



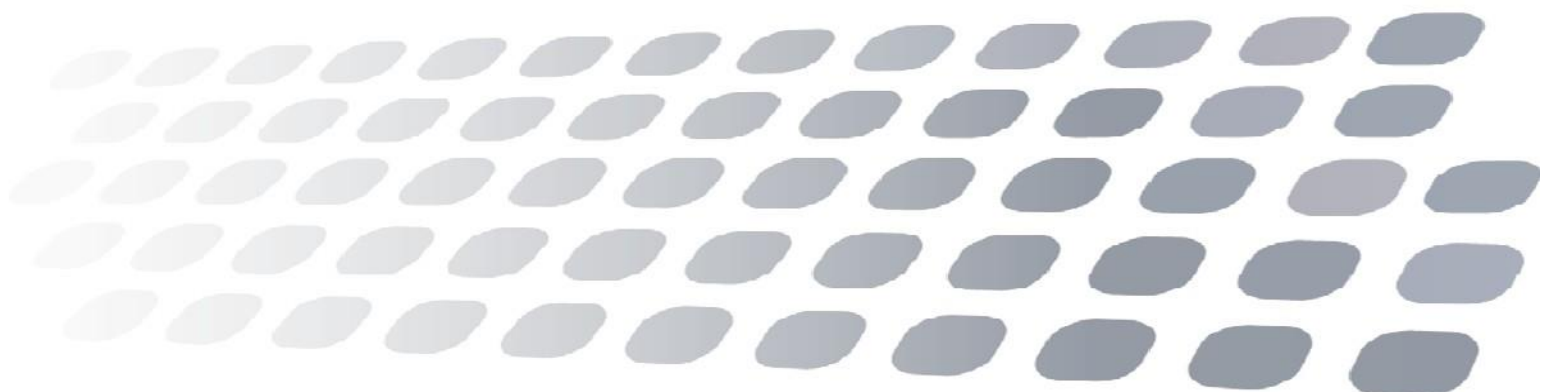
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**The Never-Ending Reform of the EU:
Another Link in the Chain of the Semi-Permanent
Treaty Revision Process?**

by

Roberto Castaldi* and Giuseppe Martinico* (eds.)

Perspectives on Federalism, Vol. 6, issue 3, 2014





Abstract

This special issue is the result of a long project started within the activity of one of the working groups created at the Centre for Studies on Federalism, Turin, almost three years ago, namely the working group on “the EU and its institutional reforms” chaired by Prof. Antonio Padoa Schioppa, Emeritus Professor of Law at the University of Milan and former President of the Centre for Studies on Federalism.

Key-words

Lisbon Treaty, reforms, semi-permanent Treaty revision process



This special issue marks the beginning of the new joint editorship of *Perspectives of Federalism* by Roberto Castaldi and Giuseppe Martinico. It is, however, the result of a long project started within the activity of one of the working groups created at the Centre for Studies on Federalism, Turin, almost three years ago, namely the working group on “the EU and its institutional reforms” chaired by Prof. Antonio Padoa Schioppa, Emeritus Professor of law at the University of Milan and former President of the Centre for Studies on Federalism.

Within the activity of this working group we organized in Pisa a workshop devoted to “Which form of government for the Eurozone?”^I held at the Scuola Superiore S. Anna, Pisa, on 27 September 2013.

On that occasion we gathered established and young scholars to give comments on a first version of a paper published by Prof. Padoa Schioppa in this journal last year with the highly significant title “Guidelines for a Constitutional Reform of the European Union”.^{II}

The workshop, co-organized with the STALS (Sant’Anna Legal Studies^{III}) Program offered a marvelous opportunity to exchange and discuss different (sometimes competing) views on the future of the Union, and triggered an ongoing debate which convinced us to collect some of those comments in the form of fully fledged papers in order to give visibility to this debate.

We thus asked our authors to write academic papers with a clear normative intent, i.e. works aimed at giving an explicit contribution to the discussion without renouncing the depth of the scholarly works. The final output of this collective enterprise reflects such a variety.

At the heart of the opening essay is the reform of economic governance in the EU, as a reaction to the Eurozone crisis, which has increased asymmetries in the Union. In her article Cristina Fasone deals with asymmetries amongst national parliaments that have arisen in the context of the crisis, by starting from the consideration that, although formally respected, the principle of equality of Member States before the Treaties has been put under stress.

Tommaso Virgili offers a critical account of the European partnership with Egypt under the European Neighbourhood Policy, in order to assess the effectiveness of EU policy in the promotion of democratization and human rights. Edoardo Bressanelli



discusses the role of EU parties and suggests how to strengthen it in the light of a number of recent developments and challenges.

In his article Giuseppe Martinico tries to explore some important issues that should be taken into account when advancing reform proposals with regard to the Court of Justice of the European Union. Diane Fromage studies the question of national parliaments and democratic accountability in the context of the financial crisis, focusing on three Member States: France, Germany and Spain.

Giacomo Delledonne investigates the role of the European Council in the institutional framework laid down by the Lisbon Treaty, trying to understand whether it can plausibly serve as a collective “head of state” of a federalised polity. Jerónimo Maillo González-Orús offers a critical account of some of the proposals to reinforce the role of the EU Commission, exploring the different implications that a “politicized” Commission would have in the EU by distinguishing different scenarios (strong politicization of the Commission vs. weak politicization of the Commission, reforms in the long run versus reforms in the short run). Mario Kölling engages with the long standing debate on the reform of the EU budget by analyzing the agreement of the Multiannual Financial Framework (MFF) 2014-2020.

María Isabel González Pascual focuses on the impact of the Eurocrisis upon Regions, with particular attention paid to the effects of budget constraints and austerity measures on the Regions of Member States such as Italy or Spain. Fabio Masini analyses the ECB contribution to crisis management and proposes to address the persistent asymmetry between monetary union (centralised) and economic union (based on a mere coordination of national economic policies), the incomplete (if compared to a fully-fledged federal Central Bank) mandate of the European Central Bank, the limited budget of the EU and uncertainty surrounding budgetary policies in the Union.

Together these papers offer an overview of the development of European governance during the crisis and contribute to the debate on its reform.

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^I <http://stals.sssup.it/files/Seminario%20Scuola-CSF-IAI-EUDO.pdf>.

^{II} http://www.on-federalism.eu/attachments/158_download.pdf.

^{III} www.stals.ssup.it.



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**Eurozone, non-Eurozone and “troubled asymmetries”
among national parliaments in the EU.**

Why and to what extent this is of concern

by

Cristina Fasone*

Perspectives on Federalism, Vol. 6, issue 3, 2014





Abstract

The reform of the economic governance in the EU, as a reaction to the Eurozone crisis, has increased the asymmetries in the Union. Although formally respected, the principle of equality of the Member States before the Treaties has been put under stress. Likewise the position of national institutions concerned by the same Euro-crisis measure can have different implications depending on the Member State. This article deals with the asymmetries amongst the national parliaments arisen in this context. National procedures adopted to deal with the new legal measures reinforce some parliaments while they severely undermine other. The article argues that such an outcome is produced by the combined effects of EU and international measures with national constitutional rules and case law, which can confer more or less significant powers to national parliaments and enhance or disregard existing parliamentary prerogatives. The asymmetries among national parliaments in the new economic governance can impair the democratic legitimacy and the effectiveness of the Euro crisis measures.

Key-words

National parliaments, asymmetries, Eurozone, Fiscal Compact, ESM, rescue packages, principle of equality



1. Equality of Member States, equality of national parliaments in the EU? An assumption to challenge

According to art. 4.2 TEU, “the Union shall respect the equality of Member States before the treaties as well as their national identities”. However, to what extent these principles can be considered enforced through some Euro Crisis measures read in conjunction with national constitutional and legislative rules of implementation is not exactly clear. In particular equality of Member States and protection of national identities do not appear to be in a balanced relationship. As soon as the Eurozone crisis advanced, it has appeared that the national dimension has become increasingly important, for legal, economic and political reasons, as shown by opt in and opt out, national bailouts, intergovernmental arrangements more or less *à la carte*, like the Fiscal Compact. This does not mean that the traditional categories of differentiated integration we have known from the beginning of the European integration and enhanced since the 1990s have been superseded; rather they have been more intensively used during the Euro crisis, also in combination with several legal instruments of international law and shaped through national constitutional law.

All of this has challenged the traditional idea of sovereign equality of the EU Member States; an idea that by no means resembles the principle of equality of the States we find in contemporary public international law (art. 2.1 UN Charter). In the EU we just observe a *prima facie* equal treatment (Blanke 2013: 192), for example because of the general rule of qualified majority voting in the Council, after the Treaty of Lisbon, and the principle of degressive proportionality in the composition of the European Parliament. EU Member States have already accepted to give up the principle of equality in some procedures and institutions, as it happens in federal systems. Moreover, the EU and hence its countries bear a certain degree of differentiation in the adoption and implementation of policies (e.g. concerning the Schengen area), perhaps the most notable being the Economic and Monetary Union (EMU). Such an arrangement meets the requirement to treat different situations differently. For example, regarding the reliability and sustainability of national public accounts most new EU Member States are firstly engaged in a convergence process and then are allowed to join the Eurozone. This picture is sustained by the polysemy of the



notion of equality in itself. Even though all Member States are placed on an equal footing before the Treaties from the viewpoint of strict or formal equality, substantive equality among EU countries, which implies a considerable degree of social redistribution and solidarity, is still fairly limited (Maduro 2012: 5 ff). Furthermore, the achievement of final goals of the EU that are put into questions in the current crisis – “the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress” (art. 3.3 TEU) – might in principle justify an unequal treatment among Member States, if the economic situation of some of them can endanger the Union as a whole and the fulfillment of its objectives, as long as and the deviation from equality is temporary.¹

In the last few years this latter understanding of the principle of equality of EU Member States has become dominant, deeply entrenched and semi-permanent, through a combination of domestic law and some Euro crisis measures, most of which are not formally EU law, although make use of EU institutions and have been considered by the Court of Justice in compliance with EU Treaties;¹¹ thus they should also respect art. 4.2 TEU and formal equality (Pinelli 2014: 9 ff.). Besides Eurozone and non-Eurozone countries, we can detect for example, Eurozone and non-Eurozone bailout countries; Contracting and non-Contracting parties of the Fiscal Compact, and, among the former, countries that committed to the entire Fiscal Compact or only to selected Titles; among the Eurozone countries as parties of the European Stability Mechanism, those receiving and those granting financial assistance and those which detain the largest share capital of the fund and those that subscribed a minimal share.

Are this differentiation and the challenge to the principle of equality of EU Member States coupled by increasing asymmetries among national parliaments? If this is so, what are the effects of these asymmetries on the democratic legitimacy of the reform of the economic governance in the EU? The article tries to answer these questions starting by the assumption that already before the Eurozone crisis “some Member States had [have], of course, more generous democratic arrangements in place through their national constitutional structures” (Leino-Sanberg & Salminen 2013b: 859; De Witte 2009: 34). In particular, depending on the form of government, on the way the system of constitutional review is structured and on the role of courts, the powers of parliaments can be more or less protected or strengthened at domestic level.¹¹¹ Because most of the Euro crisis



measures analysed request national mechanisms of implementation, which can or cannot assign decision-making and veto powers to national parliaments, the effective enforcement of some measures can derive from the role recognized by national Constitutions, legislation and case law to domestic legislatures, with some unexpected consequences. Perhaps the German *Bundestag* is the most evident example of a parliament which has gained powers during the Eurozone crisis compared to other national legislatures (Auel & Höing 2014: 1184-1193); powers that can potentially block the functioning of some European-international mechanisms established to cope with the financial instability.

The article shows that asymmetries among national parliaments in the Euro crisis can create concerns for the democratic credentials of the whole European procedures (not just the domestic ones), which result from a combination of national, EU and international law. However, from the point of view of the legitimacy, the most serious situations arise when there is a mismatch between the decision-making, veto, or participatory power recognized to a national parliament, under EU, international or national law, and the degree of involvement of the relevant Member State in the management or implementation of the measure. Proofs of this mismatch are, for instance: the veto power also of non-Eurozone parliaments in the adoption of art. 136 TFEU amendment; the ability of some national parliaments to block decision-making processes of the European Stability Mechanism; the participation of all national parliaments of the EU in the interparliamentary conference established under art. 13 of the Fiscal Compact regardless of the commitment of their national government to implement the treaty provisions. By the same token it appears detrimental for the EU democracy the fact that national parliaments of both Eurozone and non-Eurozone bailout countries, which are subject to strict conditionality, are protected in their prerogatives during the enforcement of financial and assistance programmes insofar as national constitutional law preserves their autonomy. Thus a further asymmetry among national parliaments derives from the weakening and marginalization of legislatures occurred in some Member States under financial assistance, which in turn makes the democratic legitimacy of rescue packages highly questionable as for their adoption and implementation.

The article proceeds as follows: section 2 analyses the asymmetries among national parliaments which arise from the traditional differentiation between Eurozone and non-Eurozone countries; section 3 focuses on non-Eurozone Parliaments as to show how



different are the powers of these legislatures depending on whether their country received financial assistance (3.1) and on their adhesion to the Fiscal Compact (3.2.). Section 4 considers asymmetries among Eurozone Parliaments and, in particular, how the asymmetric powers provided to these legislatures by national constitutional rules, case law and legislation can threaten the functioning of the European Stability Mechanism (4.1.) and to what extent national constitutional law can render the reaction of Parliaments in different Eurozone bailout countries to rescue packages asymmetric (4.2.). Section 5 is devoted to the setting up of the interparliamentary conference under art. 13 of the Fiscal Compact whereby all national parliaments have been considered equal notwithstanding the differentiated position of their Member States. Finally section 6 draws the conclusions on how the asymmetries among national parliaments in the reform of the economic governance have been managed.

2. A traditional asymmetry: Eurozone vs. non-Eurozone parliaments

It has been argued that the European Union (EU) – likewise its predecessor, the European Community – has always had a “Constitution of bits and pieces” (Curtin 1993: 22). However, the creation of the European and Monetary Union (EMU), and in particular of the euro since the Treaty of Maastricht of 1992, has created what has become soon a traditional element of a two-speed Europe besides other areas of multi-speed integration, like the Schengen *aquis*, or, after the Treaty of Lisbon, the two cases of enhanced cooperation on the divorce and the European patent (Cantore 2011: 10 ff.). The divide between Eurozone (19) and non-Eurozone (9) countries, because of the Treaty basis (Title VIII, Chapter 4 TFEU and Protocol n. 14), of EU secondary legislation and of the legal developments following the financial crisis in the EU, has become so deep-rooted that even a permanent differentiation in the composition of EU institutions has been proposed as to provide the Euro area with a proper institutional equipment (Piris 2012: 125 ff.). Although the Eurozone is in principle open to all Member States that meet the convergence criteria and has significantly grown since 2007, it is already acknowledged that some countries, namely the UK, Denmark and Sweden, are very unlikely to exercise the opt in. For these reasons the discourse on the two-speed integration has superseded the



narrative of the multi-speed Europe and has become a dominant feature of the European public and academic debate (Diether Ehlermann 1999: 246-270; Beukers 2013: 7-30).

How does the two-speed integration affect the position and the relationship between Eurozone and non-Eurozone national parliaments? First of all, it is not really clear in the case of Denmark and Sweden to what extent the decision not to join the Euro area was and is supported by parliaments as institutions. In Sweden, for example, the 1994 Treaty of Accession to the EU, whose ratification was authorized by the Parliament, in principle obliges the country to join the euro once the convergence criteria are met. However, as a consequence of a referendum held in 2003, Swedish citizens rejected this option. Also in Denmark the decision was subject to a prior referendum, which defeated the accession to the Eurozone in 2000, while the Parliament and the Government again in 2007 and in 2014 have supported the idea to call new referenda in the view of adopting the euro.^{IV} However, given the “will of the people” and the adverse financial situation in the Eurozone, the Swedish and the Danish Parliaments and the Executives have not taken further action in this regard.

Compared to Eurozone parliaments, non-Eurozone legislatures keep wider room for manoeuvre in shaping their economic and fiscal policies. For instance some Regulations that form part of the six-pack and the two-pack do not apply to countries outside the Euro area.^V As a consequence the parliaments of the latter countries enjoy – alongside with their executives – a higher degree of discretion in the budgetary procedures. Moreover, in the peculiar case of the UK, according to Protocol no. 15 annexed to the Treaty of Lisbon, the general obligation for all Member States to avoid excessive deficits is weakened for this country by the lack of sanctioning powers of the Council and the Commission against it, should the UK Parliament not comply with the recommendations. By the same token, the UK Parliament is also exempted from the incorporation of the additional Medium Term Objective adjustment rules of the six-pack.

Nevertheless, some non-Eurozone parliaments have expressed concerns regarding the domestic implications in their countries of Euro-crisis measures that, in theory, are not applicable in their jurisdictions. An example is given, again, by the UK Parliament which has recently considered EU legislation establishing a Banking Union as triggering considerable spillover effects over non-Eurozone countries (UK House of Lords 2012: 22-24; UK House of Commons Library 2014: 3). In the presence of a EU internal market of



financial services which includes all Member States (and a financial centre like the City of London), it is rather difficult to limit in practice the consequences of purely Eurozone measures dealing with financial institutions and flows just to Eurozone countries. However, under these circumstances, national parliaments outside the Euro area do not retain any control nor information that could enable them to oversee the structuring and functioning of the Banking Union, as this falls outside their remit and that of their governments in the light of a previous choice, like in the UK, or because the Member State at stake does not fulfill the convergence criteria to join the euro (see section 3).

Conversely, there have been also situations in which non-Eurozone parliaments could potentially block the adoption of measures addressed exclusively or primarily to Eurozone Member States. The entry into force of the amendment to art. 136 TFEU is a paramount case.^{VI} Art. 136 TFEU is placed under the chapter devoted to “Provisions specific to member states whose currency is the euro” and thus it is clear who are the addressees of the amendment. As is well known, this Treaty change was meant to provide a legal basis in the Treaties for a permanent and collective rescue mechanism amongst Eurozone Member States, under strict conditionality, to preserve the stability of the common currency, the European Stability Mechanism (ESM).^{VII} The use of the simplified revision procedure (art. 48.6 TEU), which allows the European Council Decision 2011/199/EU to enter into force subject to national constitutional requirements and hence to avoid cumbersome ratification procedures, involves the unanimity of the Member States. In practice, even if a formal ratification is not requested, a parliamentary deliberation or the approval of parliamentary legislation is always provided by national constitutional law, in spite of the simplified nature of the Treaty change (Denza 2013: 1348). This implied, in turn, that although not directly affected by the amendment of art. 136 TFEU^{VIII} a single non-Eurozone Parliament was able to veto the amendment and to prevent or delay its entry into force also for Eurozone countries.

The process of adoption of the Treaty amendment was successfully completed by all EU countries, with some delay in the Czech Republic due to the refusal of the Head of State to sign the Act of approval and not because of parliamentary filibustering. The revision finally entered into force on 1 May 2013 (after that of the ESM Treaty).^{IX} This Treaty change could have represented the first occasion to implement section 4 of the UK European Union Act 2011 that foresees the cases in which the use of the simplified



revision procedure not only requests a parliamentary approval, in the form of an Act of Parliament, but also attracts a referendum (Armstrong 2012: 3).^x The UK Government and Parliament agreed to consider the amendment to Article 136 TFEU as falling outside section 4 since the Decision was explicitly addressed only to Eurozone countries. Consequently the Government laid a statement before the Parliament under section 5 of the European Union Act 2011 as to invoke the exemption and the UK Parliament finally passed the European Union (Approval of Treaty Amendment Decision) Act 2012 in September 2012 (UK House of Common Library 2012: 3). This does not mean that there were no oppositions in the Parliament against the governmental proposal not to hold a referendum because there was not transfer of powers from the UK to the EU. In particular in the Second Chamber Lords tabled amendments – eventually rejected – at the committee stage to the Government Bill for the approval of the Treaty change and concerns were expressed regarding the drawbacks for the UK following the entry into force of new art. 136 TFEU, especially the threat of a marginalization of the country from the single market as a new ‘Eurozone alliance’ would have dominated the economic policies of the EU (Hancox 2014).

Problems with the approval of art. 136 TFEU amendment were raised also in another non-Eurozone Member State by a parliamentary group, who challenged *ex post* the compliance of the Ratification Act with art. 48.6 TEU and with art. 90 of the Polish Constitution, because of the national procedure followed in spite of the content of the Treaty amendment. In particular, the parliamentary opposition contended that Decision 2011/199/EU extended EU competences and especially the jurisdiction of the Court of Justice and the Court of Auditors. By contrast, art. 48.6 expressly forbids any Treaty change entailing an increase of the EU competences to be carried out through simplified revision procedures. Furthermore, should such an extension occur the ratification of the competence conferral beyond the State authority, according to Polish constitutional law (art. 90 Polish Const.), must be approved in each Chamber by two thirds majority or by a national referendum, whereas the challenged Ratification Act was passed pursuant to art. 89 of the Constitution, i.e. by simple majority in both Chambers (Granat 2014). The Polish Constitutional Court held that “the addition of Paragraph 3 to Article 136 of the TFEU did not confer any new competences on the Union” and also relied on the *Pringle* case law of the Court of Justice to support this statement.^{xi} Indeed, although the suit by the



parliamentary group was filed before the judgment in *Pringle* was delivered, the Polish Constitutional Court solved the case only months after, on 26 June 2013. In this case it is clear that the timing – after the Treaty amendment entered into force on 1 May 2013 – and the outcome of the Polish Court’s decision prevented any potential clash with the use of the simplified revision procedure and with the completion of the process of approval of the Treaty change.^{xii} Anyway the challenge of unconstitutionality of the parliamentary opposition could also have resulted in a different outcome, with the effect that a parliamentary group and hence a court of a non-Eurozone country would have threatened a veto to art. 136.3 TFEU amendment. The case of Poland reveals that even if the majority of the Parliament supported the adoption of the measure, it is the power of a Constitutional Court, suited by a parliamentary opposition, by citizens or other authorities, to review the compliance of such decision with the Constitution, which can make the difference and can detect, for example, that the ratification procedure followed violates the rights of the Parliament.

Nevertheless the Polish Parliament and authorities in general, although Poland is not a Eurozone Member, were understandably very engaged in the Treaty revision procedure as this country is committed to the convergence process towards the euro and in a few years, once joined the single currency, Decision 2011/199/EU, can also affect Poland’s participation in the monetary union. By contrast, a similar commitment is lacking on the part of the UK Parliament, which indeed debated on the approval of art. 136 TFEU amendment not as if one day the UK could have been concerned as a Eurozone Member by its entry into force, but rather in terms of the present negative implications for the UK economy as a non-Eurozone country.

3. Differentiation among non-Eurozone parliaments

Non-Eurozone parliaments stand on very different positions vis-à-vis the monetary union as a consequence of the commitment the Government takes in order to adhere to the convergence criteria. In spite of the fact that non-Eurozone countries are labeled all together as “Member States with a derogation” (art. 139 TFEU) their status is highly asymmetric. Denmark and the UK do have a “permanent” opt out – revocable at any time upon initiative of the Member State concerned – recognized in the Treaties, whereas



Sweden enjoys it *de facto* since 2003. The remaining 6 Member States,^{XIII} as Lithuania joined the Eurozone on 1 January 2015, are willing to become part of the euro area, but are presently coping with a temporary and compulsory opt out deriving from the lack of compliance with the conditions imposed by art. 140 TFEU and protocol n. 13. In contrast with the UK, Denmark and Sweden, their non-Eurozone status does not depend on a voluntary choice of the national Parliament and Government, but is rather imposed by the EU.

Two main cases of differentiation among non-Eurozone parliaments occurred in the last few years appear as particularly significant. The first refers to the strict conditionality some of these parliaments, in Hungary, Latvia and Romania, were subject as an effect of the financial assistance, and in particular balance of payments assistance, received from the EU and from the International Monetary Fund (IFM) and the World Bank already in 2008. The second case, instead, arises from the signature and ratification of the Fiscal Compact.

3.1. Non-Eurozone parliaments in Member States receiving financial assistance

While benefiting from financial assistance, the role of the Hungarian, Latvian and Romanian Parliaments was severely undermined, as they were not informed by their executives during the negotiations nor were allowed to authorize the ratification of memoranda of understanding (MoU). Parliaments were just involved *ex post* for the implementation of the measures agreed by the executives in exchange for the assistance (Dojcsák 2014; Rasnača 2014; Viță 2014).

In particular Latvia, which later on became a Eurozone country on 1 January 2014, from December 2008 to 2012 received financial assistance from several sources: the IFM, the World Bank, the EU through an *ad hoc* balance-of-payments assistance programme negotiated with the European Commission,^{XIV} bilateral loans from Sweden, Denmark and Estonia, Czech Republic, Poland, Norway – none of them a Eurozone country at that time – and Finland. Although the financial assistance instruments have not been directly challenged before the Constitutional Court, “case No. 2009-43-01 to some extent can be seen as an indirect challenge”, although the case arose from pension cuts requested in order to obtain assistance (Rasnača 2014: VIII.8). Relying on the cardinal principle of separation of powers the Latvian Constitutional Court said that general decisions on receiving international loans and the conditions to met are to be agreed by the Parliament.



The executive can be delegated to take specific actions and the implementation, but within the framework set by the legislature whereas in the case at stake the Parliament was not even given the opportunity to authorize the Cabinet of Ministers to start the negotiations with the international lenders. However, the Court added that regarding pension cuts, no specific requirement was ordered by the international obligations contracted, which only asked for a general reduction of the national budget.

In turn the conditions posed by international lenders could not be invoked as a justification for the reduction of pensions since this was a deliberate choice of the Parliament and Government, who did not take into account other less restrictive means for the people in order to limit the budget. The cuts were thus considered in violation of the principle of proportionality and declared unconstitutional. In spite of the general acknowledgment of the parliamentary role when negotiating international financial assistance programmes in the name of the separation of powers, the Latvian Constitutional Court sanctioned the action of a Parliament which arguably could be seen to enjoy discretion in the adoption of fiscal and structural measures. The pressure to which the Parliament was subject, at the risk of not receiving further installments, left a very modest room for manoeuvre. Not only had the Parliament been already marginalized, but the Court contributed to weaken its position further.

3.2. Non-Eurozone parliaments and the Fiscal Compact

The Fiscal Compact (FC), i.e. the Treaty on Stability, Coordination and Governance in the EMU, an international agreement agreed outside the framework of EU Law, but intended to be incorporated into it in five year time (art. 16 FC), entered into force on 1 January 2013 and was signed by 25 of the current 28 Member States, the UK, the Czech Republic and Croatia deciding not to become Contracting Parties.^{xv} Actually the option for the negotiation of an intergovernmental agreement rather than an amendment to EU Treaties was chosen when the UK declared it would have never signed such an amendment aiming to strengthening the coordination and the control over national economic and fiscal policies and to introduce, preferably at constitutional level, the balanced budget clause into domestic legal systems.

No other legal instrument of the Euro crisis has triggered a wider range of different legal status and domestic responses than the Fiscal Compact. This is patent not just for the



traditional divide between Eurozone and non-Eurozone countries, but also within the Eurozone “club” (section 5) and even more so among the States outside the Euro area.

While the UK has firmly confirmed its refusal to sign such an agreement, the new Czech Government on 24 March 2014 committed itself to become a new contracting party. However, such a decision requested a parliamentary approval, which has not been given yet, and also it remains unclear which Titles of the Fiscal Compact will bind the Czech Republic. As well known, ratifying non-Eurozone countries are automatically bound only by Title V of the Fiscal Compact, on the participation in the Euro-Summit – open to all contracting parties following the claims in particular of Poland against a first version of the agreement which excluded Member States outside the Euro area –, unless they attach a declaration to the instrument of ratification stating they want to be bound by the fiscal provisions (Title III) and by the enhanced economic coordination provisions (Title IV). Interestingly the (previous) Czech Government, although it did not sign the Fiscal Compact already in 2012, it tabled a set of constitutional amendments in Parliament which would have implemented most of the six-pack and of the Fiscal Compact provisions (Dumbrowsky 2014: III.2). Nonetheless since then the Parliament has refused to endorse these constitutional amendments, since this would result in a serious limitation of parliamentary autonomy in fiscal matters, for example concerning the adoption of compulsory measures whenever the public debt reaches the threshold of 45-60% of the gross domestic product (“debt-brake”). Thus it appears there is an opposition on the part of the Czech Parliament to accept further constraints.

Some non-Eurozone countries, like Denmark and Romania, declared themselves to be bound by the Fiscal Compact in its entirety, whereas Bulgaria committed itself to respect the whole treaty except for Title IV on economic policy coordination and convergence, which requests, for example, to discuss *ex ante* with the other contracting parties all major national economic reforms (art. 11). This implies for the Danish, the Romanian and – slightly less – for the Bulgarian Parliaments to be subject to a series of new boundaries in the budgetary cycle and in economic reforms which would have not been imposed upon them otherwise, as their countries are not part of the Eurozone. Perhaps more striking is the case of Lithuania, which had formally agreed to comply only with Title V of the Fiscal Compact, but passed a constitutional amendment to introduce, among other things, the balanced budget rule to be effective from 1 January 2015, i.e. when the country has joined



the Eurozone.^{XVI} Hence the Parliament of Lithuania is already prepared to cope with constitutional fiscal constraints as soon as the status of the country changes vis-à-vis the EMU, although such a constitutionalization is not compulsory based on the Fiscal Compact.

By contrast, other countries, like Sweden and Poland, also for reasons linked to the preservation of parliamentary powers and “fiscal sovereignty”, although signed the Fiscal Compact, they remain bound just to Title V. Especially the Swedish Government has repeated on several occasions, in particular during parliamentary debates, that Sweden is not legally bound by any Fiscal Compact’s provision; a statement that can raise doubts about its legal consistency, given the signature and the ratification of the treaty. The Government presented the Swedish adherence to the Fiscal Compact as a mere strategic and political move in order to protect the influence of the country in the EU (Södersten 2014: IX.1). It appears, however, that the rhetoric used by the Swedish Government with the *Riksdag* (the Parliament) about the lack of legal implications on national fiscal policy was instrumental to obtain – as it happened – the approval of the Fiscal Compact by a simple majority in the legislature, against the opposition of many parliamentary groups which tried to defy the government proposal to ratify the treaty. MPs claimed, for example, that the signature and the ratification of the Fiscal Compact created legal consequences for Sweden in terms of austerity policies and a threat also came from the fact that the country does not have a formal and permanent derogation from EMU (Södersten 2014: IX.3).

The legal consequences of the ratification of the Fiscal Compact, even if Poland, like Sweden, bound itself only to Title V, were very clear to many Polish MPs both in the Lower (*Sejm*) and in the Upper Chamber (*Senat*). First of all on 31 January 2012 – before the Fiscal Compact was signed – a group of deputies from the *Sejm* called on the Parliament to schedule a referendum on the ratification of the treaty, but there was no follow up of this proposal. Secondly, once the bill authorizing the ratification of the Fiscal Compact was presented by the Government, claiming that the conditions for the approval by two thirds majority of each Chamber were not met – likewise the amendment to art. 136 TFEU (section 2), a group of deputies, followed one month later by a group of senators, challenged the validity of the Fiscal Compact and of the Ratification Bill before the Constitutional Court (joint cases K 11/13 and K 12/13). Most claims of alleged violation of the Constitution dealt with the illegal transfer of powers from the Parliament to the



European Commission and the EU in general, with the limitation of the scope of parliamentary decisions, for instance regarding the “golden rule” in view of the prospective accession to the Eurozone, and of the role of national courts compared to the Court of Justice of the EU.

While the case is still pending before the Polish Constitutional Court for the decision on the merits, it is worth highlighting how different is the approach taken by the two countries, Poland and Sweden, in particular by their Parliaments, on the domestic legal implications of the Fiscal Compact, even if the commitment is formally the same. The avenues granted by the Polish Constitution to parliamentary minorities to challenge the validity of treaties, bills, and acts before the Constitutional Court, like in the case of art. 136 TFEU amendment, allows to engage in a more careful reflection on the implications of Euro-crisis measures on parliamentary powers and autonomy in non-Eurozone countries (yet).

4. Differentiation among Eurozone parliaments

4.1. The Treaty on the European Stability Mechanism and the national constraints posed by Parliaments and Courts

The ESM is an international financial institution (art. 1 ESM Treaty), a permanent rescue fund financed by all Eurozone countries according to their own capacities and based on the intergovernmental agreement signed on 2 February 2012 and entered into force on 27 September 2012.^{xvii} Although it is not part of EU law and besides its main decision-making bodies, the Board of Governors and the Board of Directors, the ESM resorts for its functioning also to EU institutions, like the Commission and the ECB, and, in the event of disputes, to the Court of Justice.

The ESM can give rise to significant asymmetries among Eurozone parliaments; directly and indirectly, although the ESM Treaty does not provide any involvement for national parliaments.^{xviii} A first source of asymmetry is defined by the derogation to the unanimity rule for the decisions of the Board of Governors and the Board of Directors, where each Eurozone country has one representative. “An emergency voting procedure shall be used where the Commission and the ECB both conclude that a failure to urgently adopt a decision to grant or implement financial assistance (...) would threaten the



economic and financial sustainability of the euro area” (art. 4.4 ESM Treaty). On these occasions decisions are taken by a qualified majority of 85% of the votes cast as every Eurozone country is given a weighted vote depending on the share capital they have in the fund, which derives from how much they contribute to it.^{XIX} As observed, when the emergency procedure is followed, “only the three largest Euro States – Germany, France and Italy – retain their veto power” (Tuori & Tuori 2014: 197), in contrast with the usual unanimity rule applied. Indeed, the share capital for the other countries is minimal, about ten times smaller (except for Spain), compared to that of Germany, France and Italy. Whether the parliaments of these three states are able to bind the action of their representatives in the ESM for this purpose will be examined shortly; first of all it is worth recalling the reaction of parliaments and courts in the other Eurozone countries to this first asymmetry introduced as a derogation.

A very significant position was taken by the Finnish Parliament, through its Constitutional Law Committee, already during the negotiations for the ESM Treaty in 2011. At that time the emergency procedure and the derogation to the unanimity rule was deemed to apply, according to a first version of the Treaty, not just to decisions granting financial assistance, but also to those dealing with the liability of the contracting parties like calls for authorized unpaid capital (Tuori & Tuori 2014: 198). In December 2011, the Constitutional Law Committee was asked to decide on the constitutionality of the ESM Treaty, as signed on 11 July 2011 (1st version). The Committee considered that, because of the scope of the provisions on the emergency procedure, the ESM Treaty as it stood and the national law on its incorporation had to be passed by the Finnish Parliament by qualified majority rather than by simple majority, i.e. with the same majority requested for the ratification of the EU accession Treaty given the transfer of fiscal and budgetary powers from the Parliament deriving from the Treaty at stake.^{XX}

Lacking a Constitutional Court in Finland, the main body entitled to review the compliance of bills, Treaties and EU-related measures with the Constitution, also upon Parliament’s request, is precisely the Constitutional Law Committee, a parliamentary body composed of MPs, according to a proportional representation of political groups in the *plenum*, and supported by constitutional law experts, usually academics (Leino-Sandberg & Salminen 2013a: 453). The Opinion of this Committee on the initial version of the ESM Treaty pushed the Finnish Government to ask for a revision of the contested provisions as



to limit the scope of the emergency procedure and, indeed, the revised version of the ESM, finally signed in February 2012, does not refer to the liability of Member States so that the potential encroachment with the Finnish Constitution was removed. The constitutional issue about the impairment of parliamentary powers which arose from the original extension of the emergency procedure to Member States' liability was the following: given that the Finnish share of the authorized stock capital of the ESM amounts to more than one fourth of the national budget, the inability of Finland and of the national parliament to control and even veto such financial flow, because of the derogation of the unanimity rule, would have violated the budgetary powers of the Parliament, granted by the Constitution, as well as national sovereignty (Tuori & Tuori 2014: 197).

In the new Opinion of the Constitutional Law Committee on the final version of the ESM Treaty, the Committee considered the constitutional problem overcome since all major decisions concerning the management of the fund do allow the Finnish Government to exercise a veto power.^{XXI} Furthermore, in the Committee's view, parliamentary powers are protected by the application of art. 96 Fin. Const., which subjects the action of the Finnish representative – in this case, within the Board of Governors – to the previous authorization and mandate of the Grand Committee, another parliamentary standing committee competent for the EU affairs.^{XXII}

In the case of Finland, the role played by the Parliament in the definition of the procedures of the ESM Treaty and in redressing the problem of the asymmetries among States and Parliaments has been noteworthy. Because of the Finnish Constitution, the Opinions of the Constitutional Law Committee, its powers, and the possibility to have a say on the constitutionality of the ESM Treaty, contributed to shape the content of the Treaty itself.^{XXIII}

A similar problem about the asymmetry triggered by the emergency procedure under the ESM was raised also in Estonia, since this country subscribed 0.186 % of the ESM fund. Hence its Parliament has remained unable to control or veto any new guarantee of financial assistance decided by the Board of Governors at least by 85% majority under the conditions laid down by art. 4.4. of the ESM Treaty. The Supreme Court of Estonia was asked by the Chancellor of Justice to decide whether the vote by qualified majority under the ESM as to what concerns the lack of national parliamentary control on the procedure was unconstitutional. In contrast with Finland, it has to be noted that the Supreme Court



of Estonia was involved only after the final version of the ESM was finally signed by the Eurozone countries, in 2012.

In a highly controversial judgment – 10 of 19 justices, as the Court sat *en banc*, submitted five dissenting opinions on different points raised by the case – the Supreme Court found the principle of a democratic state subject to the rule of law and, in particular, the financial competence of the Estonian Parliament (*Riigikogu*) protected by the Constitution (arts. 65, 115.1, 121.4) violated as well as the financial sovereignty of Estonia (art. 1 Const.).^{xxiv} According to the majority of the Court, both parliamentary prerogatives and state sovereignty were restricted by the derogation of art. 4.4 of the ESM Treaty as their discretion was constrained. Nevertheless the Court subjected these infringements to the proportionality test and, in turn, the constitutionality of the ESM was upheld. The Court considered that art. 4.4 ESM pursued a legitimate aim, to safeguard the financial stability of the euro area, including Estonia. Moreover, the fulfillment of this objective, which in theory would cause an interference with constitutional parliamentary prerogatives is justified by the need to protect, through financial stability, other “substantial constitutional values (§ 208)” like the protection of fundamental rights and freedoms enshrined in the Preamble and in art. 14 of the Constitution of Estonia. The Court concluded that, based on the proportionality test accomplished, the ratification of the ESM Treaty did not cause a “serious” interference with the Constitution (Ginter 2013: 335-354). However, “ratification of an international agreement may give rise to a need to amend other acts which are related to carrying out the international agreement” – the Court added –, which implies the possibility to regulate the right of the *Riigikogu* in a manner as to strengthen its control over the representative of Estonia sitting in the Board of Governors, even if he has not veto power on the application of art. 4.4 of the ESM Treaty. As an example, the Court mentioned the opportunity to give the European Union Affairs Committee of the *Riigikogu* the power to confer a binding mandate upon the Estonian representative;^{xxv} an option that was taken into account later on when the Act on Ratification and Implementation of the ESM Treaty was adopted.

Compared to the Opinion of the Finnish Constitutional Law Committee, the Supreme Court of Estonia, perhaps also because of the timing of the judgment, was not able to redress the problem of the asymmetric powers of Eurozone parliaments under the ESM emergency procedure and, by using the proportionality test, found a way to claim a



limitation of parliamentary prerogatives without preventing the ESM Treaty ratification. The solution – the Court found – lied in enhancing parliamentary powers at domestic level in order to control the functioning of the ESM properly.

Although the ESM Treaty was adjudicated also before other Courts in the Eurozone,^{xxvi} the problem of the asymmetric powers of national parliaments, in particular in the use of the emergency procedure, did not form part of further decisions. Even in the *Pringle* saga, although initiated by a member of the Irish Parliament, Mr. Thomas Pringle, the issue of the parliamentary powers went almost disregarded. It was not raised by the Supreme Court of Ireland in the request for a preliminary ruling and thus the Court of Justice did not take it into consideration.^{xxvii} Mr Pringle in his challenge before the Irish High Court and in the appeal before the Supreme Court questioned the so-called “transfer of powers claim”, but from a national constitutional law perspective, namely the fact that the ESM Act, implementing the ESM Treaty, could entail an unconstitutional delegation of legislative authority from the Parliament to the Government.^{xxviii} The Supreme Court did not deal with this problem, not considered urgent for the ratification of the Treaty as it affected the internal implementation of the ESM, once the ratification has been completed.

Here a second asymmetry among Eurozone Parliaments arises regarding the ESM, besides the first – just analyzed – deriving from the share capital of each country in the fund and the obvious asymmetry concerning debtor and creditor countries (see section 4.2). The second important asymmetry concerns the implications of national constitutional law on the functioning of the ESM and, especially, how the constitutional prerogatives of some Eurozone parliaments might block the decision-making in the Board of Governors by forcing their representatives in the Board to exercise a veto.

Some legislatures, like the Belgian, the Irish, the Italian and the Spanish Parliaments, for example, under national law do not retain any deliberative powers in the “ordinary” application of the ESM Treaty as to what concerns decisions to grant financial assistance and the disbursement of tranches, as the assistance to bailout countries is granted by installment.^{xxix} Although these Parliaments have been provided with the power to scrutinize and oversee the action of their Governments as well as the right to obtain information for what concerns the management of the ESM, they are not able to bind their representatives within the governing bodies of the ESM nor their prior authorization is requested before the representative takes a commitment.



Other legislatures, instead, “taking advantage” of the unanimity rule usually applied in the ESM, can veto a decision of its governing body, regardless of the share capital subscribed. Although allowed by the ESM Treaty, this is quite an extreme provision, since one single parliament is able to block the functioning of a solidarity fund like the ESM is. While Germany is also the largest contributor to the fund,^{xxx} by far the German *Bundestag* is granted the most extensive veto power by national law compared to other Parliaments (Höing 2013: 255-280; Pinelli 2014: 9). This is so because of a peculiar combination of constitutional case law and legislation enacted to implement it.

The German Constitutional Court was suited by several complaints of *Die Linke*, a far-left parliamentary group, through the *Organstreit* procedure, as well as by individual complaints,^{xxxI} which ended up in different cases. In a series of judgments, from 7 September 2011, on the financial aid for Greece, till the latest decision of 18 March 2014, when the Court delivered its final decision in the main proceedings on the ESM Treaty and the Fiscal Compact, the German Constitutional Court has requested an incremental strengthening of the rights of the *Bundestag* in the management of the ESM.^{xxxII} Based on a peculiar reading of art. 38 GG, on the right of the German citizens to elect their representatives in the *Bundestag*, in conjunction with art. 20 GG (the democratic principle) and art. 79.3 GG (the eternity clause), developed since the Lisbon case,^{xxxIII} the German Court considers that the participation of Germany in a permanent rescue mechanism cannot impair the overall budgetary responsibility of the *Bundestag* towards the people (*ex multis*, Wendel 2014: 263-284). Hence, the information right of the *Bundestag* “against” the Government, the transparency of the parliamentary procedures and the decision-making powers of this Chamber have been enhanced through constitutional case law and subsequent legislative amendments.

In particular the judgments of 12 September 2012 and 18 March 2014 have defined the conditions under which a prior authorization of the *Bundestag* is requested in order for the German representative to support a proposed decision of the ESM governing bodies.^{xxxIV} Lacking such a parliamentary authorization, the German representative has to vote against, which, in case of unanimity rule, implied a veto on the ESM decision. Amongst the circumstances that require the prior consent of the *Bundestag*, since the overall budgetary responsibility of the Parliament is affected, are, for instance, those: granting financial support to one of the contracting parties of the ESM; accepting a financial assistance



facility agreement and the corresponding MoU; changing the authorized capital stock and the maximum lending volume. In all these cases it is the plenary of the *Bundestag* who should give its consent.

To them the circumstances under which a prior approval of the budget committee of the *Bundestag* is compulsory must be added, so that the German representatives in the ESM governing bodies can hardly take a position without a binding parliamentary mandate. For example, the budget committee has to authorize decisions on the provision of additional instruments without changing the total financing volume of an existing financial assistance facility as well as the acceptance or material change of the guidelines on the modalities for implementing a rescue package.

Depending on the scope of the decision, being the plenary or its committee in charge, the *Bundestag* cannot “transfer its budgetary responsibility to other entities”, i.e. the ESM, “through imprecise budgetary authorisations”.^{xxxv} These *ad hoc* authorizations that the German Constitutional Court has listed and the legislator included in the Act for Financial Participation in the European Stability Mechanism do not simply limit Government’s discretion in the framework of the ESM, but could also impair the effectiveness of the ESM (e.g. by vetoing the change of the conditions under which financial assistance was granted as to adapt on a new economic situation) and the resort to this solidarity fund by other Eurozone parliaments and states. This unilateral strengthening of parliamentary powers, needed to comply with the German Basic Law, according to the Court, is however the source of a troublesome asymmetry between the German *Bundestag* and the other parliaments. The asymmetry derives from a national constitutional choice, which however could have European implications or at least effects for the Eurozone. This phenomenon is not entirely new, however. Some Member States, even Italy for instance, have decided to involve their Parliaments and to assign them veto powers or the power to activate a suspension of the deliberation in the Council –through the so-called “emergency brake procedure”(e.g. articles 82.3 and 83.3 TFEU) – in many more cases than those formally foreseen by the Treaty of Lisbon, e.g. article 42 TEU or 311 and 352 TFEU. A veto from the Parliament prevents the Government from voting in favour of the measure in the Council whereas the use of the “emergency brake” by the Parliament binds the Government to stop the discussion in the Council and to refer the dossier to the European Council (Piccirilli 2014: 219).



Some Parliaments (and Governments) have tried to emulate the model of the *Bundestag*, although the former have not being granted powers as strong as those of the German lower chamber. For example, the French Parliament has to approve by law the payment of any installment under a financial assistance programme in operation; the Estonian *Riigikogu* and the Finnish *Eduskunta* have to give a prior authorization before any decision to grant financial assistance is taken and the Parliament of Estonia also enjoys a veto power on draft MoU, before they are agreed; a power normally delegated to its European Union Affairs Committee, unless the Committee itself asks to defer the decision to the plenary. Although national law in these Eurozone states grant to these Parliaments veto powers on some significant subject matters, these powers are not as extended as those of the German *Bundestag*, which for example is also asked to give its assent on amendments to MoU.

Perhaps the closest example to Germany as for the national parliamentary powers on the ESM is Austria, where a constitutional amendment was adopted in 2012 aiming to establish a role for the Parliament in the decision-making process of the ESM Treaty (Jaros 2014: VIII.6). Indeed, part of the list of *ad hoc* parliamentary authorizations provided by the German Constitutional Court can be found also in the text of the Austrian Constitution (arts. 50b and 50c B-VG) and are further detailed in federal legislation. Art. 50b B-VG allows the Austrian representative in the ESM to agree or abstain, also in the case of special urgency, only if the National Council (the lower chamber) enables him to do so as to what concerns granting financial assistance to another Member State; amendments to the rescue package agreed; change of the authorized paid-in capital, of the authorized but not-paid in capital, and of the overall lending capacity of the ESM (Puntscher Riekmann & Wydra 2013: 579).

The interplay between ESM Treaty provisions and national constitutional law, whereby some Eurozone countries, namely Germany and Austria, assign veto powers to their parliaments over the functioning of the ESM can deeply affect the smooth operation of the fund for all remaining Euro States, especially those receiving financial assistance. The equality among Eurozone countries and parliaments is jeopardized by the choices taken at domestic level, in the light of the national contributions to the fund on which parliaments would lose their control once the resources are transferred to the ESM. Such an outcome is usually deemed a consequence of the intergovernmental, rather than Community-based, nature of the ESM as a financial institution, of the disproportion in the size of the national



share capital and of the current clear-cut divide between current creditors and debtors amplified by the dominant narrative of the austerity. Indeed, the Parliaments of the Eurozone bailout countries that benefit from the ESM are not in a position to decide on the use of the rescue fund, as they are subject to strict conditionality. What is striking is also the asymmetry created among Parliaments of Eurozone net contributors to the ESM, just because of constitutional provisions and case law which make some of them veto players and the other potential victims of a “veto game”. The situation could only worsen, should the number of “Parliaments-veto players” within the ESM increase following national reforms.

4.2. The case of the rescue packages: different constitutional designs, different national responses

Because of a particularly serious financial crisis which could affect the stability of the entire Euro area as well as trigger a default of the Member State concerned, some Eurozone countries have been forced to request a bailout to international and European authorities – the Commission and the European Central Bank (ECB) – and have received financial support (Greece, Ireland, Portugal, Italy, Spain, Cyprus). The Parliaments of these countries have been subject to more significant financial constraints compared to the Parliament of non-Eurozone bailout countries like Latvia and Romania. In addition to strict conditionality, the former also had to comply with the ordinary fiscal rules imposed by the six-pack, the two-pack and the Fiscal Compact, with some exceptions.

The form and the substance of the financial support or assistance received varied a lot anyway, so that it is not correct to consider Parliaments of the Eurozone bailout countries as a uniform category. For example, whereas Italy just received financial support by the ECB through the Securities Market Programme for a few months in 2011 and the conditions imposed upon its legislature in terms of reforms to be passed still remain unclear beyond the mere indications we can read from the ECB letter of 5 August 2011,^{xxxvi} from 2011 till 2013 Ireland received financial assistance by the EU and the IMF and the country is still under post-programme surveillance, which limits parliamentary autonomy in fiscal matters.

For all these countries and Parliaments there is certainly a degree of subjection imposed from outside – international and EU institutions – but, notwithstanding the pressure of



economic and financial contingencies, a wide or narrow margin of discretion remains in place for national political institutions, i.e. Parliaments and Governments, when implementing the conditions set out in exchange for the rescue package. A lot depends on the severity of the economic situation, but the institutional response to the implementation of the rescue packages at domestic level is primarily influenced by Constitutions and national constitutional arrangements. This is shown by looking at the case of the Parliaments in two Eurozone countries receiving financial assistance: their opposite reactions do not appear to derive from the content of the financial and assistance programme in itself, but rather on the national form of government and on the role played by courts, once again. Thus, the asymmetries among national parliaments of Eurozone bailout countries do not depend just by the scope and the extent of the rescue package, but also, and even more so, by national constitutional law.

Take the case of Cyprus, whose government, given a serious banking crisis, on 16 March 2013 obtained from the Eurogroup support for a financial assistance programme of 10 billion euro and from the IMF for a possible loan. Immediately after, the Cypriot government, without any consultation with the House of Representatives, committed to adopt budgetary measures in order to raise revenues and presented to the House a bill which would have established a one-off stability levy on all bank accounts (insured and uninsured) regardless of the warning by the governor of the Central Bank of Cyprus not to withdraw money from the bank accounts up to 100,000 euro. The bill was rejected by the Parliament on 19 March 2013 and the Government was obliged to re-negotiate the package with the Eurogroup. The new scheme for a financial and assistance programme provided for fiscal downsizing and consolidation of the banking sector, privatization and structural reforms as well as for a lower levy on uninsured deposits. This time the scheme was previously debated in the House of Representatives and, in contrast with what happened with the Fiscal Compact (ratified by an executive decree), the House was called to approve the law ratifying the Financial assistance facility agreement and the MoU between the ESM, the Republic of Cyprus and the Central Bank of Cyprus (art. 169.2 Cypriot Const.). The law was approved by a very slight majority, 29 MPs in favour and 27 against.

Why did the Parliament have the strength to overturn the commitment taken by the Government with the Eurogroup and could force it to re-negotiate the term of the agreement? Because of the presidential form of government, which is unique to Cyprus in



the EU. The President of the Republic, directly elected by people (together with the Vice-President), is at the same time the head of State and the head of the executive and appoints and dismisses the members of the Council of Ministers (arts. 37-38 Const.). No confidence relationship between the President and the House of Representatives is in place and both are elected for five years. By the same token, none can dissolve the House of Representatives beforehand but the House itself by absolute majority including at least one third of the Representatives elected by the Turkish Community (art. 67 Const.). These constitutional arrangements imply that the House is free to express different political directions from the Executive and the latter cannot overlook, as it happened in March 2013, the will of the Parliament, which is not, legally speaking, under the Government's control. It does not mean that, where a confidence relationship is in place the Parliament cannot overturn Government's plans, but this is much more unlikely to happen.

