sup>XLIV</sup>

### 2.3. The case of Emilia-Romagna and concluding remarks

As indicated above, article 116(3) Const. on differential regionalism does not require a preliminary referendum for ordinary regions to begin negotiating with the central government additional forms and conditions of autonomy: in this regard, the choice of the regional governments of Veneto and Lombardia to proceed with the referendum option in October 2017 was political and deliberate, to strengthen their claims and their negotiating positions before the central government. This can also be partly explained by the fact that, as mentioned above, the presidents of the two regions, Roberto Maroni in Lombardia and Luca Zaia in Veneto, are both members of LN, a political party that has historically advocated more autonomy for regions and a more robust fiscal federalism, among other things.

While the focus of this contribution are the two referenda in Veneto and Lombardia, we also made reference to the path to differential regionalism initiated by Emilia-Romagna. In fact, also this region is currently negotiating additional forms and conditions of autonomy in key strategic areas pursuant to article 116(3) Const., although it has done so without resorting to an advisory referendum. The goal of the regional government of Emilia-Romagna is to seek more legislative and administrative autonomy so as to directly manage some subject matters that are fundamental for the additional social and economic growth of its territories, and to simplify administrative procedure and decisional



mechanisms in the following four strategic areas: (i) jobs and vocational training; (ii) enterprises, research and development; (iii) health care; (iv) land-use planning and environment. The objective of this strengthened autonomy is to help improve the standard performances of regional and local institutions and thus benefit the whole regional community (including citizens, business activities, local self-governments, associations and vocational agencies) by adopting a subsidiarity-based approach to the performance of relevant functions by bringing them closer to localities.<sup>XLV</sup>

### 3. Comparative perspectives: article 116(3) Const. on differential regionalism and the so-called *principio dispositivo* in the Spanish autonomic state

As explained *supra*, the provision on differential regionalism enshrined in article 116(3) Const. was one of the most interesting novelties introduced with the constitutional reform of 2001: because not all regions shared the same positive sentiments towards federalism, this provision gave the possibility to acquire additional forms and conditions of autonomy only to those territories which were truly interested in it. We also noted that it was only very recently that the actual possibilities offered by this provision have been tested, since for a long time this article has remained neglected. It is thus too early to assess the actual value of differential regionalism considering that the negotiations between the central government and Veneto, Lombardia and Emilia-Romagna are still ongoing.

In any event, while the provision enshrined in article 116(3) Const. is quite unique in the overall landscape of federal and quasi-federal arrangements, a parallel can nonetheless be made with the so-called *principio dispositivo* found in the Constitution of the Spanish autonomic state, also in light of the reciprocal influence that the Spanish and Italian regional models have historically exerted on each other. Simply put, the *principio dispositivo* provides that each autonomous community (“AC”) may decide which legislative competencies it will assume among those that are constitutionally possible under the Spanish constitution. In Spain, the territorial distribution of legislative powers is – at least on paper – very asymmetrical, as these powers are not constitutionally enshrined (as it happens in the various paragraphs of article 117 of the Italian constitution) but are based



on the various statutes of autonomy (*estatutos de autonomia*) of the single ACs, individually negotiated with the central government.

In this regard, article 149(1) of the Spanish Constitution lists all subject matters of exclusive jurisdiction of the central state; in doing so, it uses an expression that, translated into English, can be rendered as “[t]he State shall have exclusive jurisdiction over ...”.<sup>XLVI</sup> Article 149(3) Const. mandates that all matters that are not expressly assigned to the State by the Constitution “may fall under the jurisdiction of the autonomous communities by virtue of their Statutes of Autonomy”.<sup>XLVII</sup> However, article 149(3) continues, jurisdiction on subject matters not claimed by the ACs “shall fall with the State, whose laws shall prevail, in case of conflict, over those of the autonomous communities ...”.<sup>XLVIII</sup>

Most importantly, article 148 of the Spanish constitution enumerates the subject matters devolved to the ACs by using an expression that in English could be rendered as follows: “[t]he Autonomous Communities may assume competences in the following areas ...”.<sup>XLIX</sup> thus giving them an option to autonomously legislate on a number of areas that they might consider relevant in light of their unique needs. However, once agreed upon, this transfer of legislative responsibilities is virtually final, since statutes of autonomy can be modified only through the procedures established therein: in this regard, article 148(2) provides that, after 5 years, ACs will be able to expand their competencies only by amending their statutes and within the framework laid down in article 149.

While the *principio dispositivo* and the provision on differential regionalism are slightly different, they reflect the same rationale: offering territories with asymmetrical features and needs to choose in which areas to legislate locally. In fact, both Italy and Spain are deeply asymmetrical under many aspects, so both regional systems contain flexible mechanisms such as the ones discussed here to better deal with their cleavages. Furthermore, the two principles can be seen as instances of what is usually referred to as “asymmetrical” federalism (or, in this case, regionalism) (Tarlton, 1965: 861; Rolla 2015: 3-4). However, asymmetry and special status are conceptually different even if they are often considered identical, and both are ascribable to an idea of regionalism rivaling uniformity (Rolla 2015: 3-4). In fact, Rolla contends that the concept of regional speciality (typical of the Italian model) can be traced back to a number of historical legal, political, cultural factors that endure in the present and that can be projected in the future; conversely, asymmetry is a consequence of the “dispositive power” that is “embedded in the very notion of



constitutional autonomy” and that supposes some discretion in identifying a given community, the competences it is called to exercise, and its specific organization, although both quantitative and qualitative aspects of this asymmetry shall also be grounded in a number of social, cultural and economic differential factors (Rolla 2015: 4).

#### 4. Conclusion

The two Italian referenda discussed in this paper were organized in regions that are amongst the wealthiest and economically successful not only in Italy but also in Europe. These referenda were the culminating point of movements for more autonomy that had started well before, and that wished to express a desire for increased powers and to emancipate from a central government that is perceived as distant and incapable of taking adequate care and respond to the needs of these territories. In any event, it is not certain how things will evolve both for Veneto and Lombardia: the situation is still *in fieri* and, while at the time we are writing negotiations are ongoing, it is unclear to what extent the two regions will be successful in their claims. Among other things, Italy is undergoing a profound political, economic and moral crisis, and regional claims – especially when coming from the North – are not on the priority list. But ignoring or dismissing these aspirations as mere expressions of greed does not eliminate them but simply strengthen them for future action.

Finally, it should be acknowledged that finding an effective solution to current challenges requires more than legal or doctrinal tricks, or a ruling of the CJEU. Upholding constitutionalism requires an intervention in the societal and cultural dimension too. The EU is not the only player in the field. It is therefore crucial that national actors perceive its intervention as legitimate and objective, otherwise it may become counterproductive. In order to avoid this, EU institutions should be careful not to overstep the boundaries of the current constitutional settlement, including the principle of national and constitutional identity.

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<sup>1</sup> More precisely, article 114(1) Const., as amended in 2001, mandates that “[t]he Republic is composed of municipalities, provinces, metropolitan cities, regions and the state. Municipalities, provinces, metropolitan



cities and regions are autonomous entities having their own statutes, powers and functions in accordance with the principles laid down in the Constitution.<sup>7</sup>

<sup>II</sup> The capital city of Friuli Venezia Giulia is Trieste. In 1948, Trieste and its territory were divided into two zones: zone A (comprising the city of Trieste and some neighboring municipalities) and zone B (the territory of present-day Istria and Slovenia). The *Memorandum of Understanding* between Italy, United Kingdom, United States, and Yugoslavia – signed in London in 1954 – granted the administration of zone A to Italy, whilst Yugoslavia was granted the administration of zone B. However, although zone A was under Italian *administration*, it was not under Italian *sovereignty*: this situation was resolved only with the ratification in 1975 of the Treaty of Osimo defining present-day borders (Bin & Falcon 2012: 75-76).

<sup>III</sup> The autonomous status of these two provinces (a consequence of the reception by Italy of the agreements between the Italian and Austrian governments and included in the peace agreements following WWII, as previously noted) is a unique feature, as no other province in Italy enjoys similar privileges: among other things, the *statuto* of Trentino-Alto Adige (articles 8-10) endows these provinces with legislative powers in enumerated areas – thus making them *de facto* more similar to regions than to other Italian provinces (which lack any power to make *provincial laws*) (Rolla 2015: 13-14).

<sup>IV</sup> More specifically, article 123 Const. provides that: '[e]ach Region shall have a statute which, in compliance with the Constitution, shall lay down the form of government and basic principles for the organization of the Region and the conduct of its business. The statute shall regulate the right to initiate legislation and promote referenda on the laws and administrative measures of the Region as well as the publication of laws and of regional regulations. Regional statutes are adopted and amended by the Regional Council with a law approved by an absolute majority of its members, with two subsequent deliberations at an interval of not less than two months. This law does not require the approval of the Government commissioner. The Government of the Republic may submit the constitutional legitimacy of the regional statutes to the Constitutional Court within thirty days of their publication. The statute is submitted to popular referendum if one-fiftieth of the electors of the Region or one-fifth of the members of the Regional Council so request within three months from its publication. The statute that is submitted to referendum is not promulgated if it is not approved by the majority of valid votes. In each Region, statutes regulate the activity of the Council of local authorities as a consultative body on relations between the Regions and local authorities.'