Such an outcome, however, was triggered in March 2011 in Portugal, which has a semi-presidential form of government resembling more parliamentary systems than the French model based on a strong dual executive (Miranda 1998: 211-223). The unicameral Parliament rejected the Government's amendments to the Stability and Growth Pact 2011 and, while Portugal was already in the middle of a serious financial crisis and a speculative attack, the Prime Minister resigned. However, given the economic situation, before he left his office, the resigning Prime Minister notified a request for a bailout to the European Commission and the IMF and, while the Parliament was dissolved waiting for new elections after the Government's defeat, the EU and the IMF granted financial assistance to Portugal, through the European Financial Stability Facility (EFSF), then replaced by the ESM, and the European Financial Stabilisation Mechanism (EFSM),^{xxxvii} besides the IMF.

The challenge launched by the Parliament against the Government in March 2011 eventually backfired the legislature itself. Indeed, the dissolution of the Parliament, which follows the Government's defeat and resignation, did not allow the *Assembleia da República* to scrutinize closely what was going on between the Executive, the Commission and the IMF, and to be informed about the negotiations on the rescue package; in spite of the constitutional provisions on the Executives' duty to inform the Parliament "in good time" about any development of the EU integration process (Arts. 163.f and 197.i Pt. Const.). Moreover, the new Executive, based on a centre-right coalition, considered the Memorandum of Understanding on Specific Economic Policy Conditionality and the Loan



Agreement signed as political agreements devoid of binding effects (Pereira Coutinho 2013: 147-179).^{xxxviii} As a consequence they did not need a parliamentary authorization for the ratification and the new Parliament elected in June 2011 discussed about the content of the MoU only in Fall 2011, when it had to adopt the annual Budget Act where some of the measures agreed with the Troika (the Commission, the ECB and the IMF) were included. The constitutional design of the form of government in Portugal, i.e. the confidence relationship, the dissolution of the Parliament, etc., and the timing of the resignation and the elections have marginalized the Parliament from the negotiations and the scrutiny of the rescue package.

In contrast with Cyprus, however, in Portugal another constitutional body, the Constitutional Court contributed to undermine the role of the legislature in the implementation of the rescue package. Starting from 2012, when this Court began to declare provisions of the Budget Act determining pensions and salary cuts for public workers unconstitutional, depending on the case, for a violation of the principle of proportional equality, of equality *tout court*, and of legitimate expectations, constitutional judges (within a highly divided Court) have used the same argument. The economic emergency – according to the Court – does not justify *per se* the overthrow of fundamental principles of a democratic State based on the rule of law (art. 2 Pt. Const.), particularly when the same cohort, i.e. civil servants and pensioners, is systematically affected year after year by austerity measures compared to the less adverse conditions of other groups of citizens. Also the public status and working or retirement conditions do not give ground for a persistent, *fi* not permanent, discriminatory treatment. In particular, according to the Constitutional Court, there was no evidence that the conditions imposed by the MoU and the loan agreement, which the Court recognized as international agreements, did not leave discretion to the Parliament in their implementation. At the opposite, the Parliament could have explored alternative avenues to implement the rescue package. This was the warning of the Court since judgment n. 353/2012, which has grounded most declarations of unconstitutionality of the Budget Acts from judgment n. 187/2013 onwards (Fasone 2014: 24-30).^{xxxix}

The long catalogue of social rights of the Portuguese Constitution might also have contributed to push the Court in this direction, although social rights have not been used as a standard for review (except in judgments 794/2013 and 572/2014). The effect of this



case law, was however, the marginalization of the Parliament, constrained in between these constitutional judgments, on the one hand, and the pressure of the executive to fulfill European and international obligations and reassure the financial markets. The insistence of the Government to have the Budget Acts and the austerity measures adopted in due time by the Parliament was equally defeated by the Constitutional Court, which forced the Executive to re-negotiate with the Troika the terms of the loan agreement, given the annulment of some of the measures aiming to reach the targets agreed.

In Cyprus, instead, the Supreme Court, which is entitled to review the constitutionality of legislation besides being the highest judicial authority in civil and criminal matters, has not further jeopardized the position of the House of Representatives concerning the implementation of the rescue package. The only relevant case that reached this Court dealt with the suits filed by uninsured bank depositors against the Central Bank of Cyprus, the Governor of the Central Bank and the Minister of Finance. They had issued a series of decrees, in execution of Law 17 (I) /2013, as to impose the depositors a levy on their bank accounts and to force them to participate in Cyprus' bail in. The Court, however, considered the case inadmissible as the controversy did not affect constitutional issues but rather the relationship between depositors and their banks, regulated by private law, and there was no way to review the constitutionality of those decrees.^{XI} Also in these circumstances the powers and jurisdiction of the Cypriot Court compared to the activism of the Portuguese Constitutional Court made the difference, beyond the specific content of the rescue package.

Finally, the very recent case of the Greek deadlock in the parliamentary election of the new President of Greece, resulting in the dissolution of the Parliament and in the new elections on 25 January 2015, is a further example of the influence of the form of government on the management of the financial and assistance programme and the role of the legislature. In the country that has been most affected by the financial crisis in the Eurozone, the implementation of the rescue package is definitely conditioned, at the moment of writing, to the solution of an institutional and political crisis which derives from the constitutional requirements to elect the Head of State, in spite of his symbolic powers. According to art. 32 of the Greek Constitution, the President of Greece has to be elected by the unicameral Parliament summoned in a special sitting by roll call vote by two thirds majority of MPs. If the quorum is not reached two further ballots are allowed – the



second by two thirds majority and the third by three fifth majority – at five days one from the other; after that the Parliament is dissolved and a new Parliament will proceed to the election of the President. On 29 December 2014, at the third attempt the Parliament failed again to support the candidate proposed by the Government and thus the mechanism of the automatic dissolution was tripped.

Being Greece the beneficiary of a rescue programme, the political instability has soon triggered financial instability and the IMF, which is providing a \$35 billion loan to this country (in addition to the financial assistance of the EFSF-ESM), declared immediately after the announcement of new elections that the financial aid is currently suspended until a new government is formed.^{XLI} It is patent from this recent example of Greece how a Parliament worn out by four years of strict conditionality can be further weakened by constitutional mechanisms that instead of enhancing political stability lead the country to new elections following the controversial elections of 2012.^{XLII}

To conclude on Eurozone parliaments in bailout countries, the asymmetries among these legislatures are rather evident, but do not derive only and mainly from the gravity of the financial crisis and the external constraints of the lenders. A great role in the differentiation is played by domestic constitutional arrangements, in particular the form of government and the role of courts, which can protect or ultimately undermine parliamentary prerogatives.

5. The Fiscal Compact, the art. 13 Conference and national parliaments: are they all equal?

Although it is not part of the EU legal framework, the Fiscal Compact is the source of many asymmetries in the EU, which in turn affects, depending on national constitutional rules, parliamentary autonomy at national level. The extent to which the Fiscal Compact, through domestic measures of implementation, is able to constrain the powers of national parliaments varies depending the Eurozone or non-Eurozone nature of the Contracting Party and, among non-Eurozone countries, according to the level of commitment chosen, i.e. to be bound to the entire treaty, only to Title V or to selected Titles, as well as if and when the accession to the Euro area is foreseen. Moreover at present three countries, Croatia, Czech Republic and the UK have not signed the treaty, but art. 15 of the Fiscal



Compact makes it open to further accessions subject to unanimity of the Contracting Parties, so that the degree of asymmetry and differentiation can potentially evolve throughout the time.

Asymmetries do exist also among Eurozone parliaments as a result of the Fiscal Compact. First of all there is a Parliament and in particular its Lower Chamber, the German *Bundestag*, that because of the leading role of Germany in the adoption of the treaty and in shaping its contents is, politically speaking, a *primus inter pares*. The balanced budget clause entrenched since 2009 in the German Basic Law was the source of inspiration for art. 3.2 of the Fiscal Compact and *Bundestag* has been taken as a model by other national legislatures.

Secondly the entry into force of the Treaties created in itself a differentiation among Eurozone countries, since the usual unanimity rule observed for EU Treaty revisions was disallowed and replaced by the condition of ratification by at least twelve Eurozone countries. The unanimity, which has always featured the ratification of Treaty changes in the EU, was overcome for strategic and instrumental reasons, like the fear that some countries were not able to successfully complete the ratification in due time (1 January 2013) because of the national procedures for amending the Constitution (Finland and Ireland) or because of the ongoing financial and political crisis (Greece). Based on the argument of the non-EU nature of the Treaty, by abandoning unanimity the result was a challenge to the traditional principle of equality among Member States and, in particular, Eurozone States (Closa 2011: 14-17). Thus the Fiscal Compact entered into force pending the ratification of founding members of the EU, like the Netherlands and Belgium, whose parliaments were able to authorize the ratification only months later. For example, because of the policy concerned, in Belgium all parliaments (federal, regional, etc.) had to approve by qualified majority the Fiscal Compact and hence, because of the national constitutional arrangements, it was much more difficult for this country to complete the process.

Other differences among Eurozone parliaments, depending once again on domestic constitutional procedures, also stood at the moment of the ratification. For example in Cyprus the Parliament was not even called to authorize the ratification of the Fiscal Compact and remained completely marginalized. The Fiscal Compact was indeed considered as an international agreement relating to “economic co-operation (including payments and credit)”, which pursuant to art. 169.1 of the Constitution only requests a



Cypriot Council of Ministers' decision and the act of ratification was simply a governmental decree (Pantazatou 2014: IX.3).

Regarding the implementation of the Treaty at national level, in spite of the very much contested provisions of art. 3.2 of the Fiscal Compact and the supposed constitutionalization of the balanced budget clause (Pinelli 2014: 7), besides Germany, only very few countries, like Italy, Lithuania, Slovenia and Spain, decided to amend the Constitution in order to fulfill the treaty obligations (Ruiz Almendral 2013: 189-204; Boggero & Annichino 2014: 247-261; Delledonne 2014: 181-2013; Piedrafita 2014: 319-340). Indeed, in the version of the Treaty finally agreed the constitutionalization of the balanced budget clause was not made compulsory depended on the fear of the governments in office that constitutional amendments would have been rejected by citizens in those Member States, like Denmark, where holding a referendum or new elections in order to enact those amendments is a constitutional requirement. Yet in those countries which finally entrenched the balanced budget clause into their Constitutions, since then the fiscal powers of parliaments have been constrained as any new law has to comply with the new constitutional provisions on debt and deficit ceilings aiming to comply with the Fundamental Charter.

The Fiscal Compact also contains very significant provisions regarding the “national parliaments of the Contracting Parties” alongside the European Parliament which should gather together in an interparliamentary conference “to discuss budgetary policies and other issues covered by this Treaty” (art. 13).^{XLIII} Art. 13 is important for our purpose in that it does not draw any distinction between Eurozone and non-Eurozone parliaments (Griglio & Lupo 2014: 23 ff.). Provided that the relevant State is a Contracting Party of the Fiscal Compact, the national legislature is allowed to take part in the conference without any differentiation of powers and status.

The equal treatment of all parliaments of Contracting Parties is a considerable element, if compared to the limited involvement the Governments of non-Eurozone countries enjoy in the Euro Summit, a new body composed of the Heads of State or Government of the Contracting Parties whose currency is the euro and the President of the Commission.^{XLIV} Still in the final version of art. 12, following the insistence of some countries and first of all Poland, non-Eurozone Government got an acknowledgement of their (marginal) role vis-à-vis their original exclusion: they can “participate in discussions of



Euro Summit meetings concerning competitiveness for the Contracting Parties, the modification of the global architecture of the euro area and the fundamental rules that will apply to it in the future, as well as, when appropriate and at least once a year, in discussions on specific issues of implementation” of the Fiscal Compact (art. 12.3). Moreover, the President of the Euro Summit has to keep these Government informed about the preparation and the outcome of the meetings and the current President of this new body, Donald Tusk, comes from a non-Eurozone State, being the former Polish Prime Minister.

Thus, by contrast with governments, the participation of national parliaments is not limited by art. 13, according to the Eurozone vs. non-Eurozone divide. This should not be seen necessarily as a wise choice. The reason for such an asymmetric composition between the main intergovernmental body established by the Fiscal Compact and the interparliamentary conference established are not entirely clear. For the sake of the effectiveness of parliamentary scrutiny and oversight on the Euro Summit (Wessels & Rozenberg 2013: 32), the fact that the composition of the new interparliamentary conference is also open to non-Eurozone parliaments is not good news since this diminishes the ability of the conference to give political directions to the Summit and to hold it accountable (in addition to the ordinary avenues for governmental accountability at national and European levels). Indeed, there are also parliaments which do not “match” with any Head of State and Governments in the Summit and the same can be said for the Ministers in the Euro Group, in charge with the preparation and the follow up of the Euro Summit meetings.^{xlv}

It should be noticed, however, that the mandate conferred by art. 13 to the interparliamentary conference does not explicitly refer to scrutiny and oversight, but rather to “discussions” and perhaps exchange of views and best practices as often happens with interparliamentary cooperation. The reference to Title II of Protocol n. 1 on the role of national Parliaments in the EU in the incipit of art. 13 is not of great interpretive support, being quite vague. This protocol, for instance, foresees an interparliamentary conference like the one of the Committee on EU Affairs (COSAC), established in 1989, at the same time as able to submit contributions to EU institutions, and thus entitled to provide political inputs, and as a forum to exchange information.

The institutional practice so far, following the initial implementation of the Fiscal Compact and the first three interparliamentary conferences held in Vilnius (October 2013),



in Brussels (January 2014) and in Rome (September 2014) reveal that the application of art. 13 has gone far beyond a literal interpretation of the provisions (Cooper 2014: 9-11). All national parliaments regularly take part in the conference, meaning that also the Croatian, the Czech and the UK Parliaments are fully involved, with the same rights as the others. The EU Speakers Conference of Nicosia, on 21-23 April 2013, having a role of coordination of interparliamentary cooperation in the EU, took the decision to establish a “catch all-conference”, inclusive inasmuch as possible of every national legislature, regardless of the commitment to sign and to implement the Fiscal Compact of the relevant Member State. Hence the idea of an interparliamentary conference mainly based on discussions and exchange of views was implicitly endorsed, since it is not feasible for parliaments of non-Contracting Parties to control the implementation of a Treaty that their Governments have not even signed.

From this original “sin” other flaws followed. Given the heterogenous membership, the Conference has not been able to agree on its rules of procedure and even as to who should agree on them,^{XLVI} on the composition of its delegation (national and European), nor on its powers, name,^{XLVII} and scope, e.g. should it be limited to fiscal policy and economic coordination and thus be strictly relevant to the object of the Fiscal Compact or should it consider also financial issues and the Banking Union? Constructive inputs on the part of national parliaments have not prevailed over their strong disagreement, among national legislatures as well as between them and the European Parliament, and so far the new conference has appeared as a “missed opportunity” (Kreiling 2013: 17).

The attempt to let all parliaments participate with equal powers and prerogatives in the Conference as to neglect that national asymmetries do exist in terms of European and international obligations and among the Governments in terms of involvement in relevant intergovernmental bodies has been counterproductive in the case of Conference based on art. 13 of the Fiscal Compact. Indeed, this has led to a deadlock of its activities, since in the last Conference held in September 2014 not even conclusions of the meeting could be adopted (voting rules are not defined). Perhaps in the case of the new form of interparliamentary conference established under the Fiscal Compact a way out could have been to mirror the functioning of the Euro Summit: to allow MPs from Eurozone countries to scrutinize and oversee the implementation of the Fiscal Compact, MPs from non-Eurozone Contracting Parties to participate in the debates like their governmental



counterparts in the Summit and to exclude Parliaments from non-Contracting Parties as they are not bind nor directly affected by the treaty.

6. Conclusions

That the legal response to the Eurozone crisis has increased the differentiation in the EU appears quite patent (Armstrong 2014: 63-83). Giandomenico Majone has even claimed that “most national governments are forced to accept the solutions proposed by a few leaders representing the major stockholders of the ECB” (Majone 2014: 1221). If this is the case, then the principle of equality of Member States enshrined in the EU Treaties (art. 4.2 TEU) is in danger. Indeed, there are many signals in the Euro crisis measures of these differential treatment among Member States that, in theory, are part of the same cohort, i.e. Eurozone countries, Contracting Parties of the Fiscal Compact, shareholders of the ESM. The rise of the intergovernmental method of coordination seems to have also strengthen national asymmetries at the expenses of the (formal) equality, a principle that nevertheless has been softened throughout the process of European integration compared to other international organizations.

What is perhaps more alarming than the alteration of the legal balance of powers among Member States is that asymmetries are rising also among national parliaments in the operation and implementation of the Euro crisis measures. The “parliamentary asymmetries” derive from an unequal distribution of powers amongst these legislatures, due to a peculiar combination of international, EU and national law. As recently observed by scholars, the financial crisis in the EU should not necessarily be seen as a threat to parliamentary democracy and national parliaments in particular (Griglio & Lupo 2012: 313-372; Puntischer Riekmann & Wydra 2013: 565-582; Martinico 2014; Bellamy & Kröger 2014: 454); it is rather the asymmetric growing of the powers of some national parliaments (Fossum 2014: 52-68) affecting the powers and the autonomy of an “equally sovereign parliament of a fellow Member State” that creates a problem (Majone 2014: 1221).

Through the analysis of several examples in which these asymmetries in the powers of national parliaments can impair the democratic legitimacy as well as the effectiveness of Euro crisis measures, the article highlights that such an outcome can mainly occur under three circumstances, dependent in part on EU and international law and partly on national



law. The first case deals with parliaments able to block or veto the adoption and implementation of Euro crisis measures even though their Member State is not bound by them, e.g. the participation of non-Eurozone parliaments in the simplified revision procedure for amending art. 136 TFEU or the participation of parliaments of the non-contracting parties of the Fiscal Compact and perhaps of non-Eurozone parliaments in general in the new interparliamentary conference provided by art. 13 of this treaty.^{XLVIII}

A second case concerns the power of some national parliaments, and first of all of the German *Bundestag*, to block the functioning of collective mechanisms, like the ESM, as a consequence of constitutional case law, constitutional rules and national legislation. The other parliaments which have not been granted comparable powers at national level cannot prevent such an outcome, even less so the parliaments of the Member States receiving financial assistance that are directly concerned by such a veto, but which are subject to strict conditionality. Under these circumstances, it is not desirable that the number of “parliaments-veto players” increases; rather the conditions should be posed so as to restore mutual trust among the Member States and prevent the adoption of national decisions that could jeopardize the joint liability towards these solidarity rescue funds, in spite of the intergovernmental arrangements.

Finally, the third case regarded as highly problematic is that of parliaments in – both Eurozone and non-Eurozone – countries subject to strict conditionality. In particular, the extent to which some of these legislatures are able to keep their role as democratically accountable institutions towards citizens only derives from domestic constitutional arrangements. The level of protection of national parliamentary prerogatives in the bailout countries as for what concerns the adoption and the implementation of rescue packages is not taken into consideration at European and international level, where financial and assistance programmes are agreed. Hence we can see very different responses of national parliaments to similar rescue packages which depend on the national form of government and on national constitutional case law.^{XLIX}

A final point, which can be drawn from the analysis, concerns who is responsible for the emergence of such asymmetries among national parliaments, when the asymmetries derive from national law. In most cases they are a consequence of judgments of Constitutional or Supreme Courts (Everson & Joerges 2014: 197-210), as the case law of the German Constitutional Court shows as to protect the overall budgetary responsibility



of the *Bundestag* with responsibility to the people; whereas the case law of the Portuguese Constitutional Court has gone in the opposite direction, that is to further marginalize the power of the *Assembleia da República*. There are few exceptions, influenced by national constitutional prerogatives of Parliaments, like the Constitutional Law Committee of the Finnish Parliament, which has considered a first version of the ESM Treaty unconstitutional, or the rejection by the Cypriot House of Representatives of the commitment taken by the Government in exchange for financial assistance.

These latter cases of autonomous parliamentary responses to the risk of an asymmetric distribution of parliamentary powers under the Euro crisis governance are to be preferred to the today more frequent ones of judicial struggle for the protection of parliamentary prerogatives, where sometimes in an attempt to protect democracy Courts might even trigger a worse scenario, whereby it becomes then very difficult to redress and justify imbalances among national parliaments in the EU once created via constitutional case law. When the protection of parliamentary prerogatives in Euro-crisis procedures is achieved through constitutional judgments, such a protection is rooted in more ambiguous bases, like in Germany, where it is grounded on a peculiar and creative interpretation of constitutional clauses by the *Bundesverfassungsgericht* (section 4.1). This Court is actually willing to protect the enforcement of the principle of democracy as such and not the Parliament *per se*. The *Bundestag* is incidentally guaranteed by the Court as long as the Parliament is capable to preserve the right of the people to elect their representatives and to be effectively represented by them. Otherwise, as threaten in the referral for a preliminary ruling,¹ the *Bundestag* (and the Federal Government) can be sanctioned though a declaration of unconstitutionality by omission, without further specifications of what this implies, of how this would affect parliamentary prerogatives, and of whether the Parliament can be compelled to act based on the Court's instructions whenever it has not taken appropriate action to enforce citizens' rights. This explains why a very active Court not necessarily is the best solution for keeping parliamentary powers "alive".

Whether this is for a Constitutional Court to decide does not form the subject of the present article, but the fact that parliamentary autonomy is broadened or narrowed down based on constitutional interpretation, subject to judicial discretion that can change country by country or within the same country throughout the time, appears problematic. It does not depend from an autonomous choice of the democratic body itself, the legislature, but



rather from an independent and non-democratically legitimized institution which defines based on a constitutional text what is the present standard of parliamentary accountability to be ensured at national level vis-à-vis the other Member States, their parliaments, and EU institutions, according to the “constitutional priorities” identified. Perhaps more legitimate appears the choice of the Austrian Government and Parliament to amend the Constitution as to strengthen parliamentary powers, although such a choice risks to create asymmetries among parliaments that are likely to endure for years, unless a new constitutional amendment removes it.

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^I I am grateful to Diane Fromage for having brought the issue of the polysemy of the notion of equality applied to EU Member States to my attention.

^{II} See, for instance, the case of the Treaty on the European Stability Mechanism and the judgment of the Court of Justice in the *Pringle* case, C-370/12, 27 November 2012.

^{III} On the powers retained by parliaments towards their executives in selected EU national legal systems in the aftermath of the Eurozone crisis, see the article by Diane Fromage in this *Special Issue*.

^{IV} Like the UK, Denmark enjoys a “permanent” opt out from the Eurozone, which however can be repealed at any moment on the initiative of this country (Protocol n. 16 annexed to the Treaty of Lisbon). See, recently, ‘Danish PM says country ‘should’ join the euro’, *EurActiv*, 21 February 2014, retrieved at <http://www.euractiv.com/euro-finance/danish-pm-country-join-euro-news-533661>

^V Regulation (EU) n. 1173/2011 of 16 November 2011 on the effective enforcement of budgetary surveillance in the euro area, Regulation (EU) n. 1174/2011 of 16 November 2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area, and, for some provisions, Regulation (EU) n. 1175/2011 of 16 November 2011 amending Council Regulation (EC) No 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies as well as Regulation (EU) n. 1177/2011 of 8 November 2011 amending Regulation (EC) No 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure do not apply to Member States outside the Eurozone and thus to their parliaments. Regulation (EU) n. 1175/2011 creates some obligations, however, like the submission of a convergence programme under art. 121 TFEU. The two Regulations of the two-pack, instead, only apply to Eurozone countries and parliaments: Regulation (EU) n. 472/2013 of 27 May 2013 on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability and Regulation (EU) n. 473/2013 of 27 May 2013 on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area.

^{VI} The case of the Fiscal Compact, which is examined in this section and in section 5, is borderline in that, as argued by many scholars (Fabbrini 2012; Cantore & Martinico 2013: 463-480), the provisions included in this international agreement could have been adopted in the framework of EU law by means of enhanced cooperation and its entry into force was subject to the completion of the ratification by 12 Contracting Parties from the Euro area and not by unanimity.

^{VII} The Treaty amendment – adopted through the European Council Decision 2011/199/EU of 25 March 2011 – consisted in adding a third paragraph to art. 136 TFEU, which states: “3. The Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole. The granting of any required financial assistance under the mechanism will be made subject to strict conditionality.”

^{VIII} Art. 136 TFEU amendment can affect non-Eurozone countries and parliaments in the medium-long term, if they join the euro in the years to come.

^{IX} Art. 2 of the European Council Decision 2011/199/EU foresaw its entry into force on 1 January 2013 provided that all the notifications from the Member States were received, which was not the case because of the refusal of the President of the Czech Republic to sign until April 2013. The ESM Treaty, instead, entered



into force on 27 September 2012, following the ratification of the then 17 Eurozone countries.

^X Moreover, based on the European Union Act 2008, prior approval of the UK Parliament was also requested before the Government could agree within the European Council on Decision 2011/199/EU as well as to a decision to amend the Treaties under the Article 48.6 TEU. Parliamentary approval was given without delay in March 2011 (Hancox 2014).

^{XI} The case of the Polish Constitutional Court is K 33/12 of 26 June 2013, § 7.4.1. The *Pringle* case, C-370/12, of the Court of Justice, was decided on 27 November 2012 and was based on a preliminary reference of the Supreme Court of Ireland also dealing with art. 136 TFEU amendment. Before the Polish Constitutional Court delivered its judgment, it waited for this decision of the Court of Justice and for the entry into force of the revision itself and did not refer to the Court of Justice for a preliminary ruling, like did the Irish Court. Finally the Polish Constitutional Court also referred *ad adiuvandum* to the German Constitutional Court ruling (Case 2BvR 1390/12) and to the Austrian Constitutional Court judgment (Case SV 2/12-18) both incidentally addressing art. 136 TFEU amendment (§7.5. of the Polish judgment).

^{XII} As highlighted by Closa (2014: 114), it is extremely unlikely that a Constitutional or Supreme Court of a Member State of the EU rules a Treaty reform unconstitutional, especially under the *ex post* review, i.e. once the Treaty revision has been ratified and maybe entered into force and thus a constitutional amendment must be approved.

^{XIII} These six countries are Bulgaria, Croatia, Czech Republic, Hungary, Poland and Romania.

^{XIV} See Council Decision 2009/289/EC to grant mutual assistance to Latvia; Council Decision 2009/290/EC to provide medium-term financial assistance for Latvia; Council Decision 2009/592/EC amending Decision 2009/290/EC of 20 January 2009 providing Community medium-term financial assistance for Latvia. The EU financial assistance was disbursed in four installments for a total of €2.9 billion euro.

^{XV} Croatia acceded to the EU on 1 July 2013 and since then has been eligible to sign the Fiscal Compact.

^{XVI} See Constitutional Law XII-1289, on the implementation of the Fiscal Compact into constitutional law, published in TAR, 18 November 2014, n. 17028.

^{XVII} In July 2013 the ESM also replaced the EFSF, which was a temporary rescue fund established in 2010.

^{XVIII} Following the completion of the German ratification of the ESM Treaty and in the light of the case law of the German Constitutional Court, Eurozone countries adopted a Declaration on the European Stability Mechanism, Brussels, 27 September 2012, which also states: “(...) Article 32(5), Article 34 and Article 35(1) of the Treaty do not prevent providing comprehensive information to the national parliaments, as foreseen by national regulation (...)”

^{XIX} See Annex I, Contribution Key of the ESM, to the ESM Treaty, available at <http://www.european-council.europa.eu/media/582311/05-tesm2.en12.pdf>

^{XX} See the Opinion of the Constitutional Law Committee of the Finnish Parliament, PeVL 25/2011. Since 2012, when the most recent amendment to the Finnish Constitution entered into force, arts. 94.2 and 95.2 Fin. Const. requires an authorization by two thirds majority vote in Parliament for any “significant transfer” of powers from the state to the EU or international organization.

^{XXI} See Opinion PeVL 13/2012.

^{XXII} The way the Constitutional Law Committee treated the ESM Treaty cannot be analyzed here, but it is important to notice that in many regards this Treaty was not considered as international law, but was instead assimilated to EU law, if we take the role of the Grand Committee into consideration, for example.

^{XXIII} It should also be highlighted that, in contrast with the Opinion PeVL 25/2011, the Constitutional Law Committee, given its composition, usually leaves wide discretion to the Government and tends to consider the Government’s action in compliance with the Constitution; a circumstance that in turn leads minority groups to adopt a minority opinion of the Committee.

^{XXIV} See Supreme Court of Estonia, constitutional judgment n. 3-4-1-6-12 of 12 July 2012, available at <http://www.riigikohus.ee/?id=1347>

^{XXV} Indeed § 216 of the Estonian Supreme Court’s decision tackles precisely the issue of the competence of the European Union Affairs Committee of the *Riigikogu* in response to a request of the Chancellor of Justice, who initiated the proceeding, on whether this Committee could be entitled to adopt binding opinion for the Government on behalf of the Parliament on this matter. The Court said that this is allowed under the Constitution, if the power is not a prerogative of the sole Committee, but is a power of the *Riigikogu* as a whole exercised on its behalf by the European Union Affairs Committee.

^{XXVI} See, for example, the Austrian Constitutional Court, Judgment on the case n. SV 2/12-18, 16 March 2013.



XXVII See Case C-370/12, *Thomas Pringle vs. Government of Ireland*, Judgment of the Court of Justice (Full Court), 27 November 2012.

XXVIII See Supreme Court of Ireland, *Thomas Pringle vs. The Government of Ireland*, [2012] IESC 47, 19 October 2012.

XXIX By contrast, all Eurozone Parliaments have been asked to approve, by parliamentary act, the (first installment of) paid-in capital required by the ESM Treaty, usually within the same act authorizing the ratification of the Treaty.

XXX The ESM key for Germany is 27.07 %; the second contributor is France, with a share capital of 20.33%.

XXXI One of them, against the ESM and the Fiscal Compact was supported by more than twelve thousand citizens through the NGO, *Mehr Demokratie*, and was decided in the Case 2BvR 1390/12 delivered on 12 September 2012.

XXXII See German Constitutional Court, Second Senate: BVerfG 2, BvR 987/10, 7 September 2011; BvE 8/11, 28 February 2012; 2 BvE 4/11, 19 June 2012; 2BvR 1390/12, 12 September 2012 (decision of temporary injunctions) and 18 March 2014 (final decision).

XXXIII See German Constitutional Court, Second Senate, 2 BvE 2/08, 30 June 2009.

XXXIV The Act for Financial Participation in the European Stability Mechanism (*Gesetz zur finanziellen Beteiligung am Europäischen Stabilitätsmechanismus, ESM-Finanzierungsgesetz* – ESM Financing Act, ESMFinG) affirms that “the Federal Government may through its representative only vote in favour of a proposed resolution in matters of the European Stability Mechanism or abstain from voting on a resolution when the plenary session has passed a resolution in favour of this.” The reference to the abstention, which under the unanimity rule of the ESM implies a constructive abstention, may give some leeway to the Government, but only when the *Bundestag* voted in favour.

XXXV See German Constitutional Court, Second Senate, 2BvR 1390/12, 18 March 2014, § 163.

XXXVI The text of the letter is available here http://www.corriere.it/economia/11_settembre_29/trichet_draghi_inglese_304a5f1e-ca59-11e0-ac06-4da866778017.shtml

XXXVII The EFSM is an instrument established by EU law, in contrast with all the other funds (EFSF and ESM) set up via intergovernmental agreements. The EFSM was provided under Council Regulation EU n. 407/2010 of 11 May 2010.

XXXVIII This interpretation is however disputed and the Portuguese Constitutional Court has always confirmed the binding value of the *Memoranda* and of the Financial and Assistance Programme (judgments no. 187/2013, 413/2014, 574 and 575/2014).

XXXIX See judgments 353/2012, 187/2013, 474/2013, 602/2013, 862/2013, 413/2014, 574 and 575/2014.

XL See Supreme Court of Cyprus (revision jurisdiction/branch), Full House, 7 June 2013, summary available at <http://www.supremecourt.gov.cy/judicial/sc.nsf/All/ADC518816A38904DC2257B830035B8A2?OpenDocument>

XLI See H. Smith, Snap elections will be decisive for Greece’s Eurozone future, says Samaras, *The Guardian*, 30 December 2014, <http://www.theguardian.com/world/2014/dec/30/snap-election-greece-future-eurozone-samaras-syriza>

XLII Indeed in the election of May 2012 for the first time ever 7 parties won seats in Parliament and this institutions was unable to find a majority to support a new government; as a consequence, one month later, in June 2012 new elections were held this time leading to the formation of a coalition government, subject to reshuffles in June 2013 and 2014.

XLIII In this article the role of the European Parliament in the interparliamentary conference is not taken into consideration as this goes beyond the focus of the analysis on the asymmetries among national parliaments. On the European Parliament see the article by Edoardo Bressanelli in this *Special Issue*

XLIV According to art. 12 of the Fiscal Compact, “the President of the European Central Bank *shall be invited* to take part in such meetings”, whereas “the President of the European Parliament *may be invited* to be heard” (emphasis added).

XLV The idea of not having a purely Eurozone interparliamentary conference was nonetheless opposed by non-Eurozone parliaments as well as by the European Parliament, which, given the principles of institutional unity, of free mandate and of equal representation of citizens, would have been in trouble to exclude some MEPs from the participation in the conference because of their nationality (Cooper 2014: 10).

XLVI E.g. Should it be the new Conference itself or, as happened for the interparliamentary Conference on



CFSP and CSDP, should the Conference of EU Speakers be called to set the rules first?

^{XLVII} At the third meeting, held in Rome at the Chamber of Deputies, on 29-30 September 2014, the conference was just named “Conference under Article 13 of the Fiscal Compact”.

^{XLVIII} Although, as stated above, in the case of this conference an obstacle to the agreement on its functioning also derives from the different standpoints of the European Parliament vis-à-vis national parliaments of some Eurozone countries, like France and Germany.

^{XLIX} The case of Greece is different in many regards, in particular for what concerns the remarkable level of detail of the condition posed in the rescue package. See the contents of the First and Second Economic Adjustment Programme for Greece, available on the European Commission’s website: http://ec.europa.eu/economy_finance/assistance_eu_ms/greek_loan_facility/index_en.htm

^L See German Constitutional Court, Second Senate, Order of 14 January 2014 - 2 BvR 2728/13, Dissenting Opinion of Justice Lübke-Wolff, § 21-22.

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The “Arab Spring” and the EU’s “Democracy Promotion” in Egypt: A Missed Appointment?

by

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Abstract

The aim of this article is to review the European partnership with Egypt under the European Neighbourhood Policy, in order to assess the effectiveness of the EU policy in the promotion of democratization and human rights, hinged on the use of positive and negative conditionality.

The empirical focus of the piece will be on the period following the Arab Uprising, coinciding with the creation of the European External Action Service, and therefore the most important testing ground for the newly created EU department.

From this analysis it will emerge that, in spite of the attempt to review the European policy vis-à-vis the Southern Mediterranean so as to meet the new aspirations of democracy and human rights unfolding on the ground, the European Union has failed to effectively pursue the principles that it solemnly proclaimed. This failure is due to a mix of factors, partly related to the way the EEAS was conceived, and partly to wrong political choices.

In my analysis, I will rely mostly on official documents and figures to give a synthetic account of the framework of the EU-Egypt relations. In the evaluation of its outcomes, I will resort to scholarly opinions, to the Assessment Reports of the European Court of Auditors, and to interviews I personally conducted with EEAS and Commission officials. As the information and opinions disclosed therein do not always correspond to the official “line”, in most cases I have been requested not to reveal the interviewee’s name.

Key-words

European Union, European External Action Service, European neighbourhood policy, Egypt, Arab Spring, human rights, conditionality



1. Introduction: the EEAS response to the “Arab Spring”

On 1st December 2010, the European External Action Service was formally launched as a new department of the EU, separated from the Commission and entrusted with foreign affairs and diplomatic relations between the EU and non-member states.

Eight days later, a twenty-six-year-old Tunisian set himself on fire in a little town south of Tunis, kicking off the massive wave of uprisings in the Arab World known as “Arab Awakening”, or “Arab Spring”.

This overlapping of events in the Northern and Southern border of the Mediterranean could have represented a unique opportunity for both sides: a new partnership and economic collaboration grounded on shared values of democracy and human rights

Indeed, the newly created EU department began soon to review the “European Neighbourhood Policy” (ENP) vis-à-vis the Middle East and North Africa (MENA) region, in order to meet the democratic wind blowing from the South. To this end, firm declarations of principles expressed the determination of the EU in encouraging “deep democracy” in the Southern border of the Mediterranean, through a conditional system of incentives and disincentives linked to liberal-democratic progress.

The present article analyzes this policy of the EU in favor of human rights and the rule of law and its outcomes, with special regards to the Egyptian case. In order to evaluate successes and failures of the renewed ENP, two different aspects require examination:

- 1) As to the means, has the EU effectively implemented its vaunted process of conditionality?
- 2) As to the ends, has the EU effectively promoted its vaunted principle of “deep democracy”?

Since the answers will draw an overall negative picture, both in terms of actions and purposes, I will try to answer a third question:

- 3) What are the reasons of the EU failure?

The analysis will be conducted along the following lines.

After briefly discussing the function of the ENP, I will try to present the most significant innovations triggered by the Arab Awakening on the EU policy, i.e. a strong



stance in favor of “deep democracy” (*de facto*, a liberal-democracy) in the MENA, to be achieved through a system of incentives and disincentives.

This theoretical scheme will be subsequently put to the test in the concrete EU action in Egypt. A basic account of the financial instruments deployed by the EU in the country will be followed by a critical review of their effective leverage to promote human rights with the various Egyptian governments, before and after the Uprising. In light of the events occurred after the Uprising, which evidence serious violations of human rights and the rule of law, I will defend the hypothesis that the EU has been both unable and unwilling to use negative and positive conditionality in order to drive the various Egyptian governments to build a “deep democracy”. On the contrary, the EU action has proved to be weak and superficial.

The reasons for this failure may be ascribed to different causes, a number of factors as identified by scholars, EU officials, and the European Court of Auditors. Firstly, to the very way the EEAS was conceived and enacted, i.e., deprived of political strength and strategic view necessary to address international problems in a long-term and effective manner; this has brought about wrong political choices and lack of foresight on the part of the EEAS, reflecting the same defects of member states. Secondly, to objective difficulties, such as financial constraints, unreceptive and changeable governments, political realism contrasting with ethical principles. Thirdly, to lack of moral clarity on the object and the ends of EU’s democracy promotion. All of which has brought about a totally inadequate leverage policy whose impact in favor of democratization, human rights and the rule of law has been minimal.

In the conclusions I will maintain that the EU must develop a stronger foreign policy grounded on a considered, enduring strategy to be developed further to an in-depth analysis of the various elements at play, and taking into account a set of well-identified goals. That having been done, the EU must push for “deep democracy” through a larger and firmer employment of positive and negative conditionality.

Through these discussions, I will make a strong case against contrasting arguments, based both on pragmatic and value grounds.



2. The ENP and its review further to the “Arab Spring”

The ENP is a foreign relation instrument developed by the Commission in 2004 “with the objective of avoiding the emergence of new dividing lines between the enlarged EU and our neighbours and instead strengthening the prosperity, stability and security of all. It is based on the values of democracy, rule of law and respect of human rights”.^I Briefly, the ENP aims at establishing ties with neighbouring countries to the East and the South, offering them assistance of various kinds in exchange for commitments to reforms in various domains, ranging from the economy to governmental and human rights issues. The bases of the partnership with each state are bilaterally defined through Association Agreements and Action Plans, wherein the two parties agree on the terms of the deal and the line of action.

As the ENP was created when the MENA region was firmly held by dictators, the overthrow of the latter in the popular uprisings of 2010-2011 could not be without consequences for the European policy towards the Southern Mediterranean, and consequently for some kind of review of the ENP.

This review took place in March 2011, when the High Representative presented to the other EU institutions the renewed EEAS policies the new EEAS pipeline for the region, illustrated in the document *A Partnership for Democracy & Shared Prosperity with the Southern Mediterranean* (PDSP).^{II}

As it has been correctly said, this represented the “first attempt to formulate a broad framework for the EU’s response to the ‘event of historic proportions’ [...] sparked by the Tunisian Revolution”.^{III}

Given the circumstances, it will be no surprise that the realistic approach adopted pre-crisis (and especially with the Union for the Mediterranean^{IV}) has been abandoned,^V and the ethical dimension has come back to the fore of the EU policy vis-à-vis the MENA region, in the obvious necessity of marrying the ethos of the EU with the legitimate aspirations of the Spring, and with a view to using the former to foster the latter: “the EU has to take the clear and strategic option of supporting the quest for the principles and values that it cherishes. For these reasons the EU must not be a passive spectator. It needs to support wholeheartedly the wish of the people in our neighbourhood to enjoy the same freedoms that we take as our right”.^{VI}



Hence, focus was put on three main guiding principles, in this order: democratic transformation, civil society, growth and economic development.^{VII} This marked a departure from the previous logic of the ENP. In fact, in spite of persistent bombastic rhetoric, EU-MENA relations until then had been mainly driven by an economic logic, with the EU indicating that “economic liberalization will lead to enhanced economic and political interdependence and, thus, to security and stability”.^{VIII} “Now, the logic of the ENP - economic cooperation leading to democracy - is reversed: the policy priorities are reordered in favor of deep democracy and the components and ingredients of deep democracy are clearly enumerated. The argumentation follows the recently promoted logic of the European Mediterranean policy that democratization leads to economic prosperity. Accordingly, the conditionality for a closer cooperation and association to the EU is clearly linked to democratization—and not to economic reforms as in the years before”.^{IX}

The document also implicitly acknowledged some prior shortcomings of the ENP, thus highlighting the EU commitment towards a more differentiated approach to be realized through a better working system of incentives and disincentives.^X In other words the call was for positive and negative conditionality, although, in the enthusiastic mood of the moment, the focus was on the latter: it was about a “more for more” approach whereby “those that go further and faster with reforms will be able to count on greater support from the EU. Support will be reallocated or refocused for those who stall or retrench on agreed reform plans”.^{XI}

This system of incentives pivoted on the so-called “3 Ms”: money, market and mobility, that is to say offering financial assistance, easier access to EU market, and mobility partnership, to a different extent depending on partners’ compliance with the EU requirements in various fields.

This document was integrated two months later with a further one: *A new response to the changing Neighbourhood* (NRCN),^{XII} which more explicitly took note of the past failures of the EU in trying to support political reforms in neighbouring countries. The new approach was to provide for “greater flexibility and more tailored responses in dealing with rapidly evolving partners”.^{XIII} This differentiation was to be mainly achieved via positive conditionality: “Increased EU support to its neighbours is conditional. It will depend on progress in building and consolidating democracy and respect for the rule of law. The more



and the faster a country progresses in its internal reforms, the more support it will get from the EU. This enhanced support will come in various forms, including increased funding for social and economic development, larger programmes for comprehensive institution-building (CIB), greater market access, increased EIB financing in support of investments; and greater facilitation of mobility”.^{XIV}

A key concept made explicit in the document was that democracy is more than ballots: it is about building “deep democracy” - which we could easily call “liberal-democracy”-, i.e. “the kind that lasts because the right to vote is accompanied by rights to exercise free speech, form competing political parties, receive impartial justice from independent judges, security from accountable police and army forces, access to a competent and non-corrupt civil service — and other civil and human rights that many Europeans take for granted, such as the freedom of thought, conscience and religion”.^{XV}

Also the High Representative stressed that the EU commitment was not towards a loosely interpreted “democracy”, but for “deep democracy”, entailing “respect for the rule of law, freedom of speech, respect for human rights, an independent judiciary and impartial administration. It requires enforceable property rights and free trade unions. It is not just about changing governments, but about building the right institutions and the right attitudes”.^{XVI} In comparing “deep democracy” with “surface democracy”, she further remarked that the latter, in the long run, is doomed.^{XVII}

In order to reinforce the image of a “global force for human rights”, as the EU defined itself,^{XVIII} it took two other important steps. In June 2012 it established the “European Endowment for Democracy”^{XIX} (on the model of the U.S. National Endowment for Democracy), an autonomous International Trust Fund, separated from the already existing European Instrument for Democracy and Human Rights, working as an “independent grant giving institution that supports local actors of democratic change in the EU Neighbourhood”.^{XX} Furthermore, in July 2012 a “Special Representative on Human Rights” was appointed, in the person of Stavros Lambrinidis.^{XXI}

In sum, the Arab Awakening ought to have represented the opportunity for the EU to guide a process, in the developing priorities of the newly created EEAS, of authentic



democratization based on human rights and the rule of law, not shying away from promoting such universal values through a system of punishments and rewards.

However, conditionality has been correctly defined as “a complex set of issues including the ability to attach strings to demands, the linkages between political demands and economic incentives, the attraction and credibility of these incentives for them to be effective, the ability of the EU system, including its member states, to coordinate and deliver such incentives”:^{xxii} just in terms of credibility and delivery, the new policy, which in reality reiterated old concepts, was impaired from the very beginning by the radical flaws of past hypocrisies and failures, when the EU, although not sparing declarations of principles, was close to the dictatorial regimes and therefore partly unable and partly unwilling to pursue the proclaimed values, its focus being essentially on economy and security.

On top of that, any ethical policy, sooner or later, inevitably ends up by clashing with the economic and political reasons of *realpolitik*, and finding a balance is not an easy task.

These problematical issues, along with others, invariably arose in the Egyptian case, negatively impacting on the European democratic agenda.

3. EU-Egypt Relations and Democracy (non)Promotion

3.1. EU-Egypt relations under the ENP: an overview

Egypt, the most populous Arab country and one of the most important from a geo-strategic point of view, has always been central in Euro-Mediterranean relations.

Under the ENP, European assistance to Egypt has been delivered via two main different systems: the first, and most conspicuous, is directed to the state as such, while the second is directed to civil society organizations.

In the first case, for the period 2007-2013 Egypt received an allocation of approximately €1,000 million (MN) in the framework of the European Neighbourhood and Partnership Instrument^{xxiii} - which has currently been replaced by the European Neighbourhood Instrument (both implementing instruments of the ENP)^{xxiv} -: within this sum, €449 MN was committed after the Uprising, for the period 2011-2013.^{xxv}

This assistance has been devoted to supporting reforms in three main areas: 1) democracy, human rights and justice (€50 MN for the biennium 2011-2013, i.e.,



approximately 11 per cent of the total^{xxvi}); 2) economic productivity and competitiveness (transports, energy, and trade); 3) development programs and management of natural resources (e.g., education, public health, water, etc.).^{xxvii}

The most part has been provided in the form of sector budget support to the state,^{xxviii} i.e. the “transfer of financial resources from an external financing agency to the National Treasury of a partner country in support of a sector programme, following the respect by the latter of agreed conditions for payment”.^{xxix} As Egypt has failed to meet the required conditions, sector budget support in the various fields has been frozen, with no disbursement since 2012.^{xxx} It is worth mentioning that the Commission was the only donor providing budget support to Egypt.^{xxxi}

On the other hand, in consideration of the cycle of failures in promoting human rights through the government, a trademark of the renewed ENP has been the increased interest towards civil society and its direct empowerment, by directly financing non-state organizations.

In the case of Egypt, EU support to civil society has increased from an annual allocation of €1.9 MN in 2010, reaching €3.3 MN per year on average, delivered through specific instruments such as the European Instrument for Democracy and Human Rights, the Civil Society Facility and the Development Cooperation Instrument.^{xxxii} These are outside the ENPI, and do not require the Commission to enter into financial agreements with the national authorities. In addition, the Delegation is currently managing 56 grants worth €26.7 MN to support civil society, among which 23 are on human rights.^{xxxiii} Recipients are NGOs working on different human rights issues.^{xxxiv}

When analyzing these innovations, whilst indeed positive, it must be noted that the framework of the cooperation between the EU and Egypt has remained the same during the rapid succession of uprisings and change of governments.

Indeed, the basis of such cooperation^{xxxv} is still the Association Agreement the two parties signed in 2001, entered into force in 2004.^{xxxv} On that basis, the two partners in 2007 signed an Action Plan where they set out a common range of short term and medium term priorities.^{xxxvi} This was due to expire in 2012, but has been extended several times until 2015.^{xxxvii}

The fact that nothing has changed in the framework of the EU-Egypt cooperation may



mean two things: either this proved to be a particularly effective model, whose pressure for reforms can produce its beneficial effects no matter which government is in power; or these documents are so vaguely drafted that they may be adapted to any political season, insofar as they lack any concrete input and effect.

Unfortunately, the second seems to be the most likely answer. Indeed, when Mubarak was deposed, “Brussels reacted to the overthrow of one of the Middle East’s longest standing authoritarian regimes in a self-effacing manner at best. No one even hinted that the EU’s ‘neo-functionalist’ approach towards the Mediterranean, in place since 1995, should be congratulated for having aided in Egypt’s democratization. In contrast, High Representative Catherine Ashton suggested that the time has come yet again for a re-evaluation of EU policy, less than three years following its latest incarnation under the auspices of the Union for the Mediterranean”.^{XXXVIII}

Theoretically, both the Association Agreement and the Action Plan include several key points concerning human rights and the rule of law. The problem is that these are too many, not concrete enough and lacking a system of prioritization, as authoritatively certified by the European Court of Auditors (ECA) in its report assessing the EU cooperation with Egypt.^{XXXIX}

The consequence was that, during Mubarak’s era, “[the EU] was unable to achieve progress either in the framework of its ENP dialogue or through the main ENPI project if funded in this area”.^{XI}

What is even worse, no type of conditionality was attempted to correct this path: “Notwithstanding these difficulties the commission continued to provide significant financial assistance to the Egyptian government, notably through budget support”.^{XLI} In other words, “the Commission made no link between its criticisms of human rights violations made in the progress reports and the option of reducing or suspending EU assistance. This is despite the fact that human rights clauses are included in the association agreement, the ENPI regulation [...] and the financing agreements for individual programmes. While the reduction or suspension of budget support, given that it was directly financing the national budget, could have been a particularly potent way of backing up human rights concerns, this was not done before the Uprising”.^{XLII}

It must be said that this is not peculiar to the case of Egypt, but characteristic of the EU attitude towards the Southern Mediterranean: “Notwithstanding this new methodology



introduced by the ENP, conditionality was rarely exercised in the case of the southern Mediterranean countries and, if it was, the criteria (both positive and negative) were by no means clear. While some countries (but not all) were occasionally criticized through diplomatic and Common Foreign and Security Policy (CFSP) tools, negative measures were never contemplated”.^{XLIII}

3.2. The Islamist dictatorial turn meets EU inaction

If this was the picture before the Uprising, one could expect a decisive improvement afterwards, (given the much vaunted “new deal” pivoted on “deep democracy”) through an extensive employment of negative and positive conditionality, the only possible instrument to achieve some kind of result.^{XLIV}

Yet no relevant change became apparent, even when events would have required a vigorous response from the EU; indeed, the political road of Egypt took very soon a direction which could not be farther away from “deep democracy”.

In January 2012, when Egyptians were called to vote for the first authentically democratic parliamentary elections, Islamists obtained an astonishing victory, gaining 70% of seats between Muslim Brothers and Salafists.^{XLV} In June 2012 Muhammed Morsi, a member of the Muslim Brotherhood, won the presidential elections.

In spite of great expectations, Islamists in power proved to be anything but “moderate” or “democratic”, whether in the Constituent Assembly, in the Government, or in the larger society. They exploited democracy and abused the rule of law on several occasions,^{XLVI} and in a blatant way with the notorious “constitutional decree” of 22 November 2012. In this declaration, patently unlawful as *ultra vires*, president Morsi ruled that:

- 1) the public prosecutor would be dismissed, with the President appointing a new one;
- 2) all trials against officials of the former regime, including those concluded, would be re-celebrated, with an ad hoc prosecutor endowed with broader powers;
- 3) No judicial authority could dissolve the Constituent Assembly or the Shura Council;
- 4) No judicial authority could cancel any declarations, laws and decrees made since Morsi assumed power on 30 June 2012, all pending lawsuits against them being void.



5) The president could take any measures he saw fit in order to preserve and safeguard the revolution, national unity or national security.^{XI.VII}

This happened just before the Islamist-dominated Constituent Assembly, whose boycotting secularist members had been replaced with other Islamists,^{XI.VIII} rashly approved in one-night session a draft constitution permeated by *sharia* law in key aspects, in striking contrast with human rights and the rule of law.^{XI.IX} To prevent the Constitutional Court from ruling on the legitimacy of the Assembly, Muslim Brothers even besieged the Court,^L while all protests were violently repressed, with demonstrators tortured even inside the Presidential palace.^{LI}

That would have been the moment, for the EU, to vigorously show that democracy is more than ballots, and “deep democracy” not an empty slogan. Instead, in front of this blatant move towards a new autocracy, the EU response was very weak, not to say almost inexistent.

It must be said that nobody could accuse the EEAS of not having paid attention to Egypt after Morsi’s election: Lady Ashton and the Special Representative for the Southern Mediterranean, Bernardino Leon, were undoubtedly involved with Morsi’s government, and Brussels was the first Western capital Morsi visited after his election. However, this only makes the lack of European influence even more glaring.

Tangible proof of that lacuna is given by the launch of the “Task Force” for Egypt. The Task Force was the “largest-ever meeting between the European Union and Egypt”,^{LII} “committed to launching a new EU-Egypt relationship”^{LIII} through “the mobilization of all EU assets and working with both public and private sectors”.^{LIV} In that occasion, nearly €5,000 MN were pledged by the EU, the European Investment Bank and the European Bank for Reconstruction and Development, in form of grants and loans. The amount committed by the Commission was “on top of the 449 million already provided by the EU to Egypt for the period 2011-2013”.^{LIV}

The Task Force took place in Cairo on 14 November 2012: i.e. just a week before the infamous Morsi’s constitutional declaration. In other words, the European engagement and commitments, and the potential risk of losing them, could by no means influence the most radically authoritarian drift of the Muslim Brothers’ government, in polar opposition with the much vaunted “European values”. It is quite ironic, from this point of view, to read in the Co-Chairs Conclusions that “The Task Force was the occasion for the EU to send a



strong political message in support of the democratic reform process Egypt has embarked on following the 25th January 2011 revolution”:^{LVI} in consideration of what happened right after, the “strength” of such a message is questionable to say the least...

Faced with the substantial restoration of a dictatorship, and this time moreover an Islamist one, which even in terms of mere *realpolitik* promised nothing good, the EU response was “pathetic”, to cite an EEAS officer dealing with Egypt.^{LVII}

Not even one word was uttered by the High Representative against the constitutional declaration. A statement was released only two weeks later, merely expressing concern at the “clashes between demonstrators” and asking for “calm and restraint on all sides” and an “inclusive dialogue”. No clear side was taken, and the cause of those clashes and demonstrations, which should have been vocally addressed right after the constitutional declaration by the self-proclaimed guarantor of the Arab “Spring” and its democratic wave, was completely omitted, as if the clashes were part of a normal dialectic between government and opposition. Nor was a word spoken on the constitutional process, although the statement came six days after the rushed approval of the draft by the Islamist Assembly, and only a couple of days after the violent siege of the Constitutional Court. Rather - as if this were not enough - the statement concluded by recalling the close partnership of the EU and Egypt, “based [on] the overarching values of ‘respect for social justice, socio-economic development, rule of law, human rights and good governance’”, and confirming that “[t]he EU stands by its support to Egypt’s democratic transition and urges it to continue along this path”.^{LVIII}

Paradoxically, this almost non-existent response can be interpreted as an extraordinarily steadfast reaction if compared to the Council’s deafening silence: the absolute absence of any reaction whatsoever from member states, in the name of “silent diplomacy”,^{LIX} disguised an ill-concealed impotence, and created a grave vacuum.

To see the first, somewhat timid stance against Morsi’s adventurous politics, one must await the 2012 Review of the ENP in Egypt. Therein it was stated that “President Morsi’s constitutional declaration of 22 November *giving him near absolute power*, the rushed adoption of a draft Constitution by the Constituent Assembly, the abrupt interruption of the dialogue on its provisions, and the President’s subsequent call for a constitutional referendum have pitched the nation into a deeply divisive political crisis between supporters of the President, on the one hand and the secular liberal opposition”.^{LX}



Furthermore, an entire chapter on human rights listed the numerous drawbacks in key issues: minority rights, women rights, freedom of religion and expression, the poor way the new constitution addresses them, the clashes with the judiciary.^{LXI}

Yet, in the recommendations any specific reference was abandoned, and the EU limited itself to “invite” Egypt “to ensure an inclusive dialogue with all political parties and other actors including religious leaders to ensure that the Constitution is co-owned by all Egyptians and enshrines respect for human rights and fundamental freedoms, notably preserving the freedom of religion and protecting minorities”.^{LXII} It is not by chance that the Court of Auditors has found the EU action to be particularly lacking just in the domain of minority protection and women rights, where, far from improving, the situation was visibly deteriorating in comparison with Mubarak’s era.^{LXIII}

What *de facto* happened is that the formal dialogue under the ENP between the EU and Egypt, suspended in 2011, was resumed in February 2013, less than 3 months after the infamous decree, following the program laid down in the Task Force as if nothing had changed.^{LXIV}

A senior advisor to Lady Ashton, although admitting that the constitutional decree took the EU by surprise, defended the European conduct as the High Representative’s deliberate choice not to interfere with Egypt’s internal affairs.^{LXV}

Yet this deliberate inaction seems to violate EU regulations themselves, first of all the Treaty of Lisbon,^{LXVI} as well as the ENPI^{LXVII} and the ENI^{LXVIII} general regulations, which submit EU assistance to the respect of democracy and human rights, and visibly contradicts the bases of the reviewed ENP. It denotes in fact the absolute irrelevance and the blatant denial of the tons of documents which, for decades, and more emphatically after 2011, have shaped European “normative power” based on the promotion of the universal values of democracy, human rights and the rule of law.

It is undeniable, as the senior advisor made clear, that “politics is not about straight lines”; that the EU is first of all driven by interests - as it is natural for any political organization - and that member states themselves did not know how to take strong positions. However, one cannot help but wonder what, in this case, have been the goals scored by *realpolitik*: “business as usual” would be perhaps a sufficient explanation for a medium-scale factory, but denotes a black hole, in terms of political vision, if applied to a would-be world power such as the EU.



Furthermore, the ethical failure is also a strategic one: as the abovementioned EEAS official stressed,^{LXIX} lack of moral clarity, and lack of steadiness in promoting and enforcing our values, also damages our interests; the EU would be more credible and influential if it actually implemented through negative and positive conditionality its solemnly proclaimed principles.

In the words of Karel Pinxten - ECA member responsible for the report on Egypt – “the ‘softly softly’ approach has not worked, and the time has come for a more focused approach which will produce meaningful results and guarantee better value for the European taxpayers’ money”.^{LXX}

3.3. The EU and the new regime: nothing new under the sun

In July 2013, Egypt’s regime changed again; Egyptians rebelled against the Muslim Brotherhood’s rapid path towards an Islamist dictatorship, and took to the streets once again, in massive demonstrations of tens of millions of people. Following Morsi’s renewed refusal to compromise with the opposition, the Supreme Council of the Armed Forces deposed the president.

Lady Ashton’s prophecy about the short life of “surface-democracy” (*v. supra*) thus came true, although she seemed oblivious of the prophetic nature, and impact, of her own words.

Once again the EU limited itself to attempts to mediate and to demands for reconciliation; being internally split between those states that talked about “revolution” and “popular impeachment”, those which cried against the “coup d’état” and those in the middle (*v. infra*), it was not able to take any side.

Commander-in-chief, and Minister of Defence, Abd al-Fattah al-Sisi, led the interim process until he obtained a resounding victory in the presidential elections of May 2014. These were observed by the European Union through an Electoral Observation Mission,^{LXXI} amidst obstacles interposed by the Egyptian government (the very same one which had invited Europe to supervise the election),^{LXXII} which in any case did not prevent the EOM from denouncing a climate of intimidation and infringement of fundamental freedoms.^{LXXIII}

Notwithstanding numerous and severe human rights violations perpetrated by the new government^{LXXIV} in its fight against an opposition which in its turn has shown at occasions



a violent and even terroristic attitude, the EU has not changed much of its policy; indeed, when the EU has enacted a sort of negative conditionality consisting of suspending budget support (*v. supra*), this was not due to human rights issues, but to lack of compliance with technical sector reforms. On human rights, the EU has, thus far, not gone beyond verbal remonstrations.^{LXXV} That is why the Court of Auditors has recommended that the EEAS and the Commission identify a limited number of benchmarked human rights and apply conditionality rigorously in relation to them and to “Deep Democracy”, possibly by reallocating resources from the ENPI (now ENI) assistance to civil society programs in case authorities do not cooperate.^{LXXVI}

Only recently did Europe apparently attempt to enact a form of conditionality, in the framework of the former Support to Partnership, Reform and Inclusive Growth –SPRING Programme,^{LXXVII} now Umbrella Programme. Indeed, while €90 MN was allocated to Egypt for the biennium 2012-2013, this financing has not been renewed for 2013 and 2014.^{LXXVIII}

It must be remarked, though, that the impact on human rights improvements is likely to be minimal, insofar as reward-programs of this kind, albeit progress-based, are neither systematic nor specifically linked to a single issue: not only are they based on a range of criteria which is wide and not univocal (progress in reforms, governance, transparency, transition, etc.), but they are also driven by completely different issues, such as financial needs for other countries of the region (Syria crisis, Ukraine, etc.).^{LXXIX}

The result is that there is no *conditionality* in the literal sense of the term, i.e. a clear bargain where something is offered upon the respect of certain conditions, but only a unilateral decision based on a range of contingent necessities. Moreover, the amounts offered are absolutely inadequate to make a difference (*v. infra*).

4. Reasons for failure

To summarize, the EU has been thus far partly unwilling, partly unable, to promote and enforce deep democracy in Egypt, in a mix of deliberate choices for inaction and objective difficulties.



Conditionality has only been exerted to a limited extent, and has never been able to credibly impact on the human rights situation, either before and after the Uprising, or with successive governments.

The overall impression is that the EU and its member states, far from having at least attempted to develop a coherent and long-lasting policy vis-à-vis Egypt and the broader Southern Mediterranean, are constantly lagging behind events and hardly trying to keep up with them.

Which are the causes of that, and how can this course be corrected?

4.1. Inability to overcome structural difficulties created by the “majority stakeholders”, i.e. contentious Member States

According to several sources, this weakness is the inevitable outcome of the EU structure: the European Union represents 28 Member States, and Council Conclusions adopted by the 28 drive the European foreign policy; the EU’s ability to take strong decisions is thus limited by the very way it is conceived.

Member states undoubtedly bear their share of responsibility for the failure of the EU policy vis-à-vis Egypt. Indeed, “member states maintained strong national control over such dossiers, and when acting collectively would do so under the umbrella of the CFSP, where the relevance of the EU’s external relations and its tools were limited. One fallacy of the ENP was to assume that conditionality, developed in the context of the donor-beneficiary relations of development cooperation and of EU enlargement, could be exported to policies which fall into the more traditional foreign policy domain”.^{LXXX}

At the same time, not even member states have ever attempted to define a common strategy that would be something more than a short-term, watered-down compromise between irreconcilable positions. In the aftermath of the Arab Uprisings, member states were unable or unwilling to discuss a comprehensive and rational line of action to respond to the unexpected events unfolding in the Southern border of the Mediterranean. As Maya Bozovic^{-LXXXI} from the Maghreb/Mashreq Working Party^{-LXXXII} recalls, right after the first Egyptian uprising in 2011 it was struggling to decide whether to reaffirm or to withdraw support to Mubarak, although this division was quite soon substantially overtaken by the events. But a serious drift between states has been caused by Morsi’s deposition, with long-lasting consequences in the Council that still persist. In fact, a northern group, led by



Sweden, has assumed since July 2013 a very sharp position against the military's intervention, which they wanted to downright define as a "coup d'état".^{LXXXIII} The same harsh criticism has been shown in the subsequent phases, al Sisi's election included. On the opposite side, one can find a southern group, mainly composed by Greece and Cyprus that is favorable to the "new course", and opposes strong stances against it.^{LXXXIV}

Furthermore, the states' very interest in the region, and consequently the amount of discussions within the Council, started drastically to decrease already in 2012 (with the relevant exception of Syria), which denotes a dramatic lack of attention toward the Middle East.^{LXXXV}

At the same time, member states have continued to want to firmly hold the reins of foreign politics, not allowing the EEAS and the High Representative, whom they consider just like their "spokesperson",^{LXXXVI} to autonomously fill the void left by their disagreements and lack of strategy.

All this considered, it would be unfair to put the blame for the political deficit solely on the EEAS. But since this is *not* one of those cases where "fellowship in woe doth woe assuage",^{LXXXVII} deficiencies of the EU combined with deficiencies of its member states just make the problem worse, and overall contribute to the irrelevant and/or wrong policies of Europe in foreign politics.

4.2. Inability to develop a strategy and to express a political vision

Apart from the problematic issues related to member states, the EEAS was created with a view to implementing a progressively autonomous European foreign policy. This means that it was on the High Representative herself to demonstrate she was more than a "spokesperson", and on the EEAS offices to distance themselves from the Commission, showing that the change from DG Relex^{LXXXVIII} to the External Action Service was not just a nominal one.

As a high-level EEAS official^{LXXXIX} put it, this was supposed to be the major difference from DG Relex: the EEAS is for diplomats, and diplomats are supposed to bring political vision. Political vision implies decisions, sometimes strong ones: the EU must simply accept that it cannot always be the "nice cop" and the "soft power", for credible politics involves taking sides and sometimes using hard power to be "unpleasant".^{XC} This should be implicit in the very use of conditionality, whose aims "are exquisitely political."^{XCI}



All internal sources with whom I spoke, irrespective of hierarchical level, were in agreement that the EEAS has failed in building up that political vision which was supposed to constitute the distinctive element and added value in the creation of a diplomatic service separated from the Commission, and the *raison d'être* of its leadership in foreign politics within the EU system. The EEAS, in other words, should understand that its role is no longer to be another DG, and should consequently take a leading role.

But how could this happen, given that EEAS offices have been created as carbon-copies of DG Relex,^{XCII} further to a Council Decision which, in establishing the Service, did not state objectives, but only tasks, in the absence of “an overarching EU foreign policy strategy”?^{XCIII} An assessment of the Court of Auditors on the creation of the EEAS is explicit in denouncing the deficiencies accompanying its creation and its following actions, in particular an ad-hoc approach deprived of a strategic guidance whatsoever,^{XCIV} and the lack of a system of prioritizations and results assessment.^{XCV}

Since such political vision was lacking, the EEAS was unable to assume its role fully, and this weakness caused problems and ambiguities both in its relations with the Council and with the Commission.^{XCVI} As might be expected, the analysis is quite different according to whether one speaks with either EEAS or Commission officials; for most of the former, the EEAS has failed to take its natural leading role: they argue that EU foreign policy should be structured on the model of national Ministries of Foreign Affairs, i.e. with a Minister and his Cabinet taking decisions, and with various implementing offices.^{XCVII} On the contrary, for the latter,^{XCVIII} the EEAS is a sort of mere *chef de fil*, deprived of real preeminence and political power, and its separation from the Commission only brings about unnecessary duplications of duties, where, before the EEAS, relations between Relex and the other DGs were clearer.^{XCIX} Nowadays, it is not evident what the role of the EEAS should be, given that important political decisions are still referred to the Council, while the implementation of concrete programs is for the Commission, and this in turns implies political decisions to be taken by the implementing DG.^C

However, the conclusion is always the same: an unclear division of duties and consequent duplications, lack of cooperation and faulty, or sometimes even totally absent, inter-service consultation,^{CI} have brought about poorly coordinated decisions, to the detriment of strength and effectiveness.



4.3. Inability to commit sufficient resources for a decisive impact

If these are general flaws of EU foreign politics, more specific issues must be addressed when it comes to Egypt in the framework of the European Neighbourhood Policy.

A widespread view inside the offices of Rond-Point Schuman is that the EU, for the resources it commits - or is allowed to commit by member states^{CII} - simply cannot play the game of sticks and carrots.

An EEAS official dealing with the Mashreq region explains that, of the so-called “3 Ms”, none was particularly appealing to Egypt.^{CIII}

As we have touched on above, money was absolutely irrelevant when compared to Gulf States’ donations or US support to the army.^{CIV} Furthermore, an important part of European financial assistance comes in the form of loans to finance specific projects, from the European Investment Bank and the European Bank for Reconstruction and Development, and their attractiveness is, of course, not as much as hard cash at the complete disposal of Egyptian authorities. From this point of view, the decision to halt budget support, focusing more or less exclusively on civil society, has further diminished the leverage we can use with the government. This opinion is shared within DG Devco: one of the positive aspects of budget support programmes is the political dialogue between governments that this entails, which is absent in the case of small projects which support individual NGOs. Support to civil society is undoubtedly positive and useful, but it is possible only in the framework of a wider political dialogue with the government; supporting NGOs outside of this framework leads to a reduction in communication channels and a loss of leverage.^{CV}

The second “M”, mobility, is a “two-leg deal”: it does not include only Schengen visas for Egyptian students and entrepreneurs, but also repatriation agreements to help combat illegal immigration to Europe.^{CVI} Egypt, clearly, is interested only in the first part.

Finally, when it comes to market, while it is true that in 2012 the EU was ready to open a Deep and Comprehensive Free Trade Agreement with Egypt,^{CVII} this does not bring many advantages to the country: Egypt not only lacks competitiveness, but would also be required to implement reforms to comply with EU norms; this implies a lot of work, which Egypt has been, so far, both unable and unwilling to undertake.^{CVIII}

From this point of view it is therefore not surprising that Egypt rejected both the DCFTA offer and the Dialogue on Mobility, Migration and Security.^{CIX}



In sum, nothing the EU gave or offered or promised was truly appealing, and therefore capable of making the difference for the purposes of conditionality. One, indeed, must bear in mind that the logic of positive conditionality has been largely imported from the negotiations with Eastern European countries after the fall of the Soviet Union, but with a crucial difference - the absence of the “big carrot”, i.e., “the ultimate incentive of accession”.^{CX} Given the circumstances, “if the EU had really wanted to efficaciously play sticks and carrots, it should have been ready to commit a large amount of cash, in the framework of a ‘Marshal Plan’ for the Middle East”.^{CXI}

4.4. Unwillingness to take a clear moral stance indispensable to follow words with deeds

Whereas all the above is undoubtedly true, and the EU commitment has been totally inadequate for an effective leverage policy, this is not sufficient to explain the cycle of repeated failures in the domain of democratization and human rights. After all, as a DEVCO official correctly recalls,^{CXII} the perspective may also be reversed: it does not matter how limited is your aid when you give it: when you take it back it means *lost* money for the country, and this has always a strong political impact, especially now that the US are politically withdrawing from the region.^{CXIII}

A deeper issue exists, which lies at the very foundation of European weakness: how serious are we in promoting, or even enforcing, our values? Reams of paper repeating well-worn clichés cannot conceal the inertia of a weak will.

“While Brussels claims that ‘human rights, democracy and the rule of law are core values of the European Union,’ promoting and defending them ‘both within its borders and when engaging in relations with non-EU countries’ the Egyptian case suggests that the EU does not hesitate to maintain the negotiation process even at a time of a country’s serious internal political de-liberalization”.^{CXIV} This conclusion, whilst referring specifically to the Mubarak era, could be equally applied to Morsi’s, Mansour’s and Sisi’s governments.

It is thus evident that a mixture of political calculations and moral weakness undermine conditionality *ab origine*.

Under the first aspect, a top-level EEAS official admitted that conditionality was inevitably doomed from the beginning: what is the point of promising “more for more” or



threatening “less for less” if we already know that we are not strong enough to pilot a substantial change, and we cannot afford to lose our political and economic relations?^{CXV}

Another EEAS official^{CXVI} suggested a radical change in strategy: a more concrete and effective approach - to better serve both the material and ethical interests of the EU - should not consist of all-encompassing agreements and pompous declarations of principles, but be conducted at a level of “quiet diplomacy” under the guideline of *quid pro quo* and *do ut des*. In other words, it is useless to boast the threat of negative conditionality which we lack the political and economic strength to implement. It would be better to develop a politics of closed-door, high-level meetings to concretely bargain specific exchanges, in limited and defined domains, seeking a “win-win” accord. This approach would be in the first place more effective, and would overcome the issue of “national pride against Western interference”, a common obsession of partner states which constitutes a major obstacle to effective agreements. This way, each party could concretely obtain something and “exhibit the prize” for internal consumption, without the public embarrassment of a perceived “capitulation” in front of public opinion.^{CXVII}

The problem with this solution lies again in the hybrid structure of the European foreign policy, partly autonomous and partly driven by member states: any concession on the European side has to be previously agreed with them or approved *ex post*.^{CXVIII} Even the European Parliament, under the ENI regulation, claims a prerogative in the suspension of aid for human rights reasons.^{CXIX}

Another issue is that any cooperation program should address the broader picture and be long-term; small agreements of limited scope would lack this fundamental dimension.^{CXX}

As to the second aspect, i.e. the ethical dimension, a necessary precondition of conditionality would be reaching, first of all in our own house, crystal clarity on *what* we want to promote and *what for*. In other words, what do we mean with democratization, human rights and the rule of law, and how do we want to achieve this goal?

The EU can no longer afford to pretend to ignore the sad paradox of the Middle East, whereby more democratization often means less liberalism, so that, at the end of the day, more democratization means less human rights.^{CXXI} As the previously cited EEAS official^{CXXII} provocatively put it, is it possible or advisable to promote democracy in a world



where “democratization” equates to “Islamism”? What does the “ethical” dimension of the EU consist of, at this point?

We should dare to say aloud that the end is *liberty*, to which democracy is a mere means, however important.

A clear moral stance would definitely bring about important strategic consequences: in the words of the EEAS official dealing with Mashreq, the EU ought to vocally oppose state deeds when these are in contrast with its principles,^{CXXIII} and also to take political sides in favor of those who better represent, in the meantime, its values and interests.^{CXXIV}

In the Egyptian case this means that the EU cannot find itself caught between the devil of the Muslim Brotherhood and the deep blue sea of the *ancien régime*, in its original or restored version: our support must go to the liberals, and we need to do whatever we can to empower them.

Again, the defects of the EU reflect those of its member states: in the Council strategic discussions never took place on the distinction between liberals and Islamists, and how to empower the former against the latter.^{CXXV} This was especially critical during the Arab Uprisings, when a comprehensive assessment was more than ever necessary, yet the Council on Maghreb-Mashreq became a mere “sanctions and conclusions machine”,^{CXXVI} lacking a serious strategic discussion on the line of action.

5. Conclusions

The creation of the EEAS represented a very positive turn for European foreign policy, and while its potential has still to be fully deployed, in principle it may be a useful instrument that, without taking the place of member states’ foreign services, can positively contribute to harmonize their positions, fill their gaps, and overall express the general interests of the Union in foreign politics.

As far as the Arab Awakening is concerned, the department, albeit newborn, reacted readily and with the right approach, from a theoretical point of view: the EU holds and cherishes universal values of human rights, democracy and the rule of law, which are not rhetorically, but concretely enacted on its soil, and which it is in its political and ethical interest to promote abroad. In this sense, the potentiality of the Uprisings was not underestimated, nor was the importance of a quantitatively and qualitatively increased



partnership between the two shores of the Mediterranean; a partnership that the High Representative and the Special Representative for the Mediterranean did not fail to promote, sometimes in the lack of due attention on the part of member states.

Yet, many questions remain unaddressed, both as to the EEAS *per se* and as to its “democratic agenda” for Egypt.

The EU as a whole has appeared to be merely able to develop tactics to cope with specific necessities, but never a strategy for a long-term assessment of the broader picture. As long as these questions remain unaddressed, and the EU continues to launch random programs to patch up short-term issues, without making it clear, *in primis* within its own offices, what is the final goal, it will be unlikely to be able to develop a credible and effective policy of human rights promotion.

The EEAS must therefore develop first of all a comprehensive strategy towards the Middle East, based on a reasoned assessment of the various factors at play. To this end, a more intense engagement with the world of academia and think tanks of different political views would be crucial, considered that the typically diplomatic practice of periodical mobility prevents officials from becoming experts on a certain regions and dossiers.

In other words, as underlined by the top-level EEAS official mentioned above^{CXXVII}, time employed for superficial (and sometimes useless) daily briefings ought to be more profitably spent in examining in depth the various elements on the ground - political, economic, religious, etc. -, in order to put them in a broader and diachronic picture. That would help to create that awareness which constitutes the minimal basis for any coherently considered strategy.

At the same time, the EU should make it clear what its own priorities are in the various fields – ethics, politics and security, economics - so as to identify points of intersection and points of contrast between them, and to define a balanced strategy.

In the Egyptian case, in effect, the EU has seemed to disregard both its political and ethical interests by its largely uncritical support for the Islamists in power, while economic interests do not seem sufficiently relevant to justify this policy.^{CXXVIII} What is left is merely dialogue for the sake of dialogue, the importance of which in international relations is undeniable, but which *per se* does not suffice in building a constructive policy. And perhaps political wisdom and security issues might support the adoption of a cautious approach



with the new regime, as we were with Mubarak; but once again this would be at the detriment of human rights.^{CXXIX}

It is therefore necessary to find a balance that does not destroy the European “normative” power, bearing in mind that it is in our interest, and in the best interest of human rights, to empower the liberal voices within the state.

Put simply, the EU must learn that the “softly-softly approach”^{CXXX} is not always applicable, and that must be combined with the employment of “hard power”, at occasions showing an “unpleasant” face.^{CXXXI}

The instrument to do that is clear: a greater resort to positive and negative conditionality.

As to the “more for more”, positive approach, effective conditionality requires a decisive “asymmetry of leverage and influence in favour of the EU”:^{CXXXII} hence, once goals have been made clear, the EU should make them appear more attractive through a larger deployment of resources (after all, Europe as a whole is still the first economic power in the world), provided that these are really used to implement “deep democracy”, not Islamist or military “tyrannies of the majority”.

As to the “less for less”, negative approach, whilst this is a more debated instrument, the arguments against are not really convincing.

One of them refers to the risk that a “less for less” approach would merely push MENA countries farther away from the EU, to embrace Gulf or Far East countries.^{CXXXIII}

It is evident that the EU is only one among many donors in the region, its means are limited and so its leverage (*v. supra*); yet, even with the current (relatively) limited resources, it is not so easy for countries like Egypt to do rapidly breach ties with Europe. Not only because lost aid, however little, is still lost, as said above, but mainly because Egypt, for a number of reasons, cannot afford to lose its relations with Europe. First, there is a certain kind of specialized, highly-qualified technical assistance and know-how which only the West can deliver. Second, Egypt is economically tied to the EU, in a way which sees the former much more dependent on the latter than vice-versa: “The EU is Egypt’s main trading partner. The imports from the EU to Egypt account for around one third of the total import to the Egyptian market and in 2010 the EU absorbed around one third of the Egyptian export. For the EU the export and import to and from Egypt represent 0.9% and



0.6%, respectively. The figures are indicative in the sense that obviously the economic relationship is extremely asymmetrical in the favour of the EU”.^{CXXXIV} Third, political interests go both ways; Egypt simply cannot disregard its Northern neighbour, and it does not want to (otherwise, for instance, why to invite Europe to observe the presidential elections?). After all, Saudi Arabia and China are not philanthropists, and any offer from them still comes at a price. Not to mention that post-Mubarak governments have not seemed to be waiting for Europe’s withdrawal before welcoming economic assistance from elsewhere.

Another critique holds that the “less for less” approach “would push the Euro-Mediterranean relations more in the politicized corner, hence reversing the overall strategy of the ENP (bilateral, project-based, non politicized) which has been widely perceived as the more successful way”.^{CXXXV} My argument, as I have tried to show throughout this analysis, is exactly the opposite: we *do* need more politics in the European foreign policy. A mere tactic of projects here and there, outside a strategic, political framework of well determined goals, leads nowhere.

Finally, the EU, if it really believes in its universal values, must enforce conditionality without shying away for fear of appearing “neo-colonialist” or of hurting “national dignity”:^{CXXXVI} human rights are universal, and rhetorical arguments appealing to cultural specificities are the typical instrument of tyrannies, be they of one man or of the majority, to suppress dissenting opinions and ways of life. These arguments, in a word, are the worst enemies of human beings’ equal right to freedom.

The EU must not only proclaim the universality of human rights, but be convinced of that, and act accordingly. Here lays the essence of its “normative power”. Either it’s this, or it is nothing, and in this case a radical review of the paradigm itself, reduced to a sterile rhetorical exercise, should be envisaged.

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^I “What is the European Neighbourhood Policy?” European External Action Service. http://eeas.europa.eu/enp/about-us/index_en.htm (accessed 11/9/2014).

^{II} European Commission and High Representative of the EU for Foreign Affairs and Security Policy, *A Partnership for Democracy and Shared Prosperity with the Southern Mediterranean*, COM(2011) 200 final; 8 March 2011.

^{III} Teti 2012: 266.

^{IV} A multilateral partnership between the EU member states and 15 partner countries from North Africa, Middle East and South East Europe, as a revitalized version of the Euro-Mediterranean Partnership. For further information: <http://ufmsecretariat.org/>

^V “The EU’s oscillation between democratization wishes and security needs was also reflected in the



conceptual change from the EMP to the ENP, and later the UfM, which ‘was assumed to imply a reorientation of EU foreign policy goals from a normative long-term oriented democratization to a strategic short-term stabilization of authoritarian systems on the Southern shore of the Mediterranean Sea’. Also, with the creation of the UfM: political conditionality seems to have been given up. Not only is the principle of conditionality unknown in the UfM proper, but also policy contents have been technicized to the extent that political reform no longer seems to be part of Europe’s ambitions in its relations with the MPCs”. Völkel 2014: 267.

^{VI} PDSP 2011: 2.

^{VII} *Ibid.*: 3.

^{VIII} Völkel 2014: 270.

^{IX} Bauer 2013: 7.

^X “The EU response to the changes taking place in the region needs to be more focused, innovative and ambitious, addressing the needs of the people and the realities on the ground. Political and economic reforms must go hand-in-hand and help deliver political rights and freedoms, accountability and participation. The EU should be ready to offer greater support to those countries ready to work on such a common agenda, but also reconsider support when countries depart from this track”. PDSP 2011: 9.

^{XI} *Ibid.* It must be noted that, in reality, the concept of rewarding the “best performers” is not a new one. See Völkel 2011: 264 and 271.

^{XII} European Commission and High Representative of the EU for Foreign Affairs and Security Policy, *A New Response to a Changing Neighbourhood*, COM (2011), 303, 25 May 2011

^{XIII} NRCN 2011: 1.

^{XIV} *Ibid.*: 3.

^{XV} *Ibid.*: 2.

^{XVI} Annicchino 2014.

^{XVII} *Ibid.*

^{XVIII} *Ibid.*

^{XIX} *Ibid.*

^{XX} <https://democracyendowment.eu/>, accessed 31/8/2014.

^{XXI} Annicchino 2014.

^{XXII} Balfour 2012: 7.

^{XXIII} European Court of Auditors (ECA) 2013: 15.

^{XXIV} For further details, see <http://www.enpi-info.eu/ENI>, accessed 6/9/2014.

^{XXV} European Neighbourhood and Partnership Instrument Arab Republic of Egypt National Indicative Programme 2011-2013, available at <http://www.enpi-info.eu/library/content/egypt-national-indicative-programme-2011-2013> (accessed 25/9/2014): 30.

^{XXVI} *Ibid.*

^{XXVII} For detailed figures, *ibid.* and ECA 2013: 33 foll.

^{XXVIII} ECA 2013: 7.

^{XXIX} European Commission, “Programming Guide for Strategy Paper. Sector Budget Support”, 2008. Available at https://ec.europa.eu/europeaid/sites/devco/files/programming-guide-strategy-papers-sector-budget-support-200811_en_2.pdf, accessed 11/9/2014.

^{XXX} European Commission, MEMO/13/751, 21/08/2013, available at http://europa.eu/rapid/press-release-MEMO-13-751_en.htm, accessed, 6/9/2014. For more detailed information, see European Commission and High Representative of the European Union for Foreign Affairs and Security Policy, *Implementation of the European Neighbourhood Policy in Egypt. Progress in 2013 and recommendations for action*, 27 March 2014: “no payment was made under the Energy Budget Support operation in 2013”, p. 15. “No payment was made under the EU’s Water Budget Support operation in 2013”: 16. On education, “The final payment of EU budget support funds (expected in May) to support the implementation of the 2007-2012 strategy was not released in 2013 due to non-compliance with general conditions placed on budget support operations relating to macroeconomic stability and improvements in public financial management”: 17.

^{XXXI} ECA 2013: 22.

^{XXXII} DEVCO country fiche, available at http://ec.europa.eu/europeaid/countries/egypt_en, accessed 6/9/2014.

^{XXXIII} *Ibid.*

^{XXXIV} ECA 2013: 35.



XXXV *Euro-Mediterranean Agreement Establishing an Association between the European Communities and their Member States, of the One Part, and the Arab Republic of Egypt, on the Other Part*, available at http://eeas.europa.eu/egypt/aa/06_aaa_en.pdf, accessed 6/9/2011.

XXXVI *EU-Egypt Action Plan*, available at http://eeas.europa.eu/enp/pdf/pdf/action_plans/egypt_enp_ap_final_en.pdf, accessed 6/9/2011.

XXXVII Internal source.

XXXVIII Lazarou, Gianniou and Tsourapas 2013: 178.

XXXIX “The action plan contained as many as 39 priority actions in the field of human rights and democracy. This represented an overly ambitious agenda which was not based on clearly spelled out priorities on the part of the Commission” ECA 2013, par. 24.

XL ECA 2013: 8.

XLI *Ibid.*

XLII *Ibid.*: 19.

XLIII Balfour 2012: 16.

XLIV “The related review of EU budget support identifies some important ways to strengthen commission management but these changes will not be effective unless the commission is more strict in applying its conditionality”. ECA 2013: 8.

XLV <http://www.nytimes.com/2012/01/22/world/middleeast/muslim-brotherhood-wins-47-of-egypt-assembly-seats.html>, accessed 25/9/2014.

XLVI An in-depth account of how they exploited democracy and abused the rule of law in any possible way during their year in government is outside the scope of this paper. For an accurate account: Gasparrini, Sabrina. “Il Medio Oriente visto dal Cairo.” *Radio Radicale*. [Radio broadcast]. Editor: Massimo Bordin. In particular July 11, 2012, September 9, 2012, November 23, 2012, December 5 (dealing especially with the notorious “Constitutional decrees”) and 12, 2012.

XLVII For an English translation of the decree, see <http://english.ahram.org.eg/News/58947.aspx>, accessed 25/9/2014.

XLVIII Gasparrini reports that, after the liberals seceded from the Assembly, Morsi simply replaced them with Islamist members, on the basis of a “Presidential decree” dating to August 12, with which the President deprived of authority the Supreme Council of the Armed Forces, and assumed the power to appoint *proprio motu* a new Assembly. The final version of the Constitution was eventually approved, in a single session lasted one day and one night without interruption, by an Assembly that the Constitutional Court would later declare illegitimate. It must be further noted that the ruling of the Constitutional Court was expected in early December, thus before the referendum, but Muslim Brothers besieged the Court, preventing the justices from access. See Gasparrini, *supra* note XLVI, Dec. 5.

XLIX Among the most controversial norms: art. 4 provided that the Islamic University of Al-Azhar was to be consulted in any matter generically “pertaining to Islamic law”, i.e. more or less everything; art. 219 broadened art. 2 (as per which the principles of *sharia* are the main source of the legislation) establishing that the principles of sharia have to be interpreted in the light of the classical Sunni doctrine, with no possible innovation; art. 44 criminalized blasphemy; art. 76 put at serious risk the principle of *nullum crimen, nulla poena sine lege*, by establishing that crime and penalty could be imposed not only on the basis of the law, but also of the Constitution itself, thus opening the door, via art. 2, to the inhumane *hudud* penalties provided in the Quran; art. 81 submitted the enjoyment of all rights and freedoms to the morals of the society.

L <http://www.bbc.com/news/world-middle-east-20571718>, accessed 10/9/2014.

L¹ The newspaper *Al-Masry Al-Youm* made a reportage of the “torture chambers” set up by Muslim Brothers even inside the Presidential Palace. *Egypt Independent*, Dec. 7 2012. <http://www.egyptindependent.com/news/al-masry-al-youm-goes-inside-brotherhood-s-torture-chambers>, accessed 11/9/2014.

LII European Union, Eu-Egypt Task Force Fact Sheet, 14 November 2012, available at http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/EN/foraff/133513.pdf, accessed 12/9/2014.

LIII *Ibid.*

LIV *Ibid.*

LV *Ibid.*

LVI EU-Egypt Task Force - Co-chairs conclusions, available at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/133511.pdf, accessed



12/9/2014.

^{LVII} Personal interview, July 2014.

^{LVIII} European Union, Statement by EU High Representative Catherine Ashton on the situation in Egypt, 5 December 2012, available at http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/EN/foraff/134065.pdf, accessed 12/9/2014.

^{LIX} Maja Bozovic, European External Action Service, Middle East and Southern Neighbourhood, Chair of the Maghreb/Mashreq Working Group. Personal interview, July 2014.

^{LX} ENP Progress in 2012: 2. Emphasis added.

^{LXI} *Ibid.*, pp. 6-7.

^{LXII} *Ibid.*, p. 4.

^{LXIII} ECA 2013: 63.

^{LXIV} *ENP Progress in 2012: 2.*

^{LXV} Personal interview, July 2014.

^{LXVI} Article 21.1 of the treaty of Lisbon states that: “The Union’s action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the united nations charter and international law. The union shall seek to develop relations and build partnerships with third countries, and international, regional or global organisations which share the principles referred to”.

^{LXVII} *Regulation (EC) No 1638/2006 of the European Parliament and of the Council of 24 October 2006 laying down general provisions establishing a European Neighbourhood and Partnership Instrument*, art. 28. Available at http://eacea.ec.europa.eu/tempus/documents/tempus_enpi.pdf, accessed 12/9/2014.

^{LXVIII} *Regulation (EU) No 234/2014 of the European Parliament and of the Council of 11 March 2014 establishing a Partnership Instrument for cooperation with third countries*, art. 1. Available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014R0234&from=EN>, accessed 12/9/2014.

^{LXIX} *Supra* note LVII.

^{LXX} http://europa.eu/rapid/press-release_ECA-13-18_en.htm, accessed 1/9/2014.

^{LXXI} <http://www.eucom.eu/egypt2014>, accessed 5/9/2014.

^{LXXII} In particular, for three weeks the Egyptian authorities did not release from customs equipment essential to the observers, with the result that the long-term observers could not be deployed and do their job until Egypt, under threat of a downgrade of the mission, released the material on 21 May. It goes without saying that, elections having been held less than a week later, it would be a joke to consider them “long-term” observers. See EU EOM Preliminary Statement, http://eeas.europa.eu/delegations/egypt/press_corner/all_news/news/2014/20140529_en.pdf, accessed 10/9/2014.

^{LXXIII} See the EOM Final Report, available at http://www.eucom.eu/files/pressreleases/english/eucom-egypt2014-final-report_en.pdf, accessed 10/9/2014.

^{LXXIV} This is often considered as a restoration of the *ancien régime*, but in fact it is even harsher; never, during Mubarak’s time, were cases observed of persecution against the opposition such as to include more than 1000 people condemned to death by the same court in less than one month, or the systematic persecution of opponents and journalists in such a large scale. For a detailed and constantly updated account of how the human rights situation is evolving in Egypt, see *Freedom House: http://freedomhouse.org/sites/default/files/Egypt%20Democracy%20Compass%20-%202014.pdf*, accessed 3/9/2014.

^{LXXV} See for instance *Foreign Affairs Council Conclusions on Egypt* of 10 February 2014 (available at http://consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/140971.pdf, accessed 12/9/2014), expressing concern and condemnation for the deteriorating human rights situation, especially freedom of the press, expression and assembly, the use of selective justice and indiscriminate detentions, the cycle of violence. See also *Remarks by EU High Representative Catherine Ashton following the Foreign Affairs Council* of 23 June 2014 (available at http://eeas.europa.eu/statements/docs/2014/140623_03_en.pdf, accessed 12/9/2014), which especially focus on Al-Jazeera’s journalists’ condemnation and on the mass death sentences in Minya. Specifically on the last topic, *Statement by EU High Representative Catherine Ashton on the death sentences against 529 members of the Muslim Brotherhood in Egypt* of 25 March 2014 (available at



http://eeas.europa.eu/statements/docs/2014/140324_02_en.pdf, accessed 12/9/2014) and *Statement on the Court Rulings in Egypt*, 29 April 2014 (available at http://eeas.europa.eu/statements/docs/2014/140429_03_en.pdf, accessed 12/9/2014).

LXXVI ECA 2013: 80.

LXXVII European Commission, *EU response to the Arab Spring: the SPRING Programme*, 27 September 2011, available at [http://europa.eu/rapid/press-release MEMO-11-636_en.htm?locale=en](http://europa.eu/rapid/press-release_MEMO-11-636_en.htm?locale=en); accessed 30/9/2014.

LXXVIII Guillaume Fine, Team leader – Cooperation with Egypt, Israël and Palestine, DG DEVCO, Unit F2. Personal interview, September 2014.

LXXIX *Id.*

LXXX Balfour 2012: 17.

LXXXI *Supra* note LIX.

LXXXII This is a body under the EEAS which functions as a linkage between this and the Council, and tries to find a mediation between member states in order to achieve common positions.

LXXXIII In the words of Carl Bildt, Sweden's Minister of Foreign Affairs, "if it is a duck you call it a duck", Bozovic, *supra* note LIX.

LXXXIV Bozovic, *supra* note LIX, and personal experience within Council's sessions.

LXXXV Bozovic, *supra* note LIX.

LXXXVI This is the bitter conclusion of a EEAS top-level official, released in my presence at the end of July 2014.

LXXXVII Shakespeare, *The Rape of Lucrece*.

LXXXVIII DG for Relations Exterieures – External Relations

LXXXIX *supra* note LXXXVI

XC *Id.*

XCI Balfour 2012: 17.

XCII "[D]epartments were transferred to the EEAS not on the basis of their expected contribution to the fulfillment of EEAS objectives, but on the basis of their activities and their administrative position within the Commission or the GSC". ECA 2014: 18.

XCIII *Ibid.*, par. 15-16

XCIV *Ibid.*, par.25-26.

XCV *Ibid.*, par. 28.

XCVI *Ibid.*, par. 26

XCVII As an EEAS official told me, the same way the Italian Development Cooperation is under the Ministry of Foreign Affairs, thus DEVCO should be hierarchically under the EEAS.

XCVIII Monica Liberati, former Team Leader - Head of Sector for Egypt, Lebanon, Syria. DG DEVCO, Unit F2. Personal interview, July 2014.

XCIX For instance, DG RELEX was competent for briefings related to EU external politics and attended Council meetings, on behalf of the Commission. Now that the EEAS has inherited these duties within a separate institution, DGs have to fill the void in the framework of the Commission, *de facto* duplicating the EEAS work. See also ECA 2014 par. 32 on crisis management, and par. 56: "the establishment of the EEAS as a separate entity increased the number of EU institutions dealing with the same matters and this can make it more difficult to agree on an efficient division of labour".

^c For instance, if the EU negotiates a program on justice with Egypt, DEVCO, as the implementer, has to say a word on its political feasibility.

^{ci} Cfr. ECA 2014: 55: "The EEAS participates in the Commission's inter-service consultations, although its limited resources affect its impact on the external dimension of internal policies. In the common foreign and security policy, a field of intergovernmental competence, the HR/VP assesses whether a topic falls predominantly, or exclusively, under this category when deciding whether to consult the Commission. Sometimes, this is a matter of opinion and the proposal may nevertheless have implications for the Commission's areas of competence.

^{cii} "In many cases, the EU cannot bring too many incentives on the table, as most of their promises are subject to approval by the Member States through the Council consent – which strongly reduces the negotiation possibilities of the EU's External Action Service", Völkel 2014: 273.

^{ciii} Personal interview, July 2014. Similar considerations may be found in Balfour, *supra* note XXII, 21 foll.

^{civ} "In fact, the European leverage on the new transitional regime in Egypt is minimal, especially in contrast with the huge assistance funds from the Gulf, estimated at \$12 billion. [...] Apart from that, Europe itself



promised more aid to Egypt after 2011 than it actually delivered, and Egypt was not essentially dependent on it for arms. It is worth mentioning that the EU's budgeted financial support for Egypt amounted to €1 billion between 2007 and the end of 2013, but the Commission says that the instability in Egypt reduced the flow of aid to Egypt to just €16 million in 2012. No new programs have been approved since then. Besides, the €5 billion that the EU pledged for Egypt in November 2012 — €1 billion directly from the EU, with the rest from the EIB and the EBRD — were already frozen, since they were linked to Egypt's ability to conclude a deal with the International Monetary Fund (IMF). When it comes to arms sales, the situation is not any better. According to SIPRI's Military Balance of 2013, Egypt's suppliers from 2004 to 2011 were as follows: 82.76 percent from the United States, 5.17 percent from Russia, 6.89 percent from China and 5.17 percent from all European countries." Isaac 2014: 159.

"Qatar's then Prime Minister Hamad bin Jassim al-Thani announced in early 2013 the doubling of his country's grants to post-revolutionary Egypt for stabilizing the economy, paying EUR 3.6 billion. After the fall of Morsi, Saudi Arabia, Kuwait and the UAE pledged USD 12 million as instant support to stabilize the staggering Egyptian economy. For comparison: The EU Commission's direct response to the Arab Spring comprised EUR 30 million – but for all affected MENA countries, not Egypt alone (grants of the European Investment Bank are not included in this number). Of course, the additional contributions of the EU Member States must be taken into account too; but it is clear that the EU is just one among many donors in the region. Hence, it is not surprising that in many of the current analyses of the Arab spring's geo-strategic consequences, countries like Russia, China, Iran, the US, and the UN Security Council's Permanent five plus Germany are mentioned as relevant, but not the EU." Völkel 2014: 278.

^{CV} *Supra* note XCVIII.

^{CVI} "In return for increased mobility, partners must be ready to undertake increasing capacity building and provide appropriate financial support for border management, preventing and fighting against irregular migration and trafficking in human beings, including through enhanced maritime surveillance; the return of irregular migrants (return arrangements and readmission agreements) and for enhancing the capacity and abilities of law enforcement authorities to effectively fight trans-border organised crime and corruption". PDSP 2011: 7.

"Cooperation on fighting irregular migration is essential to reduce the human suffering and diminished security that is generated. Such cooperation will be one of the conditions on which Mobility partnerships will be based". *A new response, supra* note XII, 12.

^{CVII} Cfr. ENP Progress in 2011: 2. *ENP Progress in 2013*: 11.

^{CVIII} "DCFTAs require a high degree of commitment to complex and broad-ranging reforms. This requires strong institutional capacity. The reforms can be politically challenging and require the involvement of the business community as well as other interested parties. To embark on negotiations, partner countries must be WTO members and address key recommendations enabling them to comply with the resulting commitments. They must also have made sufficient progress towards common values and principles". *A new response, supra* note XIII. **Errore. Il segnalibro non è definito.**, 8-9.

^{CIX} *ENP Progress in 2011*: 12.

^{CX} Balfour 2012: 16.

^{CXI} Statement of the official dealing with Mashreq, *supra* note CIII.

^{CXII} *V. supra* note XCVIII.

^{CXIII} *Supra* note XCVIII.

^{CXIV} Lazarou, Gianniou and Tsourapas: 180.

^{CXV} *Supra* note LXXXVI.

^{CXVI} Mentioned above, *supra* note LVII

^{CXVII} A few concrete examples of this approach: you Egypt want X visas for business men to travel to Europe? Agreed, but we Europe want Y homosexual prisoners freed; we Europe want X journalists freed: if you Egypt agree, we give you Y million euro to finance the new line of Cairo metro; etc.

^{CXVIII} For instance, a mobility partnership with Egypt was already authorized in the *Council Conclusion on the European Neighbourhood Policy of 20 June 2011* (available at http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/EN/foraff/122917.pdf, accessed 29/9/2014). However, it never got off the ground, and many events took place since then: could the EEAS tomorrow autonomously decide to restart a negotiation on that? Probably not, according to many EU officials I interviewed.

^{CXIX} "The European Parliament notes that [...] Regulation (EU) No 232/2014 of the European Parliament



and of the Council of 11 March 2014 establishing a European Neighbourhood Instrument, [...] do not contain any explicit reference to the possibility of suspending assistance in cases where a beneficiary country fails to observe the basic principles enunciated in the respective instrument and notably the principles of democracy, rule of law and the respect for human rights. The European Parliament considers that any suspension of assistance under these instruments would modify the overall financial scheme agreed under the ordinary legislative procedure. As a co-legislator and co-branch of the budgetary authority, the European Parliament is therefore entitled to fully exercise its prerogatives in that regard, if such a decision is to be taken". Regulation (EU) 232/2014, *supra* note LXVIII.

CXX Observation of Liberati, *supra* note XCVIII.

CXXI "Egypt has a dilemma: its politics are dominated by democrats who are not liberals and liberals who are not democrats". See <http://www.nytimes.com/2013/07/03/opinion/in-egypt-democrats-vs-liberals.html>, accessed 1/9/2014.

A valid explanation of this paradox, in the light of classical liberalism, can be found here: <https://www.opendemocracy.net/arab-awakening/faheem-hussain/egypt-s-liberal-coup>, accessed 1/9/2014.

CXXII *Supra* note LVII.

CXXIII For example, the new NGO law creates obstacles for civil society operators, by requiring prior Government authorization and NGO registration.

CXXIV *Supra* note CIII.

CXXV Bozovic, *supra* note LIX.

CXXVI *Id.*

CXXVII *Supra* note LXXXVI

CXXVIII While the economic relation with Europe is crucial for Egypt, it is not as much the other way around, *v. infra.*

CXXIX "Was the EU able (not to speak about 'willing') to stop the disbursement of already approved support funds, just because signs have been confusing about Ennahda's or FJP's political intentions? Rather not. And has the EU clearly condemned the military intervention in Egypt on 3 July 2013 and drawn any negative consequences? No", Völkel 2014: 271.

CXXX *V. supra*, note LXX.

CXXXI *V. supra*, note XC

CXXXII Balfour 2012: 29.

CXXXIII Völkel 2014: 280.

CXXXIV Seeberg 2013: 419.

CXXXV Völkel 2014: 280.

CXXXVI *V. supra* Balfour 2012: 30.

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**A new Commission for a new era.
Is the parliamentarization of the European
Commission the way forward?**

by

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Abstract

This contribution focuses on the need of fostering a European political space and more in particular on the role and the design of the Commission needed to attain that aim.

It is submitted that to increase true democracy in the European Union, there is a need of promoting ‘different in nature’ EU politics, more based on cross-national ideological majorities (or alliances) and less on national interests bargaining. The Commission seems to be well-fitted for that purpose and therefore it is at the core of my analysis and my reform proposals.

After explaining the so called Commission’s paradox (decline but growing role), the paper contends that, in a new era of closer Economic and Political Union, we need a strengthening and democratization of the European Commission and discusses how to attain it.

Firstly, it reviews two relevant recent steps forward: the indirect election of the Commission President in the 2014 European Elections and the new organization of the Juncker’s College.

Secondly, it turns to more medium-long term reforms which can reinforce the Commission and its democratization in the future: an intense parliamentarization of the Commission, the creation of pan-European lists for the European Elections and the merger of the Presidency of the European Commission and the European Council.

Key-words

European Commission, parliamentarization, politicization, European politics, European elections, democratic deficit



1. Introduction^I

This contribution focuses on the need of fostering a European political space and more in particular on the role and the design of the Commission needed to attain that aim.

It thus departs from two premises. The first one is that Europe's democratic deficit (Follesdal et al. 2006) is, to a large extent, caused by an excessive reliance on national politics and that, as MADURO says "without European politics other democratic developments will either be ineffective or even harmful in legitimacy terms" (Maduro 2012). In the European political process, national policies, priorities and timetables have too often and unduly prevailed over European perspectives, and consequently have impeded to fully interiorize and consider the consequences of current deep interdependence. If we wish to increase true democracy in the European Union (and to provoke an important change on the European citizen's perception), there is an imperative need of promoting 'different in nature' EU politics, more based on cross-national ideological majorities (or alliances) than on mere national interests bargaining (Koopmans et al. 2010).

The second premise is that the Commission has to be at the core of that change because it is the Institution called to defend the European interest and whose decisions should not be the outcome of mere national bargaining. It is also the Institution already having resources and technical capacity to deeply study the dossiers and it is supposed to have the independence and neutrality, in particular versus national interests, needed to lead and defend the common European perspective (Dehousse 2005: 175)^{II}. The more powers the Union has, the more likely the Commission will continue to grow in powers and tasks. The deeper integration is the higher demand on increasing democracy will be, therein included the democratization of the European Commission.

Therefore the paper focuses on the Commission's role and its evolution, in particular in recent times and makes proposals for its future. It points out at what we have called the Commission's paradox: a continuous subtle growth of the Commission's powers in a period dominated by increased intergovernmentalism. Although many factors tend to weaken, or at least constrain the Commission's performance, the Commission's role and tasks continue to expand with the transfer of new powers to the Union.



It is my belief that, for this new role and for a new era of closer Economic and Political Union, both the European Commission and its democratic legitimacy needs to be reinforced.

The 2014 European Elections, and in particular the political agreement on ‘indirectly’ electing the President of the European Commission by taking into consideration the elections results, are welcome and have already significantly contributed to a reinforcement of the President of the Commission and his visibility (Hix 1998). This is more true if we consider how the European elections campaign has developed, the role played by the candidates and their European political parties and, above all, the final outcome of the election process. The contribution will pay therefore attention to these developments and its consequences. However it will not stop there and will analyse the advantages and disadvantages of possible steps forward –with or without Treaty reform- to reinforce the Commission and its parliamentarization.