<sup>V</sup> It is not the purpose of this contribution to offer a detailed account of the 2001 constitutional reform, as an abundant literature – both in Italian and English – already exists. The reader who is interested in learning more about it can resort to the bibliography for additional sources on the subject.

<sup>VI</sup> Article 117(1) Const., as modified in 2001, indicates that legislative powers are vested in the central and regional governments. Article 117(2) Const. lists the subject matters exclusively assigned to the legislative powers of the central government. Article 117(3) Const. enumerates the subject matters of shared jurisdiction between central and regional governments, and article 117(4) Const. assigns to regions all residual legislative powers (*eg* powers not explicitly assigned to either level of government by the constitution). The list of subject matters of shared jurisdiction as spelled out in article 117(3) Const. is rather comprehensive, as it includes the following: international and EU relations of the Regions; foreign trade; job protection and safety; education (subject to the autonomy of educational institutions and with the exception of vocational education and training); professions; scientific and technological research and innovation support for productive sectors; health protection; nutrition; sports; disaster relief; land-use planning; civil ports and airports; large transport and navigation networks; communications; national production, transport and distribution of energy; complementary and supplementary social security; harmonization of public accounts and co-ordination of public finance and taxation system; enhancement of cultural and environmental properties, including the promotion and organization of cultural activities; savings banks, rural banks, regional credit institutions; regional land and agricultural credit institutions. It is worth pointing out that article 117(3) Const. further specifies that, for subject matters of concurring legislation, 'legislative powers are vested in the Regions, except for the determination of the fundamental principles, which are laid down in State legislation'.

<sup>VII</sup> Article 75 Const. provides that '[a] general referendum may be held to repeal, in whole or in part, a law or a measure having the force of law, when so requested by five hundred thousand voters or five Regional Councils. No referendum may be held on a law regulating taxes, the budget, amnesty or pardon, or a law ratifying an international treaty. Any citizen entitled to vote for the Chamber of deputies has the right to vote in a referendum. The referendum shall be considered to have been carried if the majority of those eligible has voted and a majority of valid votes has been achieved.'

<sup>VIII</sup> Article 138 Const. provides that '[l]aws amending the Constitution and other constitutional laws shall be



adopted by each House after two successive debates at intervals of not less than three months, and shall be approved by an absolute majority of the members of each House in the second voting. Said laws are submitted to a popular referendum when, within three months of their publication, such request is made by one-fifth of the members of a House or five hundred thousand voters or five Regional Councils. The law submitted to referendum shall not be promulgated if not approved by a majority of valid votes. A referendum shall not be held if the law has been approved in the second voting by each of the Houses by a majority of two-thirds of the members.'

<sup>IX</sup>Article 132 Const. mandates that '[b]y a constitutional law, after consultation with the Regional Councils, a merger between existing Regions or the creation of new Regions having a minimum of one million inhabitants may be agreed, when such request has been made by a number of Municipal Councils representing not less than one third of the populations involved, and the request has been approved by referendum by a majority of said populations. The Provinces and Municipalities which request to be detached from a Region and incorporated in another may be allowed to do so, following a referendum and a law of the Republic, which obtains the majority of the populations of the Province or Provinces and of the Municipality or Municipalities concerned, and after having heard the Regional Councils.'

<sup>X</sup> Article 123(1) Const. states that '[e]ach Region shall have a statute which, in compliance with the Constitution, shall lay down the form of government and basic principles for the organization of the Region and the conduct of its business. The statute shall regulate the right to initiate legislation and promote referenda on the laws and administrative measures of the Region as well as the publication of laws and of regional regulations.'

<sup>XI</sup> Regional Law of 19 June 2014 no. 15 ('Advisory referendum on the autonomy of Veneto').

<sup>XII</sup> Regional Law of 19 June 2014 no. 16 ('Advisory referendum on the independence of Veneto').

<sup>XIII</sup> The exact terms of the question – as drafted in law 16/2014 – were: 'Do you want that Veneto becomes an independent and sovereign republic?'

<sup>XIV</sup> For a depiction of the Lion, see the official website of *Regione Veneto*: <https://www.regione.veneto.it/web/guest/home>.