2. The Commission’s paradox: decline... but growing role?

In the last decades, particularly since the end of Delors’ period, the Commission has been perceived as a weaker actor, with less leadership and capacity to set the European Union’s political agenda, as an everyday more secondary actor entrusted with the execution and implementation of political decisions taken by other actors (Areilza 2014: 24-32; Chang M et al. 2013: 168). The economic crisis has exacerbated this vision. Is this perception totally right? Could we really say that the Commission has initiated a continuous and progressive decline and has every day less to say in the European and national politics?

On the one hand, it is true that in recent years we have witnessed an erosion of the Community spirit and method that was set in motion by the founding fathers. In particular, the European Commission, whose supranational nature must be located in the centre of the process of defense of the general European interest, has suffered a loss of leadership.

Several factors have contributed to this deterioration: the crisis and resignation of the Santer’s Commission, the appointment of second-best choices (lower profile candidates) as Presidents of the Commission, the ‘nationalisation’ of the Commission by imposing a formula of one Commissioner by Member State -often a member closely linked to the Government, something that could ultimately put at risk the independence of the College-,



an increase distrust by Governments on the Commission's role, a more combative and powerful European Parliament, the trend towards becoming more a reactive than an autonomous initiator (Ponzano et al 2012) ...

Furthermore, the progressive strengthening of the European Council, which the Lisbon reform formally elevated to the status of an institution, has had a major impact, emphasizing differences between large and small countries (Tallberg 2008) fostering the perception of the Union's decision making as an intergovernmental bargaining and shadowing supranational institutions such as the Commission and the European Parliament. The economic crisis has strongly contributed to confirm this trend. The scene has been stolen by the Heads of State and Government and the Eurogroup, who have gained protagonism.

Another of the Lisbon reforms relating to the European Council, the establishment of a stable presidency, has generated a growing confusion between the President of the European Council and the Commission President that hitherto constituted, with all their limitations, the voice of the Union in the eyes of many citizens.

Moreover the economic crisis -and certain vetos- have obliged to move certain agreements to the intergovernmental arena, beyond the Community framework.

All these factors put together pointed out at a progressive decline of the Commission. Intergovernmentalism has grown to the detriment of certain actors such as the Commission and this is problematic (Habermas 2013; Fabbrini 2013, Torreblanca 2014: 151-152), particularly if intergovernmentalism does not move forward to the Community method (Closa 2013). To a large extent, an imbalance between national governments and the Commission has been progressively developed and enlarged (Puetter 2013, Curtin 2014). This imbalance is calling for further reflection on a new design and role for the European Commission, and for a reinforcement of this Institution so that a better balance could be attained.

On the other hand, however, we should also recognize the important increased powers exercised by the Commission before, during (and after) the economic crisis^{III}. Even if, in recent years, the role of the European Council has become crucial and intergovernmentalism has been reinforced, the progressive transfer of powers to the Union is calling the Commission to play an increasingly influential role on many areas, therein included hardcore-sovereignty areas such as national economic policies, in particular -



although not only- with regard to those Member States who have benefited from rescue actions.

During the economic crisis, citizens have realized more than ever of the degree of interdependence among the different Member States and the impact of European decisions on their daily life (e.g. pensions, wages, employment, public services, health, education and social services,...). Even if in many of these areas there is no power of the EU to directly harmonize or even to regulate, it is crystal clear that European politics are now, through setting the framework that Member States have to respect, limiting to a large extent the margin of discretion of national actors and indirectly imposing certain outcomes in the national arena.

Even if shared with other Institutions, the Commission's role has grown during the crisis and it is impacting every day more in citizens' life. Citizens that, on the other hand, could argue that they have had until recently no say, or only a very indirectly say, on who is the President of the Commission, who are its members and which policy the Commission was going to follow. In a way, another imbalance has been created between the increasing Commission's powers and the few steps towards democratization and politicization of the Commission (increasing role of the European Parliament on the appointment of the Commission and closer accountability of the Commission before the European Parliament). It is submitted that this imbalance has strongly deteriorated the necessary link between the Union and the European citizen and has been very detrimental to the Europeanisation of the Union's politics.

There seems to be a large consensus on the need of more Europe to exit the crisis, to stabilize the situation and to avoid, or at least to diminish, risks for the future. Although the support to Euroskeptics or even Europhobes parties has grown in the recent European Elections, the great majority of the population voted for parties who support the European integration process and defend 'more Europe' solutions. They may differ on how to design this 'more Europe' and the rhythm to attain it but clearly support steps forward^{IV}.

There is no doubt that the crisis has already brought new significant transfers of powers to the Union and that more transfers are underway. The Commission is one of the important actors and beneficiaries of these transfers. If we look at the new Banking Union and banking regulation, the new powers of fiscal supervision or its role within the troika regarding rescue actions, it is impossible to deny that its role is growing, and it is



foreseeable that this role will continue to grow in the future if the Union's powers are reinforced (completion of the Banking Union, steps towards a Fiscal Union and Economic Union).

This growing role is calling again to a serious reflection on the Commission's design and pushing for its democratization. It is submitted that the enlarged scope of its powers, and therefore the impossibility of qualifying its decisions as merely technical, points out at a reinforced political role and advocates for a correlated increase in the democratization of the Institution to legitimate its actions.

Therefore, the decline that we have explained above is compatibilized with increased powers due to new transfers from Members States to the Union (and also communitarisation and reinforcement of existing EU policies).

Trying to answer the initial question, it is not simple. Paradoxically, the Commission has been subject to parallel weakening and reinforcing tensions. What matters is not so much which of those forces has won but that both detect imbalances and could be pushing towards a reflection and changes in the Commission's design and role. It is submitted that the correction of those imbalances need a strengthening and democratization of the European Commission (Pernice at al 2012). How to proceed is what will be discussed below.

3. Reinforcing and democratizing the European Commission

In this section, I will be analyzing both steps already initiated and new proposals to reinforce and democratize the European Commission, both in the short term and in the medium-long term, both attainable without Treaty reform and only after Treaty reform. Most proposals are directly focusing at the Commission' design and election, although I have opted to include as well some others which promote more broadly Europeanisation of the political space and in so doing could indirectly impact the European Commission.

The proposals are aiming at strengthening the legitimacy, effectiveness and visibility of the European Commission and reinforcing its capacity to set priorities. The ultimate aim is to strengthen the coherence between the new Commission's role and its design while looking for a new balance between the Commission and the other Institutions and a better integration between the national and European interests. The paper acknowledges trends



of new intergovernmentalism and deliberative intergovernmentalism (Puetter 2012 and 2013) but advocates for a reinforced role of the Commission within the agenda setting and the decision-making process.

A more direct democratic mandate is essential to increase the legitimacy of the Commission and its role as a political protagonist, without renouncing to its role as arbiter and promoter of consensus and majority through greater involvement with the work of the Council -European Council. Therefore, I propose a greater politicization of the European Commission as the key to a more dynamic transnational political space and closer linkage with citizens through the elections to the European Parliament. The new profile and legitimacy of the President (and the members of the Commission, as the case may be) will provide a more prominent political role and greater visibility.

Accordingly, it is submitted that:

Firstly, innovation in the 2014 European Elections, and in particular the political agreement on ‘indirectly’ electing the President of the European Commission by taking into consideration the elections results, is welcome. It is contributing to a significant reinforcement of the President of the Commission and his visibility, what could strengthen the Commission’s role and leadership. In order to fully understand the impact of this innovation, attention should be paid to: first, how the European elections campaign have developed and the role played by the candidates and their European political parties; second, how the European Council ‘takes into account’ the results of the European elections for its proposal of the candidate to President of the Commission and which is the European Parliament’s interaction with the European Council for this appointment; third, whether a reinforced President makes the difference and encompasses new dynamics for the appointment of the College and/or the internal organization of the Commission. Ultimately, it will depend on how all this new dynamics reflect on a change of perception of the European citizen and on the future Commission’s role, leadership and performance during the whole mandate. This contribution will pay therefore attention to the first steps of these developments and their consequences.

Furthermore, there is a need to identify other steps forward -with or without Treaty reform- to reinforce the Commission and its parliamentarization and to discuss its advantages and disadvantages. It comprises proposals such as a reduction on the number of the members of the Commission or at least a restructuring of its organization, a merger



of the Presidency of the Commission and the European Council, a further parliamentarization and politicization of the European Commission for the appointment of future Colleges or the creation of pan-European lists for future European elections.

Steps forward and proposals will be assembled in two groups. Firstly, I will deal with two relevant recent steps forward: the indirect election of the Commission President in the 2014 European Elections and the new organization of the College. Secondly, I will turn to more medium-long term reforms which can reinforce the Commission and its democratization.

3.1. Recent steps forward

a. The new model of indirectly electing the Commission President in the 2014 European elections

It is very relevant that the new Commission President, Jean-Claude Juncker, has been elected by indirect universal suffrage in the 2014 elections.

The new formula introduced by the Lisbon Treaty for the appointment of the President of the Commission, together with the agreement of pan-European political parties to designate their candidates, has opened a door, a first important step, for more democratization of the European Commission.

The process did indeed begin with a proposal by the European political parties of their candidates for Commission President at the last elections. The party and the candidate assumed a political program which was presented to and argued before the citizens. Debates between the candidates of the major parties with European parliamentary representation took place, were TV broadcasted and commented in the media.

It is true that the formula (“taking into account the outcome of the elections to the European Parliament”) was ambiguous enough to allow different interpretations. However, once the process was initiated and supported by the European political parties, it seems to me almost impossible that the European Council proposed and above all the European Parliament approved a candidate that had not been in the elections battle. Who would be that candidate, who could be said to have won the elections, might have been controversial, particularly if the result was an ‘electoral dead heat’ between the two main parties and candidates. Should it automatically be the most voted candidate in the elections? Should it be the candidate obtaining a stronger support by the recently elected Euro-parliamentarians? There was a certain margin for negotiation between the European



Council and the new European Parliament but no doubt that the power of this latter Institution had intensively increased with the new formula.

The most democratically respectful decision of the European Council was to give the most voted candidate the possibility of collecting majoritarian support in the European Parliament for his appointment. This was the suggestion to the European Council agreed by the larger European political parties after the elections. In spite of the formula ambiguity and some initial resistances by the European Council to accept the automaticity of this outcome, the European Council finally agreed to it.

Thus, the candidate of the most voted party, Jean-Claude Juncker for the European Popular Party, was proposed by the European Council. After a negotiation with other large political parties, he obtained majority support both in the European Council and the European Parliament and was appointed Commission President.

In this way a direct (or quasi-direct) link between the citizen's vote and the appointment of the President was created. This step represents in itself a qualitative leap with huge potential to generate a new dynamism and a very significant reinforcement of the elections to the European Parliament and the European political space. A new system to appoint the Commission President is now consolidated and it would be hard -not to say impossible- to step backwards. All actors must be conscious that, in future European Elections, the Commission President will be indirectly elected by the citizens as it has already been the case in 2014. This will reinforce the importance of the appointment of candidates by European political parties and the approval of their programs. Indeed, it is obliging candidates and parties to communicate a project and a program from a European perspective, and to defend the same arguments before the media and citizens of all Member States.

In my opinion, in future elections, it would be good for candidates for Commission President to be presented in the lists as MEPs. It is not indispensable (and could perhaps have the effect that some good candidates rule themselves out), but it would enhance and revitalize the European Parliament's role and visibility in the media and with the citizens (Arregui 2012).

On the other hand, this new system to appoint the Commission President does not radically change the system or the usual practice for the appointment of the other members of the Commission. Governments still propose names of the same political colour as the



national government, and the Council, by common accord with the President-elect, accepts this after due negotiation. This is what the Treaty currently says and this is how the new 2014 Commission has been appointed.

It is possible that Mr. Juncker as President-elect, for the additional legitimacy obtained, has had slightly more weight in the negotiation and a greater say in the profile of the other Commission members. However, until the Treaty changes or governments unlikely accept to change their usual practice, the impact is going to be limited.

What is crucial –and what measures the low intensity of the change- is that the Commission is not yet designed to be representative of the new majority held at the European elections but of the majority held at the European Council. In such a model, it might even be possible that the Commission President is surrounded by a majority of different partisanship^V. This co-habitation within the European Commission would be a new scenario of uncertain outcome and, in my opinion, reveals that a change might be needed in the future.

In any case, within this new model, the President should have ample leeway to organize the Vice-Presidents and the work of his team. The States would have to be willing to not hinder this exercise, for to do so would risk the new legitimacy becoming content-less. It is also particularly important in this first model that the Commission retains its powers and in particular, the monopoly over the legislative initiative.

Among the advantages of this new model, it is important to reiterate that the election by indirect universal suffrage of the Commission President is in itself, if properly communicated and implemented, a qualitative leap with huge potential to generate a new dynamism and a very significant reinforcement of elections to the European Parliament and the European political space. Indeed, it has already created new positives dynamics for the 2014 elections and the new Juncker Commission and this effect will presumably be stronger for future elections.

The politicization being moderate, being confined mainly to the figure of the President and not involving an alignment of the Commissioners with the political profile of the President (or the majoritarian alliance in the EP supporting the President), involves two advantages and two disadvantages. The first advantage is that it facilitates the appointment of the other Commissioners, avoiding conflict with national governments of different political persuasions. The second is that it is likely to promote a better cooperation of the



Commission with the Council-European Council.

By contrast, among the drawbacks two potential risks must be mentioned: first, it may be detrimental to the coherence of the team and the policies it promotes and to implement the political program which the political party and candidate presented in the elections as the Commission does not represent the new majority held at the elections but the majority at the European Council; on the other hand, there is a risk of not going far enough, that the change does not have important practical implications and that citizens perceive it as merely a cosmetic change (Weiler 2013). Therefore, for this model to work, it is essential to accompany it with a clear increase in the power and visibility of the Commission President and the institution he leads^{VI}.

b. A restructuring of the Commission organization as an alternative – a second best – to a reduction of the number of members of the Commission

In the latter years, there has been a discussion between two models for designing the Commission.

The first would be a Commission with fewer Commissioners than Member States, elected according to an equal rota. This is the model that the Lisbon Treaty appeared to choose for the period after 2014, establishing in Article 17.5 TEU that it will consist of a number of members corresponding to two thirds of the number of Member States, "unless the European Council unanimously decides to alter this number".

The second model is a Commission with one member per state, i.e. the model in place at present, although in principle on a temporary basis (Article 17.4 TEU). However, the Treaty also says that this temporary regime could be extended beyond 2014 with a unanimous decision of the European Council, with regard to which a political commitment was already given at the European Council in December 2008 to facilitate the adoption of the second referendum to ratify the Lisbon Treaty in Ireland in 2009. The political commitment has been confirmed and thus also the second model. The Juncker Commission -as the former Barroso Commission- follows therefore this second model.

I continue to defend the first model as being the best fit to the supranational character of the Commission, allowing it greater flexibility in decision-making, and facilitating a closer coordination and coherence in its actions and thus promoting greater visibility of the Commission and its members as a whole. A Commission with fewer members would gain



agility and executive strength, increasing the visibility and political weight of its President and the full College.

Advocates of the second model often invoke the need to have one Commissioner per State, so that all national sensitivities are present. However, I believe these sensitivities can be captured in other ways without compromising the effectiveness of the Commission. There must be a guarantee that the large blocks of interests of the Union are always present, but this can be obtained with a good design of the equal turn rota. I must, therefore, opt for the first model, and if it were politically feasible –which does not appear to be the case in the current scenario - establish it as the definitive model. It should be noted that this does not require amendment of any of the Treaties but a new unanimous decision of the European Council.

Alternatively, formulas should be adopted for the President to restructure the internal organization of the European Commission, the way it works and its decision-making, forming smaller and effective sub-teams (e.g.the President with his Vice-Presidents, Vice-Presidents with several Commissioners working on related topics). It is not ideal, but it could solve or at least alleviate many of the drawbacks of the current situation.

The Juncker Commission has been organized according to this alternative or second-best scenario. Several innovations are worthy to be stressed:

Firstly, seven vice-presidents have been appointed. They have been entrusted with the main challenges and projects for the European Commission and the European Union in the next 5 years as presented by Juncker in his action plan: Digital Single Market, Energy Union, Euro & Social Dialogue, Jobs, Growth, Investment & Competitiveness, Better regulation & the Rule of Law, and, last but not least, Better External Action. This is a clever means to link the priorities of the mandate with the internal organization and design of the Commission. It is also setting some benchmarks to assess the performance of the new Commission, of the internal teams and the progress on facing the identified challenges.

Secondly, the remaining members of the Commission will therefore be -at least to a certain extent- coordinated by the Vice-Presidents. With regard to the main challenges of the action plan, they will have to be supervised and co-ordinated by the Vice-President concerned and, within the limits of their portfolios, they will have to contribute to the goal pursued as required by this Vice-President. All this may imply a certain ‘functional



hierarchy' between the different members of the Commission, at least within the limits of the responsibility entrusted to the Vice-President concerned. Furthermore, it is also worthwhile to stress that a member of the Commission needs to count with the prior consent of the correspondent Vice-President before raising certain proposals to the College. This new organization aims at promoting coordination and coherence of the different members of the Commission.

Thirdly, there is one clear First Vice-President, in particular for all internal action that requires regulation or which raises a question directly affecting the rule of Law. This seems to be aiming at implementing the priorities of the action plan and coordinating the different proposals while supervising and increasing the quality of the regulation.

Fourthly, the new organization allows for a much better coordination of the whole external action as it implies a reinforcement of the supervisory powers of all the portfolios of the Commission dealing with external action by the High Representative of the Union for Foreign Affairs and Security Policy.

Fifthly, the new design may also be a source of conflicts that will likely be resolved by the Vice-Presidents and the President himself. It is still to be seen whether this reinforces the role of the President and/or Vice-Presidents.

However, although important, the innovations are limited. Each Commissioner continues to have one vote and to have, at least formally, equal status regardless of whether he is entrusted with a Vice-presidency or not. Moreover, the Commission keeps on meeting as a College and deciding by majority. And above all, the Commission continues to represent the majority held at the Council and not the new majority of the European elections.

Furthermore, it is soon yet to know how far the system will change certain dynamics. For instance, it is still to be seen whether more reduced meetings between the President and the Vice-Presidents will be often convened. The same applies regarding how the teams of several Commissioners under the coordination of one of the Vice-Presidents meet and work.

Overall, considering the limitations imposed by the political context, the new organization is a step forward in the right direction, an opportunity for more political, strong, coherent and coordinated action of the European Commission. Although it is a limited innovation, it can work as a first pilot experience and a means to develop a second-



best option within the limits of the current framework.

3.2. Medium and long term reforms

The former recent steps forward have already contributed to a parliamentarization, democratization and strengthening of the Commission and in general of the institutional system. They are limited innovations, possible without Treaty reform, but one should not underestimate them. Every journey starts with a first step.

However, it is submitted that changes are not sufficient for a true democratization and the needed reinforcement of the European Commission and thus further measures should be adopted in the future. The proposed changes point out to a scenario of greater integration, closer to a federal model. Clearly, this scenario would require a political will that does not currently exist, and of course a thorough reform of the Treaties.

a. An intense parliamentarization of the Commission

A model of intense parliamentarization/politicization consists not only in the Commission President being elected by indirect universal suffrage in the European elections, but also that the whole Commission were representative of the new majority at the European Parliament that has supported the Commission president. As very likely there would not be a single political party having the sufficient majority at the European parliament, a coalition would have to be formed to give support to the appointment of the President, the whole Commission and its program, and even to participate in the Commission.

This proposal builds on the moderate politicization initiated with the indirect election of the Commission President in the last elections. It now adds greater discretion for him to choose his team of government from members of his own party or the coalition that supports him (also being able, if deemed appropriate, to incorporate independent figures). In this way the new President could form his team in the same way that a government is usually formed after national elections. This would be a team with the President's full confidence, with a greater ideological affinity of its members and with more chance of advancing the program for government that the party and the President have argued for during the election campaign (or that the coalition that has supported him has agreed after the elections). Naturally, there may be some general requirements that limit his freedom of



choice (not various persons of the same nationality, a certain balance between large and small, including rotating turns, etc.) but it would no longer require the consent of the respective national governments. It would indeed seem appropriate, in any case, that the final chosen group and its program are given the formal approval of the European Council; and, of course, approval by the European Parliament would be necessary (a majority of its component members).

In this model, there might be more doubts about whether it would be necessary to completely maintain the Commission's monopoly over the legislative initiative. Undoubtedly, a power of legislative initiative should continue to reside with the Commission, and this also should remain the most common route for proposals of new European legislation. However, it is more arguable whether, if we attain this model of a new Commission (composed and elected like a national government) it can or should maintain a full monopoly. In all our national democratic systems, when there is a monochrome government with majority support in the national parliament, legislative proposals may originate not only from the executive but also from a particular group or number of parliamentarians. It is a mechanism that ensures the possibility that groups that are in a minority, but that have enough weight and representation, can at least have their proposals debated. This guarantee is not essential at present in the European Union since the Commission is never monochrome, and nor is it elected like a national government, but it might be useful if we change the model. Such power of initiative would not be shared with the States and their governments but rather with the European Parliament (with a sufficiently large group of MEPs), and only if the Commission rejects an initial request from them to draw up a proposal. The Commission would always maintain precedence and, once the proposal has been made, exclusivity. The possibility of proposals from other actors would therefore be residual, and would be designed more as a mechanism for very representative opposition groups to pressure the Commission to present a proposal to debate. In any case, there would have to be a proper specification of the consultations and powers of the Commission within the framework of this exceptional legislative procedure uninitiated by a proposal from the Commission. It would be more a case of a nuanced or attenuated monopoly than a breakup of the monopoly.

Among the advantages of this model of intense politicization, it is undeniable that the system would be a substantial change in the institutional model. It would represent a



definitive step toward creating a true European political space and it would bring the model of the appointment of the Commission and its profile closer to that of most of the state governments. It would enhance citizens' perception of the importance of their vote and their ability to influence the leaders who govern the EU and the policies that they are going to implement.

Its major weaknesses are the main advantages of the previous model of only moderate politicization. Firstly, in practice it would require a reform of primary law by double unanimity (all governments' approval followed by a ratification process involving national parliaments when not directly with citizens through a referendum). Indeed, it is inconceivable that Article 17.7 TEU would give adequate coverage to this model, given that it provides that the proposals of members of the Commission are to be presented by the States (in practice, the governments) and are to be selected by mutual agreement between the President-elect and the Council. Without reform of the Treaty, it is not foreseeable that each government would waive the exercise of this power to yield it to the Commission President. Secondly, it could increase the conflict between the Commission and the Council -European Council and hinder their work together (especially when the Council and Commission have opposing ideological majorities) (Dehousse 2005: 178-80). This would require some kind of "cohabitation" between opposites that is not always easy, but not impossible, as is demonstrated to us by the national experience of some states.

Another weakness -one may argue- is that this politicization of the European Commission could diminish its ideological independence and neutrality and be detrimental to the performance of some of its regulatory and enforcement tasks. However, there are several counterarguments for this statement. First, we must consider that the EU is much more than the regulatory organization it was in the first decades and the Commission is not only a regulator but also a key political actor in the legislative and executive decision-making process. In a new era of Economic and Political Union, without further democratization of the Commission, this Institution risks to be perceived everyday more as just a technocratic body and be marginalized of the important political decisions. Second, the new model does not substantially change the 'ideological character' of the Commission. Members of the Commission are already important national politicians. The difference with the model herein proposed is that they will represent the new majority held at the



European elections and not the one held at the European Council. Third, it is likely that the Commission composition will continue to be non partisan, non ideologically monochrome, as no European political party will likely obtain a sufficient majority to monopolise the Commission. Fourth, European agencies can perfectly maintain their independence regardless of the Commission's design just as national agencies in many of the Member States. The Commission could continue to exercise efficiently many of the regulatory and enforcement tasks directly assigned to it as national governments and administrations do at national level. If necessary, the possibility to delegate some of these tasks to new agencies remains open.

Overall, the advantages overcome the disadvantages and militate in favour of the new model.

b. Create pan-European lists to accompany the intense politicization of the Commission

The intense politicization of the Commission must be accompanied by a new system of electing of MEPs to reduce the 'nationalization' of the European electoral debate. There should be encouragement to talk about Europe, to debate on the European project and its policies, and to vote based on European issues. It is my understanding that this system should not be limited to a symbolic constituency of a few MEPs, but extended to a much more substantial percentage of all MEPs (around 30-50%)^{VII}.

A first advantage is that this new system would consolidate once and for all the European parties, which at present are only families with a certain ideological affinity but deeply fragmented by national interests. Moreover, from a practical point of view, this mechanism would promote that the candidates of each list would be sufficiently well-known figures outside their borders, and also with sufficient linguistic capacity, to spread their message to an electorate of 500 million Europeans. Finally, the voting of the European elections would become independent from that of the national elections, eliminating or at least mitigating the reward/punishment effect focused exclusively on domestic policy, while citizen interest in the European Parliament and Europe would increase^{VIII}.

There must be avoidance of the risk of small countries becoming under-represented, and that voters in small and/or peripheral countries increasingly lose interest in Europe if the main candidates are exclusively from certain countries (large/central) or if they feel that



their interests are excessively diluted. This can be remedied through a system of double voting, as is the German electoral system for the Bundestag. Thus, 50-70% of the European Parliament would be elected from national constituencies, for which we should create one or more areas for each Member State. The other 30-50 % would be elected following a proportional system based on closed lists with one constituency at the European level. Among the disadvantages of this, it should be noted that the proposed system, while ensuring a national and even regional representation, respecting minorities, could increase complexity and be perceived by small countries as detrimental to their interests. However, it is submitted that that with a strong enough information campaign and with a balanced negotiation regarding the design of the new system, these difficulties could be overcome.

c. Merge the Presidency of the Commission and the European Council?

Since the entry into force of the Lisbon reform, the new position of permanent President of the European Council has generated a lot of confusion with the Commission President, weakening the latter's visibility and hampering his prominence and leadership. Although a permanent presidency is better than the rotation of the past and should remain, the model of double presidency has raised questions and involves certain disadvantages. Moreover, the election by indirect universal suffrage of the Commission President has created a new political context that would be further modified by the proposed intense parliamentarization and the creation of pan-European lists. All this forces us to reframe the debate about the appropriateness of a dual presidency model and evaluate an alternative model of a single presidency according to which the Commission President would also preside over the meetings of the European Council.

The disadvantages of the double presidency model can be centred on three points. Firstly, the strengthening of the European Council and the design of its new presidency have contributed, in recent years, to tipping the balance towards the intergovernmental, and weakening the role of the Commission. Secondly, significant functions and prominence have been given to a figure that is the repository of an indirect intergovernmental legitimacy and whose political responsibility is diffuse or excessively dependent on the Heads of State and Government of the Member States. This can have a negative impact on the capacity to influence and control of the European Parliament.



Finally, as was to be expected, the President of the European Council is now to some extent in competition with the Commission President (and even with the High Representative in relation to foreign affairs), undermining the prominence and leadership of these two figures and the interests they represent. It has generated a great deal of confusion that distances the Union from its citizens.

To overcome these disadvantages, the creation of a single presidency has long been proposed from various quarters, such that the Commission President also chairs the European Council (Quermonne 1999, Moussis 2003)^{IX}.

The new single presidency, based in Brussels, would have the stability and visibility that is needed, as well as the technical know-how and support of the Commission. The serious problem of confusion at present would be overcome. Since this President would come from the European elections and would have the support of the European Parliament, this would help connect citizens with the Union. The new role of Commission President could also be a key stimulus if and when the European Council is capable –over and above the representation of national interests – of communicating also, to a greater extent, supranational perspectives and common interests. Thus, it could help correct the loss of influence of the Commission and balance the intergovernmental approach that has characterized recent years. The advantages that a single presidency model would bring in terms of transparency and of Commission-European Council interdependence are easy to foresee.

The reservations of the States in this regard are also evident. In this model, the President, far from being a representative of the Heads of State and Government, would have his own legitimacy further enhanced by his appointment being originated from the European elections. A European Council chaired by the President of a Commission resulting from European elections, i.e. with a clear political origin, is certainly a risky proposition. This model would guarantee interdependence with the Commission and good preparation and follow up of its work, but the difficulties would arise from the relationship of a politicized President with the Heads of State and Governments of different political hues. In reality, the drive towards democratization and politicization of the Union requires, in any case, taking risks of this nature. Indeed, the politicization of the Commission would in any case have an impact on its relationship with the European Council and the Council.

In my view, despite the difficulties, the single presidency system could be viable. The



Commission President could preside over the Heads of State and Government, with the possibility of monitoring the work, strengthening synergies with the Commission and avoiding the confusion of a dual presidency. The European Council would continue to be the necessary protagonist of the European government, but its presidency, associated with the Commission, could become a driving force, an original but feasible proposal, like the system of integration itself.

It should finally be noted that the Treaty does not appear to exclude this possibility, by specifying the incompatibility of the office of President of the European Council only with a national mandate. However, this is controversial, because some consider that Art. 15.2 TUE requires a revision. In any case, if the Treaty is reformed and this proposal of single presidency is promoted, it is advisable to clarify article 15.2 TUE.

4. Conclusions

It is submitted that to increase true democracy in the European Union, there is a need of promoting 'different in nature' EU politics, more based on cross-national ideological majorities (or alliances) and less on national interests bargaining. The Commission seems to be well-fitted for that purpose and therefore it is at the core of my analysis and my reform proposals.

If we look back at the latter years, the Commission has paradoxically been subject to parallel weakening and reinforcing tensions. What matters is not so much which of those forces has won but that both detect imbalances and could be pushing towards a reflection and changes in the Commission's design and role. It is submitted that the correction of those imbalances need a strengthening and democratization of the European Commission. How to proceed is what this paper discusses.

In a new era of closer Economic and Political Union, a more direct democratic mandate is essential to increase the legitimacy of the Commission and its role as a political protagonist. Therefore, my proposals mainly focus on a greater parliamentarization/politicization of the European Commission as the key to a more dynamic transnational political space and closer linkage with citizens through the elections to the European Parliament.



Steps forward and proposals in that direction are assembled in two groups. Firstly, I examined two relevant recent steps forward: the indirect election of the Commission President in the 2014 European Elections and the new organization of the College. Secondly, I turned to more medium-long term reforms which can reinforce the Commission and its democratization in the future.

Regarding the new model of indirectly electing the Commission President at the European elections and the new restructuring of the Commission, both are welcome.

The new formula introduced by the Lisbon Treaty for the appointment of the President of the Commission, together with the agreement of pan-European political parties to designate their candidates, has opened a door, a first important step, for more democratization of the European Commission. It is in itself a qualitative leap with huge potential to generate a new dynamism and a very significant reinforcement of elections to the European Parliament and the European political space. Indeed, it has already created new positive dynamics for the 2014 elections and the new Juncker Commission and this effect will presumably be stronger for future elections.

The restructuring of the Juncker Commission with 7 Vice-Presidencies (one clear First Vice-President) entrusted with the main priorities of the action plan, is not ideal, but it could solve or at least alleviate many of the drawbacks of the current model of 28 members of the Commission, one by Member State. It is an opportunity for more political, strong, coherent and coordinated action of the European Commission. It can work as a first pilot experience and a means to develop a second-best option within the limits of the current framework.

The former recent steps forward have already contributed to a parliamentarization, democratization and strengthening of the Commission. They are limited innovations, possible without Treaty reform, but one should not underestimate them.

However, although important, these innovations are limited. Each Commissioner continues to have one vote and to have, at least formally, equal status regardless of whether he is entrusted with a Vice-presidency or not. Moreover, the Commission keeps on meeting as a College and deciding by majority. And above all, the Commission continues to represent the majority held at the Council and not the new majority of the European elections.



Therefore, it is submitted that these innovations are not sufficient for a true democratization and the needed reinforcement of the European Commission and thus further measures should be adopted in the future. The proposed changes point out to a scenario of greater integration, closer to a federal model. Clearly, this scenario would require a political will that does not currently exist, and of course a thorough reform of the Treaties. It comprises an intense parliamentarization of the Commission, the creation of pan-European lists and the merger of the Presidency of the European Commission and the European Council.

A model of intense parliamentarization/politicization consists not only in the Commission President being elected by indirect universal suffrage in the European elections, but also that the whole Commission were representative of the new majority at the European Parliament that has supported the Commission president. As very likely there would not be a single political party having the sufficient majority at the European parliament, a coalition would have to be formed to give support to the appointment of the President, the whole Commission and its program, and even to participate in the Commission.

The creation of pan-European lists implies that 50-70% of the European Parliament would be elected from national constituencies, for which we should create one or more areas for each Member State, whereas the other 30-50 % would be elected following a proportional system based on closed lists with one constituency at the European level. This change aims at reducing the 'nationalization' of the European electoral debate. It is a means to encourage to talk about Europe, to debate on the European project and its policies, and to vote based on European issues.

The election by indirect universal suffrage of the Commission President has created a new political context that would be further modified if the proposals of intense parliamentarization and the creation of pan-European lists are accepted. All this forces us to reframe the debate about the appropriateness of a dual presidency model and evaluate an alternative model of a single presidency according to which the Commission President would also preside over the meetings of the European Council.

Finally, it should be stressed that these changes aim at a new inter-institutional balance more than at a radical change of system. A new balance in which the Commission increase its legitimacy, visibility, protagonism as agenda-setter and coherent action to better play its



new role and, together with the European Parliament, promote ‘different in nature’ EU politics. Yet its role will continue to be different from a national government as the Council and the European Council will maintain their very crucial roles as decision-makers, political leaders and consensus-builders. Even if all these proposals are accepted, the European Elections and the new Commission may not dramatically change the direction of EU policies but certainly both would have much more influence on the future design of the policies^x.

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[†] This paper is partially based on the report “Proposals for the Future of Europe: The Road to an Economic and Political Union”, University Institute for European Studies, CEU ediciones, Madrid, 2014, that I have co-authored together with B BECERRIL and M MOLTO. The report was presented and discussed before an *ad hoc* working group and then before a larger study group, both chaired by former member of the Commission M OREJA. I am grateful to the preparatory discussions and the comments received during the preparation and drafting of the report. Some of the ideas of this paper were also presented at the Conference What Form of Government for the European Union and the Eurozone?, held in Tilburg (The Netherlands) on 5-6 June 2014. I am grateful for comments received during and after the conference.

[‡] “En d’autres termes, si la Commission n’existait pas, il faudrait maintenant l’inventer” (Dehousse 2005:175).

[§] For an overview of the measures proposed, adopted or implemented by the Commission to fight the crisis, see SZAPIRO 2013: 334-43.

[¶] However, the Eubarometer shows a substantial decrease in the European population support to European integration, something that should be a matter of big concern and which should not be underestimated.

[∇] This has not been the case of the new 2014 Commission because the European Popular Party, the most voted party in the 2014 Elections, and the Party to which Mr. Juncker belongs to, holds as well the majority of representatives in the European Council.

[∞] As S DULLIEN & JI TORREBLANCA, 2012:7, said”...citizens may revolt when they discovered that the EU government they elected had no real powers to introduce new policies or change the rules”.

[∞] This proposal, although covering a more reduced percentage, could also be found in a report of the AFCO Committee of the European Parliament, whose rapporteur was Andrew Duff MEP.

[∞] The need to change the incentives of MEPs and to make them less dependent on decision of their national parties has been stressed by several authors. See for instance, Hix 1997, Arregui 2012: 95 or Hix et al 2007. One of the main challenges of the democratization process is to transform the European elections on first-order elections, and abandon its traditional classification as second-order or even third-order elections (Reif et al 1980; Reif 1997).

[∞] Some others proposed making the President of the Commission a President of the Union but maintaining a rotating Presidency for the European Council and the Council (Pernice 2003).

[∞] However it is true that some Member States may see these changes are unacceptable or at least problematic in their national political orders.

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Four Points on the Court of Justice of the EU

by

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Abstract

This article addresses the role of the Court of Justice of the EU (CJEU) in possible scenarios of EU reforms. Despite its crucial role in the EU integration process the CJEU has been neglected in many of the proposals recently suggested to reform the EU. In this piece I shall try to explore some important issues that should be taken into account when advancing reform proposals with regard to this institution.

Key-words

Court of Justice of the European Union, Preliminary Ruling Mechanism, reforms, European Convention on Human Rights, financial crisis, national courts



1. Introduction

When looking at some recent reform proposals of the EU Treaties from think tanks, the first impression is the very limited attention paid to the Court of Justice of the European Union (CJEU)¹. This does not seem to be consistent with recent rounds of constitutional politics (on them see Alonso García 2010; Vătăman 2011). For the sake of clarity, here I am not underestimating the amendments introduced by the Lisbon Treaty: in certain cases one may have the feeling that the latter have been just indirect consequences of broader changes concerning the structure of EU law- for instance this is the case of the so called de-pillarization, but actually reforms like those introduced by means of Art. 255 TFUE (Alemanno 2014) are of crucial importance. This piece briefly identifies four “camps” or “challenges” that can be identified in current scenarios on the CJEU, and which should be kept in mind when proposing a new round of constitutional politics for the EU. Moreover when advancing reform proposals concerning the CJEU^{II} one has to take its particular position into consideration; whatever the changes proposed, the CJEU will be at an advantage if compared to the other EU institutions, since it will also be the interpreter of those provisions aimed at reforming it. This partly explains why for instance provisions that have been over the years introduced to “hijack” the integration process (Curtin 1993), or to limit the CJEU’s activism, have rarely worked, as I have tried to point out elsewhere (Martinico 2012). Let me also write a couple of lines about what this piece is not about: it neither offers an organic account of the reforms introduced by the Lisbon Treaty, nor does it aim to give a complete overview of all the proposals previously advanced by scholars.

It is a piece which should be understood as being written to be included in a special issue like this, conceived as a moment of reflection upon some burning issues, and an opportunity to contribute to the debate with some concrete proposals.



2. National Autonomy versus EU Law Primacy: The case of the *res iudicata*

My first example of challenge is given by the struggle for a new equilibrium between the primacy of EU law and the national procedural autonomy after the emergence of the *Köbler*^{III} doctrine (Wattel 2004; Zingales 2010) - which represents, according to some scholars (Komárek 2005), a rupture in the traditional cooperative relationship connecting national common (i.e. ordinary and administrative) judges and the CJEU.

Indeed, following decisions like *Köbler*,^{IV} *Traghetti del Mediterraneo*^V and *Kühne & Heitz*,^{VI} Komárek wrote about the “end of the sincere cooperative relationship” (Komárek 2005: 21), and the judicial attempt to build coherence and unity by establishing a de facto hierarchy similar to that of classic federal judicial systems. This is at the core of the so-called appellate theory, according to which “one possible way of reading *Köbler* is to see the referral sent in the context of the claim of liability for a judicial breach as a special kind of an appellate procedure whereby the questions of Community law, improperly treated by the national court, the judgment of which gave rise to the liability action, may eventually reach the Court of Justice on the second attempt” (Komárek 2006) . Or, in other words, “liability action can be seen as an indirect possibility to appeal and reach the Court of Justice” (Komárek 2005:31). As Komárek has noted, the term “appeal” is used metaphorically, since “the decision whether to refer a preliminary question to the Court of Justice remains exclusively in the hands of the national judge, not the parties”. (Komárek 2005: 14). Irrespective of the acceptance of the “appellate theory”, it is unquestionable that the CJEU has chosen to counter centrifugal judicial forces by insisting on its authority and equating the infringement of EU obligations with the violation of its own case law.^{VII}

In the wake of the *Köbler* and *Traghetti del Mediterraneo* cases, there was a huge debate over the possibility that the CJEU might threaten the principle of national *res iudicata* in order to ensure the uniformity of interpretation.

The problem of the equilibrium between the need for interpretive uniformity, and for respect of the principle of *res iudicata*, was tackled by the CJEU in the *Kühne & Heitz* case.^{VIII} In that case (which concerned administrative decisions), the CJEU clearly expressed its preference for the overcoming of the national *res iudicata*, where the applicable national law allows it. This reference to national autonomy (suggested by the *a quo* judge



himself when raising the preliminary question) seems to mitigate the strong acceleration of the CJEU's interpretive uniformity. In *Kapferer*,^{IX} the CJEU answered a preliminary question raised by the *Landesgericht Innsbruck* (Austria) in the proceedings *Rosmarie Kapferer versus Schlank & Schick GmbH*.

The *a quo* judge expressly proposed the possibility to extend the *Kühne & Heitz* principle to the case of *res indicata* in a judicial decision. The CJEU highlighted that:

“It should be added that the judgment in *Kühne & Heitz*, to which the national court refers in Question 1(a), is not such as to call into question the foregoing analysis. Even assuming that the principles laid down in that judgment could be transposed into a context which, like that of the main proceedings, relates to a final judicial decision, it should be recalled that that judgment makes the obligation of the body concerned to review a final decision, which would appear to have been adopted in breach of Community law subject, in accordance with Article 10 EC, to the condition, inter alia, that that body should be empowered under national law to reopen that decision (see paragraphs 26 and 28 of that judgment). In this case it is sufficient to note that it is apparent from the reference for a preliminary ruling that that condition has not been satisfied”.^X

The *Kapferer* doctrine seemed to resolve the issue. Yet, a few months after that decision, the CJEU dealt with another interesting case, *Lucchini*^{XI}. In *Lucchini* the CJEU, following the Opinion of General Advocate Geelhoed, concluded that “Community law precludes the application of a provision of national law, such as Article 2909 of the Italian Civil Code, which seeks to lay down the principle of *res indicata* in so far as the application of that provision prevents the recovery of State aid granted in breach of Community law which has been found to be incompatible with the common market in a decision of the Commission which has become final”.^{XII} As I have argued elsewhere (Martinico 2009), my first impression was that the final conclusion reached in *Lucchini* could be explained by the fact that the contested decision was issued *ultra vires*. Indeed, as the CJEU itself recalled, the challenged decision had been adopted on a subject of undisputed Community competence, given that national courts “do not have jurisdiction to give a decision on whether State aid is compatible with the common market”.^{XIII} As Advocate General Geelhoed said, the principle of *res indicata* cannot permit the persistence of a judicial decision which amounts to a clear violation of the basic separation of competences between the ECs and the Member States.^{XIV} *Lucchini* seemed to be an extra-ordinary judgment, unlikely to set a



precedent on the point; broadly speaking, the judicial autonomy of the Member States did not seem to be put in doubt. However, a few months ago, in *Fallimento Olimpiclub*^{xv} the CJEU confirmed the point (but at the same time, curiously the Advocate General Mazák insisted on the “special” nature of *Lucchini*^{xvi}) saying: “that Community law precludes the application, in circumstances such as those of the case before the referring court, of a provision of national law, such as Article 2909 of the Italian Civil Code, in a VAT dispute relating to a tax year for which no final judicial decision has yet been delivered, to the extent that it would prevent the national court seised of that dispute from taking into consideration the rules of Community law concerning abusive practice in the field of VAT”^{xvii}.

However, case law on the national *res indicata* is just one of the ways in which the Luxembourg Court is challenging the principle of national procedural autonomy.

As we know the CJEU has always attempted to build a direct relationship with national (lower) courts, insisting on the fact that national judicial hierarchies cannot jeopardise the functioning of that direct channel represented by the preliminary ruling mechanism.

A confirmation of this trend is represented by the *Cartesio*^{xviii} judgment whereby the Luxembourg Court “has opened the possibility for national Courts to make references and maintain them, even if they are quashed on appeal by a superior Court on points of EC Law”^{xix} thus jeopardizing the “national judicial autonomy” of the States.^{xx}

Eventually, despite the different suggestion coming from the Advocate General Cruz Villalón^{xxi}, another harsh decision was given in the *Elchinov*^{xxii} case, where the CJEU confirmed the *Rheinmühlen-Düsseldorf* doctrine^{xxiii} by sacrificing the national procedural autonomy and stating that: “European Union law precludes a national court which is called upon to decide a case referred back to it by a higher court hearing an appeal from being bound, in accordance with national procedural law, by legal rulings of the higher court, if it considers, having regard to the interpretation which it has sought from the Court, that those rulings are inconsistent with European Union law”^{xxiv}.
Alongside these judgments - which once more raised the question whether the aim of the CJEU is to build a sort of judicial hierarchy to be considered as alternative to the national one - it might be helpful to consider other contested decisions, which led to several critiques against the CJEU’s case-law, as well as other more recent cases^{xxv}. However for



the purpose of this article it is now necessary to say something on how to solve this thorny issue. I see two options, the first one would imply a reform of the preliminary ruling mechanism and was presented by Komárek in an important article some years ago (Komárek 2007). That piece was written in the pre-Lisbon scenario and in reaction to a Communication of the EU Commission entitled “Adaptation of the provisions of Title IV of the Treaty establishing the European Community relating to the jurisdiction of the Court of Justice with a view to ensuring more effective judicial protection”^{xxvi}. Briefly, the proposal advanced by Komárek consisted of a basic point, described as “the rule”, predicated on the need to limit the preliminary ruling procedure to courts of last instance. However, the author also proposed two exceptions to that rule: a *necessary* exception “when a lower court considers that one or more arguments for invalidity, put forward by the parties or as the case may be raised by it of its own motion, are well founded, it must stay proceedings and make a reference to the Court for a preliminary ruling on the act’s validity” (Komárek 2007: 468^{xxvii}) and a *possible* exception “the Council can decide which EU law measures may be subject to preliminary references from lower courts” (Ibidem). The idea behind this proposal was to guarantee the importance of national judicial hierarchies against attack from the CJEU and in order to reinforce it the author considered in that article a series of possible counter-arguments. In his mind this would enhance the clarity, uniformity and authority of EU law;

“Narrowing down the possibility of lower courts to send preliminary references reflects the philosophy of the Court of Justice’s role as a veritable Supreme Court for the Union and its courts. Supreme, not because of its hierarchically superior position over the national courts – this article does not advocate such a position. The article believes that the fundamental Court of Justice’s task, when ensuring that in the interpretation and application of the Treaties the law is observed, is to provide national courts with authoritative guidance. However, to be able to speak with authority, the Court must speak clearly and persuasively. This cannot be done if it pulverizes its authority into hundreds of (sometimes) contradictory and (often) insufficiently reasoned answers” (Komárek 2007: 484).

I do not think this interpretation is consistent with the spirit and the traditional use of the preliminary ruling mechanism, the reasons for its success can most likely be ascribed to the direct relationship between lower courts and the CJEU. The second option would imply a change in the doctrine of the CJEU and was suggested by Advocate General Cruz



Villalón^{XXVIII} (in his Opinion to the *Elchinov* case). The latter has the advantage of being flexible and might represent a possible new equilibrium in this field after the tensions caused by the above mentioned decisions.

The Advocate General suggested that “it does not appear to be necessary also for a lower court to consider it possible to disregard its internal hierarchical organization in order to preserve the effectiveness of European Union law, since, inter alia, an individual who holds rights conferred by European Union law may now bring an action for liability for judicial acts”^{XXIX} against the Member State. If accepted in the future, this view could be interpreted as another example of softening of the absolute primacy of EU law over national law, thus another change in the structure of one of the constitutional principles of EU law after a confrontation between national and supranational judges. Between these two examples, I would go for the substance of the latter. One could even suggest to go a step further, by trying to codify *expressis verbis* prohibition for lower courts to disapply decisions based on a breach of EU law, but covered by *res iudicata*. However this might have possible shortcomings; the notion of *res iudicata* is not univocal when looking at comparative law and there are legal orders that allow the overcoming of the *res iudicata*. For these reasons it would be necessary to add to the wording of this provision, forbidding national judges to disapply national decisions covered by *res iudicata* with the inclusion of a line stating “in those cases where, according to the legal system of the referring judge, is not possible to overcome the *res iudicata*”. This would be consistent with preserving existing diversity present at the national level. However, I would be the first to be sceptical about a proposal like this, since it would make in any case too rigid a decision which should be handled by courts. This leads me to conclude that on balance the EU Treaties are not the place for a rule like this.

3. Preliminary Ruling Mechanism and Constitutional Courts

A second important challenge is exemplified by the relationship between the CJEU and national Constitutional Courts. On 26 February 2013 the Court of Justice of the European Union (CJEU) decided *Melloni*^{XXX}, a very important case triggered by a preliminary question raised by the Spanish Constitutional Court. This preliminary question had attracted the attention of scholars for at least two reasons. First of all, it was raised by the Spanish



Constitutional Court, which for the first time had decided to use Article 267 of the TFEU. In this sense *Melloni* represented the latest link of a longer chain of preliminary questions raised by national Constitutional Courts. The second reason was because the CJEU was expected to say something important about Article 53 of the Charter of Fundamental Rights of the EU, concerning the burning issue of the relationship between the standard of protection ensured to the same right at different levels.

In this case the CJEU refused a minimalist interpretation of Article 53, by stating at par. 58 of that decision that the “Charter would undermine the principle of the primacy of EU law inasmuch as it would allow a Member State to disapply EU legal rules which are fully in compliance with the Charter where they infringe the fundamental rights guaranteed by that State’s constitution”. The Court then added at par. 60 “It is true that Article 53 of the Charter confirms that, where an EU legal act calls for national implementing measures, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised”. This was seen as a return to an absolute conception of primacy^{xxxI} and in general it sounded very harsh. More recently, on 13 February 2014, in its follow up to the *Melloni* decision of the Luxembourg Court, the Spanish Constitutional Court reversed its case law and abided by the indications of the CJEU^{xxxII}. The Spanish follow up to the *Melloni* case was somewhat ambiguous, because “while the outcome does fulfil the mandates of EU law, the reasoning proves quite unsettling” (Torres Pérez 2014: 309).

This case gives a more general idea of the very difficult role played by national Constitutional Courts. This decision is in line with other recent rulings of the CJEU, whereby the Luxembourg Court did not show great deference towards national Constitutional Courts; I am referring to the *Filipiak*^{xxxIII} and the *Winner Wetten*^{xxxIV} cases for instance, as we will see later in this article. This does not seem to be coherent with another recent trend which sees Constitutional Courts more and more open to Article 267 TFEU and with another series of decisions which had been traced back to a sort of margin of appreciation doctrine of the CJEU^{xxxV}. Other examples of this difficulty is given by cases like *Melki*^{xxxVI} - a well-known case which originated from the reform introduced in France by Article 61-1 of the French Constitution, by which the *incidenter* control of constitutionality was introduced^{xxxVII} - or *Križan*^{xxxVIII}, *Chartry*^{xxxIX} or, recently, *A v. B*^{XL}.



For instance, *Križan* originated by a preliminary reference sent by the *Najvyšší súd Slovenskej republiky* (Supreme Court of Slovakia).

Among other things, the *a quo* judge asked whether Article 267 TFEU requires or enables the supreme court of a Member State to use the preliminary ruling mechanism

“even at a stage of proceedings where the constitutional court has annulled a judgment of the supreme court based in particular on the application of the EU framework on environmental protection and imposed the obligation to abide by the constitutional court’s legal opinions based on breaches of the procedural and substantive constitutional rights of a person involved in judicial proceedings, irrespective of the EU law dimension of the case concerned that is, where in those proceedings the constitutional court, as the court of last instance, has not concluded that there is a need to refer a question to the [Court of Justice] for a preliminary ruling and has provisionally excluded the application of the right to an acceptable environment and the protection thereof in the case concerned?”^{XL1}

The answer delivered further proof of the strong conception of EU law employed by the CJEU in its relationship with national (constitutional) judges, stressing the autonomy to be left to the *a quo* judge to refer to the CJEU^{XLII}.

Traditionally, Constitutional Courts have always been “pretty problematic” from the viewpoint of the CJEU; for many years they refused to employ the preliminary ruling mechanism (Martinico 2010). Now the situation has changed, at least apparently, since the Constitutional Courts of Germany^{XLIII}, Belgium,^{XLIV} Austria,^{XLV} Lithuania,^{XLVI} Italy,^{XLVII} Spain^{XLVIII} and France^{XLIX} have agreed to make a preliminary reference to the CJEU. However, to date the majority of Constitutional Courts still have not accepted considering themselves as judges under Art. 267 TFEU, and even those Courts that have embraced the mechanism make it evident that they consider it as an *extrema ratio* (with the Belgian and Austrian exception, perhaps). The Austrian case is emblematic, because even in this case of a traditionally “friendly” and loyal Constitutional Court, the CJEU has recently produced a “Melki style” reaction in the already mentioned *A v. B.* case^L. On that occasion, and this leads me to my proposal, the CJEU thought the case was similar to *Melki* and the question was not decided by the Great Chamber but by its fifth section. This was not the first time in which cases concerning established case law of national Constitutional Courts (questioned by the referring judges through the use of preliminary mechanism) had been decided in a composition different from the Great Chamber, another case is *Landtová*^{LI}. In



this respect I do agree with scholars like Alonso García (Alonso García 2012: 7-8) who insisted on the fact that cases like these should be decided by the Great Chamber and in this sense the introduction of a specific provision in the Rules of Procedure of the CJEU could be advocated.

Another interesting proposal concerning Constitutional Courts and Art. 267 of the TFEU is presented by Tatham in his latest book and consists of the introduction of an “*actio popularis*” at EU level, “a constitutional reference which could eventually be sent to the CJEU. The use of this procedure would be available to natural and legal persons in EU Member States to raise a claim directly before their constitutional court on an issue of European law on the grounds that an essential element of national sovereignty was being impinged upon by an EU legal provision” (Tatham 2013: 314). The author also sketches out the possible revision of a new Art. 267 TFEU reading “Where the court or tribunal of a Member State against whose decision there is no judicial remedy under national law is a constitutional court or a supreme court or chamber thereof exercising final constitutional jurisdiction in that Member State, any natural or legal person in proceedings before such court or tribunal, either directly or indirectly as a party to a case referred from another court, may request a European constitutional reference to the Court where such person claims infringement, actually or potentially, by EU law of the constitutional identity of that Member State” (Tatham 2013: 315). Although this proposal was designed some years ago, it is still worthy of consideration, especially since it tries to take into account the problematic nature of Art. 4.2 TEU¹¹¹, one of the most controversial novelties introduced by the Lisbon Treaty.

4. The Accession of the EU to the European Convention of Human Rights

My third challenge is represented by the accession of the EU to the ECHR, at least for those who still believe in the accession after Opinion 2/13 CJEU¹¹¹¹. However, imaging that Opinion 2/13 will just delay the accession to the ECHR can be considered as the outcome of a process of gradual emergence of the issue of fundamental rights in EC/EU law; a step in the journey towards a more comprehensive system of protection of fundamental rights. It will be also a test for the EU institutions that will not only be



controlled “internally” (by the domestic actors operating at the national level) but also “externally”, according to a mechanism that will enable the European Court of Human Rights (ECtHR) to abandon the indirect control which, since the *Cantoni*^{LIV} judgment, has always carried *de facto*, even on the “fundamental rights performance” of the EU.

With particular reference to the Court of Justice, the accession to the Convention may also mean the beginning of a period of downsizing and this could have consequences on the same doctrine of the autonomy of Union law. Relationships that are now assigned to the comity (see doctrine *Bosphorus*^{LIV}) could be subject to a rigorous discipline, with obvious limitations of the scope of autonomy of the actors involved (more certainty, one might say, but also less flexibility).

Traditionally, as the *Mox Plant*^{LVI} case demonstrates, the CJEU has always jealously guarded their monopoly of interpretation; how will it react to this new situation? This is not merely a hypothetical question, as Art. 1 and 3 of the Protocol concerning EU accession to the ECHR to the Treaty of Lisbon confirm^{LVII}.

According to this Protocol, nothing in the agreement relating to the accession of the EU to the European Convention on the Protection of Human Rights and Fundamental Freedoms provided for in Article 6(2) of the Treaty on European Union shall affect Article 344 of the TFEU (former Art. 292 ECT). Article 344 of the TFEU concerns the interpretive monopoly of the CJEU on EU law (and, as is well known, the agreements concluded by the European Communities are considered as part of the Community – now EU – law due to the automatic treaty incorporation doctrine^{LVIII}).

Indeed the attention paid by the CJEU in Opinion 2/13 has confirmed the importance of Art. 344 of the TFEU. Why was such an article recalled in the Protocol on the accession to the ECHR? Looking at some documents published on the CJEU’s website, one can see how the Luxembourg Court seems to be worried about the need to preserve its interpretive autonomy^{LIX} (another pillar of its reasoning in Opinion 2/13) and this might induce the CJEU to present some thorny interpretive issues involving both the ECHR and the European Charter of Fundamental Rights (CFREU) as questions concerning only the second document in order to preserve its interpretive autonomy. This is just a hypothesis and the future will tell us more about that (again, imagining that Opinion 2/13 will just delay and not preclude the accession). What is interesting here is to demonstrate how the



results of the accession cannot be easily forecast, at least at this stage, without having a clear picture of the contents of the agreement evoked by Protocol No. 8.

This discussion confirms the interpretative competition between the European Courts and the risk of conflicts even after accession. The draft on the agreement on the accession (DAA)^{LX} of the EU to the ECHR was made public and, from its wording (at least looking at its first version), according to some authors, seemed to interpret the relation between the ECtHR and the CJEU as a hierarchical one.^{LXI}

What should we do now after Opinion 2/13? In a provoking post Besselink argued that a new Protocol should be introduced whose wording would be as follows:

“The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms, notwithstanding Article 6(2) Treaty on European Union, Protocol (No 8) relating to Article 6(2) of the Treaty on European Union and Opinion 2/13 of the Court of Justice of 18 December 2014” (Besselink 2014).

This would be a sort of “Notwithstanding Protocol” (Besselink 2014) introduced with the specific purpose of circumventing the Opinion of the CJEU. I respectfully disagree, this does not seem to be feasible or even desirable, since it would represent a dangerous precedent in reaction to a bad decision. I think the only solution is to renegotiate the agreement, including some of the points made by the CJEU (since some of them seem reasonable after all, for instance that concerning Protocol No. 16^{LXII} aiming at creating a mechanism enabling highest national courts to request advisory opinions to the Strasbourg Court). There will be room for changes and adjustments, and the possibility has also been suggested of a mechanism similar to the preliminary ruling procedure that allows the European Courts (CJEU and ECtHR) to “converse” using a preferred mechanism for judicial cooperation.^{LXIII} However, even in the case of confirmation of the “hierarchical” reconstruction of the relationship, the autonomy of interpretation of the CJEU would not suddenly disappear; much will depend, for example, on how the CJEU would treat cases of potential “interest” to the Strasbourg Court. In the event that the CJEU considers that the interpretation to be given to the provisions of the Charter of Fundamental Rights is not perfectly coincident with that of a similar provision contained in the ECHR (which is not improbable, even in light of the explanations of the Charter drafted by the *Praesidium*), for



example, the Luxembourg court could “carve out” an area of non-interference, even in this area, from the control exercised by Strasbourg.

In any case, if it remains to be seen whether the new system devised by the accession to the ECHR will increase the coherence of the system, it will certainly not decrease the interpretative competition between the European courts, giving birth to other potential conflicts.

In this respect the words pronounced by Sir Francis Jacobs are emblematic:

“Although competition is in general a valuable technique for achieving economic progress and is central to the concept of the common market, it is not clear that competition between fundamental rights instruments within the same legal order has a positive value. Moreover, in the particular case of the European Institutional complex, the constitutional entrenchment of the Charter might be seen as liable to cause confusion”^{LXIV}.

Another problematic element provided in the draft agreement was the “co-respondent mechanism”^{LXV} introduced in the draft agreement which allows “the EU to become a co-respondent to proceedings instituted against one or more of its member States and, similarly, to allow the EU member States to become co-respondents to proceedings instituted against the EU”^{LXVI}. The DAA provided for another mechanism (“prior involvement”) which will give the CJEU the opportunity to “have voice” in “cases in which the EU is a co-respondent” by assessing the compatibility with the Convention of the relevant provision of Union law, if it has not already had the possibility to do so at an earlier stage^{LXVII}. Even before Opinion 2/13, scholars^{LXVIII} had expressed their concerns about the introduction of these mechanisms that seemed to respond to logics of judicial politics and which did not seem to have anything to do with the real aim of the accession: the increase of coherence in European fundamental rights’ protection.

Referring to the excellent comments published soon after the release of the Opinion for detail (Peers 2014a; Douglas Scott 2014; Besselink 2014, Lock 2014), for the time being I would like to point out that very much will also depend on the use of the Charter of Fundamental Rights of the EU which contains many provisions inspired by (as recalled by the explanations to the Charter) those included in the ECHR. In this sense some of the cases brought before the ECtHR in the future could be solved by the CJEU through



reference to its own Charter: this would ensure that the CJEU maintains an important position in the architecture of the fundamental rights of the EU. However, in order to do so it is first necessary to clarify the scope of application of the Charter, and perhaps a restyling of Art 51 could be very helpful, with, moreover, a re-examination of ambiguous case law of the CJEU in this field^{LXIX}.

5. The Financial Crisis

My fourth case arises from the financial crisis. As we know at the beginning of March 2012, 25 European leaders signed the new “Treaty on Stability, Coordination and Governance in the Economic and Monetary Union” (TSCG).

What will change with the entry into force of this new Treaty?

The issue of the innovative contents introduced in EU law by means of this international Treaty has been disputed among scholars. Within the contents of this Treaty, a particular problematic provision is Article 3. In particular Art. 3.2 provides for the necessity for the States to codify the budget rule in national law “through provisions of binding force and permanent character, preferably constitutional, or otherwise guaranteed to be fully respected and adhered to”. It is debatable whether this last provision (Art. 3.2) is consistent with Art. 4.2 of the TEU stating the necessity to respect the national identity and constitutional structure of the EU Member States. Does this article imply a constitutional obligation for the Member States? Who is in charge of the control of the respect of this article? A situation which is somehow comparable to that characterizing Art. 4.2 TEU.

Who is in charge of defining what belongs to the idea of national identity or constitutional structure of Member States under Art. 4.2 TEU? National Constitutional Courts or the CJEU?^{LXX} Similar considerations apply to other open provisions (i.e. provisions referring to national law in the interpretation of EU law^{LXXI}) present in the recent product of EU constitutional politics. Here it suffices to recall the *Lissabon Urteil*^{LXXII} where the German Constitutional Court specified the sensitive sectors that embody the national constitutional identity. In doing so, the German Constitutional Court made an important contribution to the definition of Article 4 of the TEU, in its problematic concept of “national identity”. However, one can see the risk of proceeding in this way –



interpretive anarchy, a context in which each Constitutional Court can express its own view on the notion of constitutional identity while pretending to participate in a “pluralist” interpretation. This episode confirms the risks present in a clause like Article 4.2. TEU and the impossibility of neutralizing conflicts by means of clauses like these. Even in the case of Art. 3 there will be an overlapping zone since this golden rule will be, at the same time, part of the TSCG and of some national constitutions and this might increase the interpretative competition between courts.

It is not a coincidence that more recently Constitutional Courts (or Supreme Courts in other cases) have been progressively involved in the domain of economic governance, which has traditionally been a domain of the political institutions^{LXXIII}.

Another problematic provision is Art. 8, which gives the CJEU jurisdiction to rule on parties’ compliance with the requirements of Art. 3.2 of the Treaty. Is this provision compatible with the TFEU? The Preamble of the international agreement refers to Art. 273 of the TFEU and Art. 260 of TFEU, but Art. 273 of the TFEU seems to be very clear in anchoring the jurisdiction of the CJEU to the subject matter of the EU Treaties^{LXXIV}. As the Court said, the extension of the competences of the Court is always possible, provided that the core of the Treaties^{LXXV} is respected. The complicated picture of the TSCG is made even more problematic by the uncertain mandate of the CJEU, since it is not clear from Art. 8 TSCG whether the task of the Court only concerns the content of Art. 3 or all the contents of the TSCG (and this of course matters),^{LXXVI} i.e. one of the most important actors in the process of EU integration, the guardian of those constitutional safeguards that inspire the life of the Union. In this sense the possible incorporation of the contents of these provision – consistently with Art. 16 of the TSCG^{LXXVII} – into the body of the EU Treaties would overcome these doubts.

In conclusion, this piece has tried to present four major challenges for the CJEU and also identified some proposals to deal with them. In some cases these issues could be tackled by rewriting the EU Treaties while in other cases I looked at the Rules of Procedure of the Court as the most appropriate sources. Finally, there are cases where after having listed some options in terms of reform of the EU Treaties, I expressed my preference for a judicial *revirement* seen as the most viable way to overcome the issue at stake, especially in those circumstances where the solution seems to require a certain degree of flexibility.



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^I See for instance Padoa Schioppa 2013. A slightly different approach is the example of “A Fundamental Law of the European Union” written by the Spinelli Group-Bertelsmann Stiftung where it is possible to find a couple of interesting provisions, for instance that empowering the Ombudsman “to advance the cause of the EU citizen, including the right to refer to the ECJ cases concerning a breach of the Charter”. Moreover “The Court is given full command of its own rules of procedure. Article 58 serves to widen access to the Court of Justice in important ways a change which will serve to develop the role of the ECJ as a federal supreme court. Article 64 makes it possible to attack in the Court a decision of the Parliament taken against a state charged with a breach of fundamental rights” (the Spinelli Group-Bertelsmann Stiftung 2013: 53).

^{II} On some recent proposals see Peers 2014b.

^{III} Case C-224/01, *Köbler* [2003] ECR I-10239.

^{IV} Case C-224/01, *Köbler* [2003] ECR I-10239.

^V Case C-173/03 *Traghetti del Mediterraneo Racc*, 2006, I-5177.

^{VI} Case C-453/00, *Kühne & Heitz* [2004] ECR I-837.

^{VII} In the *Köbler* case, for example, it acknowledges that: “The principle that it is for the legal system of each Member State to determine which court or tribunal has jurisdiction to hear disputes involving individual rights derived from Community law, subject to the reservation that effective judicial protection be ensured, is applicable to actions for damages brought by individuals against a Member State on the basis of an alleged breach of Community law by a supreme court”. And before: “In any event, an infringement of Community law will be sufficiently serious where the decision concerned was made in manifest breach of the case-law of the Court in the matter”.

^{VIII} Case C-453/00, *Kühne & Heitz*, 2004 ECR I-837.

^{IX} Case C-234/04, *Kapferer*, 2006 ECR I-2585

^X Case C-234/04, *Kapferer*, 2006 ECR I-2585, par. 23.

^{XI} Case C-119/05, *Ministero dell'Industria, del Commercio e dell'Artigianato v. Lucchini SpA*, 2007 ECR I-6199. About *Lucchini* see: Groussot- Minseen 2007.

^{XII} Case C-119/05, *Ministero dell'Industria, del Commercio e dell'Artigianato v. Lucchini SpA*, 2007 ECR I-6199, par. 63).

^{XIII} Case C-119/05, *Ministero dell'Industria, del Commercio e dell'Artigianato v. Lucchini SpA*, 2007 ECR I-6199.

^{XIV} “In short, the key question is whether a final judgment which came about in the circumstances referred to above, which, as is evident from the previous point, may have serious implications for the division of powers between the Community and the Member States, as this results from the Treaty itself, and which would also make it impossible for the powers assigned to the Commission to be exercised, must be considered inviolable. To my mind, that is not the case” (par. 70- 71), Opinion of the AG Geelhoed on the *Lucchini* case, delivered on 14 Sept. 2006.

^{XV} Case C-2/08 *Fallimento Olimpiclub*, ECR 2009, I-7501.

^{XVI} Advocate General Mazák, Opinion to Case C-2/08 *Fallimento Olimpiclub*, ECR 2009, I-7501:”The approach taken by the Court in that line of cases concerning the obligation to review or reopen final decisions which are contrary to Community law is certainly characterised by its focus on the circumstances of the individual case. Ultimately, however, each of those judgments reflects a balance that had to be struck, in the particular factual and legal circumstances of the case, between legal certainty, which the finality of decisions is intended to serve, and the requirements of Community legality. Accordingly, I do not share the view suggested by the referring court that the line of cases outlined above reveals a general trend in the case-law of the Court towards eroding or watering down the principle of *res judicata*.” (par. 54- 55).

^{XVII} Case C-2/08 *Fallimento Olimpiclub*, ECR 2009, I-7501, par. 32.

^{XVIII} Case C-210/06, *Cartesio*, ECR, 2008, I-9641.

^{XIX} See the point: “Where rules of national law apply which relate to the right of appeal against a decision making a reference to a preliminary ruling, and under those rules the main proceedings remain pending before the referring court in their entirety, the order for reference alone being the subject of a limited appeal, the second paragraph of Article 234 EC is to be interpreted as meaning that the jurisdiction conferred by that provision of the Treaty on any national court or tribunal to make a reference to the Court for a preliminary



ruling cannot be called into question by the application of those rules, where they permit the appellate court to vary the order for reference, to set aside the reference and to order the referring court to resume the domestic law proceedings”, Case C-210/06, *Cartesio*, ECR, 2008, I-9641, par. 98. On *Cartesio* see Sarmiento 2012.

^{XX} “*Cartesio* raises many questions about the degree of interference that the ECJ is willing to inflict on national judicial autonomy, but it is clear from its wording that national Courts that engage in a preliminary discourse with the Luxembourg Court are protected from most appellate intrusions of superior domestic Courts. When the ECJ states that a revocation or an amendment from the appellate jurisdiction is a matter that the inferior court ‘alone is able to take a decision on’, it is conferring on the said Court a power to disregard a judgement delivered by an appellate Court, on a case that will eventually return to that same jurisdiction when the judgements of the ECJ and the referring court are dictated”, Sarmiento 2012: 303.

^{XXI} Advocate General Cruz Villalón, Opinion to C-173/09 *Elchinov*.

^{XXII} Case C-173/09 *Elchinov* www.curia.europa.eu.

^{XXIII} Case C-166/73 *Rheinmühlen-Düsseldorf*, ECR, 1974, 33.

^{XXIV} Case C-173/09 *Elchinov* www.curia.europa.eu, par. 32.

^{XXV} For instance, among others, Case C-416/10, *Krizan & Others -v- Slovenska Inspekcia Zivotneho Prostredia*, www.curia.europa.eu; Case C-136/12, *Consiglio nazionale dei geologi v Autorità garante della concorrenza e del mercato*, www.curia.europa.eu.

^{XXVI} COM(2006) 346, http://www.astrid-online.it/--spazio-e/PROGRAMMA-/EUComm_TitleVI_JurisdictionECJ_28Jun.pdf.

^{XXVII} See also: Case C-344/04, *The Queen on the application of International Air Transport Association And European Low Fares Airline Association Department for Transport*, ECR, 2006 I-00403 (par. 30- 32).

^{XXVIII} Advocate General Cruz Villalón, Opinion to C-173/09 *Elchinov* “The increased workload facing the Court of Justice warrants a final word in that connection. The high number of references for a preliminary ruling which arrive at the doors of this institution together with the creation of the urgent procedure, which is intended to provide a reply in a much shorter period, make it all the more pressing for the Court to share functions with the national courts. The introduction before national courts of remedies under European Union law, as occurred with State financial liability and the principles of effectiveness and equivalence, is a move which strengthens and promotes cooperation between the Court and its national counterparts. In addition, the increased number of Member States, allied to the ever more frequent and direct contact between individuals and European Union law, make the aim that the Court should deal alone with the task of supplying an authoritative interpretation of European Union law less and less realistic. In that regard, the judgment in *Rheinmühlen I*, which is a product of its time and of a particular context, may, paradoxically, end up impeding rather than safeguarding the effectiveness of European Union law. That is all the more so since, in the circumstances of the present case, Mr *Elchinov* could use other legal remedies before the national courts, remedies which, moreover, are guaranteed to him under European Union law...In contrast to the situation in the 1970s, it is possible to assert today that European Union law has reached a level of maturity which allows it to ensure its own practical effectiveness before the courts of the Member States with a lesser degree of involvement in the autonomy of national courts than that which indubitably results from *Rheinmühlen I*. That is why the time for reconsidering that case-law appears to have arrived” (par. 29-31).

^{XXIX} Advocate General Cruz Villalón, Opinion to C-173/09 *Elchinov*, par. 27.

^{XXX} Case C-399/11, *Stefano Melloni v Ministerio Fiscal*, www.curia.europa.eu. Mr. Melloni, an Italian citizen living in Spain, was convicted in absentia for bankruptcy fraud by a sentence delivered by the Tribunale di Ferrara and arrested by the Spanish police. On the basis of the Council Framework Decision on the European Arrest Warrant (2002/584/JHA as amended by the Framework Decision 2009/299/JHA) the Italian authorities asked for the activation of the mechanism. Mr. Melloni opposed surrender to the Italian authorities, by arguing the violation of the right to defence. The Audiencia Nacional (a special Spanish high court) decided to surrender Mr. Melloni to Italy since it considered the right to defence was respected (Mr. Melloni, in fact, was aware of the trial, opted for the absentia and appointed two lawyers to defend himself). Against the order of the Audiencia Nacional, Mr. Melloni opposed a *recurso de amparo* (a direct action for the protection of constitutional rights guaranteed by the Constitution) before the Spanish Constitutional Court.

^{XXXI} To quote the formula used, also recently, by some scholars: von Bogdandy - Schill 2011.

^{XXXII} Available at: <http://s01.s3c.es/imag/doc/2014-02-20/sentenciaTCextradicion.pdf>.

^{XXXIII} Case C-314/08, *Filipiak*, ECR, 2009, I-11049.



XXXIV Case C-409/06, Winner Wetten, available at www.curia.europa.eu.

XXXV “The ECtHR’s margin of appreciation doctrine plays a role similar to that of the reverse Solange jurisprudence of Schmidberger and Omega—allowing the court to acknowledge and defer to national specificities in the understanding of common principles—while the BVG’s Görgülü doctrine corresponds to Solange—allowing the national court to defer to judgments by the ECtHR, as long as the latter provides, in general, equivalent protection of fundamental rights” Sabel – Gerstenberg 2010: 519-520.

XXXVI “The Court has concluded therefrom that the existence of a rule of national law whereby courts or tribunals against whose decisions there is a judicial remedy are bound on points of law by the rulings of a court superior to them cannot, on the basis of that fact alone, deprive the lower courts of the right provided for in Article 267 TFEU to refer questions on the interpretation of EU law to the Court of Justice (see, to that effect, Rheinmühlen-Düsseldorf, paragraphs 4 and 5, and Cartesio, paragraph 94). The lower court must be free, in particular if it considers that a higher court’s legal ruling could lead it to give a judgment contrary to EU law, to refer to the Court questions which concern it (Case C-378/08 *ERG and Others* [2010] ECR I-0000, paragraph 32)” (p. 42), Joined Cases C188/10 and C189/10, Case *Melki*, ECR 2010 I-05667.

XXXVII Art. 61-1: “If, during proceedings in progress before a court of law, it is claimed that a statutory provision infringes the rights and freedoms guaranteed by the Constitution, the matter may be referred by the *Conseil d’État* or by the *Cour de Cassation* to the Constitutional Council, within a determined period. An Organic Law shall determine the conditions for the application of the present article”. On this, see Fabbrini 2008.

XXXVIII Case C-416/10, *Krizan & Others -v- Slovenska Inspekcia Zivotneho Prostredia*, www.curia.europa.eu.

XXXIX Case C-457/09, *Chartry* available at www.curia.europa.eu.

XL Case C-112/13, *A v. B.*, <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-112/13>. On the differences between *Melki* and *A v. B* see: Guazzarotti 2014.

XLI Reference for a preliminary ruling from the Najvyšší súd Slovenskej republiky, Case C-416/10, *Krizan & Others -v- Slovenska Inspekcia Zivotneho Prostredia* www.curia.europa.eu, par. 47.

XLII “The national rule which obliges the Najvyšší súd Slovenskej republiky to follow the legal position of the Ústavný súd Slovenskej republiky cannot therefore prevent the referring court from submitting a request for a preliminary ruling to the Court of Justice at any point in the proceedings which it judges appropriate, and to set aside, if necessary, the assessments made by the Ústavný súd Slovenskej republiky which might prove to be contrary to European Union law.” And see also: “Finally, as a supreme court, the Najvyšší súd Slovenskej republiky is even required to submit a request for a preliminary ruling to the Court of Justice when it finds that the substance of the dispute concerns a question to be resolved which comes within the scope of the first paragraph of Article 267 TFEU. The possibility of bringing, before the constitutional court of the Member State concerned, an action against the decisions of a national court, limited to an examination of a potential infringement of the rights and freedoms guaranteed by the national constitution or by an international agreement, cannot allow the view to be taken that that national court cannot be classified as a court against whose decisions there is no judicial remedy under national law within the meaning of the third paragraph of Article 267 TFEU. In the light of the foregoing, the answer to the first question is that Article 267 TFEU must be interpreted as meaning that a national court, such as the referring court, is obliged to make, of its own motion, a request for a preliminary ruling to the Court of Justice even though it is ruling on a referral back to it after its first decision was set aside by the constitutional court of the Member State concerned and even though a national rule obliges it to resolve the dispute by following the legal opinion of that latter court.”(par. 71-73), Case C-416/10, *Krizan & Others -v- Slovenska Inspekcia Zivotneho Prostredia*, www.curia.europa.eu.

XLIII German Constitutional Court, orders of 17 December 2013 and of 14 January 2014

2 BvR 1390/12; 2 BvR 1421/12; 2 BvR 1438/12; 2 BvR 1439/12; 2 BvR 1440/12; 2 BvR 1824/12; 2 BvE 6/12.

XLIV Among others see: *Cour d’Arbitrage*, 19 February 1997, no. 6/97, available at www.arbitrage.be/fr/common/home.html.

XLV Among others see: *VfGH*, 10 March 1999, B 2251/97, B 2594/97, available at www.vfgh.gv.at/cms/vfgh-site.

XLVI *Lietuvos Respublikos Konstitucinis Teismas*, decision of 8 May 2007, available at www.lrkt.lt/dokumentai/2007/d070508.htm.

XLVII *Corte Costituzionale*, sentenza no. 102/2008 and ordinanza no. 103/2008, available at www.cortecostituzionale.it. The preliminary reference was raised during *principaliter* proceedings. More



recently the Italian Constitutional Court extended its *revirement* to *incidenter* proceedings, see: ordinanza 207/2013,

http://www.governo.it/Presidenza/CONTENZIOSO/comunicazione/allegati/ordinanza_207_2013_completa.pdf.

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86/2011,

<http://www.tribunalconstitucional.es/es/jurisprudencia/Paginas/Auto.aspx?cod=10386>.

XLIX Conseil Constitutionnel, Décision n° 2013-314P QPC 4 April 2013, <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2013/2013-314p-qpc/decision-n-2013-314p-qpc-du-04-avril-2013.136588.html>.

^L C-112/13, *A v. B.*, <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-112/13>. On the differences between *Melki* and *A v. B* see: Guazzarotti 2014.

^{LII} Case C-399/09, *Landtová*, www.curia.europa.eu.

^{LIII} On Art. 4.2 See: Guastaferrò 2012; Alcobarro- Saiz Arnaiz 2013; Millet 2013.

^{LIII} Opinion 2/13, <http://curia.europa.eu/juris/liste.jsf?num=C-2/13>.

^{LIV} ECtHR, *Cantoni versus France*, 1996, <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=cantoni&sessionid=79242172&skin=HUDOC-EN>.

^{LV} ECtHR, *Turizym v. Irlanda*, www.echr.coe.int/ECHR/FR/Header/Case-Law/Hudoc/Hudoc+database. See also the judgement of the CJEU, C-84/95, *Bosphorus Airways*, ECR., 1996, I-3953. On the similarity between *Solange* and *Bosphorus*, see: Lavranos 2008.

^{LVI} In the *Mox Plant* case the CJEU recalled that: “The obligation devolving on Member States, set out in Article 292 EC, to have recourse to the Community judicial system and to respect the Court’s exclusive jurisdiction, which is a fundamental feature of that system, must be understood as a specific expression of the Member States’ more general duty of loyalty resulting from Article 10 EC. It is for that reason unnecessary to find that there has been a failure to comply with the general obligations contained in Article 10 EC if a failure to comply with the more specific Community obligations devolving on a Member State pursuant to Article 292 EC has already been established”, Case C- 459/03, *European Commission c. Ireland*, ECR., 2006, I-4635.

^{LVII} “Relating to Article 6(2) of the Treaty on European Union on the Accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms”, available at the following URL: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0201:0328:EN:PDF>.

^{LVIII} On this see: Mendez 2010.

^{LIX} See “Discussion document of the Court of Justice of the European Union on certain aspects of the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms”, available at http://curia.europa.eu/jcms/jcms/P_64268/ and the comments reported on the website *Adjudicating Europe*: (2010) <http://adjudicatingeurope.eu/?p=482>.

^{LX} Draft revised agreement on the accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms, http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Meeting_reports/47_1%282013%29008rev2_EN.pdf.

^{LXI} See, for instance, Zucca 2011.

^{LXII} Protocol No. 16 to the Convention on the Protection of Human Rights and Fundamental Freedoms http://www.echr.coe.int/Documents/Protocol_16_ENG.pdf. “In the third place, it must be pointed out that Protocol No 16 permits the highest courts and tribunals of the Member States to request the ECtHR to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms guaranteed by the ECHR or the protocols thereto, even though EU law requires those same courts or tribunals to submit a request to that end to the Court of Justice for a preliminary ruling under Article 267 TFEU.

It is indeed the case that the agreement envisaged does not provide for the accession of the EU as such to Protocol No 16 and that the latter was signed on 2 October 2013, that is to say, after the agreement reached by the negotiators in relation to the draft accession instruments, namely on 5 April 2013; nevertheless, since the ECHR would form an integral part of EU law, the mechanism established by that protocol could — notably where the issue concerns rights guaranteed by the Charter corresponding to those secured by the ECHR — affect the autonomy and effectiveness of the preliminary ruling procedure provided for in Article



267 TFEU. In particular, it cannot be ruled out that a request for an advisory opinion made pursuant to Protocol No 16 by a court or tribunal of a Member State that has acceded to that protocol could trigger the procedure for the prior involvement of the Court of Justice, thus creating a risk that the preliminary ruling procedure provided for in Article 267 TFEU might be circumvented, a procedure which, as has been noted in paragraph 176 of this Opinion, is the keystone of the judicial system established by the Treaties. By failing to make any provision in respect of the relationship between the mechanism established by Protocol No 16 and the preliminary ruling procedure provided for in Article 267 TFEU, the agreement envisaged is liable adversely to affect the autonomy and effectiveness of the latter procedure. 200. Having regard to the foregoing, it must be held that the accession of the EU to the ECHR as envisaged by the draft agreement is liable adversely to affect the specific characteristics of EU law and its autonomy” (par. 196-200), Court of Justice of the European Union, Opinion 2/13, <http://curia.europa.eu/juris/liste.jsf?num=C-2/13>.

LXIII On this see Lock 2011.

LXIV See the conclusions of Jacobs 2005.

LXV On this see: Lock 2011.

LXVI Art. 3 of the DAA “1. Article 36 of the Convention shall be amended as follows: a. the heading of Article 36 of the Convention shall be amended to read as follows:

“Third party intervention and co-respondent”;

b. a new paragraph 4 shall be added at the end of Article 36 of the Convention, which shall read as follows:

“4. The European Union or a member State of the European Union may become a co-respondent to proceedings by decision of the Court in the circumstances set out in the Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms. A co-respondent is a party to the case. The admissibility of an application shall be assessed without regard to the participation of a co-respondent in the proceedings.”

2. Where an application is directed against one or more member States of the European Union, the European Union may become a co-respondent to the proceedings in respect of an alleged violation notified by the Court if it appears that such allegation calls into question the compatibility with the rights at issue defined in the Convention or in the protocols to which the European Union has acceded of a provision of European Union law, including decisions taken under the Treaty on European Union and under the Treaty on the Functioning of the European Union, notably where that violation could have been avoided only by disregarding an obligation under European Union law.

3. Where an application is directed against the European Union, the European Union member States may become co-respondents to the proceedings in respect of an alleged violation notified by the Court if it appears that such allegation calls into question the compatibility with the rights at issue defined in the Convention or in the protocols to which the European Union has acceded of a provision of the Treaty on European Union, the Treaty on the Functioning of the European Union or any other provision having the same legal value pursuant to those instruments, notably where that violation could have been avoided only by disregarding an obligation under those instruments.

4. Where an application is directed against and notified to both the European Union and one or more of its member States, the status of any respondent may be changed to that of a co-respondent if the conditions in paragraph 2 or paragraph 3 of this article are met.

5. A High Contracting Party shall become a co-respondent either by accepting an invitation from the Court or by decision of the Court upon the request of that High Contracting Party.

When inviting a High Contracting Party to become co-respondent, and when deciding upon a request to that effect, the Court shall seek the views of all parties to the proceedings. When deciding upon such a request, the Court shall assess whether, in the light of the reasons given by the High Contracting Party concerned, it is plausible that the conditions in paragraph 2 or paragraph 3 of this article are met.

6. In proceedings to which the European Union is a co-respondent, if the Court of Justice of the European Union has not yet assessed the compatibility with the rights at issue defined in the Convention or in the protocols to which the European Union has acceded of the provision of European Union law as under paragraph 2 of this article, sufficient time shall be afforded for the Court of Justice of the European Union to make such an assessment, and thereafter for the

parties to make observations to the Court. The European Union shall ensure that such assessment is made quickly so that the proceedings before the Court are not unduly delayed. The provisions of this paragraph shall not affect the powers of the Court.

7. If the violation in respect of which a High Contracting Party is a co-respondent to the proceedings is



established, the respondent and the co-respondent shall be jointly responsible for that violation, unless the Court, on the basis of the reasons given by the respondent and the co-respondent, and having sought the views of the applicant, decides that only one of them be held responsible”.

8. This article shall apply to applications submitted from the date of entry into force of this Agreement.

LXVII Appendix V Draft explanatory report to the Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms, p. 66: “Assessing the compatibility with the Convention shall mean to rule on the validity of a legal provision contained in acts of the EU institutions, bodies, offices or agencies, or on the interpretation of a provision of the TEU, the TFEU or of any other provision having the same legal value pursuant to those instruments. Such assessment should take place before the Court decides on the merits of the application. This procedure, which is inspired by the principle of subsidiarity, only applies in cases in which the EU has the status of a co-respondent. It is understood that the parties involved – including the applicant, who will be given the possibility to obtain legal aid – will have the opportunity to make observations in the procedure before the CJEU”, http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Meeting_reports/47_1%282013%29008rev_2_EN.pdf.

LXVIII For instance: Douglas Scott, 2011.

LXIX Case C-617/10, Åklagaren v Hans Åkerberg Fransson, 2013, www.curia.europa.eu, C-206/13 Siragusa, 2014, www.curia.europa.eu. On this and other cases see: Fontanelli 2014.

LXX See Ruggeri 2005. See also: Kumm 2005.

LXXI For instance the many provisions of the Charter of Fundamental Rights of the EU. I reflected on these clauses in another piece: Martinico 2012.

LXXII *BVerfG*, cases 2 BvE 2/08, at par. 249.

LXXIII On this see Fabbrini 2014; Delledonne 2012.

LXXIV ”Professor Craig, for instance, agreed that Article 273 was sufficient to give the Court jurisdiction, but that Article 8 of the proposed treaty caused difficulties because even though the Commission would not bring a case in name, the provisions meant that it might do so in effect, and there is no provision under the EU treaties for the Commission to bring such a case”, House of Lords, 2012.

LXXV On the involvement of EU’s institutions outside the scope of EU law see Case C-316/91 EP v Council and C-181/91, ECR, 1994 p. I-625. On the possibility of giving the CJEU a jurisdiction not referred to in the Treaties see Opinion 1/00, ECR, 2002 I-3493. For an overview of these issues see: Peers 2012.

LXXVI On this see: Ferreres Comella 2013: 236.

LXXVII “Within five years, at most, of the date of entry into force of this Treaty, on the basis of an assessment of the experience with its implementation, the necessary steps shall be taken, in accordance with the Treaty on the European Union and the Treaty on the Functioning of the European Union, with the aim of incorporating the substance of this Treaty into the legal framework of the European Union”.

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The European Council after Lisbon: A review article

by

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Abstract

This contribution deals with the role of the European Council in the institutional framework of the European Union, as it has been laid down by the Lisbon Treaty. It focuses on its rising influence, even beyond the wording of the Treaty, and the increasing criticism stimulated by this evolution. In reviewing the main relevant issues and critical viewpoints related to the European Council, some aspects are considered in depth: the increasing institutionalisation of the European Council and its critical position with regard to the management of the economic and financial crisis and to the ongoing process of “politicisation” of the Union. The discussion also considers comparative constitutional data and organic proposal of reform of the institutional architecture of the EU.

Key-words

European Council, President of the European Council, intergovernmentalism, politicisation of the European Union, comparative federalism



1. Introduction

This contribution deals with the role of the European Council in the institutional framework of the European Union, as it has been laid down by the Lisbon Treaty. It will consider its rising influence, even beyond the wording of the Treaty, and the increasing criticism stimulated by this evolution. In reviewing the main relevant issues and critical viewpoints related to the European Council, some aspects will be considered in depth: the increasing institutionalisation of the European Council and its critical position with regard to the management of the economic and financial crisis and to the ongoing process of “politicisation” of the Union. Can it plausibly serve as collective “head of state” of a federalised polity? Should an effectively “politicised” Union relativize the role of the European Council? The discussion will also consider comparative constitutional data and organic proposal of reform of the institutional architecture of the EU.

2. Problematising the European Council

The proper place and role of the European Council within the institutional system of the Union is typically subject to never-ending dispute. Far from settling this issue, the Lisbon Treaty, which has explicitly included the European Council among the institutions of the Union at Art. 13(1) TEU, has intensified controversy. The management of the economic and financial crisis – which coincides, in chronological terms, with the existence of the “new” European Council and Herman Van Rompuy’s term(s) in office – has further complicated the overall picture, thus revealing the persistent flaws of the Lisbon constitutional settlement. As a consequence of this, it might be argued that doubts about (or open criticism of) the European Council can be traced back to three main arguments: (i) the unsatisfactory features of its institutionalisation under the terms of the Lisbon Treaty; (ii) recurrent distrust of intergovernmentalism, of which the European Council is the most obvious personification; (iii) anxiety for the current constitutional arrangements in the area of the coordination of economic policies.

The first point is directly related to the distinctive features of the Lisbon Treaty. In spite of having the ambition to put an end to the semi-permanent Treaty revision process



(as defined by De Witte 2002), the Lisbon Treaty clearly reflects the “tradition” of EU constitutional law (Besselink 2008; Martinico 2011: E68 f.). The Treaties have been said to be a “snapshot” or an “achievement” constitution (Carrozza 2007): they provide a rationalisation of the state of affairs rather than serving as a blueprint for further development. This is particularly true for the European Council: prior to the coming into force of the Lisbon Treaty, the European Council was not part of the institutional framework of the Union, at least in strictly formal terms. This may also have been the reason why the European Council has only received intermittent attention in legal scholarship (as critically observed by Vogiatzis 2013: 1663). The Lisbon Treaty has institutionalised the European Council and provided it with a semi-permanent, full-time President, clearly distinct from the rotating President of the Council. Does the Lisbon settlement measure up to the mandate for the Intergovernmental Conference in 2007, which mentioned the enhancement of the efficiency and democratic legitimacy of the enlarged Union¹?

A clear shortcoming of the Lisbon Treaty concerns the *functions* of the European Council, which are not presented in a satisfactory way; as will be shown later, the internal *structure* of the institution has been subjected to reform proposals too. According to Art. 15(1) TEU, “The European Council shall provide the Union with the necessary impetus for its development and shall define the general political directions and priorities thereof”. The wording of this Treaty provision is hardly in accordance with the way the European Council acted before the entry into force of the Lisbon Treaty (and has acted since). According to a widespread opinion, the European Council is the body which *leads the Union* (Editorial Comments 2009: 1383). Leading the European Union cannot be reduced to the (altogether important) function of defining general political directions and priorities. The hiatus between legal provisions and constitutional practice has further increased since 2009, as the European Council has showed an explicit willingness to take over a role of active direction in the management of the crisis (Schoutete 2012: 11). On 25 March 2010, the heads of state or government of the Member States of the Eurozone issued a statement in which they held that “the European Council must improve the economic governance of the European Union”ⁱⁱ. They also proposed “to increase its role in economic coordination and the definition of the European Union growth strategy”ⁱⁱⁱ. All those formulation hint at a willingness to intervene directly and decisively in the EU’s political direction. They also



point out a fundamental transformation. The first steps of the European Council and its ability to play a leading role have historically been related to economic or constitutional crises (think e.g. of the oil shock in the 1970s). Contingency, rather than permanency and stability, has been a key factor in shaping the peculiar nature of the European Council (see, inter alia, Wessels 1981, Bulmer 1985, and Bulmer 1996). Now its institutionalisation seems to announce a different approach, more confident in its own resources and less dependent on the outbreak of crises.

The second point has a longer story. The first meetings of the European Council in the mid-1970s were surrounded by the deep scepticism of partisans of the Community method (concentrated above all in the three smaller Benelux countries): in fact, a meeting of the heads of State or government of the Member States had been a recurring request of Gaullist France, aiming at providing the Communities with a clearly *political Directoire* (Werts 2008: 3). In this regard, an interesting paradox should be pointed out. In recent times, the discretionary appointment of the President of the Commission by the European Council – and the (supposedly) excessive involvement of the latter in Europe’s day-by-day business – has been seen as the major obstacle to the politicisation (meant as parliamentarisation) of the EU. In the 1970s, however, the organisation of regular summits of the heads of State or government was perceived by the French government as a way of politicising the Communities and providing them with more effective impetus than the allegedly technocratic approach of the Commission could ever do. This trend was further encouraged by the Maastricht Treaty, which “fundamentally increased the significance of the EU for European governments: member states have extensively extended the scope of dealing with public policies and differentiated their modes of governance” (Wessels 2012: 765).

In fact, both the origins of the European Council – in which Jean Monnet was no less influential than President Giscard d’Estaing – and its subsequent action should have greatly relativised those alarmed claims (Mourlon-Druol 2010). The European Council played a crucial role in the creation of the European Monetary System, the resolution of budgetary disputed in the 1980s and the launch of further treaty amendments (Lewis 2013: 155). It should be added, however, that this was often possible thanks to the strong leadership of the then President of the Commission, Jacques Delors. This remark allows adding another clarification which strengthens this argument. There is no *necessary* contradiction between



what is known as Community method – centred on the main role of the European Commission – and European-Council-based intergovernmentalism. The President of the Commission is entitled to take part in the meetings of the European Council as a non-voting member (Art. 235(1) TFEU): hence the importance of his *effective* ability to influence the decision-making processes of the institution^{IV}. This was particularly evident under such a strong Commission President as Jacques Delors – or, conversely, under his weaker successors (Werts 2008: 51; Kassim 2012). Furthermore, political scientists have recently emphasised that the relationship between the European Council and the Commission would properly be described in terms not so much of *principal agent theory*, as of *competitive cooperation*: “in many cases the European Council – Commission relations are two way rather than purely top-down, and often collaborative rather than antagonistic” (Bocquillon and Dobbels 2014: 26). It is for the Commission – and its President – not to turn such collaboration into a top-down relationship. On the other hand, however, the establishment of a permanent President of the European Council can also be interpreted “as an attempt to reinforce the ability of the European Council to monitor the Commission and prevent agency drift” (*ibidem*).

An optimistic presentation of the relationship – and the proper balance – between Community method and intergovernmentalism is clearly present in the speech given by the German Federal Chancellor on 2 November 2010 at the college of Europe in Bruges: according to Angela Merkel, the possible synthesis between the two approaches may be labelled as “Union method”, which is properly described as “coordinated action in a spirit of solidarity”^V (see Rittelmeyer 2014: 39).

In recent years, however, a more and more perceptible shift has taken place – to the advantage of the European Council. A feeling of satisfaction with the status quo was clearly the dominant note in Angela Merkel’s address, whereas the former President of France, Nicolas Sarkozy, was more peremptory in saying that intergovernmentalism – and the European Council – should be clearly strengthened: “The crisis has driven heads of state and government to take on ever greater responsibility because ultimately it is they alone who hold the democratic legitimacy that permits them to take the decisions. The road to European integration is through intergovernmental relations because Europe will need to make strategic choices, political choices”^{VI}. Such proposal reflected a traditional French approach which has recently spread to Germany as well (Fabbrini 2013: 1012; see also



discussion by Padoa-Schioppa 2013b: 1001). In recent years, this view also relied on a gamble, whose stake was the ability of the European Council to drive the Union out of the crisis.

The third controversial point is the dominant role of the European Council in the management of the economic and financial crisis in the last five years or so. In this field, the rise of the European Council has been interpreted as the result of a bargain between Germany and France, whereby the former would accept the “French political paradigm” (see above) and the latter would adapt to the German-inspired economic paradigm based on financial stability (Fabbrini 2013: 1012). This role is particularly evident with regard to the European Semester. It is for the European Council, first, to adopt economic priorities for the EU based on the Annual Growth Survey between February and March. Those priorities are the basis for the country-specific recommendations issued by the Commission. The European Council, again, endorses those recommendations in Summer. Apart from this, another point which is worth mentioning in economic affairs is the shift of power from the Council towards the European Council and the instauration of a “dialogue” between the latter and the European Central Bank – which might make questions arise with regard to democratic accountability. Finally, the European Council has taken the lead in ensuring the compatibility of the European Stability Mechanism with the primary law framework, by amending Art. 136 TFEU by means of a simplified revision procedure^{VII}. Economic governance has recently been interpreted as a system of *deliberative intergovernmentalism*. This notion “highlights the dependency of policy co-ordination in the field of EU economic governance on policy deliberation” (Puetter 2012: 166): instead of focusing just on negotiation between Member States, deliberative intergovernmentalism is an approach which underlines “the paradoxical struggle for policy consensus in a decentralised policy framework” (Puetter 2011: 4).

The course of action followed by the European Council in this area, however, has been criticised for its limited effectiveness: be it Angela Merkel’s Machiavellian strategy of “hesitation” (*Merkiavellis Zögern*: Beck 2012) or a complacency ultimately resulting in “too little too late” (Spinelli Group and Bertelsmann Stiftung 2013: 11), intergovernmentalism seems not to have measured up to early expectations.



3. The semi-permanent President: flexibility to welcome?

The creation of the entirely new semi-permanent President of the European Council has been generally welcomed. Although the arguments in favour of a semi-permanent President which were used during the drafting of the Constitutional Treaty and then the Lisbon Treaty were hardly unquestionable^{VIII}, the establishment of a Presidency with a two-year-and-a-half term, providing the European Council with a more stable leadership, made it possible for the institution to work on the basis of a longer-term agenda (Blavoukos, Bourantonis and Pagoulatos 2007).

A second innovation can be labelled as “Europeanisation” of the European Council, whose leader is no longer the head of a national executive but a truly “European” figure. This Europeanising trend also affects the source of funding for the European Council, which now comes from the central EU Budget, and no longer from the Member State holding the rotating presidency (Lewis 2013: 155). As it occurs with the President of the Commission, the President of the European Council also has a cabinet at his disposal (Eggermont 2012: 31).

Being the result of a difficult compromise, however, this new institutional role is not without defects (Eggermont 2012: 31) – an analysis of its flaws is a way of assessing how much the current normative framework and its implementation have measured up with the underlying conception of the “new” European Council. These flaws primarily concern the legitimisation of the President of the European Council. The President of the European Council is *de facto* co-opted by his fellow members of the European Council (Art. 15(5) TEU). These have a clear democratic legitimacy in their capacities as heads of state or heads of government of their respective Member States (Art. 10(2) TEU)^{IX}. The “election” (according to the wording of the Treaty) of the President of the European Council is affected by the very same critical features which have long been observed with regard to the parliamentary election of heads of state: lack of formal candidacies (in the absence of explicit provisions which so require), lack of a public debate with a clear presentation of the main relevant stakes, and a general lack of transparency (Stradella 2013).

The election of the President of the European Council is a convincing example of how a selection procedure may influence the overall attitudes of the office-holder (and the expectations related thereto). Some official versions of the Treaties design the top officer



of the European Council as its President; the Dutch version, in turn, uses the term *voorzitter* (*chairman/Vorsitzender*): “This seems to indicate that a deliberate choice was made for the word with greater gravity. ... the prevailing vocabulary is a consciously presidential one. It may then be noted that the chosen term holds a certain promise, at least from a linguistic point of view, and that it might signify a more than auxiliary function” (De Waele and Broeksteeg 2012: 1046). Be that as it may, the President of the European Council is supposed to “endeavour to facilitate cohesion and consensus within the European Council” (Art. 15(6)(c) TEU) rather than taking forward a political agenda of his own.

The President of the European Council is a non-voting member of the body he presides over (just like the President of the Commission, indeed): this probably limits the potential for a more assertive presidency model (Dinan 2013: 1260). Being a “stateless” official without a constituency of his own, the President has to rely much more on his own personal and political skills than a national head of State or government normally does (Dinan 2013: 1269).

A variable on which the ability to act of the President of the European Council depends is the presence of a well-established “directory” within the body. More particularly, a strong Franco-German partnership, when existent, is normally able to play a dominant role within to European Council and to impair its President’s influence. This is what happened in the so-called “Merkozy” phase, which ended in coincidence with President Sarkozy’s electoral defeat in 2012. Nicolas Sarkozy’s successor, President François Hollande has not been able to rebuild so strong a partnership with the German Chancellor (Charlemagne 2012). On the other hand, this has considerably strengthened Herman Van Rompuy’s position: the end of a privileged cooperative relationship between the heads of government of Germany and France meant that consensus would not be built within the European Council on a stable basis, thus allowing the President to deploy his own mediation skills^x. Similar remarks can be made with regard to the attitude of the Member State holding the rotating presidency of the Council and his willingness to define policy priorities and broad orientations for the Union, thus overshadowing its semi-permanent counterpart at the European Council. In fact, this was truer when the Treaty of Lisbon had just come into force – by now, the distinction between these two functions is much clearer.

Another occurrence which has helped the first President of the European Council



affirm his position is the growing degree of asymmetry within the European Union and, more particularly, within its institutional system (Cantore and Martinico 2013). This, indeed, reflects a more general trend which studies in comparative federalism have consistently highlighted in the past few decades (Palermo 2007). For the purposes of this paper, the more interesting point is how policy asymmetry affects the structure and functioning of EU's institutions. Within the European Council, asymmetry can strengthen the coordination function of its President.

This view is confirmed by the informal establishment of the Euro summit within the European Council since March 2010. The activities of the Euro Summit have been more clearly formalised in October 2011^{XI}. Herman Van Rompuy was also designed as President of the Euro Summit. This led a number of commentators to argue that Van Rompuy's appointment was also due to his coming from a Eurozone Member State. This would clearly reduce "the already small pool of potential European Council presidents ... consisting in effect of current or former leaders of eurozone countries and current or former Commission presidents" (Dinan 2013: 1271). This forecast has been contradicted by the election of Donald Tusk, the sitting Prime Minister of Poland, as successor to Van Rompuy and new President of both the European Council and the Euro Summit. On the other hand, the designation of a President of the European Council and the Euro Summit from a non-Eurozone Member State may even be welcomed as a way of "taming" the impact of asymmetry at the top of the EU's institutional system.

At the end of this paragraph, we can tentatively state that the office of European Council President is inherently marked by flexibility. This has to do not only with the personal qualities of the office-holder – as it is generally typical of monocratic functions – but also with a number of additional circumstances.

4. Unifying presidencies

Before the formal launch of the "*Spitzenkandidaten* process"^{XII}, the constitutional debate in the EU was marked by a recurrent proposal aiming at improving the effectiveness of its institutional system without amending the Treaties. This could arguably be achieved by "unifying" the two main offices in the European Union, the presidency of the European Council and the presidency of the Commission (Pernice et al. 2012: 38; Oreja 2013: 19 f.;



Padoa-Schioppa 2013a: 8). Nothing in the Treaties prevents from strengthening the link between the two bodies by means of such personal union. The debate about whether to provide the European Council with a “single-hat” or a “double-hat” President had been one of the most heated ones at the Convention on the Future of Europe. Declaration no. 6 annexed to the Treaties makes it clear that the decision in favour of a “single-hat” presidency has also to do with the complexity of the Union: having three executive top offices – Presidents of the European Council and of the Commission, and High Representative for Foreign Affairs and Security Policy – should allow for a more faithful representation of the “geographical and demographic diversity of the Union and its Member States”^{xiii}. More generally, a unification of the two presidencies would have undermined the inter-institutional balance in the Union (Dougan 2008: 628)^{xiv}.

Why has the dominant feeling about this arrangement so clearly changed? The most plausible explanation lies in the further rise of the European Council and its responsibilities after the entry into force of the Treaty. As said before, this has often taken place to the detriment of the Commission’s ability to articulate its policies effectively^{xv}. On the other hand, a “double-hat”, President would also be stronger within the European Council, in which he would be able to challenge established coalitions of Member States.