<sup>XV</sup> Article 139 provides that '[t]he Republic form shall not be a matter for constitutional amendment.' It might be interesting to confront in this regard the conclusion reached by the ItCC on the secession proposal of Veneto with a similar ruling of the Spanish Constitutional Court on the Catalan secession referendum. In fact, in January 2013 the Catalan Parliament passed a resolution proclaiming that the Catalan people are sovereign and thus have a right to decide their future – in other words, they can freely decide whether to secede from Spain. The reaction of the Spanish government was to bring this Declaration before the Constitutional Court, which rendered its decision in March 2014. Among other things, the Spanish Constitutional Court referred to article 2 Const. proclaiming the indissoluble unity of Spain: for the Court, the Catalan people cannot, legally speaking, be sovereign and, as a result, Spanish regions cannot unilaterally call a referendum of self-determination. However, differently than Veneto – where the ItCC said that the principle of unity enshrined in article 5 Const. is unamendable – the Spanish Court insisted on the fact that the Spanish Constitution (and consequently article 2 on the indissoluble unity of Spain) can always be amended pursuant to the procedures contained therein: this means that, for the Spanish Court, no constitutional principle is immune from amendment, not even principles establishing the unity of Spain and the sovereignty of the Spanish people (Ferrerres Comella 2014: 571-590)

<sup>XVI</sup> The terms of question #2 were: 'Do you want that at least 80% of the taxes paid annually by the citizens of Veneto are used locally?'

<sup>XVII</sup> The terms of question #3 were: 'Do you want that Veneto keeps at least 80% of the revenues locally?'

<sup>XVIII</sup> The regional statute of Veneto, contained in Regional Law 1/2012, regulates regional referenda in articles 26 and 27. In particular, article 26(4)(a)(b) does not allow to call a regional referendum on fiscal and budgetary laws or on regional laws passed in compliance to constitutional, international and EU obligations: see ItCC ruling 118/2015, par. 6.

<sup>XIX</sup> The terms of question #4 were: 'Do you want that the revenues coming from the financial sources be freed from any allocation constraint?'

<sup>XX</sup> Article 119(5) Const. mandates that '[t]he State shall allocate supplementary resources and adopt special measures in favor of specific municipalities, provinces, metropolitan cities and regions to promote economic development along with social cohesion and solidarity, to reduce economic and social imbalances, to foster the exercise of the rights of the person or to achieve goals other than those pursued in the ordinary implementation of their functions.'





XXI The terms of question #5 were: ‘Do you want that Veneto becomes a special region?’

XXII It is perhaps interesting to point out that the date chosen for the referendum both in Veneto and Lombardia – 22 October 2017 – is not accidental but rather has a symbolic importance, as it coincided with the 151<sup>st</sup> anniversary of the 1866 plebiscite that sanctioned the annexation to the Kingdom of Italy of Venice, the Venetian provinces and Mantua, these territories being part of the Austrian Empire and ceded to France after the Third Independence War.

XXIII Based on the information contained in the official website of *Regione Veneto*, the total number of electors having the right to vote was 4.068.560, with 2.328.949 (or the 57,2%) voting; see <http://referendum2017.consiglioveneto.it/sites/index.html#!/riepilogo> (last checked: 15 January 2018).

XXIV

See

[http://referendum2017.consiglioveneto.it/dati/20170000000000/7/reportistica/risultati\\_prov\\_belluno.pdf](http://referendum2017.consiglioveneto.it/dati/20170000000000/7/reportistica/risultati_prov_belluno.pdf).

XXV See Roadmap for the autonomy of Veneto (*Road Map per l'autonomia del Veneto*): [http://www.regione.veneto.it/c/document\\_library/get\\_file?uuid=ef34a45d-bc2f-4bef-86b0-2839b8a96a98&groupId=10136](http://www.regione.veneto.it/c/document_library/get_file?uuid=ef34a45d-bc2f-4bef-86b0-2839b8a96a98&groupId=10136).

XXVI Official Journal of *Regione Veneto (Bolletino Ufficiale)* n. 113, 20 November 2017, available here: <https://bur.regione.veneto.it/BurVServices/pubblica/DetailDcr.aspx?id=357469>.

XXVII *Ibid.*

XXVIII See Roadmap for the autonomy of Veneto (*Road Map per l'autonomia del Veneto*): [http://www.regione.veneto.it/c/document\\_library/get\\_file?uuid=ef34a45d-bc2f-4bef-86b0-2839b8a96a98&groupId=10136](http://www.regione.veneto.it/c/document_library/get_file?uuid=ef34a45d-bc2f-4bef-86b0-2839b8a96a98&groupId=10136).