Indeed, there is no incompatibility between the two jobs, as Art. 15(6) TEU only prohibits the President of the European Council from holding a national mandate – and both Presidents are not entitled to vote within the European Council. Still, some elements might suggest a more cautious approach (or perhaps just what is not sought, i.e. a revision of the Treaties). The President of the European Council is only answerable to the national heads of State or government, who can end his term of office in the event of an impediment or serious misconduct (Art. 15(5) TEU). The President of the Commission, on the other hand, is primarily answerable to the Parliament. If the latter approves a motion of censure, the Commission – thereby meaning its President as well – is forced to resign collectively. In that event, the “double-hat” President could stay in office as President of the European Council; this, however, would not reduce the magnitude of such political conflict. In this regard, discrepancies between parliamentary majority and European Council “majority” should not be discarded: the composition of the European Council depends on the results of national elections, whereas the composition of the European Parliament depends on the results of European elections (Fabbrini 2013: 1006).



A solution which has been generally refused is the direct election of the President of the European Council. This is quite unpopular with the smaller Member States, which could hardly influence the electoral process (Fabbrini 2012: 6). On the other hand, the introduction of a kind of presidential regime would deeply alter the nature of the office.

According to another proposal, the reform of the process of selection of the President of the European Council should take into account the difficulty of parliamentarising the EU around the European Parliament. The legitimacy of the President of the European Council could be enhanced by introducing a system of election of the President of the European Council by a composite assembly, made up of members of national parliaments. In order to be elected a candidate would need a majority of votes – with smaller Member States being overrepresented in the electoral college. The European Parliament would not take part in the election procedure (Fabbrini 2012: 6). This proposal is probably inspired by the American model and the discussion about the role of the U.S. Electoral College as a political safeguard of American federalism (Wechsler 1954). It stresses a separation between supranational democratic legitimation (provided by the European Parliament) and national democratic legitimation (provided by the electoral college for the selection of the European Council President). It also tries to reconcile democracy – i.e., rule by the majority – and the concerns of the smaller Member States.

The German model could suggest an alternative solution^{xvi}. The President of the European Council would be elected by a mixed assembly, made up of members of the European Parliament and an equal number of members of national parliaments. This system would be inspired by the provisions of the German Basic Law on the election of the President of the Federal Republic of Germany (Art. 54(3)), which aim at reconciling the unitary and the federal dimensions of Germany's constitutional order (Nettesheim 2005: 1047 f.).

What is interesting is that all those proposals seem to take for granted that the European Council can be viewed as a kind of collective “head” of the European Union (Fabbrini 2012: 4). The most obvious term of comparison for this may be the Swiss Federal Council (see above and Biaggini 2007): a non-monocratic executive body, “representing” the diversity of the Confederation. These arguments, however, have to be reconciled with the well-rooted conception of the Commission as the government of the Union^{xvii}.



5. The long-lasting shadow of dualism: a critical assessment

Comparative constitutional analysis suggests that the European Union presents a number of state-like features (Rosas and Armati 2012: 15 ff.)^{xviii}. Having in mind this starting point, this paragraph argues (i) that for constitutional law the executive power is normally more difficult to encompass than the legislative, and (ii) that the tradition of *executive dualism*, proper to a number of European nation states, may offer some interpretive tools for assessing the current supranational developments.

The tradition of European constitutionalism has been more careful of defining the role and functions of parliaments than those of the executives (Carrozza 2009: 860). This had to do with the struggle of representative assemblies for gaining control over the activities of the (mainly monarchical) executive, thus seeking the recognition of specific powers. The executive, in turn, was already part of the picture, which may explain the absence or the vagueness of provisions concerning the executive in many European constitutional charter in the 19th century and the first half of the 20th century (until the appearance of “rationalisation” in constitutional law). The picture has become even more complicated in the 20th century because of the autonomisation of public administration and the “pluralisation” of the executive power. Even at the EU level, the position of national executives vis-à-vis the Union is less clearly defined than that of national parliaments, “which were sidelined from the start of the integration process, only to regain lost ground later” (DN, JHR and TV 2012: 165).

The rise of representative government in 19th-century Europe is also at the origin of dualism. At the very beginning, this concerned the relationship between a monarchical head of state and “his” (or “her”) government, which was now supposed to enjoy the confidence of parliament. Strong theoretical foundations were provided by Benjamin Constant’s *pouvoir neutre* theory (see Luciani 2014). The gradual decline of royal powers was the starting point of a monistic understanding of parliamentary regimes in Europe (just think of Bagehot’s elective dictatorship). Executive dualism is still particularly strong in those Member States in which the head of state is directly elected by the voters (the 5th French Republic, Poland, Romania, etc.). This circumstance also contributes to a certain rigidity of the constitutional system, in which conflicts between the branches and uneasy *cobabitations* are always possible. It is more difficult to conceive of dualism in parliamentary



systems in which the head of state is indirectly elected and which are more accurately described as monistic (as is the case for Italy or the 3rd Republic in France^{XIX}). Still, political crises may allow the head of state to (re)gain some ground to the detriment of the cabinet (Fusaro 2013).

Dualism – and criticism thereof – is probably the main point in the current debate about what the role of the European Council within the institutional system of the Union should be. According to a widespread feeling, the main executive responsibility lies with the European Council, and its relationship with the Commission should be described according to the principal-agent model (see above). This state of affairs has been subject to criticism: according to a number of scholars, the “actual substance” (*la realidad*) of executive power should be reserved for the Commission and its President (Juillet 2010: 47).

The main supportive reason for these claims is that the European Council has been too often perceived as an institution in which the relative weight of the “big” Member States is able to condition the determination of policies decisively (Schoutheete 2012, Novak 2014). As said before, the crisis of the Franco-German partnership has partially changed this, thus increasing President Van Rompuy’s influence. The debate about how the (s)election process of the European Council President could be amended aims at consolidating this shift in influence by transforming it into a structural feature of the European Council.

An alternative and more radical solution is the politicisation of the Union by establishing a more direct link between election of the European Parliament and designation of the President of the Commission (see Maillo González-Orús 2015). In this regard, the possibility of genuinely political conflicts between European Parliament and Commission, on the one side, and the European Council, on the other side, should not be underestimated (see above at 4). A less visible, more uncertain politicisation is also taking place within the latter: the left-right divide and European political parties are able, to some extent, to influence the deliberation process of the European Council (Tallberg and Johansson 2008). According to the prevailing opinion, however, negotiation within the European Council does not mainly happen along party lines: “The purely national interests of Member States and of the governmental leaders have rather been the main force” (Werts 2008: 27).

Even more radical is the draft Fundamental Law published by the Spinelli Group and Bertelsmann Stiftung. Their proposal, aiming at enhancing efficiency, effectiveness,



transparency and accountability in the EU's institutional system, tries to soften the risk of dualism by “beheading” the European Council. In order to reduce the risk of tension and confusion with the Commission, the “supernumerary ‘permanent’ President of the European Council is abolished in favour of the election by the heads of government *of one of their number* to chair their meetings for a period of two and a half years” (Spinelli Group and Bertelsmann Stiftung 2013: 16)^{xx}.

The success of “politicisation” (in the current sense) will paradoxically depend on the willingness of the European Council to continue making decisions on non-(party)-political bases. If this happens, the shadow of dualism will probably re-emerge.

6. Strengthening accountability

The political and legal accountability of the European Council is another issue which has not been properly regulated by the Lisbon Treaty. This might not have been particularly urgent if the body had merely stuck to its task of defining “general political directions and priorities”. Things go clearly different, however, if the European Council engages with actual decision-making. This makes it necessary to have a closer look at the possibilities of holding the European Council to account under the current circumstances.

In this respect, its *political* accountability seems to be particularly weak. Primary law only asks the President of the European Council to present a report to the European Parliament after each of the meetings of the European Council (Art. 15(6)(d) TEU). This provision is hardly a real innovation, as it codifies a constitutional practice which had been in place since 1987.

The “personal union” of the two Presidencies would make it possible to strengthen the institutional connection between the European Council (or, properly speaking, its head) and the European Parliament. As argued above, this could also strengthen the position of the “double-hat” President within the European Council itself (Oreja 2013: 20).

Apart from this, the European Parliament adopts resolutions before every meeting of the European Council “in order to stress the issues which are of importance to it and to make the European Council aware of its expectations” (Werts 2008: 141). After that, the President of the European Parliament traditionally gives an introductory speech at the beginning of European Council meetings (see Art. 235(2) TFEU), without taking part in



the subsequent course of its discussions. More generally, the way the summits of the European Council are conducted does not automatically lend itself to the exercise of effective parliamentary control (Hefffler et al. 2013: 1).

When it comes to holding the European Council to account, other commentators have focused not so much on the European Parliament as on more “traditional” forms of parliamentary control. More properly speaking, they have suggested that national parliamentary control be “Europeanised” in order to control the European Council more effectively. According to these interpretations, the current state of affairs, in which the national heads of state or government are mainly held to account by national parliaments, should not be radically overturned but simply “adjusted” in order to favour cross-national parliamentary oversight. *Permanent interparliamentary conferences* have been hinted at as perhaps the most appropriate tool in order to ensure effective control of the activities of the European Council (Lupo 2014: 6). The chief example for this trend is the “conference of representatives of the relevant committees of the European Parliament and representatives of the relevant committees of national parliaments in order to discuss budgetary policies” (Art. 13 of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union; see also Fasone 2014). Other studies, however, have also stressed a great diversity among Member States parliaments and the persistent impairment of a number of them when “controlling” the activities of the European Council^{XXI}. No less than seven models have been identified in this regard, among which a “Europe as usual” model, according to which the national parliament does not make any distinction between control over the European Council and ex ante control over EU legislative proposals^{XXII} (Hefffler et al. 2013: 9; Wessels et al. 2013).

As far as *legal* accountability is concerned, the turning point has been, again, the institutionalization of the European Council. In the mid-1990s the Court of Justice had clearly stated that Art. 230 (ex 173) TEC did not allow reviewing the legality of acts adopted by the European Council^{XXIII}. Art. 263 TFEU now empowers the Court of Justice to review the legality of acts of the European Council “intended to produce legal effects *vis-à-vis* third parties”. More recently, the *Pringle* case has allowed the Court to go a bit further: the Court has, in principle, jurisdiction to examine the validity of a decision of the European Council in the framework of the preliminary reference procedure, as Art. 267(1)(b) TEU gives it jurisdiction “to give preliminary rulings concerning ... the validity



... of acts of the institutions”^{XXIV}. This is a direct consequence of the formal recognition of the European Council as one of the institution of the European Union (Goebel 2011: 1258). In the very same decision, the Court of Justice also used the Conclusions of the European Council in order to interpret the impugned Decision^{XXV}.

7. Concluding remarks

When analysing the main issues in the discussion about the European Council, this short contribution has taken for granted that it is possible and heuristically useful to do so by means of a clearly constitutional perspective. This peculiar vantage point, however, is quite far from absorbing all the possible ways of studying this institution, which continues being somehow eccentric within the institutional system of the Union.

In recent years, in fact, the study of the European Council as a very developed example of institutionalised summitry has also gained ground (Starita 2013; Murlon-Druol and Romero 2014). This has to do not only with the origins of the European Council in the mid-1970s, but also with a renewed rise of intergovernmental institutions since the outburst of the crisis (think e.g. of G20)^{XXVI}.

The analysis of many of the developments presented in this contribution is conditioned by a fundamental uncertainty: whether or not the leading role played by the “new” European Council since 2009 mirrors a permanent transformation or is just a result of an unprecedented crisis. In other terms, things will (or might) go different when economic normalcy reappears (Schoutheete 2012: 21). On the other hand, it should also be considered that perennial emergency and short-term perspectives seem to be a defining trait of today’s decision-making processes^{XXVII}. If this (rather pessimistic) assessment is accepted, it is also possible to analyse the recent performance of the European Council in order to draw more general conclusions.

This short contribution has shown some (probably inevitable) shortcoming of the Lisbon constitutional settlement. They have to do with both structural and functional features of the European Council. All the reasons for dissatisfaction with it point at the end of the EU’s output legitimacy (as a sufficient justification for its activities) and an ever-rising necessity of redefining input legitimacy (Jakab 2012: 18).



The conclusions can be summarised as follows. First, the process of autonomisation of the European Council and its emancipation from the Council as a political institution (Werts 2008: 59) is by now complete. Second, a generally accepted point is that the European Council takes part in the exercise of the executive power together with the Commission. Both institutions play a crucial role for the purposes of a deeper integration (Oreja 2013: 26). The decisive point is to what extent this should happen. All the proposed reforms suggest that this question is far from being resolved. As shown before, this should not even be seen as surprising. General formulations – e.g., a collective “head of the Union” not interfering with day-to-day government business (*ibidem*) – may be satisfactory insofar as the emergence of new crises does not reveal again their practical frailness. A final and distinct issue is the degree of autonomy of the European Council vis-à-vis some of the Member States. In order for this institution to be convincingly described as a “head of the Union”, the structure and functioning of the European Council should be somehow modified. As said before, much of this depends on the role and the legitimacy of the European Council President. If he succeeds in getting greater authoritativeness vis-à-vis to his national counterparts (following one of the ways mentioned above), deliberation within the European Council would probably be less strongly influenced by specific national coalitions than they used to be between 2009 and 2012^{XXVIII}.

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^I The IGC mandate is available at <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2011218%202007%20INIT> (accessed 15 December 2014).

^{II} Statement available at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/113563.pdf.

^{III} *Ibid.* In its *Europe 2020 Strategy*, the Commission also stated that “the European Council should steer the strategy as it is the body which ensures the integration of policies and manages the interdependence between Member States and the EU” ([ec.europa.eu/eu2020/pdf/COMPLET_EN_BARROSO_007 - Europe 2020 - EN version.pdf](http://ec.europa.eu/eu2020/pdf/COMPLET_EN_BARROSO_007_-_Europe_2020_-_EN_version.pdf)).

^{IV} In the 1980s – i.e., before the “recognition” of the European Council in the primary law of the EU – there was some discussion about whether or not the President of the Commission had some kind of right of veto within the European Council. A group of legal experts concluded that the collaboration of the President of the Commission was not needed for the formation of a position in the European Council (Werts 2008: 35 f.).

^V English translation of the speech available at <https://www.coleurope.eu/speeches>.

^{VI} Speech given by the then French President Nicolas Sarkozy on 1 December 2011 in Toulon (abridged translation available at <http://www.ambafrance-uk.org/President-Sarkozy-s-keynote-speech>).

^{VII} Decision 2011/199/EU of 25 March 2011.

^{VIII} Among them, the supposed lack of effectiveness of the rotating presidency when occupied by a (comparatively) small Member State.

^{IX} Also see critical remarks by Reestman 2011: 269 f.



^X This also means, incidentally, that equality among the twenty-eight Member States is stronger when there are no pre-defined coalitions within the body.

^{XI} “To deal more effectively with the challenges at hand and ensure closer integration, the governance structure for the euro area will be strengthened, while preserving the integrity of the European Union as a whole. We will thus meet regularly – at least twice a year – at our level, in Euro Summits, to provide strategic orientations on the economic and fiscal policies in the euro area. This will allow to better take into account the euro area dimension in our domestic policies. The Eurogroup will, together with the Commission and the ECB, remain at the core of the daily management of the euro area. It will play a central role in the implementation by the euro area Member States of the European Semester. It will rely on a stronger preparatory structure” (Euro Summit Statement, 26 October 2011, available at www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/125644.pdf).

^{XII} See the European Parliament resolution of 22 November 2012 on the elections to the European Parliament in 2014 (2012/2829(RSP), available at www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2012-462).

^{XIII} Tools for ensuring the representation of cultural pluralism not only within the legislature but also within the executive are typical for polities marked by great cultural diversity. Think e.g. of Art. 175(4) of the Swiss Federal Constitution of 1999: “In electing the Federal Council, care must be taken to ensure that the various geographical and language regions of the country are appropriately represented”. If not only constitutional provisions but also constitutional conventions are taken into account, another convincing example comes from the Canadian long-established practice of regional ministers within the federal cabinet (see e.g. Bakvis 1988).

^{XIV} This point is quite important as it can be used as the most solid objection to the “foreign policy analogy”, according to which “[t]he same logic which lies behind the future combination of the functions of the High Representative for the CFSP and the Commissioner in charge of Exterior Relations, also supports the notion of such a single President” (Werts 2008: 158).

^{XV} As a veteran EU correspondent put it, “it seems hardly conceivable that either Commission President José Manuel Barroso (2004-) or his successor will ever be capable of reconquering the position once held by Delors. To do his job well today, every Commission President needs, more than ever, broad support in the European Council for his programme” (Werts 2008: 51).

^{XVI} See Article 54 of the German Basic Law: the Federal President shall be elected by a Federal Convention (*Bundesversammlung*) consisting of the members of the Federal Parliament (*Bundestag*) and an equal number of members elected by the parliaments of the *Länder* on the basis of proportional representation.

^{XVII} This idea, however, has also been criticized by some political scientists (e.g., Kreppel 2009).

^{XVIII} This can be done without departing from the view that the EU cannot be regarded as a state, let alone a federal one (Pinelli 2013: 179).

^{XIX} On the latter see Hauuy 2013.

^{XX} In fact, the elimination of the head of state – possibly the most radical way of “exorcising” a resurgence of dualism without creating a useless institution – has been discussed by constituent legislators and constitutional scholars both in Italy (Baldassarre 1987: 477) and Germany (Nettesheim 2005: 1033 f.).

^{XXI} Inverted commas are used because, properly speaking, parliaments in the Member States control their own heads of State or government.

^{XXII} The “Europe as usual” model is typical of Italy and some “new” Member States in Central and Eastern Europe. The other models which have been pointed out are the limited control model, the expert model, the public forum model, the government accountability model, the policy maker model, and the Danish fully parliamentarised model.

^{XXIII} Court of Justice of the European Communities, Cases C-253/94, *Ronjansky v Council* and C-264/94, *Bonnamy v Council*.

^{XXIV} Case C-370/12, *Pringle* (see also Vogiatzis 2013: 1675).

^{XXV} “It must ... be stated that, as is confirmed moreover by the conclusions of the European Council of 16 and 17 December 2010 to which reference is made in recital 4 of the preamble to Decision 2011/199 ...” (Case C/370/12, *Pringle*, para. 58). See also the view by Advocate General Kokott.

^{XXVI} According to Starita (2013), the exclusion of the European Council from “strong” parliamentary control is neither an accident nor a mere “modification” of the Community method. Rather, it can be traced back to a widespread attitude of national executives, which tend to escape democratic control when elaborating programmatic international norms in the economic domain. Furthermore, the European Council may act in



two capacities: as an institution of the European Union and as an international summit. When acting in the latter capacity, the European Council does not undergo the limitations stemming from the principle of conferral of Art. 13(2) TEU.

^{XXVII} With regard to the distinction between *Katastrophe* and *Rhetorik der Katastrophe* in the framework of the risk society theory, see Beck 2012: 28.

^{XXVIII} A development of this kind would clearly take place to the detriment of flexibility, which has often been welcomed as a positive feature of the European Council. On the other hand, it should also be underlined that greater rigidity would be a clear signal of an even stronger “constitutionalisation” of this institution.

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National parliaments and governmental accountability in the crisis: theory and practice

by

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Abstract

This contribution studies the question of governmental accountability in the crisis. It looks at how three Member State's parliaments – French, German and Spanish – have exchanged on European Council meetings and Euro summits organized between 2010 and 2014.

It first analyzes the formal obligations these Governments have in this domain before focusing on the practice; how National parliaments have used their prerogatives and how the established customary rules have compensated for the lack of formal rights in favour of National parliaments.

Finally, some conclusions are drawn on the role of the established practice and its consequences and some potential prospects.

Key-words

Eurocrisis, national parliaments, accountability, European Council, Euro summits



The economic and financial crisis from which Europe has been suffering in the past years has required that the European Union (EU) Member States develop and create new mechanisms and constraints to prevent the Eurozone from falling apart^I.

In this context, European intergovernmental instances, and especially European Council and Eurozone summits, have gained a predominant role without National Parliaments always being able to control the position defended by the National representative in these arenas (Wessels et al 2013:14 s.), even if their (conventionally reserved) budgetary prerogatives were strongly affected. Indeed, traditionally Member States parliaments have focused their scrutiny on EU documents or on the EU Council meetings without developing a strong control – or even follow-up strategies – of the position defended by their Heads of States and Governments in the European Council (Wessels et al. 2013: 16-17) in spite of the fact that the European Council was gaining importance through formalization (art. 13 TEU) and the creation of its permanent presidency (art. 15 TEU) in the Lisbon Treaty^{II}. As for the Euro summits, they arose in 2008 and were institutionalized in 2012 becoming in this way, for National Parliaments, yet again, a new challenge or at least one more European meeting to monitor.

In parallel, the Lisbon Treaty enhanced the role of National Parliaments and it had been deemed to have, for this reason, (finally) improved the democratic deficit existing – supposedly – in the European Union^{III}. Following its entry into force, EU Member States adopted legislation for the implementation of the prerogatives newly granted to National parliaments. In some cases, such as the German or the Italian ones (respectively through the Responsibility for integration Act and Act on Cooperation between the Federal Government and the German Bundestag in Matters concerning the European Union, and Italian Law n. 234 of 2012), the National rules went beyond the content of the Treaty in guaranteeing rights of participation and information to the Parliament.

Moreover, it has now become apparent that the economic crisis has also led to the empowerment of some National parliaments in EU affairs. This is especially true of the German *Bundestag* whose prerogatives were strongly protected and reinforced following the judgments of the Federal Constitutional Court (decisions commented by Hölscheidt 2013:114 ff.; more generally on this point: Fasone in this issue). As a consequence, the



German government's actions at European level are now better controlled and influenced by the *Bundestag*; its consent – as well as the *Bundesrat*'s in some cases – can be required too.

While this is undoubtedly the case of Germany, the formal reinforcement of Parliaments in other Member States is less evident, even where demanding Memoranda of understandings are agreed on as a consequence of financial support by the other EU Members, as is the case of Spain for instance (Fasone in this special issue; Fromage forthcoming).

Additionally, these differences are made possible by the silence of the European Treaties and measures which, by and large, leave this matter up to domestic regulations. Article 13 of the Treaty on Stability, Coordination and Governance (TSCG) is an exception to this but it only involves National Parliaments collectively as it foresees that 'As provided for in Title II of Protocol (No 1) on the role of national Parliaments in the European Union annexed to the European Union Treaties, the European Parliament and the national Parliaments of the Contracting Parties will together determine the organization and promotion of a conference of representatives of the relevant committees of the European Parliament and representatives of the relevant committees of national Parliaments in order to discuss budgetary policies and other issues covered by this Treaty.' Consequently, this Treaty, concluded outside of the EU framework, merely foresees the creation of an interparliamentary conference, whose features are, furthermore, not defined and leave important room for interpretation; it does not grant any right to National parliaments individually.

Moreover, at European level, no specific control over the Euro summits exists. As already mentioned, this institution arose in 2008 before it was formalized in article 12 TSCG in 2012 (Eurozone portal). It first held irregular meetings (one in 2008, one in 2010, three in 2011); now, they have to be organized at least twice a year. This organ also has a President, who is jointly the President of the European Council and who is not necessarily the Head of State or Government of a Eurozone country since the Pole Donald Tusk currently holds this mandate. Given this framework, it will be up to each Member State to decide – internally – to grant its Parliament the capacity to control and to influence on the position defended by the executive representative in this forum – or not –.

Parliamentary practice plays an important role here, in a two-fold manner: first, because customary developments may complement existing formal rules – or even compensate the



lack thereof –; second because having formal rights of participation is not enough for parliaments to use them effectively. Other factors, such as political dynamics or the salience of the issues treated during a specific meeting, will play a decisive role in Parliaments being ready to use the instruments of control they have, especially when there is a relationship of confidence between the Government and one of the Chambers^{IV}. In other words, as Sabine Kropp summarizes, ‘Even a strong parliament in itself can – for different reasons – abstain from using its rights of control, and it is conversely conceivable that a weak Parliament – in terms of control – develops new, effective strategies.’ (Kropp 2013: 182).

In this context, an analysis of the way in which National Parliaments hold their Government to account appears particularly necessary. The present study will regard three Member States (France, Germany and Spain) and will focus solely on how their Parliaments hold to account, via hearings, the National representatives in the European Council – and in the Euro summit to a lower extent – as the crisis has dramatically strengthened the powers of these intergovernmental institutions (Auel & Höing 2014: 1185-86).

The study of these three States is justified by their role in the management of the crisis (creditor vs. debtor) as well as by their tradition of parliamentary involvement in EU affairs (strong but with scarce use of the specifically designed prerogatives for Germany and weaker in France and Spain where more traditional means of parliamentary influence – hearings, resolution – are used).

This article will argue first that these National parliaments have not adapted to these changes equally, especially with the lack of provision for the monitoring of Eurozone summits. Second, it will highlight that it is often misleading to focus solely on the prerogatives formally guaranteed to Parliaments to assess their (real) capacities to hold their Governments to account. Finally, it will also draw some conclusions on potential future developments.

The first Part will be devoted to the formal rights these National Parliaments possess to hold to account their governmental representatives in the European Council and in the



Eurozone summits (Part 1), before analyzing which use they have made of them in practice since the beginning of the crisis management under the rules defined by the Lisbon Treaty in 2010 (Part 2). This part will be dedicated to the development – or lack thereof – of customary procedures complementing or replacing the ones formally guaranteed by the law. Some concluding remarks regarding the efficiency of the systems in place, the consequences of the practice developed and the role the formalization of the rules may play will close up this piece (Part 3).

1. Tighter (but still insufficient?) parliamentary control over European Council meetings since Lisbon and the crisis

The Lisbon Treaty has, in itself, strongly empowered National parliaments. These – national – institutions are, for the first time, included in the text of the Treaty itself and, more importantly, they are now called on to ‘participate actively to the good functioning of the Union’ (art. 12 TEU). To this end, a series of new powers – contained in the same article of the Treaty – , among which the most visible and frequently used one is the subsidiarity check performed in the framework of the Early Warning Mechanism, are granted to them. National Parliaments are also, together with the European Parliament, given a special role in the democratic legitimacy of the Union which, according to article 10 TEU, rests on two pillars: ‘Citizens are directly represented at Union level in the European Parliament. [whereas] Member States are represented in the European Council by their Heads of State or Government and in the Council by their governments, themselves democratically accountable either to their national Parliaments, or to their citizens.’

This attribution of new prerogatives by the Treaty has required some adaptation at Member States level and, as has already been highlighted, this requirement has encouraged some States to extend the parliamentary prerogatives beyond what was strictly necessary to enable their Chambers to make effective use of their new powers. Furthermore, in some cases, these rights were further enlarged to compensate for the attribution of new competences to the EU level in the economic domain in response to the current crisis.

Germany is surely one of the States in which the Parliament, and in its case especially its directly elected Chamber, the *Bundestag*, have benefitted from these evolutions and have gained better access to information and stronger possibilities to hold governmental



representatives to account when they take part in Council and European Council meetings^v; as declared by the Federal constitutional court, the German parliament has a ‘responsibility for integration’ (BVerfG, 2 BvE 2/08 of 30 June 2009). Until 2009, the German representative in the European Council was not bound by the will of Parliaments in its negotiations. In contrast, since the reform of the Act on Cooperation between the Federal Government and the German Bundestag in matters concerning the European Union following the entry into force of the Lisbon Treaty, the ‘Federal Government is to reach agreement with the *Bundestag*’ before any final decision in the Council or in the European Council on the opening of negotiations on accession or on Treaty amendments, among others.

As regards the duty of information on the European Council meetings themselves, the Basic Law provides a general information duty in EU matters since its Article 23-2 provides, since the constitutional reform performed at the moment of the adoption of the Treaty of Maastricht, that ‘the Federal Government shall keep the Bundestag and the Bundesrat informed, comprehensively and at the earliest possible time.’ Additionally, specific obligations are anchored, together with other numerous reporting obligations, in the Act on Cooperation between the Federal Government and the German Bundestag in matters concerning the European Union. The Act on Cooperation approved in 1993 as a consequence of the approval of the Maastricht Treaty had already been reformed following the entry into force of the Lisbon Treaty in 2009. However it was modified again in July 2013 in order to ensure that the *Bundestag* would be informed in all circumstances, including the new ones reinforced as a consequence of the economic crisis (Eurogroup, Euro summits among others), after the Federal Constitutional Court confirmed this right to the *Bundestag* in its judgment on the European Stability Mechanism and on the Euro Plus Pact (see below).

Section 4, par. 2 of the 1993 Act as amended provides to this end, in general terms, that ‘The Bundestag must be informed in advance and in sufficiently good time to form an opinion on the subject of the meetings and on the position of the Federal Government and to be able to influence the negotiating line and voting decisions of the Federal Government. Reports of meetings must present at least the positions adopted by the Federal Government and other states, the course of negotiations, intermediate findings and final outcomes as well as any decisions for which parliamentary approval is required.’



Furthermore, paragraph 4 of this section is especially devoted to specific arenas, among which the European Council meetings, and to Euro summits; it states that ‘Before meetings of the European Council and of the Council, informal ministerial meetings, euro summits and meetings of the Eurogroup and comparable institutions that meet on the basis of international agreements and other arrangements which complement or are otherwise particularly closely related to the law of the European Union, the Federal Government shall notify the Bundestag of each subject of discussion in writing and orally. This notification shall encompass the main features of the subject matter and of the state of negotiations as well as the negotiating line of the Federal Government and its initiatives. After these meetings, the Federal Government shall provide written and oral information on their outcome.’ This obligation pre-existed the reform of 2013 – it was introduced in 2009 – and, hence, this later reform simply extended its content^{VI}. Before 2013, the governmental obligations did not encompass the Eurozone summits which the Government considered as not being EU law but ‘of a purely intergovernmental nature’ (Heffler & Höing 2013: 53). It was only after the Federal Constitutional Court’s judgment delivered in June 2012 on the ESM and the Euro plus pact that the *Bundestag*’s right to information was further guaranteed^{VII}. Since 2013, though, the obligation of the Government towards the *Bundestag* is particularly detailed and comprehensive with both oral statements and written reports having to be provided.

As in the German case, the Spanish parliament is formally guaranteed information regarding European Council meetings. In fact, this obligation of the Government towards Parliament has long existed; it was introduced in 1994 when law 8/1994 was approved following the entry into force of the Maastricht Treaty^{VIII}. As provided for in article 4 of this law, the government has to appear before the Congress of Deputies after each ordinary and extraordinary European Council meeting. As a consequence, the information flow guaranteed exists only *ex post* at a time when the Congress of Deputies can no longer influence the Government in any way. This is especially problematic as the rules regarding the transmission of the agenda of future meetings, and those regarding the Government’s position on these items, are unclear. The rules regarding the EU Council meetings are very protective of the Parliament as article 8 (since its introduction in law 8/1994 by law 38/2010) foresees that the Joint Committee for EU affairs^{IX} will decide on which members



of Government will be heard on the basis of the EU Council meeting's agenda. However, in contrast, the only potential basis for the transmission of the agenda of an upcoming European Council meeting is article 3 d) of the same law which opens the possibility for the Joint Committee to 'receive from the Government the information it has on the activities of the EU institutions'. Furthermore, the opportunity open to the Joint Committee to organize a debate with the Government on an EU subject – within this Committee or in plenary – (art. 3 c)) is strictly restricted since these debates have to be on an EU legislative proposal and hence, at least formally, this possibility cannot be used to discuss on the European Council meetings. One means for providing parliamentary information could be the obligation made to the Government to inform the Joint Committee of the 'inspiring lines of its policy within the EU' (art. 3 e)), but this provision is vague.

It should be noted too that the Government is compelled to provide the Joint Committee with a report on all the developments that occurred during the last European presidency before the European Council meeting concluding this presidency takes place (art. 3 e)). However, in practice, the Government has never complied with this obligation introduced in 1994 (Sánchez de Dios 2013: 134). The Secretary of State for the European Union does make an oral report at the end of the Presidency before the Joint Committee though^x.

Additionally, the formal obligation imposed on the Government by law 8/1994 to appear before the Congress of deputies after each European Council meeting leaves the Senate aside, although it is represented in the Joint Committee on EU affairs. Such an exclusion can be justified by several factors: first and foremost, the Government is only democratically accountable to the Congress of deputies which political majority it represents. Second, even if the Senate is involved in the legislative process, its opinion can be overridden by the Congress which, de facto, can act as if it were the only parliamentary Chamber. The Senate could still use its right to question the Government in plenary session guaranteed by article 170 of its standing order to compensate its exclusion and this means of control was used indeed once during the period of this study when senator Joan Lerma Blasco questioned the positive consequences for the economy expected after the European Council meeting of June 2012^{XI}.



In France, the situation is contrary to that in Germany and more like that in Spain, in that the (formal) dispositions defining the rights of Parliament in EU affairs have not been modified as a consequence of the economic crisis, nor have the reforms performed following the entry into force of the Lisbon Treaty contributed to parliamentary control procedures over the European Council meetings being introduced. Furthermore, the French system is peculiar in one aspect: given the existence of a split executive in the persons of the directly elected President and the appointed Prime Minister, where only the latter is democratically accountable to the National assembly whereas the former is not formally subject to any form of parliamentary control. In fact, the President's communication with the assemblies is permitted only in writing unless both Chambers are gathered in Congress as defined in article 18 of the French Constitution: 'The President of the Republic shall communicate with the two Houses of Parliament by messages which he shall cause to be read aloud and which shall not give rise to any debate. He may take the floor before Parliament convened in Congress for this purpose. His statement may give rise, in his absence, to a debate without vote.' The lack of provisions concerning the European Council or the Euro summits could be explained by the absence of any link of trust between the French Chambers and the President of the Republic, who represents the French Republic in these intergovernmental arenas. However, when the President belongs to the same political party as the parliamentary majority (as has been the case since the last *cohabitation* period ended in 1995)^{XII}, in practice he or she is the Chief of the Executive too and hence Government members may be, as we shall see, called to report before the Chambers on European Council meetings too on behalf of the President who cannot appear before the Chambers for constitutional reasons^{XIII}.

Thus, the only possibility to organize debates at the occasion of European Council meetings exists relying on the Chambers' rules of procedures. Part of the constitutional reform introduced in July 2008 aimed at reducing the predominance of the executive and its political majority in the Chambers' work which had been the rule since the Constitution of the V Republic was approved in 1958; therefore a new paragraph 4 was introduced in article 48. It provides for the possibility of more parliamentary control since 'One day of sitting per month shall be given to an agenda determined by each House upon the initiative of the opposition groups in the relevant House, as well as upon that of the minority groups.' This change has allowed the Senate to follow up on its European positions



whereas this had proved impossible until then (Haenel 2009: 15). In the Assembly, according to Article 48-7 Rules of procedures, ‘Each president of a group of the opposition or a minoritarian group obtains as of right the inscription of one subject of evaluation or control to the agenda of the week foreseen in article 48, par. 4 of the Constitution. In the framework of that week, one session is dedicated firstly to European questions.’ These recent developments may give some leeway to the parliamentary opposition for more control of the Government over European Council decisions.

Additionally, Article 6 bis par. 2 of Decree 58-1100, which provides that ‘The Commissions in charge of European affairs follow the works conducted by the institutions of the European Union. To this end, the Government forwards them the projects or proposals of acts of the European Communities and of the European Union as soon as they are transmitted to the EU Council. **The Government may as well forward, on its own initiative or upon a request of their presidents, any required document.**’ (emphasis added). This could serve as basis for the Government to forward the agenda of future European Council meetings to the Chambers, but neither this Decree nor the Circular of 21 June 2010 on the participation of the National Parliament to the European decision-making process, which contributes to its implementation, contain any specific reference to European Council documents.

Of these three States, only the German Chambers are guaranteed information regarding European Council meetings and Euro summit *ex ante* and *ex post*. The Spanish law regulating the functioning of the Joint Committee for the EU seems to invite a more top-down information flow – limited to European Council meetings – rather than to the establishment of a real exchange between Parliament and Government. In France, there exists no formal obligations from the Government towards Parliament regarding either European Council meetings or Euro summits.

Putting these three Member States in a global EU perspective shows that the French case is rather the exception than the rule since 17 of the then 27 Member States Parliaments had formal rules allowing for parliamentary control over European Council meetings in 2012 (Hefftlar & Wessels 2013: 6).



2. The development of practices to compensate for the lack of formal dispositions and the use Parliaments effectively make of their prerogatives^{XIV}

As discussed in the introduction, parliamentary practice needs to be analyzed too since extensive interpretations of existing provisions have often been crucial in allowing for parliamentary participation in EU affairs^{XV}. Paradoxically, even parliaments that have a strong tradition of control – or at least monitoring – of the Government’s actions may have been reluctant to using the instruments available to them, favouring informal – and, hence, invisible – means of influence (Auel 2006: 259 f.; Obrecht 2009: 156-157).

An analysis of German practice reveals that it is usually the Chancellor herself who reports on European Council meetings *ex ante*. *Ex post* the Government is usually represented by the Minister of State to the Federal Chancellor (Heffler & Höing 2013: 55). *Ex ante* control is more frequent than *ex post* control since the former took place in more than two thirds of the cases whereas the latter did in only 40% of them. Moreover, the arena of these debates was different although, in contrast to the French National Assembly and to the Spanish Congress, there is no exclusivity of the plenary or the European Affairs Committee; rather, both can be involved. Despite this lack of functional divide, there is, however, a tendency to organize *ex ante* debates in plenary (14 out of 21) whereas *ex post* debates tend to take place rather in Committee (9 out of 12). This could be explained by the additional publicity across political groups and among deputies that only the plenary provides. This may be especially the case at times when controversial decisions were taken by the Heads of States and Governments of the EU Member States, and it may have been necessary for the Chancellor to make sure that she would be supported upon her return from Brussels and to be informed of the different positions represented within the lower Chamber. After her return, once political decisions have been made, a more technical exchange in Committee seems to be preferred. Additionally, when a debate is organized in plenary, political groups can present a resolution to vote; typically, the debate will then start with a statement by the Chancellor, followed by parliamentarians’ statement and conclude with the discussion and vote on a resolution if such initiative has been presented (for example: plenary debate on 16 October 2014).



It should also be noted that at the peak of the crisis in 2011 and 2012, the budget committee was very often involved *ex ante* and/or *ex post*, and it was the Finance Minister that would appear before it and not the Chancellor. This practice is currently no longer in use, though.

As is shown by the practice, there are no rules as to which organ should conduct *ex ante* or *ex post* control; this is explained by the absence of rules regarding the involvement of the plenary in the Rules of procedures (Hefftlar & Höing 2013:53). For *ex post* debates, in practice, parliamentary party groups of the *Bundestag* first decide whether or not they want to organize a debate on the outcomes of the European Council, and then where it should take place (Hefftlar & Höing 2013: 54). Indeed, the selection operated by party groups – according to the salience of the European Council’s agenda and the need for posterior parliamentary approval? – is reflected in the frequency of the debates; whereas at the peak of the crisis in 2011 and 2012, all meetings were subject to debate *a priori*, in 2013 and especially in 2014 this frequency diminished strongly. The elections organized in September 2013 might, however, explain why the meeting organized in October in Brussels was not scrutinized with a hearing. In any case, it should be born in mind that in the German case especially an absence of hearing does not mean that the *Bundestag* was not informed; written reports are otherwise submitted.

In spite of only an *ex post* control procedure being provided by law 8/1994, practice as developed in Spain has permitted the involvement of Parliament before the European Council meetings too. First of all, the Prime minister – who sits in representation of Spain in these meetings – usually meets with the leader of the opposition (Sánchez de Dios 2013: 135). The prior involvement of the Joint Committee on EU affairs is also – often – provided through the organization of governmental hearings. In this case, it is usually the Secretary of State for the EU who informs the Joint Committee; only in one occasion did the Minister for foreign affairs himself appear before the Joint Committee in June 2012^{XVI}. This means of information dissemination is fairly efficient – especially given the fact that it is informal – as hearings sessions could be organized on the basis of article 44 of the Congress rules of procedures for more than half of the European Council meetings that took place between 2010 and 2014. The frequency of these debates varied widely over the five years studied here, though: in 2013 all meetings were first discussed in the Joint



Committee, whereas in 2011 and in 2012, when the most important and controversial decisions were made by the Heads of States and Governments, less than half of them were. In 2014 also only 2 of the 7 meetings were subject to debate which might indicate that the closer scrutiny observed in 2013 was exceptional and linked to the subjects on the European Council's agenda, and to the fact that Spain was directly affected.

In contrast, in spite of the formal obligation granted to the Government by law 8/1994 to appear after European Council meetings, in practice, these hearings often do not take place, only occurring in approximately half of the occasions over the same period. This was the case even – and perhaps especially – when important decisions were taken in economic and financial matters that directly affected Spain as a debtor Member State in 2011, but this low parliamentary involvement might be related to the elections organized at the time. A similar decrease in frequency of *ex post* meetings can be observed in 2014 as was the case of *ex ante* meetings.

In France, as highlighted above, the Constitution, rules of procedures, and Decree 58-1100 on the functioning of the parliamentary assemblies – which long compensated the lack of constitutional provision in terms of parliamentary information in EU affairs – contain no formal obligations for the Government to inform the Parliament in the framework of European Council meetings or Euro summits. Practice developed in both Chambers has been instrumental in compensating such lack of formal provisions and has permitted the establishment of a dialogue before and/or after European Council meetings between Parliament and Government.

In the Senate, a practice has been established in the past years according to which a debate is organized in plenary before each meeting of the European Council (Haenel 2009: 11). During the period from 2010 to 2014, when the Heads of States and Governments were called to take the most important decisions to save the Euro, more than two thirds of the meetings were accompanied by a previous debate in plenary with the Secretary of State or the Minister for EU affairs^{XVII}, although a couple of them were organized in the framework of the Commission on EU affairs due to elections. In plenary, the Secretary of State makes a statement before the senators can intervene and ask questions which are then answered by the Secretary of State (Kreilinger et al. 2013a: 47). In some occasions, debates were also organized *ex post* but these were much less numerous. While one of them took



place in plenary with the then newly appointed Prime minister, Jean-Marc Ayrault, in June 2012, in general these hearings *ex post* are organized in the Committee on EU affairs, sometimes in a joint initiative with the Committee of the National Assembly, as was the case in December 2012 when the German minister for EU affairs also participated. Furthermore, European Council meetings are sometimes discussed during hearings of the General Secretary for EU Affairs; this happened in June 2013 for instance^{xviii}. Also, especially since François Hollande was elected in 2012, many of the meetings organized after European Council has met include both the Committee on EU affairs and the Committee on foreign affairs.

Given these developments, it is indeed undoubtable that the development of practice, and the extensive use of the instruments the Senate possesses to control the Government, have dramatically improved its position. However, the lack of an extensive *ex post* follow-up hinders the Senate from having an effective control or influence since once its members have expressed their opinions, the Executive is free to follow them – or not –. Only in a few cases has it been held accountable for the position it eventually defended in Brussels. However, both Chambers and the Government have, generally, similar views on EU affairs – or can reach such a common view through organized debates – so that this is not problematic and, in any event, only the National Assembly bears a relationship of trust with the Government.

The relationship between Executive and Legislative might be the reason why the National Assembly's control over the European Council meetings is, compared to that of the Senate, tighter *ex post* whereas it is looser *ex ante* (8 hearings *ex ante* vs. 21 and 15 *ex post* vs. 7). The deputies may benefit from informal means of information and influence though, and those of the majority may prefer these invisible channels. In any event, since the failure to adopt the Constitutional Treaty in 2005, a customary rule has been established according to which a hearing is organized in the plenary before each ordinary meeting, though extraordinary and informal meetings are excluded due to the short notice typically available (Kreilinger et al. 2013a: 47). As in the Senate, the *ex post* debate takes place in Commission. The exchange of opinions organized before each meeting is therefore more public whereas the one taking place afterwards is more specialized; "This also reflects the idea that the control exercised by Parliament is more like a "shadow control" where the parliamentary majority tries to avoid to weaken the government."



(Kreilinger et al. 2013a: 49).

Evidently, the fact that it is a Minister who debates on the European Council meetings with the Houses of Parliaments *ex ante* makes any parliamentary influence more difficult since the Minister cannot commit to defending any position in the name of the President. As Kreilinger et al. summarize ‘the physical absence of the President is detrimental to the performative aspect of the debates’ (Kreilinger et al. 2013b: 22).

The three examples analyzed here seem to indicate different uses of the exchanges between Parliament and Government which, additionally, do not necessarily match with the formal provisions for these debates.

As it turns out, the Spanish parliament is the only one of the three which almost equally interacts with the Government before and after the meeting. The French National Assembly focuses on the information on the results of the meetings whereas the French Senate and the *Bundestag* are involved most frequently *ex ante* which grants them higher chances of influence.

In terms of where the debates should be organized, there is no consensus among the three States analyzed here: the French Chambers favour the plenary for *ex ante* involvement, and so does the *Bundestag* whereas Spain prefers the more technical meetings of the Joint Committee. The exact opposite tendency can be observed as regards the *ex post* control.

Of course, the content of these debates should also be analyzed as for instance, in the past, parliamentary questions on EU affairs were used in Spain by the majority to present its position rather than to oblige the Government to behave in a particular manner (Cienfuegos 1996: 59 s.). However, for a parliament which is particularly weak in EU affairs (Pérez Tremps 2002: 410) and generally not very active in this matter either – this is illustrated for example by its low participation in the Early Warning System and in the Political Dialogue with the EU Commission (Commission Annual Reports) –, the debates on the European Council regarding 60% of its meetings in Spain show a strong involvement.

In any event, recent developments seem to show that Tapio Raunio’s predictions were right in his declaration that ‘there are strong reasons to argue that political parties will revert back to their ‘old ways’ and avoid public debates on Europe’ (Raunio 2015: 115).



And indeed, at least in France and in Spain, such tendency has begun to make itself visible in the past year.

3. Concluding Remarks

Having observed the formal rules in place and the practice in these three Member States, some concluding remarks should be made.

The present analysis has shown that, as it is especially common for Parliaments in EU affairs^{XIX}, practice plays a crucial role in the field of governmental scrutiny. Although this is surely positive in States such as France and Spain where parliamentary rights to information and influence is neither protected by the law nor by a constitutional court, this development presents the risk that Parliament – and especially the political minority – remains *in fine* strongly dependent on the Government's will. These two Governments, whose only fear in the process is that of political blame, might be tempted to use this instrument of dialogue to their advantage and, indeed, this very reason motivated the institutionalization of the *ex post* control of the European Council meetings in the Spanish Congress of Deputies as early as 1994. This formal inclusion in the law 8/1994 prevented the organization of these debates from depending on the Government's will or on an agreement being reached among the members of the Board (Cienfuegos 1996: 90).

In addition to the existence – or absence – of formal obligations and to the organization in practice of these debates – or lack thereof –, the question of transparency needs to be addressed. One of the functions Parliaments have to fulfill is that of information towards the citizenry. At a time when important decisions are made by EU heads of States and Government within the – secret – meetings of the European Council, the additional lack of transparency at the National level appears to be especially problematic. Given the fact that the European Parliament was long absent in this field, it appears particularly important that the second pillar for the guarantee of democracy in the EU – National parliaments – assume their role and hold their Executives accountable. It is with this aim that some control procedures should be designed at National level.

Prior to the Executive representative's encounters in Brussels, it is highly desirable that both the representative and parliamentarians have had the opportunity to discuss and agree on a common – National – position. This might prove difficult if *ex ante* debates take



place in plenary sessions which, by definition, are public whereas committee meetings may be entirely transcribed (France and Spain) or not (Germany). Hence, a balance needs to be struck between on the one hand, the need to inform both the public in general and all deputies, and to raise their awareness on important issues, and on the other hand the privacy required to be able to have a real debate. This being said, it is worth considering the fact that in these three Member States no mandating system exists and that the Government – or the President – remains responsible for making political choices at European level (although it may have to justify its choice to deviate from the political directions indicated previously). Thus, it might be wiser to raise political awareness of all deputies in plenary and reserve debates in smaller arenas – Committees – to the most politically sensitive questions.

Indeed, if plenary debates are ‘key elements of political competition, allowing the electorate to follow (directly or through media coverage) issues on the political agenda and to identify the political parties in these matters, and thereby contribute to both citizens’ (Raunio 2015: 106) awareness of politics and to accountability of the government and MPs’, before negotiations take place in Brussels, too much transparency may be harmful to the National interest. This judgment might call for reassessments over time though.

Admittedly, European politics had remained, up until the entry into force of the Lisbon Treaty, a subject of little parliamentary interest. Following the economic crisis and the new rights granted to the members of the *Bundestag*, however, it seems that they have become consequently more active in EU affairs in general, moving from ‘control actors’ to ‘participatory actors’ (Calliess & Beichelt 2013: 32). Should this tendency be confirmed and subsequently extend to other Member States, then perhaps the Government-Parliament relationship in the framework of European Council meetings could be more targeted to the development of a consensual definition of a position in committee without this position necessarily being extended up to the definition of a mandate. This holds if, as has been the case since the beginning of the European integration process in the three Member States studied, deputies continue to be, in their majority, pro-European; this article has mostly focused on Eurozone summits and European Council meetings and even between 2010 and 2012 when the most controversial decisions were made to save the Euro, the parliamentary resolutions and mandates addressed to the Government represented only a limited part of the total numbers resolutions approved, which shows consensus (15% in



the French National Assembly, less than 10% in Germany and 25% in Spain; Auel & Höing 2014: 1189).



Hearings organized in the French, German and Spanish parliaments before and after European Council meetings (2010-2014)

SOURCE: Own analysis of the parliamentary protocols and agendas.

This analysis is limited to the plenaries and the EU affairs committees since they are most commonly involved. However, other committees (especially: budget committee in Germany and foreign affairs committee in the NA) have been involved.

		2010		2011		2012		2013		2014		TOTAL EX ANTE & EX POST	TOTAL (out of 31 EC meetings)
		HEARING S	EC MEETIN GS	HEARING S	EC MEETIN GS	HEARING S	EC MEETIN GS	HEARING S	EC MEETIN GS	HEARING S	EC MEETIN GS		
NA	ex ante	0	6	0	6	0	6	1	6	0	7	1	8
	Plenary	1	6	4	6	2	6	0	6	0	7	7	
	EAC	0	6	2	6	4	6	5	6	3	7	14	
F	ex post	0	6	0	6	1	6	0	6	0	7	1	15
	Plenary	0	6	0	6	1	6	0	6	0	7	7	
	EAC	1	6	2	6	0	6	0	6	1	7	4	
S	ex ante	4	6	3	6	2	6	5	6	3	7	17	21
	Plenary	1	6	2	6	2	6	1	6	0	7	6	
	EAC	0	6	0	6	1	6	0	6	0	7	7	
G	ex post	0	6	0	6	1	6	0	6	0	7	1	7
	Plenary	0	6	0	6	1	6	0	6	0	7	7	
	EAC	0	6	4	6	1	6	2	6	0	7	7	
BT	ex ante	3	6	2	6	4	6	2	6	3	7	14	21
	Plenary	0	6	2	6	2	6	2	6	3	7	14	
	EAC	0	6	4	6	2	6	1	6	1	7	9	
G	ex post	0	6	1	6	0	6	1	6	1	7	3	12
	Plenary	0	6	1	6	0	6	1	6	1	7	3	
	EAC	0	6	2	6	3	6	6	6	2	7	18	
S	ex ante	0	6	0	6	0	6	0	6	0	7	0	18
	Plenary	0	6	0	6	0	6	0	6	0	7	0	
	EAC	0	6	0	6	0	6	0	6	0	7	0	
S	ex post	4	6	1	6	5	6	6	6	3	7	19	19
	Plenary	4	6	1	6	5	6	6	6	3	7	19	
	EAC	0	6	0	6	0	6	0	6	0	7	0	



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^I The principle instruments being the Two pack, the Six pack and the Treaty on Stability, Coordination and Governance (TSCG). See K. Tuori & K. Tuori 2014.

^{II} In addition to this lack of procedural means of control, further elements make any kind of parliamentary control especially difficult; European Council meetings are not public and little information is available beforehand, not all Heads of States and Governments have a relationship of confidence with the Parliament (the Cypriot and the French ones do not for instance) Wessels et al. 2013: 16.

Some argue that the European Council's empowerment dates back to the middle of the 1990s and was simply amplified by the crisis. Puetter 2014: Chap. 3.

^{III} The link between the improvement of the democratic deficit and the involvement of National Parliaments in the EU had clearly been mentioned in the Declaration on the future of Europe (Laeken Declaration) of 2001 (par. 2).

^{IV} This is, however, true of the *Bundesrat* during the studied period (2010-2014).

^V This influence goes beyond Germany as a European Council meeting had to be rescheduled in order to allow the *Bundestag* to gain a comprehensive understanding of the situation and to mandate its Government. Buzogány & Kropp 2013: 6.

The involvement of the *Bundesrat* is limited in this framework: according to the Act on Cooperation between the Federation and the Länder in European Union Affairs no transmission of *ex ante* and *ex post* information in relation to EU Council and European Council meetings is specifically foreseen. An attempt was made to reform this Act in 2013 in order to include the transmission of information related to international Treaties linked to the EU but this initiative did not prosper due to the federal elections organized the same year. In any case, European Council documents, which are then made available to regional Governments on an internal platform, are transmitted by the Federal Government on the basis of article 23 Basic Law, and also article 2 of the Act on Cooperation provides for the information of the Länder 'comprehensively and at the earliest possible time' on all EU projects that 'can be of interest for the Länder'. Previously, a practice existed according to which the Federal Government would inform the EU Committee orally before European Council meetings but this customary procedure was discontinued.

^{VI} Indeed, until 2013, the obligation of information was limited to EU Council and European Council meetings.

^{VII} 2 BvE 4/11 of 19 June 2012.

^{VIII} De facto, these meetings had already existed since 1989. On the institutionalization of this practice: Cienfuegos Mateo 1996: 90.

^{IX} In Spain, since the country's accession to the European Communities there has always been only one Joint Commission on EU affairs common to both parliamentary Chambers.

^X For example, at the end of the Hungarian presidency on 13 September 2011. Joint Committee's Sessions Diary.

^{XI} Initiative 670/ 000051/ 0001 of 10 December 2012.

^{XII} The Constitutional reform of 2 October 2000 reduced the presidential mandate from seven to five years so that the presidential elections now take place the same year as the elections of the deputies sitting in the National assembly. Furthermore, the order of these elections was modified by Organic Law 2001-419 so that since then, the presidential elections take place first and are followed by the parliamentary elections with the aim that the electors will be willing to provide their favorite candidate with a majority to govern in the Assembly.

^{XIII} There may however be differences between the position defended by the member of the Government in the Chamber and the one the President has himself held publicly. The former are usually more technical and cautious. Krelinger et al. 2009b: 16 s.

^{XIV} This second part will focus on the control on European Council meetings since the hearings organized usually formally focus on them. Therefore, if subjects specific to the Euro summits are treated, they are most often introduced in the general debate on the European Council meeting. Some exceptions exist, though, for instance in the German *Bundestag* where meetings in plenary and in the EU affairs Committee were organized around the Euro summit of October 2011.

^{XV} The Annex includes a summary of all hearings organized in the Parliamentary Chambers considered here between 2010 and 2014. For this purpose, only the hearings addressing solely the European Council meetings have been taken into account, independently of the fact that these questions may have arisen in the framework of other governmental hearings. Additionally, only the meetings organized with a Government



representative either in plenary or in the European Affairs Committee have been analyzed. This notwithstanding, other specialized committees may have been either involved (for instance, committee on foreign affairs or committee on economy in the French National Assembly) or may have conducted a hearing independently (German budget committee for example).

^{XVI} Another initiative was presented by the Government in February 2013 but it was later withdrawn and finally the Secretary of State represented the Executive.

^{XVII} In France, this function is characterized by a lack of stability both in terms of its status – which varies between Minister delegate to the Minister for Foreign Affairs with responsibility for European affairs and Secretary of State for European Affairs – and of its holder – nothing less than 12 in 12 years! –. The main difference between a secretary of state and a minister delegate lies in their access to the weekly meeting of the Council of ministers; while the former assists only if he is invited for reasons of the agenda, the latter participates as of right. In practice, the President of the Republic, who represents the French Republic in the European Council, likes to keep his hand on EU affairs directly and this member of the Government has only limited powers.

^{XVIII} The French executive has been characterized by its very strong organization in EU affairs since the beginning of the integration process. The organ which has now become the General secretariat on EU affairs (*Secrétariat général des affaires européennes – SGAE*) is a powerful tool in charge of uniting the positions of the different ministers involved in a negotiation so that there is only one French position in Brussels.

^{XIX} Among many examples, in France, a report is prepared by the Government to prepare the future transposition of EU norms. These *Fiches d'impact stratégiques* (strategical impact reports) exist but are not formalized in any decree (*ordonnance*) of any kind.

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Eurocrisis and Regional States: New trends in the European Regional Policy and the Regions' future

by

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Abstract

This article focuses on the impact of the Eurocrisis on Regions and the role played by the European Regional Policy. Budget constraints and austerity measures determine to a large extent social policies, which have been traditionally designed and implemented by the Regions of Member States such Italy or Spain. This trend is particularly troublesome because one of the main Regions' sources of legitimacy is the achievement of positive equality. This tendency could be smoothed by in the European Regional Policy. However, this article puts this into question given the current link of Regional Funds to both economic governance requirements and the Lisbon Agenda.

Key-words

European Regional Policy, Eurocrisis, regional legitimacy, social policies



1. Introduction

Eurozone Member States have been at the center of a major financial and economic crisis since 2009, the management of which has necessitated major budgetary constraints, particularly for Member States with serious economic difficulties. Moreover, several Member States have been required to undertake deep reforms which have impacted upon their constitutional structure. In this regard, this article analyses the effect of these reforms for Regional States in the cases of Italy and Spain^I.

Both Italy and Spain are struggling with the crisis and receiving important EU directions. In fact, the Commission initiated an excessive deficit procedure regarding to Spain and Italy in 2009, which in the Spanish case had continued until the present day. Moreover, both Italy and Spain have been identified as States with macroeconomic imbalances following in-depth reviews (IDR) carried out by the Commission since 2012^{II}.

Unsurprisingly, as Italy and Spain are States organised along regional lines the EU requirements have lead to profound changes in regional social policies. In this regard, the aim of this article is to discuss the impact of this trend on regional legitimacy and the role that the European Regional Policy could play by reinforcing the social cohesion and, by doing so, regional competences.

Therefore, firstly I will briefly discuss the relationship between social policies and regional democracy. Secondly, I will describe the main novelties of the European Regional Policy from the regional social policies' perspective. Finally, I will focus on the troublesome scenario for regions in the EU.

2. Welfare State and Regions; Spain and Italy as case studies

The relationship between federal principles and the welfare state is well-known. Generally, the balance between federalism and positive equality was struck by enhancing the centralization of public policies. In fact, from the new deal onwards the welfare State seemed to imply a “Unitary Federal State” (Hesse 1962: 13). In other words, the stronger the welfare State was, the weaker the subnational units were.



Consequently, the 70's Welfare State's crisis promoted a decentralization of social policies. In this regard, it was considered that the decentralization of social policies would improve their management and would guarantee an efficient allocation of resources. Thus, local and regional administrations were empowered on social matters.

The Spanish case is a striking example because democracy, Welfare State and regionalism were almost simultaneously founded. The Spanish Regional and Welfare State's development was progressive and, particularly in the case of the latter, never fully accomplished. Several Regions were empowered over social policies during the 80's and by the end of the 90's all Regions were in charge of the main social policies' development and implementation. Hence, the Welfare State in Spain is weak and regional. The Spanish State, though, kept the power over the general framework in education and public health along with the duty to guarantee a basic equality in constitutional rights enjoyment throughout the territory^{III}.

The Italian case followed a similar path. Social policies became to a certain extent regional during the 90's. This trend was enshrined by the 2001 Italian Constitution's amendment. Regions were empowered in respect of several social policies, whereas the central State ruled over both main social policies' general framework and basic equality on social rights^{IV}. Hence, in both cases, the State has to guarantee a basic equality above which Regions can establish both different administrative models and even different entitlements for their citizens^V.

The balance achieved between regional power and positive equality no longer required deep centralization. Therefore, the relationship between regional principle and welfare state is an unstable one and relies on the economic situation but also on the prevailing political thinking in each moment^{VI}. In other words, the analysis of political decentralization out of its political, institutional and socio-economical framework is but a utopia (Neumann 1957: 217).

Nevertheless, the equilibrium between the welfare state and the regional state had a key flaw in both Italian and Spanish case because Regions were not empowered over the revenues. Fiscal federalism has not been completely achieved because Regions do not have substantial resources outside of National State's transfers. Regional social policies are funded mainly by the State's transfers of revenues, which are arranged between Regions



and the State. This flaw explains the impact that austerity measures may have upon regional policies.

3. Austerity measures and regional policies: Regions trapped?

Public administrations both in Spain and Italy have been asked to reduce public debt. In fact the EU has explicitly required strong fiscal measures and budgetary compliance at the regional level also^{VII}. Moreover, the measures required to reduce the public debt in the context of the Euro crisis have been extremely demanding and have been applied under particularly tight time constraints. Furthermore, lowering the financial contribution to social policies has been the easiest way to reduce administrations' expenditures quickly. In this regard, it is worth highlighting that social policies account for up to the 75% of Italian and Spanish regional budgets. In my view it is quite difficult to envisage how one could reduce the regional deficit without decreasing the expenditure in social services^{VIII}.

Furthermore, although both the Spanish and Italian State can reduce regional revenues by decreasing its transfers to the Regions^{IX} the above mentioned competence of the State to guarantee a basic equality throughout the territory prevents Regions from reducing social services in order to decrease their public deficit without the Central State's involvement.

In this regard, Catalonia and Madrid established an extra charge of one euro per prescription, with certain criteria established to exempt disadvantaged groups. However, according to the Constitutional Court the extra charge is unconstitutional^X. The Central State sets out the health system's budget and, by doing so, it guarantees a uniform standard in the enjoyment of the right to health throughout the State. Thus, Regions are not allowed to diminish essential public services on their own.

Moreover, they cannot improve social entitlements unilaterally either. In fact, Andalusia and Navarra have passed new Regional laws^{XI} on the right to housing which have foreseen further temporary suspension of evictions, and have created an official register of vacant properties under official protection which are currently owned by the Banking Sector.

Both laws have been challenged before the Constitutional Court and their application have been suspended. Surprisingly, the legal basis for suspending these regional laws is the fifth review of the Financial Assistance Programme for the Recapitalisation of Financial Institutions in Spain. According to this report the 'different legal frameworks on housing



across the national and regional levels and legal uncertainty about the rules to be applied could weigh on the value of the mortgage collateral and the stability of financial markets.’ In addition, ‘regional laws aimed at alleviating the social problems related to foreclosures and evictions [...] create additional legal uncertainty [...]. In the worst case, they may even endanger financial stability’^{XII}.

The Regions claimed that the scope of their laws would not endanger the financial sector and also re-iterated the need to protect the right to housing, but their arguments were disregarded as unconvincing^{XIII}.

Therefore, it is apparent that Regions can neither lower the social entitlements nor increase them without the State’s consent. Besides, a reduction in transfers implies per se a reduction of Regions’ competences on social policies. There is almost no room left for social policies without resources. Regions might be still legally empowered on public health, for instance, but they cannot make any actual decisions.

Regions have challenged this trend before Constitutional Courts but they do not seem to support regional demands. Both Italian and Spanish Constitutional Courts have empowered the State over Regions, emphasising the need to guarantee a balanced budget^{XIV}. Moreover, States are entitled to constrain Regions’ competences on the basis of equality among citizens within the State. However, disappointing as they might be, the decisions made by both Courts were foreseeable.

In this regard, both Spanish and Italian Constitutional Courts are not willing to question the consistency of the EU/international measures with their national Constitutions (Martinico and Pierdominici 2014: 132). Furthermore, the balance between equality and regional principle has quite often simply been struck by asserting that once the Central State has provided a right, Regions may improve this entitlement^{XV}. This assertion is useless nowadays because Regions need to decrease public spending. It was indeed a too simple answer to such a complicated question (González Pascual 2013b: 1521). In fact, Regions are trapped between the economic governance requirements and the minimum of equality guaranteed by the State.



4. Social policy and democratic legitimacy: the actual scope of the regional crisis

Regional crisis and Welfare State's crisis are inevitably intertwined to a large extent. Moreover, it should be born in mind that the regional crisis might impinge upon the democratic principle. On the one hand, social policy is a key legitimating source for regional administrations. Civil and political rights are quite uniform throughout Spain and Italy, there is only one Constitution and the judiciary has not been decentralized. Consequently, social services have become the regions' *raison d'être* to a large extent. Furthermore, Spanish and Italian societies strongly demand a minimum standard in the enjoyment of welfare rights, provision of which are in regional hands. As a consequence, the growing inequality within societies might diminish regional legitimacy before citizens.

On the other hand, historical and socio-political reasons underlying a political decentralization process must not be underestimated. Doubtlessly, decentralization might aim at improving public policies' management. Hence, if the relationship between public management and political decentralization fails it seems reasonable to promote a political recentralisation. In this regard, there are several proposals both in Italy and Spain in favour of a clear recentralisation by reducing local and regional competences.

However, recentralisation should not be encouraged without a thorough analysis, for recentralization cannot be automatically equated with better public management in the context of budgetary constraints. Such a relationship should be proved. Furthermore, political decentralization was not simply a technocratic decision for Regional States; Regions were founded to allow the coexistence of different understandings of the political sphere within certain States. The need to create different democratic arenas in a territory derives from the coexistence of identities which may even challenge each other. As a consequence, regional reform cannot solely be predicated on management and economical arguments because Regional States' existence goes further, beyond administrations' efficiency. They are rooted on the democratic principle to a large extent in societies such as the Spanish and the Italian ones under discussion. However, the reform does not derive from a new understanding of the constitutional settlement within the States.

Hence, the impact of austerity measures upon regional social policies may eventually become a democratic issue. It can undermine the legitimacy of a constitutional



arrangement between Regions and the national State which is to ensure the coexistence in one polity of different identities. In fact, the intensity of the increasing conflict between Spain and Catalonia must be read in the context of the economic crisis. Regional crisis may impair the popular support either to the Regions or to the State depending on the predominant identity among citizens. The political role of regions indeed “may weaken the link between national identity and citizenship” (Aasi 2009:129)

To sum up, Regions cannot develop their social policies in order to fulfil the budget constraints promoted by the EU. This trend might impinge upon the legitimacy of the Regions (or the State) as perceived by their citizens, thus aggravating the institutional crisis both in Italy and Spain.

5. European regional development fund and regions: the Lisbon Agenda and the role of Regions

The EU has deeply changed the constitutional design of Member States. However the eventual EU impact may differ among states owing to the domestic structures and settings (Jachtenfuchs/ Kohler-Koch, 1996). In this regard, the regional participation at the EU derives from the domestic arrangements and political culture (cooperative or antagonist). Traditionally, both Italian and Spanish States are very reluctant to cooperate with their regions on European matters.

Thus, regional social policies are constrained by decisions taken by institutions and organisms alien to them. They can only rely on the explanations given to them by their central government to get to know the actual debate within the European arena. However, regional participation in EU Institutions aims also at delivering some control over their own central government’s decisions. In fact, the design of the regional participation in the EU has been characterized as institutionalised mistrust towards the central governments (Chardon 2005: 149). Regions seem to prefer direct participation in the EU- institutions than an indirect participation through their own State. All regions in Europe long for a direct relationship with the EU institutions^{XVI}.

Doubtlessly European Regional Policy allows for a bridging of the gap between the EU and Regions. In fact, the EU Commission has promoted regional participation in the European Regional Policy, in particular by enforcing the partnership principle and shaping



new avenues for regional participation along the years. This promotion was not only grounded on a technocratic argument but also on an understanding of Europe “in which the value of non-state and sub-national participation in public governance is valued both intrinsically and extrinsically” (Bache 2001: 63)

It could be argued that management of European Regional funds could compensate for the reduction in the effectiveness of both Italian and Spanish regions over social policies. Therefore, the European Regional Policy might enforce the regions legitimacy by strengthening social policies aimed at achieving an actual equality among citizens.

In fact, the European Regional Development Fund (ERDF) currently claims to “strengthen economic and social cohesion in the European Union by correcting imbalances between its regions”^{xvii}, whereas the European Social Fund (ESF) is particularly devoted to promote employment and to reduce poverty. In this regard, although many scholars have questioned whether cohesion is the actual key target of EU Regional Funds, cohesion policy is still biased towards the least prosperous member states, which highlights that its distributive impact is still substantial (Begg 2010: 80). Given that the Euro crisis has increased the inequality rates within several Member States the European regional funds might eventually overturn this trend by promoting economic development and social cohesion^{xviii}.

Therefore, regional empowerment through European Regional Funds could reinforce the bonds between citizenry and regions. Moreover, theoretically EU popular support could also be broadened by a policy aimed at improving living conditions of EU citizens. Even this eventual bond between citizens and Regions, and the potential support of the EU process, will result to a large extent not only from the policies’ outcome but “from the introduction of procedural elements based on fundamental concepts like citizens’ participation” (Sommermann 2013: 12). Thus, although Spanish and Italian Regions are entitled to participate actively in the European Regional Policy design and implementation, the outcome in terms of citizens’ support is not straightforward.

Besides, cohesion might not be the main target of the European Regional Policy. On the one hand, social policies accounts for scarcely 20% of the European Regional Funds, not least because the ERDF is particularly well funded^{xix}. In this regard, the ERDF aims at fulfilling the Lisbon Agenda’s goals, being these innovation and research; the digital agenda; support for small and medium-sized enterprises and the low-carbon economy.



Those policies account, at least, for 50% of the ERDF. Thus, the margin left to States and Regions' to shape their own policies is scarcer than ever.

On the other hand, European Regional Policy is conditional on Economic governance requirements. The National Reforms Programmes (NRP) drafted by the States and evaluated by the EU Institutions are crucial to the development and maintenance of the operational programs. In fact, the operational programmes have to be consistent with the NRP and address the reforms identified through country-specific recommendations (CSR) in the European Semester^{xx}. In this regard, it has been argued that the cohesion policy is being used “to enforce EU objectives on structural reform and fiscal stability” (Mendez 2013: 651)

This is a particularly troublesome trend for both Italian and Spanish Regions because their respective National States watch over regional budgets, in the framework of the Eurocrisis^{xxi}. Besides, it should be born in mind the limited participation of Italian and Spanish regions in EU institutions. Regions still need the State to participate effectively in the European decision-making process. In fact, they participate neither in the European Council nor in Ecofin which are taking the lead along with the Commission in the form and execution of austerity measures.

Thus, in case of need, European regional policy could be in the States' hands on the basis of the budgets' constraints. In other words, the European semester' requirements hang over the regional policy like Sword of Damocles.

In fact, although the European Regional Policy claims to open up more avenues than in the past to the local actors by being a place-based policy, such a statement has been questioned ; the concentration of expenditure on the Europe 2020 goals does not provide flexibility for a place-based policy. Furthermore, the management of economic governance in a context of crisis is not linked to territorial development goals (Mendez 2013: 651).

European regional policy management could alleviate the current pressure on regional budgets and, with it, ameliorate their problem of decreasing legitimacy. Nevertheless, European Regional Policy is linked to the Lisbon Agenda and, ultimately, to the European semester. Social cohesion is still a very important target for the European Funds but it is not their main goal, excepting the case of the Cohesion Fund. In fact, much thought should have been given to the eventual conflict between competitiveness and equity/cohesion objectives (Begg 2010: 92).



Moreover, operational programmes can even be conditioned by the CSR, and must take into account the NRP. However, Regions do not have a say regarding the CSR and their position is very weak regarding the NRP. Flawed regional participation in EU institutions negatively impacts on the accessibility of European Regional Funds for local and regional actors, in disregard of the place-based narrative, and thus falls short of both a territorial convergence approach and of a local-democracy empowerment.

6. Which future for Regions within the EU?

Regional participation in EU institutions should be increased; for supranational, national and subnational constitutional scenarios are intertwined. Decisions made at the EU level impact upon regional competences. This development is not new, but up until recently, important as it might be, it did not undermine the legitimacy of regional power. However, nowadays EU decisions impinge upon regional competences which lay at the core of regional legitimacy itself. The austerity measures required by the EU are being used to centralise regional powers. This trend is based on the assumption that transferring public services to the central government level will make them more cost-effective^{xxii}

Nevertheless, Regions remain powerless within the EU. Not only Member States are mostly politically centralised States, but their own [constituent] States are quite reluctant to widen the regional participation in EU-matters. In fact, such States do not share easily with the Regions their seats at EU Institutions and organisms (Moore 2006), even though they might be even stronger than other Member States if they did it (Tatham 2008: 500)

Centralisation within Italy and Spain has deepened through the Euro-crisis. This tendency probably started before the crisis, being promoted particularly by the central governments. However, in the framework of a deep political and socio-economical crisis, central governments have become even stronger in relation to the Regions (González Pascual 2014: 127). The “paradox of the weak”^{xxiii} has been fulfilled and can condition the implementation of the European Regional Policy. The pre-existing balance of power between the centre and different regions within states is crucial in explaining the regional empowerment on the basis of the EU regional policy (Bache and Jones 2007: 19) and this balance has been changed.



The link between European Regional Policy and economic efficiency and financial stability must also be highlighted in a context of crisis and increasing poverty. The loss of legitimacy for the supranational project on the long run should be assessed; the progressive erosion of national (and local) democracy will endanger the European project eventually. Still, Member States seem incapable of making decisions in the interest of the EU project unrelated to their current individual needs.

Nevertheless, the EU has been an engine for regionalization in several States. In fact, regionalization would have been highly unlikely in several Member States without the influence of the EU (Lidström 2007:508). Furthermore, the treaties have increasingly paid attention to the Regions (Martín y Pérez de Nanclares 2010: 59). However European integration seems to weaken Regions constitutional foundations. In fact, the Europe of Regions has been never fully accomplished (Keating 2008: 635). Regionalism rooted in identity claims seems not to fit within the EU.

The European Communities were funded to guarantee the coexistence of citizenries, which had even been enemies in the past. However, paradoxically, the European project is gradually eroding the arrangements made between different societies within the Member States. The so-called compensation of the loss of regional power through participation in the EU level depends in practice fully on the Member States' will (González Pascual 2013a: 18)

European Regional Policy could be a useful tool to ease this trend by bringing together European and regional actors. If this link between European and regional institutions were focused on the pressing needs of European citizens, it could generate a spill-over effect upon the legitimacy of both regional and European project. Unfortunately, under the current legal framework, this scenario seems to me quite unlikely.

The Euro crisis and its management have gone as far as influencing dramatic changes in social entitlements (Kilpatrick and De Witte 2014: 2); such changes might undermine the citizens' support to public power. This trend might be particularly troublesome for both Italian and Spanish regions, whose legitimacy is anchored to their social policies.

European Regional Policy could have softened this trend by strengthening social cohesion within societies particularly affected by the crisis. However, the European Regional Policy aims at fulfilling the Lisbon Agenda and is linked to the requirements of economic governance. Against this background, European Regional Policy can hardly



ameliorate the poor regional social policies nor reinforce the regional role within the European integration.

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^I For the purposes of this article, the differences between regions and autonomous regions are set aside

^{II} The macroeconomic imbalances were considered excessive in the Spanish case in the 2012 IDR and 2013 IDR and in the Italian case in the 2014 IDR.

^{III} Article 149 (1) (1) Spanish Constitution; “The State holds exclusive competence over the following matters: Regulation of the basic conditions guaranteeing the equality of all Spaniards in the exercise of their rights, and in the fulfilment of their constitutional duties”

^{IV} Article 117 (a) Italian Constitution. “The State has exclusive legislative powers in the following matters: Determination of the basic level of benefits relating to civil and social entitlements to be guaranteed throughout the national territory”

^V Social insurance, including pensions schemes and unemployment benefits, is still almost fully controlled by central authorities in Spain and Italy

^{VI} A striking example in this regard was the approval of the *Personal Responsibility and Work Opportunity Reconciliation Act in 1996* whose actual target was deeply put into question by the scholarship. (Ferejohn and Weingast 1997; Schram and Beer 1998).

^{VII} Recommendation for a Council recommendation on Spain’s 2012 national reform programme and delivering a Council opinion on Spain’s stability programme for 2012-2015. COM (2012) 310 final, 30.05.2102.

^{VIII} According to the Stability Plan 2012-2015 for Spain the budgets’ cuts implied a savings of 7.2 billion Euros in the area of health.

^{IX} In this regard, the Italian budgetary strategy is currently devoted to a spending review, projected to entail savings on the expenditure side, worth more than 0.5% of Italian GDP in 2015. Specifically, around half of these savings is related to lower transfers to Regions and Provinces. Commission Staff Working Document. Analysis of the draft budgetary plan of Italy. Accompanying the document Commission Opinion on the draft budgetary plan of Italy SWD(2014) 8806 final 28.11.2014

^X Spanish Constitutional Court Judgments 71/2014 (8.5.2014) and 85/2014 (29.5.2014)

^{XI} Law 24/2013, approved by the Parliament of Navarra and Law 4/2013, passed by the Parliament of Andalusia

^{XII} Fifth review of the Financial Assistance Programme for the Recapitalisation of Financial Institutions in Spain, European Commission, Occasional Papers, 170, January, 2014: 26

^{XIII} According to the Constitutional Court, the Troika is composed of independent and highly specialised institutions. Hence, the President of the Government can rely on their reports to require the suspension of a regional law. In the Court’s view such reports make plain that regional laws on the right to housing jeopardise not only the financial assistance program but international obligations assumed by Spain. Spanish Constitutional Court Decisions 69/2014 (10.2.2014), 115/2014 (8.4.2014).

^{XIV} Regarding the Italian case law on the matter (Martinico and Pierdominici 2014)

^{XV} Italian Constitutional Court, 24 april 2003, n. 467.

^{XVI} Being the increasing number of Regional Offices in Brussels a striking example (Moore 2008: 521)

^{XVII} http://ec.europa.eu/regional_policy/the_funds/regional/index_en.cfm

^{XVIII} For the purposes of this article only the ESF and the ERDF are taken into account because to all Italian and Spanish regions participate at both, being the influence of the Cohesion Fund much more limited in both cases.

^{XIX} The available budget for the EDRF is 351.8 billion of Euros whereas the budget for the ESF (included the youth employment initiative) accounts up to 83.2 billion of Euros

^{XX} European Commission. Refocusing EU Cohesion Policy for Maximum Impact on Growth and Jobs: The Reform in 10 points [MEMO/13/878](#)

^{XXI} In fact, both Italian and Spanish Constitutions have enshrined the power of the State to control regional deficits to comply with TSCG. See, among others, (Martinico and Pierdominici 2014; Alberti Rovira 2013)

^{XXII} Opinion of the Committee of the Regions on ‘Devolution in the European Union and the place for local and regional self-government in EU policy making and delivery’ (2013/C 139/08) *OJ C 139, 17.5.2013, p. 39–45*

^{XXIII} This statement refers to the central governments, which have become weak at the international level but



strong at the domestic one. (Grande 1996).

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Political Parties in the EU: What's Next?

by

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Abstract

Political Parties at the European level (Europarties) have traditionally been regarded as weak actors in the EU political system. Yet, this assessment fails to correctly describe the role that the Europarties play in different arenas. The parliamentary parties are responsible to organize the workings of the European Parliament (EP) and have developed strong organizational structures over time. In contrast, the Europarties remain weak in the electoral arena, and in performing a linkage function connecting the EU citizens and institutions. Thus, this article presents the ‘state of the art’ on Europarties and discusses a number of reforms which could strengthen the role of the extra-parliamentary parties as ‘representative’ actors. It argues that the role that the Europarties play in the Union today would have been unimaginable only a decade ago. Yet, the average European citizen is still hardly aware of their existence. Some reforms or political actions – such as recognizing individual membership, or sponsoring Citizens’ Initiatives – could strengthen their visibility and enhance their status in-between the rounds of EP elections.

Key-words

Europarties, democracy, European Parliament, 2014 EP elections, reform



1. Introduction

If in national political systems political parties are going through a phase of transformation and possibly decline (Daalder 2003; Enyedi 2014), in European Union (EU) politics political parties are, instead, among the emerging actors. They have recently been further institutionalized through the formal recognition made by the Treaty of Lisbon (in its art. 10.4 TEU); they have been allocated considerable financial resources from the EU budget (more than 20 million euros in 2013)¹ and they have a key role in organizing the working of the European Parliament (EP). Yet, their activity and role is not very visible to the European citizens who, in the EP elections – classically defined as “second-order” elections (Reif & Schmitt 1980; Schmitt 2005) – vote for national parties, on the bases of national regulations, and with campaigns dominated by national issues.

How could we explain the fact that political parties at the EU level (in brief: Europarties) are more and more important in Brussels, but are hardly visible in the member states of the Union? What opportunities, and what constraints, exist for political parties in the EU political system? What institutional reforms and political innovations are currently being discussed by the EU policy-makers to strengthen the Europarties? While the EU – and some of its Southern member states in particular – are torn by the Eurocrisis, and macro-economic and budgetary decisions are increasingly taken outside the national boundaries, the issue of the legitimacy of the EU has gained even more importance. In this context, the future of the Europarties, and their prospects beyond the 2014 EP elections, might be crucial to address the ‘democratic deficit’ of the Union.

In order to address these questions, I will first describe the historical development of the Europarties, focusing on the emergence and consolidation of the (strong) parliamentary parties and the (weak) extra-parliamentary parties. I will then explore what opportunities exist today for the Europarties in the EU, while national parties are experiencing a crisis of legitimacy, and the EU is plagued by both its ‘democratic deficit’ and the economic crisis. I will then analyze the role of the Europarties in EU decision-making, and a number of reforms meant to strengthen their linkage function and role in the electoral arena.



2. Europarties: Change and Development

From an organizational perspective, the Europarties exist both as political groups inside the EP and as extra-parliamentary parties with headquarters (generally) in Brussels. The development of the two EU-organizational faces of the Europarties has followed different trajectories and has confronted itself with diverse institutional and environmental (dis)incentives. On the one hand, the political groups are the key actors in the EP, whose organization and functioning depends on its political parties. On the other hand, the organizational development of the extra-parliamentary parties has been much slower and uncertain, and they have played a very marginal role in the electoral arena. How could this difference be accounted for?

The organizational consolidation of the political groups has come in response to the legislative empowerment of the EP (Kreppel 2002). Up to the Single European Act (1987), the EP was only consulted in the making of legislation, and decisions were taken by the Council of Ministers. With the cooperation procedure and, most importantly, with the co-decision procedure – introduced at Maastricht (1992) and ‘strengthened’ with the Treaties of Amsterdam (1997) and Nice (2001) – the EP was given equal legislative powers to the Council in more and more policy areas. To the legislative empowerment of the EP, the groups have reacted by consolidating their organizational structures. When the EP was only consulted by the Council, the voting choices of the Members of the European Parliament (MEPs) were inconsequential. As the EP obtained equal powers to the Council, however, the political groups’ role in ensuring the voting cohesion of their members has grown in importance (Hix *et al.* 2007). Cohesive groups became necessary for the formation of the required majorities in the EP and for the EP to be more successful in the legislative bargaining with the Council.

The very important role of political parties *inside* the parliamentary arena is not matched by anything comparable in the electoral arena. Indeed, to the relevance of the political groups corresponds the very weak role of the extra-parliamentary parties in the EP elections and, more generally, in the linkage between the citizens and institutions of the EU. This observation, empirically driven, stands in contrast with the formal letter of the Treaty of Lisbon which, in its art. 10.1, indicates that the Union is founded on “representative democracy” and attributes to its political parties the function to “forming



European political awareness” and “expressing the will of citizens of the Union” (art. 10.4). Despite some steps in the direction of a stronger consolidation, the disincentives to the institutionalization of Europarties outside the parliamentary arena are still important.

When the early federations, or confederations, of national parties began to be constituted in the then Economic Community in the mid-1970s, a strong pulling factor were the first direct elections to the EP to be held in 1979. It was a widely shared expectation that the federations could draft a common manifesto among the member parties in the nine member states, and lead a common transnational campaign, based on European issues. Yet, these expectations were based on normative ideals, and clashed against the empirical reality. In the EU “second-order elections” (Reif and Schmitt 1980) national, rather than European, issues were the salient ones; participation was lower than in ‘first-order’ elections and these elections were used as a test for the popularity of the government of the day. In the EP ‘second-order’ elections, the key actors were (and remain) the national parties, which are responsible (rather than the Europarties) to select candidates and define the composition of the electoral list.

The disappointment which followed the first direct elections was responsible for a protracted moment of stasis in the development of the Europarties, lasting throughout the 1980s. In the early 1990s, however, there was a surprising resurgence in the interest for the Europarties, due to the enthusiasm for the new European Union, the construction of the Economic and Monetary Union and a new integrationist momentum. With the new art. 138A, Europarties were for the first time mentioned in the Treaties. Thus, the old ‘federations’ changed their names, becoming – formally, at least – ‘parties’ and reformed their statutes and regulations (see Hix and Lord 1997). Finally, in the early 2000s, the extra-parliamentary parties started to receive money from the EU budget with Regulation 2004/2003.¹¹ With public funding, the extra-parliamentary parties became more autonomous from the political groups (which were, formerly, responsible for the financing and the logistic assistance to the extra-parliamentary parties) and were able to hire more staff and move to new headquarters.

Yet, despite a growing organizational consolidation, the visibility of the extra-parliamentary parties beyond Brussels remains low. The last round of EP elections – despite the innovation produced by the presence of the *Spitzenkandidaten* (see, for details, below) – confirmed that they are, essentially, still national elections. Intra-party divisions



and the low salience of EU-wide issues for the national electorates tend to produce national campaigns. Some years ago, it was hypothesized that the EU was “ripe for politicization” (Van der Eijk e Franklin 2004). Even after the crisis, however, the main division on the EU is between mainstream, pro-European parties and fringe, Eurosceptic parties. What has emerged is an alternative ‘for’ or ‘against’ the EU, rather than different policy agendas for the EU (see also Mair 2007).

3. The Crisis of National Parties and New Opportunities for the Europarties

It may seem paradoxical to imagine a consolidation of political parties at the EU level when political parties are certainly not in their heyday in national politics. In the Italian case, political parties are the least trusted institutions in citizens’ opinion but, more generally, parties struggle everywhere to pursue the tasks they have traditionally been attributed (see Dalton and Weldon 2005). Thus, it is in decline their socialization capacity, with a more and more limited membership and a weaker presence on the ‘ground’; their role in selecting the political class is challenged; they are losing ground as agents of representation, with problems both on the supply-side (i.e. the end of ideologies) and on the demand-side (i.e. the fragmentation of the electoral body). Moreover, parties appear not to make a difference on what public policies are pursued. Political agendas are often determined outside the national borders and do not necessarily reflect citizens’ preferences. It would suffice here to think about the role of European Central Bank or the European Commission in countries like Greece, Italy or Ireland in the context of the Eurocrisis (Mair 2014).

Yet, it could be the crisis of the national parties to provide, ironically, a more favourable context for the Europarties. Indeed, if key decisions on economic, monetary, environmental, budgetary policies and so on are now taken at the EU level, a meaningful representative channel needs to be structured at that very level. The traditional channels of accountability are insufficient when key decisions are taken outside the national borders. Moreover, it is not only in the light of representation and accountability – that is to say: democracy – that a stronger role for the Europarties could be advocated. The national parties themselves could (re-)gain a role in the making of public policies by strengthening their cooperation at the EU-level with like-minded parties (also Hix 2008a). It could then



be advantageous to the national parties themselves to reinforce transnational party linkages.

Yet, while in the member states of the EU there exists a system of party government, in which the support of the legislature, and that of a partisan majority (of a single party, or a coalition of parties) is needed for the survival of the government, this is not the case for the EU. In the EU political system, the executive and the legislature are independent, and the former can be dismissed by the latter only for cases which closely resemble the impeachment of the US President. Furthermore, another fundamental difference between the EU and the parliamentary systems of the member states is that in the latter there are (normally) clear government/opposition dynamics, while in the EU different coalitions form in the EP depending on the policy content of the vote (see Fabbrini 2010). Furthermore, the ‘fate’ of the executive is never linked to the outcome of a parliamentary vote. Arguably, the 2014 EP elections and the indirect vote for a candidate-President of the European Commission – chosen by the Europarties – have moved the EU political system closer to the parliamentary model. Yet, while the nomination of the President of the Commission has changed with the Treaty of Lisbon (more below), that of individual commissioners and the collegial vote of censure have not.

Nonetheless, the absence of party government does not automatically imply the irrelevance of political parties. It has even been argued that, as parties are no longer asked to govern, they could better perform a representative function (Mair and Thomassen 2010). In other words, when the legislature and the executive are autonomous, the parties in parliament could better concentrate on the content of public policies: indeed, the classic example of a ‘law-making’ parliament is the American Congress, while in fused power systems (such as the Westminster system in Britain) it is the government to make most legislation (Kreppel 2013).

In a parliamentary EU, the EP is thus likely to play a lesser role than it has played until now. Yet, whatever institutional model is embraced by the EU, the issue remains that, if the EU has to overcome its legitimacy problems, the distance between the EU institutions and its citizens needs to be reduced. As in domestic political system, it is doubtful that any organization different from political parties could effectively perform a linkage function (see, classically, Schattschneider 1942; Sartori 1976). For the representative process to work, citizens should be able to upload their preferences to the governing institutions via political parties (the inputs of the system), while political parties should be able to pursue



public policies in line with citizens' preferences (the outputs of the system). In what follows, I will assess what is the role of the Europarties in relation to both the outputs and the inputs of the EU political system.

4. Do Europarties Matter?

For a long time, it has been common knowledge that Europarties would be irrelevant for integration. For intergovernmentalists, the key forces behind integration were (and are) the member states, while neo-functionalists focus their attention mostly on supranational institutions like the European Commission and the European Court of Justice. Of course, from Ernst Haas (1958) to David Marquand (1978), the idea of a “Europe of parties” was occasionally raised. Yet, political parties remained secondary actors (to say the least) in integration theory, and with some reason. As it was argued above, beyond the EP their role has traditionally been minimal, and the Europarties often defied the (high) expectations that observers placed upon them (i.e. their dismal performance in the EP election campaigns). More recently, however, there has been a resurgence in the academic interest for the Europarties, with studies leaving aside more general theoretical discussions on their role in the EU, but aiming at empirically capturing their ‘impact’ (if any) in the EU political system and, specifically, on its policy-making. The main finding of this literature is that the Europarties “matter” – to some extent, at least – and that they make some contribution to the EU policy process.

Obviously, political parties “matter” inside the EP. In what ways, specifically? After twenty years of more and more sophisticated empirical studies, some points have been established. First, the political groups have at their disposal some instruments to control their members, and make use of them (for all, Hix *et al.* 2007). The groups' leadership has some ‘carrots’ and ‘sticks’ at its disposal to control MEPs – even if it does not dispose of the strongest sanctioning instrument (exclude a member from the electoral list, which is controlled by the national member parties). Thus, it has been demonstrated that those MEPs with more distant preferences from the group average obtain a lower number of legislative reports (Yordanova 2011), while the least loyal deputies (as shown by roll-call votes) are rarely selected as rapporteurs, in particular when the ordinary legislative procedure applies (Yoshinaka *et al.* 2010). On the bases of a more anecdotal evidence, the



group leadership makes use of the allocation of inter-parliamentary delegations, funds for events and round-tables, and the distribution of internal posts in the group to reward the most loyal and active members (in general, see Kreppel 2002).

In order to influence the policy position of the EP, and to enhance its role in inter-institutional bargaining, the political groups need to be cohesive. Voting cohesion results ‘naturally’ high when the groups’ members are homogenous in their ideological preferences. Because of the EU’s enlargements, however, and in particular after the 2004/07 enlargement towards Central and Eastern Europe, the political groups have considerably expanded and the new members have not always ‘fit in’ neatly in terms of ideology (Bressanelli 2012).

However, despite 12 new members joining the EU, the ‘Big Bang’ enlargement has not only failed to negatively affect the voting cohesion of the groups (Voeten 2009), but it has also produced a further consolidation of their organizations (Bressanelli 2014). The need to maintain the capacity to perform, in a very different environment with much higher transaction and coordination costs, has pushed the political groups to adapt their organizational structures, attributing more powers to their leaders and creating new institutional structures to forge intra-group consensus and smothering down internal dissent. This is especially true for the larger and more diverse political groups, which are also (quite surprisingly) the most cohesive (Hix *et al.* 2007).

Policy-seeking political groups have therefore adapted to a changing environment – where the EP has gained stronger legislative competences Treaty reform after Treaty reform – by strengthening their organizations. Yet, as the EU decision-making process does not end in the EP, there are other actors and arenas which the Europarties could seek to influence. In the ordinary legislative procedure, which is now used for about 85-90 percent of legislation, there is a bicameral system constituted by the EP and the Council of Ministers, with the legislative initiative attributed to the European Commission. If the key players in the EP are the political groups, those in the Council are the national ministers, representing the member states. With increasing frequency, and currently in the quasi-totality of the cases, negotiations between the two co-legislators take place behind closed doors, in trilogues also involving the Commission as mediator.

Could the Europarties – and, specifically, the extra-parliamentary parties – play a role in inter-institutional decision-making? The literature shows that the Europarties could be a



factor in the negotiations between the EP and the Council (Lindberg *et al.* 2008). For instance, it has been shown that if the EP rapporteur and the competent minister for the Council Presidency belong to the same party family, then an agreement is more likely to be found (Rasmussen 2007). Furthermore, the smaller the ideological distance between the two co-negotiators, the higher the likelihood to conclude early the negotiations (Reh *et al.* 2013). Moreover, when an informal agreement is concluded, the major Europarties exercise a stronger control on their members in the EP, in order to ensure that the plenary vote formalizes the text which was agreed informally (Bressanelli *et al.* 2014).

Further evidence of the attempt of the Europarties to influence policy-making at the EU level is found observing their organizational adaptation. The major Europarties – the European People’s Party (EPP) and the Party of European Socialists (PES) – have reformed their organization in order to bring together the ministers of their party family belonging to a specific Council formation. Beyond the traditional Europarty Summits bringing together the leaders of the national parties, that are organized ahead of the meetings of the European Council, or the Intergovernmental Conferences reforming the treaties (see Hix and Lord 1997), the major Europarties have also started to organize ministerial meetings. The objective, as the strategic plan of the PES for 2010-14 indicates: “our [...] task is thus to influence EU policies together with social-democrats present in all institutions (MEPs, Commissioners, Ministers)”. Relevant MEPs are also often invited to the ministerial meetings, in order to bring together the most important actors involved in policy-making.

All in all, the capacity of the Europarties to influence the direction of the EU has traditionally been assessed with skepticism. Moreover, the EP itself would be less influential than the Council in shaping the EU legislation (Thomson 2011). Yet, the Europarties are slowly finding their way outside the parliamentary arena, as their emerging role in inter-institutional decision making suggests. There is a life beyond the parliamentary arena, after all. Therefore, the next section reviews some of the reform proposals which are meant to strengthen the extra-parliamentary parties and evaluates what future prospects exist for the Europarties.



5. Four (not so Modest) Reforms

Despite the role of the political groups in the parliamentary arena, and the growing activism of the Europarties in Brussels, the visibility of the Europarties remains weak beyond the Brussels circles. When European citizens are asked whether they are aware of the existence of the Europarties, the number of respondents which answers affirmatively is low (AECR-AMR 2014). In other words, the Europarties live an introverted life in Brussels – in particular, in the EP – but are hardly known to the EU citizens. They are failing, therefore, to act as transmission belts between the European citizens and institutions.

Some observers have pointed out that the absence of a fully-fledged representative *process* would not exclude the possibility of a representative *outcome* at the EU level (Mair and Thomassen 2010). Indeed, if the national parties belonging to the same party family share priorities and objectives, even if the EP elections remain ‘second-order’ elections without a transnational electoral supply, their result could nonetheless produce congruence between the preferences of the voters and the agendas of the political groups. If the left-right dimension is the most important domain of identification in almost all EU member states, both for voters and for parties, the aggregation of national election outcomes would ‘produce’ relatively coherent and diverse Europarties (Thomassen 2009).

Yet, the enduring weakness of the Europarties in the electoral arena has been perceived as a relevant problem for the EU (lack of) legitimacy by both practitioners and academic commentators. In order to tackle this issue, a number of reforms have been suggested, or have recently been implemented in the EU. Some of them are of institutional nature, while others affect the organization of the Europarties. In one way or another, what they have in common is the attempt to give empirical content to art. 10.1 TEU: “the functioning of the EU shall be founded on representative democracy”.

5.1. Individual Membership^{III}

Currently, the Europarties are parties of parties, without rank-and-file members. Recently, however, the debate over providing some form of direct involvement to party activists has gained traction. In general, the extra-parliamentary parties have resisted the direct involvement of ordinary citizens, although they have, at times, devised alternative forms of participation. For instance, the PES has institutionalized the role of ‘party activist’,



participating in electoral campaigning, debating on European politics and making the PES voice heard at the grass-root level. The ALDE has also recently introduced 'associate members', individual members without voting rights. Some form of individual membership – 'supporters' – has also been introduced by the European Greens but, again, without voting rights (Hertner 2013: 145-47).

The falling turnout in the EP elections, together with the relatively large amount of public funding that the extra-parliamentary parties receive, are calling for stronger citizens' involvement in the Europarties' activities. But the introduction of new modes of participation – as for the PES activists, the ALDE associate members or the European Greens (EG) 'supporters' – amounts to little if political decisions (that is, decisions taken by the party Congress or other executive bodies) exclude the rank-and-file members. In this regard, individual membership, with full voting rights, would be a more effective way to strengthen citizens' involvement.

Nonetheless, the arguments for resisting the introduction of individual membership are not trivial. How could individual membership be regulated? Which voting rights would members be granted? It is a widespread fear among the Europarty leaders that individual membership might be used for tactical reasons: what if a party faction uses the channel of individual membership to oppose the official political line of a member party? Would the Europarties be transformed into a battlefield for regulating domestic problems? Taking everything into consideration, then, it is unlikely that individual membership would, in the short-run at least, be introduced. Alternative forms of individual participation, with more limited rights, are for the time being more feasible.

5.2. Legal Status

A new regulation on the statute and funding of European political parties (Regulation 2012/0237) attributes legal personality according to EU law to the Europarties and their associated political foundations.^{IV} As the non-legislative report tabled by MEP Giannokou puts it^V “strengthening European political parties is a means of enhancing participatory governance in the EU and finally strengthening democracy”.^{VI} In order to achieve this goal, the report posits that an important step would be granting legal personality to the Europarties.



Indeed, the legal status of the European political parties – that is to say, of the extra-parliamentary parties – is at present equivalent to any NGOs or pressure group registered in Belgium. They are generally recognized as 'international nonprofit association' by the Belgian law, when their headquarters are based in Brussels. The so-called Europarty Statute (Regulation 2004/2003) failed to grant an EU legal status to the Europarties, making them *de facto* lesser actors in the EU institutional architecture.

The full legal recognition of the Europarties would certainly enhance their status in the EU, besides having obvious advantages, in terms of salary and job security, for their employees. However, it is hard to imagine what more substantial consequences this reform will bring. As a result of its adoption, it seems unrealistic to expect the distance between parties and citizens to be lessened. While granting to the Europarties a stronger status in Brussels might be a task worth pursuing, in order to connect citizens and the EU institutions it is definitely too small a step.

5.3. Transnational List

A proposal tabled by the British Liberal MEP Andrew Duff^{VII} asked for a modification of the 1976 Election Act by introducing a transnational list to be elected in a single EU-wide constituency. 25 additional MEPs were to be chosen from a single list directly managed by the Europarties. Concretely, each European citizen would be granted two votes in the EP elections: a first one for the national or regional party, as it is now, and a second one for the transnational list. In Duff's words, the Europarties would be transformed, by directly managing this list, into "real campaign organizations".

The proposal is fully inscribed into the federalist tradition wishing a single electoral constituency for the whole of Europe. It would certainly represent a breakthrough in the system against the monopoly of the national parties in candidate selection. Furthermore, it would also make the Europarties much more visible to European citizens.

Nonetheless, there were a number of difficulties that made the introduction of a transnational list for the 2014 EP elections impossible. The most important one had to do with the opposition of a large number of MEPs who, backed by their national parties, resisted the setting up of a parallel – albeit limited – channel of recruitment for the parliamentary elites. Ultimately, in July 2011, the Duff proposal was sent back to the



Constitutional Affairs Committee for further consideration, given the high likelihood of rejection in the plenary of the EP.

Moreover, the Duff's proposal prescribes the setting up of a 'closed list', whose management would be a task for the Europarties. However, deciding who will top the list is likely not to be a banal choice. How would the Europarties decide? Would they open a broad consultation with civil society, leave the matter to the Congress (that is, to the member parties), or something else?

The introduction of a transnational list is certainly a brave innovation but, even in the very unlikely case that the EP and the Council would approve it in the future, a number of significant problems will still need to be tackled.

5.4. European Citizens' Initiative

The Lisbon Treaty (art.11.4), drawing literally from the aborted Constitutional Treaty, introduced the so-called 'Citizens' Initiative'. For the first time, citizens of the 28 member states have been given the possibility to directly ask the Commission to initiate legislation on matters where legislative action is considered to be necessary for the purpose of implementing the Treaties. The Citizens' Initiative requires one million of signatures, collected in at least a-quarter of the member states.^{VIII} Once the collection is completed and all formalities are met, the Commission has the obligation to duly consider the initiative and communicate its conclusions and actions it plans to take (if any) within three months. The Commission is not obliged to follow up with a legislative proposal, but needs to motivate its action.

The Regulation disciplining the Initiative states that 'entities, notably organizations which under the Treaties contribute to forming political awareness and to expressing the will of the citizens of the Union, should be able to promote a citizens' initiative' (art. 9 of Regulation 211/2011). Even if the Europarties are not explicitly mentioned by this regulation, the Citizens' Initiative appears to be an important stimulus to promote their engagement with civil society. Indeed, Bouza Garzia and Greenwood commented that 'a measure of formalized organization and resources will be necessary to gather the necessary signatures' (2012: 252) and the Europarties, together with their national member parties, might be able to supply them. The Initiative offers them a concrete possibility to engage



with policy issues and might increase their visibility among European citizens (see also Hrbek 2012: 376-80).

Nonetheless, mapping the initiatives for which the collection of signatures is either currently open or has been closed in the Commission's 'official registry',^{IX} it is worth noticing that in a few cases only Europarties are among the sponsors, giving funds to support the initiative. Ironically, in the initiative for the 'suspension of the EU Climate and Energy Package' (for which not enough support had been gathered) the sponsor is the Eurosceptic Europe Freedom and Democracy (EFD), asking for a suspension of allegedly 'ineffective' EU legislation. Although funding is not the only way through which the Europarties could support an initiative (they and their members could advertise and endorse it, they could offer logistic support...), their unwillingness to financially support the existing initiatives is rather surprising. While the reasons for this lack of engagement need to be better investigated, civil society organizations and citizens have started to use this new instrument largely without the active involvement of the Europarties.

6. The 2014 EP Elections and Beyond

Arguably, the most important institutional change for Europarty development which could be implemented without further reforming the Treaties was by explicitly linking the EP elections with the choice of the Commission President (i.e. Hix 2008b; Bardi *et al.* 2010: 100-01). In May 2014, European citizens were not only asked to cast their vote to elect MEPs, but also to indirectly endorse a candidate to the Presidency of the European Commission. The Lisbon Treaty introduced the norm that the European Council should “take into account” the results of the EP elections in the nomination of the Commission President.

Europarties were keen to exploit this new opportunity and five of them (pre)-selected their own candidate(s) ahead of the 2014 EP elections. The EPP selected the former President of the Euro-Group Jean-Claude Juncker; Martin Schulz, the President of the EP, became the candidate-President of the PES; Guy Verhofstadt – the leader of the Alliance of Liberals and Democrats (ALDE) in the EP – became the candidate of the corresponding extra-parliamentary party; Alexis Tsipras, the leader of the Greek party SYRIZA, was selected by the European Left and José Bove and Ska Keller were the



frontrunners for the EGP, which contested the elections with a tandem of candidate-Presidents.

The importance of this development cannot be overrated: if national parties remain the key actors in the EU member states, selecting their candidates and waging their own electoral campaign in the 28 member countries of the Union, the role of the Europarties in the process of nominating a new President of the European Commission added a truly European element to the ‘second-order’ electoral contests. Most fundamentally, for the first time the Europarties became an actor in the electoral arena (Bressanelli 2014). They pre-selected the candidates that the European voters could then choose, albeit indirectly via the national parties, to lead the EU executive. The visibility of the Europarties and their candidates was not the same in each and every EU-member country (Hobolt 2014), but has certainly grown in comparison with the previous election rounds, where their role was limited to the preparation of a common manifesto (hardly read by voters).

The process inaugurated in 2014 to select the head of the European Commission came after two decades in which the role of the EP had been progressively strengthened. Before the ratification of the Treaty of Maastricht (1992), the nomination of a new Commission was fully controlled by the member states. With the Treaty of Maastricht, the EP was recognized the right to be consulted on the nomination of the Commission President, while the Amsterdam Treaty ruled that its “nomination shall be approved by the European Parliament”. Another important provision agreed at Maastricht extended the mandate of the European Commission to 5 years, to have it run in parallel with the EP term in office. Today, the European Council has to “take into account” the result of the EP elections (art. 17.7) and, consequently, the nominees proposed by the Europarties. In other words, while the selection of a new Commission was a purely intergovernmental affair that took place behind closed doors until the early 1990s, from Maastricht onwards the formation of a new Commission (and, in particular, the selection of its President) has been increasingly ‘parliamentarized’.