XXIX *Regione Veneto*, Press Release of 1 December 2017, available here: <http://www.regione.veneto.it/web/autonomia-veneto/comunicati-stampa>.

XXX *Regione Veneto*, Press Release of 10 January 2018, available here: <http://www.regione.veneto.it/web/autonomia-veneto/comunicati-stampa>.

XXXI See *Regione Veneto*, Press Release of 28 February 2018, available here: <http://www.regione.veneto.it/web/autonomia-veneto/comunicati-stampa>. Incidentally, political elections were held in Italy on 4 March 2018: at the time we are writing, an executive yet has to be formed.

XXXII For a more detailed analysis of the peculiar history of Lombardia and of its ‘apolitical’ culture, it might be helpful to consult Galli della Loggia 2010, in particular chapter 3 (“Le Mille Italie”)

XXXIII *Regione Lombardia*, 10 questions on the autonomy referendum, slide 2, available here: <http://www.regione.lombardia.it/wps/wcm/connect/ed35c93b-4aa2-410d-a69e-d00d3a506bc5/10+domande+sul+Referendum+per+%27autonomia.pdf?MOD=AJPERES&CACHEID=ed35c93b-4aa2-410d-a69e-d00d3a506bc5>.

XXXIV

*Regione Lombardia*, official data on referendum available here:

<http://www.regione.lombardia.it/wps/portal/istituzionale/HP/DetailRedazionale/istituzione/autonomia-della-lombardia/referendum-autonomia/referendum-affluenza-risultati>.

XXXV According to the data available on the official website of *Regione Lombardia*, the total number of voters in the metropolitan city of Milan was 769.277, whereas in the city of Milan only 270.017 residents casted a vote. See <https://referendum.regione.lombardia.it/#/coc/100000/103000/103073>.

XXXVI *Regione Lombardia*, 10 questions on the autonomy referendum, available here: <http://www.regione.lombardia.it/wps/wcm/connect/ed35c93b-4aa2-410d-a69e-d00d3a506bc5/10+domande+sul+Referendum+per+%27autonomia.pdf?MOD=AJPERES&CACHEID=ed35c93b-4aa2-410d-a69e-d00d3a506bc5>.

XXXVII *Regione Lombardia*, 10 questions on the autonomy referendum, slide 8, available here: <http://www.regione.lombardia.it/wps/wcm/connect/ed35c93b-4aa2-410d-a69e-d00d3a506bc5/10+domande+sul+Referendum+per+%27autonomia.pdf?MOD=AJPERES&CACHEID=ed35c93b-4aa2-410d-a69e-d00d3a506bc5>.

XXXVIII *Ibid.*

XXXIX *Ibid.*, slide 9. As the slide further explains, this is the highest fiscal balance among Italian regions, followed by Emilia-Romagna (EUR 19 billion) and Veneto (EUR 15.5 billion). It further explains that two of the most competitive regions in Europe, Bavaria and Catalonia, have a fiscal balance of EUR 1.5 billion and EUR 8 billion, respectively.

XI *Ibid.*, slide 9.

XLI *Ibid.*, slide 10.



XLII Regione Lombardia, Information Sheet (a):  
<http://www.regione.lombardia.it/wps/portal/istituzionale/HP/DettaglioRedazionale/istituzione/autonomia-della-lombardia/risoluzione-per-autonomia-lombardia>.

XLIII *Ibid.*

XLIV Regione Lombardia, Information Sheet (b):  
<http://www.regione.lombardia.it/wps/portal/istituzionale/HP/DettaglioRedazionale/istituzione/autonomia-della-lombardia/avviati-tavoli-autonomia>.

XLV See official website of Regione Emilia-Romagna on increased autonomy, available here: <https://www.regione.emilia-romagna.it/autonomiaer> detailing, among other things, the objectives, steps, resources and progress of the application of article 116(3) Const.

XLVI In Spanish, '[e]l Estado tiene competencia exclusiva sobre las siguientes materias ...'

XLVII In Spanish, '[l]as materias no atribuidas expresamente al Estado por esta Constitución podrán corresponder a las Comunidades Autónomas, en virtud de sus respectivos Estatutos.'

XLVIII In Spanish, '[l]a competencia sobre las materias que no se hayan asumido por los Estatutos de Autonomía corresponderá al Estado, cuyas normas prevalecerán, en caso de conflicto, sobre las de las Comunidades Autónomas ...'

XLIX In Spanish, 'Las Comunidades Autónomas podrán asumir competencias en las siguientes materias...'

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