While these reforms effectively empowered the EP, the selection of the EU executive was still disconnected from the EU citizens (see Hix 1997). Yet, with the 2009 EP elections there were the first signs of ‘party politicisation’ of the process leading to the choice of the Commission President (Gagatek 2009). The EPP clearly endorsed the candidacy of the incumbent José Manuel Barroso for President. Following the EPP’s decision, the PES also



discussed the nomination of a candidate but, due to its internal divisions, its attempt was unsuccessful.

The ‘constitutional’ framework established by the Treaty of Lisbon represented a window of opportunity for the Europarties and their associated political groups in the EP. The case for an active involvement of the Europarties, and a clearer specification of the role that they could play, were presented in a number of official documents drafted by the EU institutions. In September 2012, in his ‘State of the Union’ address, the then President of the Commission Barroso declared: “an important means to deepen the pan-European political debate would be the presentation by European political parties of their candidate for the post of Commission President at the European Parliament elections already in 2014 [...] This would be a decisive step to make the possibility of a European choice offered by these elections even clearer”.

The European Commission further argued that the election of its President would benefit the EU political system by: (i) bringing more transparency to the process of selecting the “figurehead of the EU executive”; (ii) clarifying what is at stake in EP elections; (iii) enhancing the participation of the EU citizens; (iv) increasing the democratic legitimacy of the process and (v) contributing to “forging a European public sphere”.^x Its endorsement was echoed in two documents of the EP: a resolution on the elections to the EP in 2014^{xi} and an own-initiative report,^{xii} urging the national member parties to add the names or symbols of the Europarties on the ballot paper and inform citizens on the candidate-President that they supported and his (her) manifesto.

With the support of the European Commission and the EP, the Europarties had the ground prepared to play a more active role in the 2014 EP elections. While there could be drawbacks in politicizing the nomination of a new Commission and moving towards a ‘fusion’ between the executive and the legislative powers in the Union, when in June 2014 the European Council endorsed the candidacy of Juncker as the EPP candidate it became clear to everyone (even to the recalcitrant British and Hungarian Prime Ministers) that the selection of the top executive official in the EU was no longer a mere intergovernmental matter, and the Europarties were now a key actor in the process. Nonetheless, it remains to be empirically assessed whether the European citizens noticed this change, or were rather absorbed by the dynamics of the second-order, national elections.



7. Conclusions

The Europarties' role in the EU political system could be differently assessed, depending on the arena of partisan activity. While the political groups are the key actors in the parliamentary arena, in the extra-parliamentary arena (be it the electoral one, or the governmental one) the Europarties have traditionally been much less important, if not utterly irrelevant. This article has shown that there are historical reasons explaining this difference, and the development of the Europarties still reflects this historical unbalance. Yet, due to the Europeanization of policy-making, and the 'crisis' of the national parties, there are currently stronger environmental incentives to the consolidation of the extra-parliamentary 'face' of the Europarties. Indeed, this article has shown that the Europarties could play an important role in inter-institutional policy-making, and are already adapting their organizations to the purpose. Perhaps most importantly, in the 2014 EP election the Europarties have (pre-) selected their own candidates to the Presidency of the European Commission and, building on the Treaty of Lisbon, have constrained the European Council in the nomination of Jean-Claude Juncker.

Currently, the most pressing issue which the Europarties would need to address, if they aim to play a representative role in the political system of the EU, regards their low visibility among the European citizens. It may well be that the aggregation of the national results of the EP elections produces a representative *outcome* (Mair and Thomassen 2010), but to build a representative *process* what we need are political parties performing a linkage function. In this respect, the Europarties should find concrete ways to connect more with the European citizens. Individual membership and the sponsorship of European Citizens' Initiatives could be two instruments to be more visible in-between the EP elections. The creation of a transnational constituency would be a more landslide change, but its implementation has very high costs and is, at present, very unlikely. Under the current institutional set-up, however, the Europarties already have the possibility to enhance their presence in civil society. Yet, whether they are really interested or capable to do so remains a key empirical puzzle.

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¹ For the complete figures, see http://www.europarl.europa.eu/pdf/grants/Grant_amounts_parties_11_2014.pdf

¹¹ Regulation 2004/2003(COD) was then amended with Regulation 1524/2007(COD).



- ^{III} This section and the following ones are adapted from Bressanelli (2014), 'Conclusions', pp. 168-173.
- ^{IV} Regulation 2012/0237(COD), 'European political parties and political foundations: statute and funding' repealing Regulation 2004/2003. The regulation was published in the Official Journal on 04.11.2014.
- ^V Application of Regulation 2004/2003 on the regulations governing political parties at European level and the rules regarding their funding, 2010/2201(INI), 06.04.2011.
- ^{VI} As in the 'explanatory statement' accompanying the report tabled in the Constitutional Affairs Committee of the EP and voted on 18 March 2011.
- ^{VII} Report on a proposal for a modification of the Act concerning the election of the Members of the European Parliament by direct universal suffrage of 20 September 1976, 2009/2134(INI), 28 April 2011.
- ^{VIII} Regulation no. 211/2011 of the European Parliament and of the Council of 16 February 2011 on the Citizens' Initiative, art. 5.
- ^{IX} <http://ec.europa.eu/citizens-initiative/public/welcome> last date accessed 07 January 2014.
- ^X COM(2013) 126 final.
- ^{XI} EP resolution of 22 November 2012 on the elections to the EP in 2014 (2012/2829(RSP)).
- ^{XII} Own-initiative report on improving the practical arrangements for the holding of the EP elections in 2014 (2013/2012(INI)).

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The ECB: towards a monetary authority of a federal Europe

by

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Abstract

The article explores the present role of the ECB in European economic governance and point at the required steps to make such governance effective in tackling the challenges of the Eurozone and of the European Union in the global economic order.

Key-words

European Central Bank, Economic and Monetary Union



1. Introduction

There is a widely held opinion, in the debates of the last few years on the crisis hitting some euro-zone sovereign debts, on the alleged shortcomings of the ECB. Some have pointed at its too narrow mandate to price stability as a myopic strategy in times of credit crunch. Others have argued that, irrespective of such mandate, the ECB could have done more. Many have provided evidence of the fact that a Central Bank without the capacity to act as lender of last resort is inefficient in protecting the underlying economy from speculative attacks.

All these claims seem to highlight important elements of an inefficient governance of economic policy throughout the Eurozone. They nevertheless crucially miss the point in two major respects. Firstly, they accuse the ECB of something for which it can hardly be accused, being a technical agent constrained by a political agreement at the level of the Heads of States and Governments of the EU. Monetary policy alone is unable to recover a complex economy with structural problems such as in the case of Europe. Secondly, a reform of the ECB can only be envisaged within a completely different institutional framework, where the ECB becomes the Central Bank of a genuine federal constitutional system.

In order to illustrate these claims, we shall explore the present role of the ECB in European economic governance and point at the required steps to make such governance effective in tackling the challenges of the Eurozone and of the European Union in the global economic order.

2. The role and limits of the ECB: unconventional policies

Central Banks are key actors of economic policy. They manage liquidity and provide a reference price for the credit system, thus impacting on the real economy. They may change collateral and/or reserve requirements within the banking system, thus affecting the degree of systemic risk in the economy. And they usually play the role of lender of last resort in case of dramatic financial distress.



The European Central Bank is, in this conventional framework, a strange subject. Its statute, agreed upon by the European Council, commits the ECB to the stability of prices, (more or less) irrespective of other macroeconomic targets.

Inflation targeting, which is widely acknowledged as the dominant goal of monetary policies throughout the whole world in the last few decades, is for the ECB the mandatory aim. Within inflation targeting regimes, central banks usually set interest rates as a main tool to implement monetary policy. Nevertheless, in the last few months the ECB has made an effort to go beyond its explicit mandate, as far as making recent decisions to implement quantitative easing measures, i.e. to buy government bonds in exchange for newly created money.

After the speech of Mario Draghi on July 26th 2012 (“the ECB is ready to do whatever it takes to save the euro... And believe me, it will be enough”), threatening Outright Monetary Transactions to buy government bonds of those countries under speculative attacks, spreads on interest rates have decreased dramatically, allowing for more radical changes on the political side. Such radical changes from the European Governments, nevertheless, have not come yet.

In the meanwhile, the European economy was stabilized, but with hardly any perspective of balanced growth. The last few months have shown that worries about the risk of inflation following OMTs were wrong, as a few authors had already suggested (De Grauwe and Ji 2013). The ECB has reduced financial fragmentation and provided unlimited liquidity against changing collateral requirements. As Peter Praet (2014), Member of the Executive Board of the ECB, summed up:

“Since the onset of the crisis, the ECB’s mainstay response to this problem has been twofold: a policy of unlimited provision of liquidity at fixed interest rates against eligible collateral in the weekly main refinancing and longer-term operations, and an extension of maturity of the liquidity operations from 3 months to up to 3 years. This dual approach to crisis management has been reinforced by two further initiatives.

First, collateral rules have been adapted in various stages with a view to broadening the pool of assets that banks could mobilize for Eurosystem liquidity provision. This process – which has complemented the fixed-rate-full-allotment decision – has always balanced the need to be supportive to our counterparties with the goal of exercising an appropriate degree of risk control, and to protect our balance sheet. Incidentally, Portuguese banks have greatly benefited from these measures. For instance,



they were able to strengthen collateral buffers by mobilizing additional credit claims for the purpose of obtaining Eurosystem liquidity – and more effectively than other banking systems in the euro area.

Second, the refinancing risk faced by euro area banks has been minimised by giving them reassurance that monetary policy will remain accommodative for an extended period of time. In the course of 2013, this reassurance has taken two forms: conditional forward guidance on the level and direction of our policy rates in the future, and a pledge to maintain the fixed-rate-with-full-allotment policy for as long as needed and at least until mid-2015.

These measures proved powerful in addressing the funding risk faced by our counterparties throughout the crisis, as evidenced, for example, by the significant decline in money market term premia.”

For some (Beukers 2013; Weber and Forscher 2014), all these measures are challenging the independence of the bank, which may be seen to have acted under political pressures. On the contrary, we believe that they are true testimony of the independence of the ECB from the political impasse of the EU. Our key claim is that such improvements are not enough to make the EU and the Eurozone escape the present situation of structural crisis. The ECB has bought time for European Governments to do “whatever it takes” to overcome the present crisis. Until now, they have not done enough.

3. An architecture for growth

Expectations are the key single concept for economic health. When expectations are negative, agents behave in a way that prevents the economy from growing. This is a problem because expectations cannot be created and governed easily. Strong credibility is a necessity of the whole economic and political system of governance. And this is the weak point of European institutional arrangements, where the main tools of economic policy are inconsistent with one another.

The performance and responses of each economy to endogenous and exogenous shocks depend on their market and institutional structure. The European economy is characterized by a very peculiar architecture where monetary policy is constrained by severe rules and is managed at the supranational level. Budgetary policies, as well as most laws and rules affecting high public debts, financial regulation, macroeconomic supervision and trade are for a major part in the hands of institutions outside both national and European public institutions. Three relevant supply-side elements for the European recovery such as



fiscal consolidation, markets liberalization and reforms of the labour markets are mostly a matter of national decisions; but they require a coherent supranational framework.

On the demand side, economic interdependence among European countries is so great that un-coordinated national demand policies may boost neighbouring countries rather than the domestic economy. In the short run, as another member of the ECB board, Tommaso Padoa-Schioppa[†], used to argue, we should be able to combine economic rigour at the national level, where budgetary problems are relevant, with supranational expansionary policies, where debt is zero and favourable interest rates can be gained on the market.

In the long run, in such a context, a complex system of coordinated multi-layered governance is necessary to adapt the European economy to the challenges of world-wide competition. As ECB Governor Mario Draghi (2014) recently claimed:

“The issue is not really whether policies to support demand should precede or follow policies to support supply. Reform and recovery are not to be weighed against each other. The whole range of policies I have described aims simultaneously at raising output towards its potential and at raising that potential. This combination of policies is complex, but it is not complicated. Each of the steps involved is well understood. The issue now is not diagnosis, it is delivery. It is commitment. And it is timing. I recently said of monetary policy that, at the current juncture, the risks of doing too little exceed the risks of doing too much. If we want a stronger and more inclusive recovery, the same applies to doing too little reform.”

Let us now try to outline some of the main directions towards which such reforms should aim. European-wide collective public goods – such as communication and transport infrastructures, research, energy, and some redistributive measures – need to be financed by a supranational budget.

Nation-specific collective goods – such as local infrastructures, education (up to a certain point), and the major part of the welfare state – should be financed through national budgets, in a bottom-up logic of the principle of subsidiarity. This implies that a new constitution should be written to allocate competences to the different layers of government, which is something requiring a dramatic change of the Treaties or at least the implementation of enhanced cooperation among Eurozone members.



4. Towards an effective economic and political governance in Europe

This process can nevertheless be built by steps. Starting from the Roadmap *Towards a Genuine Economic and Monetary Union* of the Four Presidents of December 2012 (Van Rumpuy et al. 2012), the banking union should be completed as soon as possible. Significant steps in this direction have been taken. As was indicated in the document, the *Single Supervisory Mechanism* “will be a guarantor of strict and impartial supervisory oversight, thus contributing to breaking the link between sovereigns and banks and diminishing the probability of future systemic banking crisis” (Van Rumpuy et al. 2012: 5). And as for the *Single Resolution Framework*, it is designed to reduce the risk that banking failure might burden taxpayers.

The second step should be to foster financial integration. It should aim at providing the resources that are necessary to support growth. This in turn implies two directions: the first concerns greater budgetary coordination and surveillance; the second implies the ability to raise additional resources. The *Roadmap* suggests the following:

“The crisis has revealed the high level of interdependence and spill-overs between euro area countries. It has demonstrated that national budgetary policies are a matter of vital common interest. This points to the need to move gradually towards an integrated budgetary framework ensuring both sound national budgetary policies and greater resilience to economic shocks of the euro area as a whole. This would contribute to sustainable growth and macroeconomic stability.” (Van Rumpuy et al. 2012: 8).

We expect the provisions of the *Six Pack*, the *Two Pack* and the *Fiscal Compact* to be included within the new framework of European governance. The mid-term revision of the Treaties of 2016 should aim at including all these mechanisms.

But this may not be enough, because constraints are not a sufficient condition for growth, and the *European Stability Mechanism* is only designed to provide financial assistance to Eurozone members in difficulty, not as a fund to finance growth. Even the recent *Juncker investment plan* risks not being able to meet its explicit goals, as insufficient resources are envisaged. A braver step would be to issue project bonds to finance specific strategic goals, such as European-wide collective investments as previously identified.

In a broader perspective, nevertheless, the Eurozone should think about its own autonomous fiscal capacity (Moro 2013). From this point of view there are several



proposals that may be considered. A carbon tax (Majocchi 2011) and a European use of the Financial Transaction Tax might be short-term solutions. And a specific share of income taxes might also be worth considering. This is of course a crucial step because it requires a change in the existing treaties on a key point: unanimity. We recall that Article 311 TFEU states:

“The Council, acting in accordance with a special legislative procedure, shall unanimously and after consulting the European Parliament adopt a decision laying down the provisions relating to the system of own resources of the Union. In this context it may establish new categories of own resources or abolish an existing category. That decision shall not enter into force until it is approved by the Member States in accordance with their respective constitutional requirements. The Council, acting by means of regulations in accordance with a special legislative procedure, shall lay down implementing measures for the Union's own resources system in so far as this is provided for in the decision adopted on the basis of the third paragraph. The Council shall act after obtaining the consent of the European Parliament”.

Unanimity by definition defends Pareto optimality but implies no move from the status-quo and the de-facto impossibility to make collective choices.

On the contrary, financial integration requires strategic collective choices on the use of such resources. The third pillar of the *Roadmap* is indeed a genuine economic union, where a federal Treasury is in charge of budgetary choices. When collective public choices are required, a democratic legitimation is necessary to guarantee their sustainability and social acceptance; as it is usually recalled: “No taxation without representation”. This is the reason why the fourth step of the *Roadmap* is a political union, where Parliaments (in particular the European Parliament) are given genuine power over economic governance, now reduced by the constraining mechanisms of the Fiscal Compact and the other measures of macroeconomic surveillance. As Fasone (2012) sums up:

“The participation of the EP in the ‘management’ of the EU economic governance is fundamental for the legitimacy and the effectiveness of the new regulatory framework, which appears to be highly fragmented also in terms of national positions expressed and thus dangerous for the tenure of the European integration process... In this regard, though the contribution of national Parliaments is also very important for the good functioning of the EU (Art. 12 TEU), especially on budgetary policy they are likely to defend national interests at the EU level, thus increasing the already divisive scenario that characterizes the EU at the moment. On the contrary, only the EP can constitute the place where



national cleavages are willing to be pieced together through an open debate and mitigated in their most extreme manifestations. In other words, by their nature and when diverging points of view arise, both the Governments, individually and summoned in the Council and the European Council, and the national Parliaments are more prone to defend national self-interests to the detriment of the genuine spirit of integration and the achievement of the common European good. In order to make the new economic governance work, solidarity and mutual trust amongst Member States and national citizens are decisive ... Therefore a suitable recipe for increasing the democratic legitimacy of the economic governance could be a further empowerment of the EP in this field, while, at the same time, the EP should try to involve also national Parliaments in the perspective of a coordinated enforcement of the new European provisions”.

The central bank can support such processes in several ways. The first is to provide liquidity during the transition, as it is doing at present. The second is to put pressure on national governments so that they go on with structural reforms. The third is to lobby the European Council in order to make the constitutional changes that may enable a radical transformation of the EU in a multilayer federal system of coordinated governments (Fitoussi and Creel 2002). The fourth point is to legitimate itself through a new strategy of monetary dialogue and communication with the European Parliament (Torres 2013).

5. Concluding remarks

The ECB, although designed for times of growth, when rules may be more effective than discretion in monetary policy, has recently made a huge effort to do “whatever it takes” to counter the crisis. It cannot be accused of having done nothing or not enough to face the crisis hitting the Eurozone in the last few years. The latter is the by-product of inconsistencies in the economic and political structure of governance of the European Union and in particular of the Eurozone.

The weakness of constitutional commitments towards collective responses to the crisis have eased, and resulted in boosted speculation against the sovereign debts of some euro-countries. The European governments have been unable to tackle this weakness with the necessary credibility and political commitments.

Nevertheless, it would be unfair to claim they have done nothing. They have - slowly and ambiguously - tried to build the first steps indicated in the document of the Four Presidents in 2012, starting with the banking union. And, more importantly, they have



provided the (more implicit than explicit) political support to the choice of ECB to do *whatever it took* to contrast the crisis.

But structural crises cannot be dealt with through monetary policy alone. All the technicalities concerning the room for manoeuvre of a central bank were explored and attempted by the ECB, up to the quantitative easing of the recent times. Even against the explicit mandate of its original statute.

The question is now manifestly political. The shortcomings of the European economy do not depend on technical questions but on political decisions. A radical change in the structure of economic governance is urgent. The required reforms concern the creation of a multi-layered structure of economic and political institutions to tackle each specific part of the complex architecture of European economic governance, ranging from demand side support to structural reforms, from supranational monetary policy to budgetary policies at both national and EU level. It will only be possible to see if the European economy is still able to grow at a rate compatible with the maintenance of its welfare system once this restructured framework has been completed. And if it fails, then Europe will have to give up important and increasing shares of the welfare system, losing one of its crucial competitive advantages in the world economy.

These latter cases of autonomous parliamentary responses to the risk of an asymmetric distribution of parliamentary powers under the Euro crisis governance are to be preferred to the today more frequent ones of judicial struggle for the protection of parliamentary prerogatives, where sometimes in an attempt to protect democracy Courts might even trigger a worse scenario, whereby it becomes then very difficult to redress and justify imbalances among national parliaments in the EU once created via constitutional case law. When the protection of parliamentary prerogatives in Euro-crisis procedures is achieved through constitutional judgments, such a protection is rooted in more ambiguous bases, like in Germany, where it is grounded on a peculiar and creative interpretation of constitutional clauses by the *Bundesverfassungsgericht* (section 4.1). This Court is actually willing to protect the enforcement of the principle of democracy as such and not the Parliament *per se*. The *Bundestag* is incidentally guaranteed by the Court as long as the Parliament is capable to preserve the right of the people to elect their representatives and to be effectively represented by them. Otherwise, as threaten in the referral for a



preliminary ruling, the Bundestag (and the Federal Government) can be sanctioned through a declaration of unconstitutionality by omission, without further specifications of what this implies, of how this would affect parliamentary prerogatives, and of whether the Parliament can be compelled to act based on the Court's instructions whenever it has not taken appropriate action to enforce citizens' rights. This explains why a very active Court not necessarily is the best solution for keeping parliamentary powers "alive".

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Reform options for the EU budget – First reflections on the new departure for a new EU budget

by

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Abstract

There is a long standing debate on the reform of the EU budget. According to the final agreement on the Multiannual Financial Framework (MFF) 2014-2020 signed in December 2013, the Commission will present, by the end of 2016 at the latest, a review of the functioning of the MFF. The review will be accompanied by a legislative proposal for the revision of the MFF 2014-2020. This revision could provide an important occasion and stimulus to reform the financing of the budget and to readjust the spending structure.

Key-words

EU budget, Multiannual Financial Framework 2014-2020



1. Introduction

According to the final agreement on the Multiannual Financial Framework 2014-2020 (MFF 2014-2020) signed in December 2013^I, the Commission will present, by the end of 2016 at the latest, a review of the functioning of the MFF. The review could be accompanied by a legislative proposal for the revision of the MFF 2014-2020. This revision provides an important occasion to reform the financing of the budget and to readjust the spending structure. In this respect Jean-Claude Juncker, European Commission President has already said that: “The mid-term review of the Multiannual Financial Framework should be used to orient the EU budget further towards jobs, growth and competitiveness”. The Juncker plan, as it is now known, published in November 2014, will already have an impact on EU budget spending and in May 2014 a high level group under the chairmanship of Mario Monti started work with the objective of undertaking a general review of the own resources system.

However, and besides the determination to improve the EU budget, the reform efforts of the EU budget and of the MFF are not new. The latest attempt dates back only to 2005 when the European Council, after having reached an agreement on the MFF 2007-2013, invited the Commission to undertake a full, wide ranging review covering all aspects of EU spending, including the Common Agricultural Policy (CAP), and resources, including the UK rebate.^{II} In contrast with the current attempt, in 2007 the Commission launched the review with a broad public debate, and delivered the conclusions of this process in 2010. Some of the ideas discussed were later incorporated by the European Commission in its proposals for the MFF 2014-2020. However, after a very long and conflictive negotiation, the agreement on the MFF 2014-2020 has been received with mixed feelings. On the one side there are some innovations with regard to the expenditure structure, but there is, compared to the 2007-2013 period, an overall reduction of resources of 3.5% in commitments and 3.7% in payments over the next seven years and almost no progress with regard to the financing of the budget.

Dissatisfaction with the EU budget has traditionally inspired numerous debates, academic papers and reform proposals. The criticism regarding the expenditure and revenue side of the EU budget is probably as old as the budget itself. Moreover the highly



politicised and conflictive negotiation procedure of the MFF is increasingly criticised. This is from one point of view astonishing because the European Union budget is an extremely small part of EU GDP. Nevertheless, historically the EU budget has played an important role in the EU integration process and has been used to compensate potential losers in the European integration process or for buying approvals for specific projects. These “compensations” were locked into the EU budgetary structure and institutionalised in the *acquis* (Cipriani 2010). Moreover the budget became increasingly dependent on national contributions (as percentage of the Gross National Income - GNI) which increased the *juste retour* logic and limited a policy-driven debate on the budget. (Sapir et al. 2003) Furthermore the conflictive character of budgetary negotiation is to a certain extent natural since it results from a multitude of decisions on the use of scarce public resources (Heinemann et al. 2010).

All reform attempts, so far, have been disappointing and, as has been confirmed frequently, the EU budget is path dependent and resistant to reform. It is mainly because of the unanimity rule, that several member states could easily defend their acquired rights, such as the British rebate. Furthermore because of the net return mentality many of the benefits gained from EU policies contributing to far-reaching Union’s objectives have been largely ignored.

However taking into account the long term development of the EU budget we can see a continuous but slow evolution with incremental modifications. Analysing the Delors I package and the MFF 2014-2020 there are important developments to acknowledge with regard to the financing and spending structure.

In order to contextualise the ongoing revision, in this text, first, we will analyse the main arguments and criticisms which have been put forward with regard to the revenue, expenditure and negotiation procedure of the MFF. Moreover some proposals regarding the current reform process will be presented and analysed.

In the following text we will concentrate on the EU budget and neither reflect on the recent investment plan presented by the President of the Commission nor comment on the discussion on a separate, additional budget for the Eurozone.



2. Where do we stand in the current reform process?

After two and a half years of intense and complicated negotiations, the European Parliament, the Council and the Commission reached an agreement on the much expected MFF 2014-2020 in December 2013. Although the official start of the negotiation was the presentation of the proposals for the MFF 2014-2020 by the EC in June 2011, the negotiation had already started in 2005 when the European Council, after having reached an agreement on the MFF 2007-2013, invited the Commission to ‘undertake a full, wide-ranging review covering all aspects of the MFF.’^{III} In 2008 the Commission launched the review with a broad public debate and delivered the conclusions of this process in 2010. Despite the new input coming mainly from academic experts, NGOs and the European Parliament, the consultation phase demonstrated all too clearly that the EU organs and the member-states interpreted the review as an early starting point for the MFF 2014–2020 talks, and tactical considerations automatically permeated the contributions (Becker 2012). Nevertheless several new ideas came up aimed at a refocusing of EU spending priorities and the financing of the EU budget. Some of these ideas (such as the financial transaction tax) were later incorporated by the European Commission in its proposals for the MFF 2014-2020. One of the Commission’s main arguments was that the reform of the revenue system would relieve the current burden on national Treasuries to finance the EU budget, create synergies between these budgets in order to implement common EU strategies, and give greater impact to European policies^{IV}. In the end the Commission’s attempt to reform the EU revenue system for the MFF 2014-2020 was not successful, and the question of the financing of the EU budget was never addressed seriously by the Council.

Coming back to the current revision, the agreement to undertake this new revision was mainly reached due to demands of the EP which made it as a condition for approving the MFF 2014-2020. In this sense a High Level Group on Own Resources (HLGOR) was set up, which will undertake a general review of the own resources system guided by the overall objectives of simplicity, transparency, equity and democratic accountability. Progress of the work will be assessed at the political level by regular meetings, at least once every six months.

The working group started their deliberation in May under the chairmanship of Mario Monti with the objective of undertaking a general review of the own resources system. In



December 2014 the high-level group presented a first assessment report (HLGOR 2014). This report is only a first step to delivering final recommendations by 2016 when the Commission will assess whether new legislative initiatives to amend the own resources system are appropriate. According to the road map, in 2016 national parliaments will discuss the proposals at an inter-parliamentary conference. On the basis of the results of this process, the Commission will assess if new Own Resource initiatives are appropriate. This assessment will be done in parallel with the review of the MFF Regulation with a view to possible reforms to be considered for the period covered by the next MFF.^v There is no public consultation expected.

3. A short review of general arguments related to the EU budget reform coming from different theoretical approaches

The debate on the reform of the EU budget is not solely based on economic aspects, but also on efficiency arguments and concerns on the transparency of the budget and the budgetary procedure, as well as focusing on questions related to democratic accountability for budgetary decisions. In general terms there is a common understanding among academic experts and practitioners that the financing and the spending structure of the EU budget is far from ideal and should be improved in order to move towards a more efficient system. In this sense, the academic literature agrees that current rules for expenditure and revenue make the system slow to react to unforeseen events while too many complexities hinder its efficiency and transparency.

Besides this consensus there are different expectations on the right size, expenditure priorities and optimal revenue structure. Moreover the underlining principles of the budget, like the question on “What is the maximum accepted level of financial solidarity?” are highly disputed.

Several studies apply arguments based on the theory of fiscal federalism to the EU budget (Feld, Necker 2010). Fiscal federalism gives insights on how to allocate expenditure and revenue between different levels of government. Proponents of this theory underline the positive effects of investments financed by the EU budget which can offer the effective targeting of policy priorities, as well as avoiding unnecessary overlaps of national spending. In this sense the central provision of public goods promises substantive economies of



scale. Spending coming from the EU level can also be more cost-efficient due to cross-border externalities, where some policies have an impact not only on the country where they are implemented but also on its neighbours. So the European dimension can maximise the efficiency of Member states' finances and help to reduce total expenditure and secure better results. If the theory of fiscal federalism is taken into account it could also be argued that every level of government, state and federal (and European), should have an independent control of financial resources sufficient to perform its exclusive functions (Wheare 1963).

However there are several critical remarks on the validity of this approach for the EU budget. In order to have areas in which EU public spending could be more efficient than national spending the EU budget has to be increased. Moreover the EU is a union between sovereign countries where the national governments are more powerful than the EU level (Ackrill 2003). Related to this, and considering insights from a broader approach of public economics, there are questions on whether there really is a need for EU budgetary intervention. This argument is also in line with the principles of subsidiarity and proportionality, according to which the EU should only perform those tasks which cannot be performed effectively at a more immediate or local level and only act to the extent that is needed to achieve its objectives. Consequently, the budget should only be used to finance EU public goods when member states and regions cannot finance these public goods. The theory of public economics supports these arguments, thus providing a framework for thinking about whether or not public administrations should participate in markets.

Above all, there is a strong regulatory capacity of the EU. Regulation at the EU level offers clear economies of scale and cross-border externalities. Although since the late 1980s the potential supporting role of the budget for the internal market have been voiced (Padoa-Schioppa, 1987), and the amount for Cohesion policy has been growing, the results are not convincing; cohesion countries are more affected by the recent crisis than countries which have not received specific funds to increase their competitiveness (Mayhew, 2012). Finally, similar to federal countries there are aspects of cost-effectiveness, especially with regard to the revenue side of the budget e.g. what would be the administrative costs of a European tax?

Moreover, as already mentioned, the debate on the EU budget does not only depend



on efficiency considerations but also on whether an increasing budget and/or fiscal competences is seen as legitimate since it would reduce national sovereignty (Figueira, 2008). In line with this argument, although different areas of EU spending/revenue may be efficient at the EU level, their transfer could create problems in terms of legitimacy.

With regard to the legitimacy argument, public opinion and accountability of the policymaking process are crucial. According to Eurobarometer^{VI}, European citizens have very positive preferences towards an increasing role of the EU budget in social welfare and employment (42%), economic growth (40%), education and training (39%) or public health (36%) –expectations which are not in line with the current spending structure. Consequently, when asked for their position on the current EU budget, a majority of Europeans agree that ‘the political objectives of the EU do not justify an increase in the Union’s budget’.

There is a further argument which supports budgetary reform and which is related to the commitments and obligations of the EU. The Lisbon Treaty increased the role of the Cohesion Policy and introduced a third dimension: territorial cohesion (Article 158 TFUE). The Treaty also contains a broad catalogue of objectives for the CAP related to employment, rural development and competitiveness (Article 39 TFUE). Besides the increasing financial commitment of the Lisbon Treaty, there are also more specific policy goals. The Lisbon Agenda 2000 had already added a new dimension to the MFF 2007-2013, underlining that the EU budget should provide adequate financing for initiatives in support of and in synergy to the goals of the Agenda. Although the MFF 2014-2020 is not the financial translation of Europe 2020, there is a very close linkage established between this Strategy and all the spending headings of the MFF 2014-2020. Considering the commitments and obligations of the EU, it is quite clear that the structure of the EU budget is not in line with the Treaty objectives and political assignment of policy objectives.

4. What is at stake? – Concrete reform options

Taking into account that net balances are important for member states negotiation strategies - meaning the relationship between gross payments into the EU budget via the EU’s own resources mechanism and the returns from EU spending programmes - the



margin for fundamental reforms are small and modifications of the revenue side should be combined with changes on the expenditure side.

During the past two negotiations of the MFF the net contributors have been very quick to demand an overall limit of the MFF. For the sake of visibility it was fixed by 1 percent of EU GNP (this amount referred to commitments or payments according to the negotiation strategy of each net contributor). As it stands the current volume of the MFF comprises about 1 percent of EU GNP, but the annual budgets usually lie below that. In real terms, 1 % of aggregate EU GNP can be very large when expressed as a percentage of many individual Member State's GNP, and for the great majority of Member states, this means that a relatively moderate proportion of the EU budget could play a sizeable stabilising role (Begg 2012). However, as already suggested by the 1977 MacDougall report, a budget of 2% EU GNP would have an effect in reducing the inequalities of living standards, and an increase to 5-7% of GNP would be necessary in order to give the budget a stabilisation role^{VII} (Majocchi 2011). In this sense the EU budget, critics say, has marginal growth effects and lacks of resources to respond to short-term challenges (e.g. only an European wide Basic unemployment insurance would require 1% of the EU GDP)^{VIII}, while others underline the important contribution of the EU funds to the growth rate of national GNPs (e.g. in 2009 more than half of the 1.8% economic growth in Poland was achieved thanks to EU funds).

4.1. The revenue side

The revenue side has also attracted widespread criticism and there have been several reform attempts. The debate about the EU revenue system is an issue dating back to the EEC Rome Treaty of 1957, which should have opened the process of replacing member states' national contributions by 'Community's own resources'. The transition from member states' contributions towards own resources had been ensured in April 1970. But the Treaty commitment, that the budget shall be financed completely from own resources, has never been put in praxis. It was only during the past decade, in 2004 and 2011, that the Commission tabled substantial reform proposals aiming to address identified deficiencies such as the proliferation of rebates and correction mechanisms, in addition to the high dependence on the GNI - based resource. So far, all attempts, in particular the introduction of direct EU fiscal revenues, have failed^{IX} (Cipriani 2014).



However the system has not been static and there have been some important reforms, especially in the proportions of revenues which have altered considerably. In 1988, when the GNI-based resource was first introduced, the proportions were: VAT-based resource, 61 per cent; TOR, 29 per cent; and GNI-based resource, 10 per cent. Over the past two decades, Member states have thus seen a significant rise in GNI-based contributions (75% in 2011). Today^x more than 85% of EU financing is based on statistical aggregates derived from GNI and VAT, the European Union still has no right of its own to raise taxes, and is forbidden to borrow.

There are strengths and weaknesses of the current system. On the one side the current EU revenue system allows a stable flow of resources for seven year periods, so budgetary stability and security of planning are guaranteed. The Commission's Own Resources Report of 2011 explained that the GNI-based resource had a positive impact in terms of stability and sufficiency of resources flows. The current system, has, from the administrative point of view, at least until 2014, been working with reasonable cost effectiveness. However, on the other side, the present system encourages the member states to negotiate the allocation of spending in the EU budget as a counterpart to "their" payments into the common budget, and to endless debates on budgetary issues between net payers and net contributors about the costs of the EU budget. The need to respect the requirements of the Stability and Growth Pact has led to increasing pressure on the national contributions to the EU budget. In this sense the high level of GNI-based contributions constitutes an important incentive and easy mechanism for net contributors to cap the budget. The perceived burden leads to the complex concepts of correction mechanisms and as a consequence the system has become highly opaque. Doubtlessly, these existing correction mechanisms are one major criticism of the current EU system of own resources. The most important distortion is, of course, the UK rebate. Furthermore, since decisions on the own resource system require unanimity by the Council, the revenue side can only respond slowly to changing circumstances (e.g. the impact of the economic crisis in specific member states).

Based on the existing mixed approach, two categories of revenue models could be envisaged. A first option would be to concentrate the financing of the EU through member states' contributions based, for example, on the GNI resource without a specific European tax or tax sharing. The GNI resource has been considered a flexible and cost-



efficient revenue type with reasonable statistical reliability, and moreover it is a transparent indicator for national contribution capacity. While the ability-to-pay principle stresses the relative size or prosperity of member states as the variable to determine the revenue burden, under the equivalence principle, a country contributes in proportion to its benefits from membership.

Reducing the number of revenue sources would make the system simpler and transparent since revenues would be directly linked to the national budgets and national parliaments could control them. In order to reduce the conflictive debates on budgetary imbalances, a generalised mechanism could limit national contributions.

A further possibility would be to finance the EU budget by an explicit fiscal source. According to several studies, there are at least six potential sources and their variants (financial sector taxation; revenue from auctioning under the EU Emissions Trading System; taxation of the aviation sector; an EU VAT; an EU energy tax or an EU corporate income tax). Additionally, the EC proposed European Project Bonds, an EIB scheme for raising funds, in order to stimulate investment in key strategic EU infrastructure (Haug, Lamassoure and Verhofstadt 2011).

Again the argument is that the system would become simpler and visible on top of being more predictable in its impact. A financing system based on “real” own resources would increase the financial autonomy of the EU and introduce a direct link to citizens. Accordingly, the establishment of own resources could provide the justification for giving the European Parliament budgetary powers. According to Iozzo et al. (2008) there are some principles which a new tax should respond to:

- (a) most revenues should come from only one “general” tax;
- (b) EU taxes should have a broad base and be levied at a low rate, to minimise allocative distortions (neutrality);
- (c) The tax should be simply and uniformly assessed (simplicity);
- (d) The tax should be automatically transferred to the EU without going through national budgets (independence);
- (e) Citizens should be made aware of what they pay to the EU budget (transparency);

However, raising one or more resources could become more costly in administrative terms and discriminate against some countries. For example, the VAT resource tends to



discriminate against poorer countries or countries with a high share of tourism where the VAT base is relatively large due to a higher consumption ratio. Moreover the claim that an EU tax would end the *juste retour* thinking does not hold up to closer scrutiny. According to Heinemann et al., the perception of unfair burden sharing hinges crucially on the shares of expenditures, so that a tax based system would not solve the problem (Heinemann et al. 2010).

4.2. Expenditure

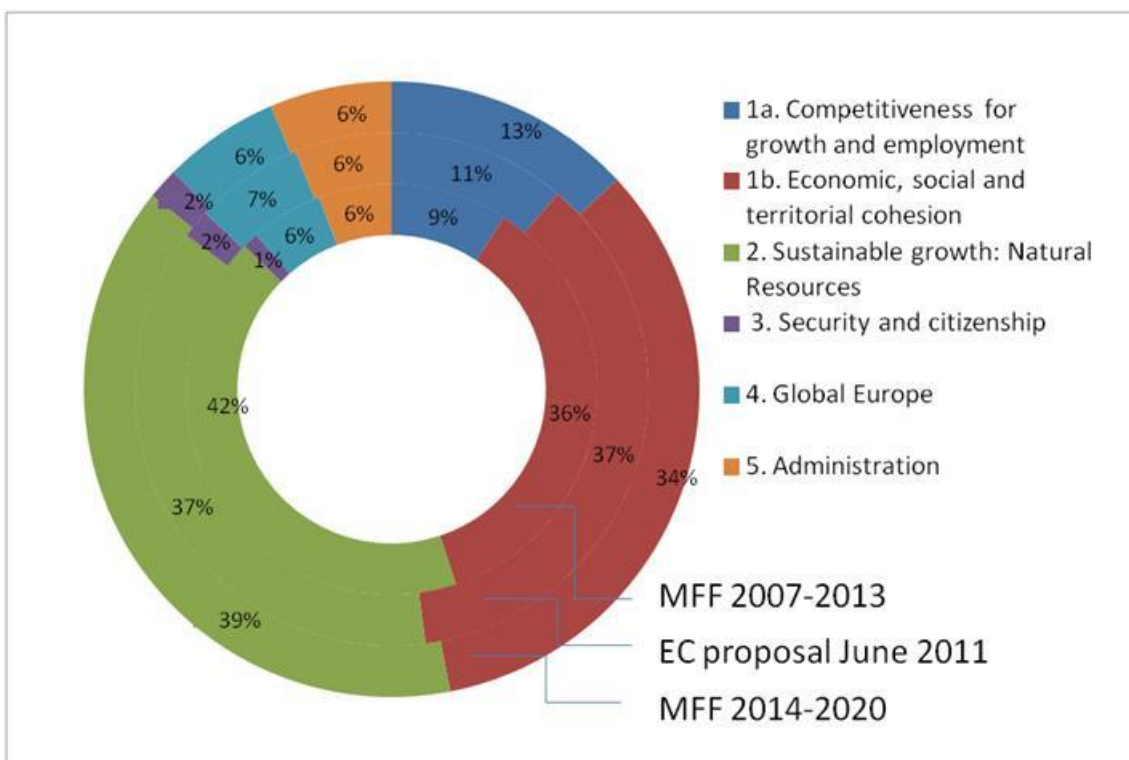
Since the debate on UK membership at the beginning of the seventies there are increasing debates on how and where the EU budget is spent. While net payers demand “European added value” for EU spending in order to justify the restriction of the budget volume, the net beneficiaries appealed to “European solidarity” to defend and increase spending programmes. The introduction of the MFF in 1988 helped to ensure predictability of EU expenditure and budgetary stability. This predictability has come at the price of limited flexibility. The obstacles to re-prioritisation have made it harder to give priority to new issues such as crisis situations or urgent international responsibilities. The budget's inability to “expect the unexpected” brings both an operational and a reputational cost to the EU.^{XI}

However, the European Commission and increasingly the EP have taken advantage of openings in the political opportunity structures to capitalise on new opportunities in budgetary negotiations. While process management and control mechanisms have been progressively defined by the EC, the content of the MFF remained based on the Treaty objectives and political agreements among Member states (Laffan 2000: 729). Nevertheless, the spending structure of the EU budget has also evolved in accordance with the EU integration process, as well as to specific challenges. In this sense, the first MFF was agreed for the period 1988-92 (Delors I package) in order to provide the resources needed for the budgetary implementation of the Single European Act. The MFF 1993-99 (Delors II package) contained a significant increase of structural and cohesion funds as a basis for the preparation of Member states for the single currency. In 1999 the MFF for the period 2000-06 (Agenda 2000) secured the necessary resources to finance the enlargement process. Finally, as already mentioned, the MFF 2007-2013 established a new link between spending programmes and sustainable growth and competitiveness. Although the Sapir



report in 2003 famously dubbed the EU Budget as a historical relic, underlining that there is too much focus on agriculture (Sapir et al. 2003), there have been some important steps forward. With regard to the current MFF, there are significant changes in the headings compared to the 2007-2013 period. This is notably the case for: ‘Competitiveness for growth and jobs’ (+37%); ‘Economic, social and territorial cohesion’ (-8%); ‘Sustainable Growth: Natural Resources’ (-11%) and ‘Security and citizenship’ (+27%). These changes confirm a certain shift from treaty based objectives to a more policy oriented budget. In this sense a strong emphasis is put on expenditure aimed at boosting growth and creating jobs.

Graph 1: Comparing of the spending structure between the MFF 2007-2013, the Commission proposal and the MFF 2014-2020.



Source: Own elaboration

There are also some further innovations which can be summarised in the following way:

- The creation of a specific fund for employment.



- The new macroeconomic conditionality aims to link the allocation of structural funds to good economic governance.
- The priority given to the Europe 2020 Strategy in all spending headings.
- The mid-term adjustment of the national allocations.^{XII}
- A new contingency margin aimed at allowing flexibility within the MFF 2014-2020 to cope with unforeseen circumstances.
- As regards to the CAP, - greater flexibility in the use of the rural development funds.
- New instrument of “connecting Europe Facility”, which will be finance infrastructures in the field of transport, telecommunications and energy.
- The revision clause, for a mid-term review on all spending headings and the financing of the EU budget
- Flexibilisation of the Multiannual Financial Framework.

Nevertheless, most spending is still within two headings which leave fewer resources for other spending headings. The long-standing demand for a reform of the Common Agricultural Policy, e.g. through a reduction in the spending and/or national co-financing, could have two important consequences: on the one hand an increase in pressure for the elimination of the British rebate, as well as, on the other hand, an increase in the resources available for headings which could deliver European public goods.

4.3. The negotiation process

After its introduction in 1988, the system of MFF had helped to overcome institutional power struggles that had characterised budgetary negotiations in the 1980s. Since the negotiations for Delors-I, which ended after one year, negotiations have become more complicated. The negotiation of the MFF 2014-2020 took nearly two and half years. Despite this extension of negotiations, negotiation outcomes *per se* have become even less impressive. However, circumstances have become more complicated, not only because of an increasing number of member states but also because of the increasing heterogenic economic development within the EU. The increasing number of veto players has also led to the effect that member states prefer to agree on the lowest common denominator rather than starting ambitious initiatives to modernise the budget which would involve a certain



risk of the negotiations failing. Moreover, as already mentioned, any time a new financial framework is negotiated, member states end up struggling to get a ‘net return’ or specific side-payment. As a result, the question of how and where the EU budget can best add value to European integration hardly ever comes up in budget negotiations. The “juste retour” debate therefore has had a negative impact on the quality of delivery and has reduced EU added value.

The negotiation process is, after twenty-five-years, well-oiled, in which most conflicts are predictable and roles are largely known and accepted (Becker 2012). Although the Treaty of Lisbon has increased the role of the EP in the annual budgetary process, the formal power of the Parliament remains very limited.

Some options seem to exist for reforming the MFF negotiation process. Firstly there are proposals to align the next MFF with the political cycles of the Commission and EP. This would offer the opportunity to “politicise” the discussion on the MFF and present differences before the electorate on the occasion of European elections, with the caveat that, in order to ensure full democratic legitimacy, Parliament and Commission should have a mandate to negotiate the MFF, which would be applied during their mandates. Secondly there are demands that the final decision on the MFF should be taken by a qualified majority. A shift towards a qualified majority voting for the MFF regulation would be in line not only with the ordinary legislative procedure, used for the adoption of virtually all EU multiannual programmes, but also with the annual procedure for adopting the EU budget.

And thirdly some consider that the EP should have a similar input in the MFF decision than in the annual budgetary process. In this sense it has been put forward that the MFF should be prepared in co-decision of the Council with the EP (Padoa-Schioppa 2013). Moreover in order to make the procedure more flexible the modification of shares of taxes (e.g. VAT) or certain budget shares could also take place using the same procedure.

5. What are the positions of the main actors?

The European Commission proposed several reforms of the own resources system, as well as possible financing means that could gradually replace national contributions. The



latest proposals, during the budget review and alongside its proposal of the MFF 2014-2020, can be summarised as follows:

- the abolition of the current VAT-based own resource,
- the introduction of lump-sum reductions in the GNI-based resource payments,
- and a European wide financial transaction tax.

In this sense, the European Commission is determined to bring the revision process to a positive end. Commenting at the first meeting of the High-Level Group in early April 2014, the former EU Budget Commissioner Janusz Lewandowski stated that the current system is too opaque and too complex. However, unanimous agreement on the need to improve the current system is one thing, finding a fairer, more transparent and more modern system likely to be agreed by all is another thing. And, this unanimity notwithstanding, the Commission has little reason to feel rushed; the agreed resources are secured from the outset and are paid out without major problems until 2020. However the debate has been reactivated after the appointment of the new EU Commission. During the negotiation of the MFF 2014-2020 the pan-European infrastructure project, which was supposed to be financed by European Project Bonds was not supported by the governments of member states. Nevertheless because of the success of the pilot phase of the "project bonds", the mechanism attracted new attention. Finally project bonds and similar guarantee mechanisms will be used to leverage the foreseen €315 billion of Juncker's Investment plan.

The reform of the financing of the EU budget was never addressed seriously by the Council during the negotiation of the MFF 2014-2020. Member states are traditionally reluctant to accept any form of direct fiscal taxation and financial autonomy for the EU. Although the financial autonomy of the EU could reduce the burden of national budgets there are only few member states which are openly in favour of the European Tax. The Council's main interest is not to lose Member states veto power over EU financing arrangements. Since the introduction of a FTT at EU-wide level was opposed by Member States, this revenue source has been only implemented, in the context of an enhanced cooperation, by several Member States.

The European Parliament is the principal promoter of the review of the EU revenue system and has a real interest in moving forward. Although the main argument has been to



reform the budget in order to make it more transparent, it is also clear that the Parliament is aiming to increase its power within the budgetary process. In its report on the lessons to be learned from the negotiations on the MFF 2014-2020, the Parliament favours the introduction of “new and real own resources”. In this sense the EP is hoping that direct revenue for the EU – for example from a tax on financial transactions – would ease some of the political considerations that impose pressures on the budget. In this sense the position of the Parliament is clear: “existing system of own resources, (...) is non-transparent, unfair, not subject to parliamentary control, highly complex and totally incomprehensible to European citizens”^{xiii}. Also a recent report by Jean-Luc Dehaene and Anne E. Jensen on the EU's own resource system points out that the EP has always demanded that the EU's budget be “fully financed” from own resources.

These demands are not new; the Parliament has a long record of proposals for a reform of the own resource system. However after assuming its new role in the negotiation process, and after expanding its powers, the Parliament is now flexing its muscles with much more self-confidence.

6. Conclusions

Dissatisfaction with the EU budget has grown steadily over the past three decades, but there is also a growing recognition that the current EU budget is not well suited to current needs and future prospects of European integration and that the European budget and finance system needs to be reformed.

The current revision provides an important occasion and stimulus to reform the financing of the budget and to readjust the spending structure. Nevertheless the ongoing reform will not lead to a radically different budget, regarding its revenues and spending programmes as well as decision-making procedure, but contribute to establishing an effective instrument to foster EU policy goals. With regard to spending, the budget will continue the path of inconspicuous gradual and sustainable reforms within existing European spending priorities.

Today, there are still important divergent visions on what the EU budget stands for, and what it should achieve. In this sense there should be a debate on the principles of the budget at the beginning of the reform process, a debate which could narrow the positions



on the long term and short term results to be achieved with the EU's funding programmes, e.g. should the EU budget be a tool to stimulate growth and jobs or concentrate on treaty objectives? Having discussed the long term and short term objectives, the financial needs should be agreed, again starting with a debate on the principles of the budget revenue, e.g. solidarity or fair distribution of financial burden, equivalence principle or the ability-to-pay principle.

With regard to the procedure, it has to be asked whether we should continue working with the MFF procedures, and if yes how could these be reformed in order to reduce the growing number of conflicts, as well as to make the decision making process more effective in order to avoid deadlocks and save valuable time and resources in the course of negotiations.

Without any doubt, reform should be related to a revision of the treaties; nevertheless in a first step, common praxis should be formalised in an agreement at the political level. Several procedures could eventually be enshrined in the Inter Institutional Agreement itself.

To sum up, and taking into account the different theoretical and empirical insights of the literature, there are four main requirements the EU budgetary system should fulfil. The system is geared to fostering the efficient and sustainable provision of European public goods, consolidate budgetary discipline, it has to be designed to be conducive to the integration process and should enable the EU to fulfil its normative and policy objectives.

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^I Article 2, Mid-term review/revision of the MFF, Council Regulation, No 1311/2013 of 2 December 2013 laying down the multiannual financial framework for the years 2014-2020.

^{II} See Council of the EU, Financial Perspectives 2007-2013, 15915/05, 19.12.05.

^{III} Ebd.

^{IV} According to the Commission's estimates, an FTT applied at EU level could have provided to the EU budget by 2020 an amount of €37 billion a year.

^V See Joint Declaration by Parliament, Council and Commission on improving effectiveness of public spending in matters subject to EU's action, Council document 15997/13, ADD 1, Brussels, 25.11.2013.

^{VI} Standard Eurobarometer 75, Spring 2011, Europeans and the European Union budget.

^{VII} See Report of the Study Group on the Role of Public Finance in European Integration, April 1977.

^{VIII} See proposal by László Andor former European Commissioner for Employment, Social Affairs and Inclusion on "Basic European unemployment insurance: Countering divergences within the Economic and Monetary Union".

^{IX} See COM(2004), "The financing of the European Union - Report on the operation of the own resources system", 14 July 2004.

^X Under the present system, there are three types of own resources:

Traditional own resources: consist mainly of customs duties on imports from outside the EU and sugar



levies. EU Member States keep 20 % of the amounts as collection costs.

Own resources based on value added tax (VAT): a uniform rate of 0.3 % is levied on the harmonized VAT base of each Member states.

Own resources based on GNI: each Member State transfers a percentage of its GNI to the EU. Although designed simply to cover the balance of total expenditure not covered by the other own resources, this has become the largest source of revenue of the EU budget.

Other sources of revenue include tax and other deductions from EU staff remunerations, bank interest, contributions from non-EU countries to certain programmes, interest on late payments and fines.

^{xi} See COM(2010) 700 final, The EU Budget Review, Strasbourg, 19.10.2010

^{xii} It will adjust these total allocations whenever there is a cumulative divergence of more than +/-5%. The total net effect of the adjustments may not exceed EUR 4.000 million.

^{xiii} See European Parliament (2014), Report on the draft Council decision on the system of own resources of the European Union, C7-0036/2014.

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