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Stelio Mangiameli *Editor*

The Consequences of the Crisis on European Integration and on the Member States

The European Governance between Lisbon and Fiscal Compact

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The Consequences of the Crisis on European Integration and on the Member States

The European Governance between Lisbon and Fiscal Compact

With Contributions by

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Preface

The volume entitled "The Consequences of the Crisis on European Integration and on the Member States" presents the contributions delivered at the Conference on "European Governance between Lisbon and Fiscal Compact", promoted by the Institute for the Study of Regionalism, Federalism and Self-Government "Massimo Severo Giannini" of the National Research Council.

The processing of these contributions, published by Springer, has considered the evolution of the institutional crisis of the European Union that has become even more prominent in recent months, during which the British referendum on Brexit was held, because of the difficulties encountered in bringing about a recovery of the economy of the Old Continent.

The various contributions take the move from the restrictions posed by the Lisbon Treaty, from the effects of macroeconomic monitoring and from the restraints produced by the Fiscal Compact, and they offer an analysis of the current situation of the European Union and of the effects of the measures adopted to manage the crisis, making reference also to how the citizens perceive Europe. Moreover, the articles offer thoughts about the European integration process and in particular about the effects that the policies adopted to face the crisis have had on the economic and financial sovereignty of the Member States.

The thorough examination of the situation of the EU between the Lisbon Treaty and the Fiscal Compact is characterized by an original multidisciplinary approach that offers the opportunity for an articulated reflection on the criticalities that affect the actions of both the European Institutions and the National Institutions.

Besides identifying the main critical elements that are causing the current stalemate in the European integration process and the growing dissent at the national level, the various contributions offer food for thought for tracing the next steps of the European journey in our globalized society.

The Italian observatory appears to be particularly well-positioned to prompt some thinking about the future of the European Union because Italy is one of the countries that has been most affected by the restrictive policies for curbing the crisis, in particular with reference to the definition of the national economic policy.

As is well known, the means for dealing with the crisis (Fiscal Compact, the Six Pack, and the Two Pack) have addressed essentially, if not exclusively, the need for stability and budget restraints, that at the present time they continue to be the focus of the actions of the European Institutions.

These measures have enabled the European Union, through the European Commission, to carry out a policy of tight surveillance, imposing on Member States the obligation to make cuts and implement financial stability programs, but they have not enabled the implementation of growth policies.

In summary, they have entailed a yielding of sovereignty by the States that has not been adequately offset by corrective actions in terms of participation in the decision-making process.

Consequently, the link between power and accountability has progressively deteriorated with the ensuing rising tide of the feeling of being run by a soul-less technocracy, far removed from the people and a widespread lack of confidence in the Union.

The articles show that European economic governance, entrusted to means that lie outside of the circuitry of the Treaties, has failed, and they point to the dangers of having strayed from the path towards a political union. A political union is needed to provide responses to the needs of the citizens through governance actions of a federal type on fundamental matters such as foreign affairs, common security, major economic choices and, in particular, immigration.

On the whole, albeit with different arguments, the articles all converge towards the issue of sovereignty as the Gordian Knot to be disentangled to recover a greater legitimation of the decision-making process.

The path that is suggested is a return to European constitutional law, hopefully in the direction of a federal Europe.

In a nutshell, the European Union needs to be reformed so it to go on existing: it needs to become more democratic and politically more significant than its underpinning Nation States.

If action is not taken readily, it will become increasingly difficult to stem the pressure and momentum of the political forces that are taking advantage of the discomfort of the people exhausted by the long-term effects of the policies adopted to react to the crisis, putting at great risk the very future of the integration process.

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August 2016

Stelio Mangiameli

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The Functioning of the European Union After the Lisbon Treaty and the Fiscal Compact

Antonio Brancasi

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1 Introduction

This paper focuses on the initiatives taken by the Union after the Lisbon Treaty to deal with the crisis. Such initiatives actually questioned some of the European economic governance principles, and in the least modified their terms of application, thus proving that they were inadequate for dealing with the situation at hand and that it was illusive to consider them as absolutely irrevocable.

Among the principles that experienced this fate there is the 'no-bail out' of Member States, and in any case the prohibition of granting financial aid,[1] and the principle of squaring the balance of the Union.

The prohibition to provide financial assistance derives from Arts. 122 and 125 of the TFEU. The former allows the Council to grant financial assistance to a Member State experiencing, or threatened by, severe financial problems, but then goes on to

[1]Chiti (2012) speaks of the transition from a "community of benefits" to a "community of risk" (p. 788).

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specify that such difficulties must derive from natural disasters or in any case from "exceptional occurrences beyond its control". Art. 125, instead, states that the Union shall not be liable for the commitments of Member States and adds that not even Member States that are not involved shall be liable for the commitments of other Member States. Even though opposing interpretations have been proposed,[2] recently confirmed by the Court of Justice,[3] Art. 125 was deemed to embody the 'no bailout clause' regarding States in difficulty and in any case the prohibition to provide financial assistance,[4] and, consistently with this interpretation, Art. 122 was construed as being an exception to this prohibition.[5]

Art. 310 of the TFEU lays down the principle according to which the revenue and expenditure shown in the budget of the European Union shall be in balance and requires that the Union shall not seek funding through loans from the marketplace.

Initially, on the occasion of the first intervention to help Greece, both principles remained intact,[6] because the financial aid was provided by Member States through bilateral and syndicated loans. Bilateral in the sense that the relationship was exclusively between the individual Member States and Greece as the borrowing State.[7] And the loans were syndicated because of the ties linking the lending States that provided the loans at the same conditions and for the role acknowledged to the Commission that organized and managed the loans. By the way, it is worth noting that these bail outs proved to be an excellent deal for the States that provided the loans because of the large difference between the interest paid on the funds they raised (around 2 %) and the interest rate on the loan facility (initially more than 4 % and then more than 5 %).[8]

Later there was another type of intervention which also complied with the two principles mentioned above. Namely the creation of a company under Luxembourg law by the States of the Eurozone, which was to last 3 years and have the aim of finding resources in the marketplace required to issue loans and provide guarantees to the participating States that were in difficulty.

The prohibition to provide financial assistance was instead questioned from within the European order by the establishment, with a regulation,[9] of the European Financial Stabilisation Mechanism (EFSM) that enables the Council, upon proposal of the Commission, to grant loans and open credit lines in favour of any Member State (including those not belonging to the Eurozone). To

[2]Messina (2013), pp. 4 et seq.; Napolitano (2012), p. 463.

[3]Court of Justice 27 November 2012, C-370/12, Pringle, on which Chiti (2013b), pp. 148 et seq.; Napolitano (2012), pp. 468 et seq.

[4]Ruffert (2011).

[5]Chiti (2013a, b), p. 5 et seq.

[6]Napolitano (2010) and Brancasi (2010).

[7]It was however envisaged that, if the lending State incurred higher fund raising expenses, the difference would be covered by a reduction in the interest that the borrowing States were owed.

[8]Napolitano (2012), p. 462.

[9]Regulation no 407/2010 of the Council of 11 May 2010.

implement such interventions the Commission and the Beneficiary Member State are to sign a memorandum containing the economic policy conditions to be complied with to reinstate a healthy economic and financial situation and find loans in the marketplace and the Beneficiary State makes the commitment to comply with such conditions.

The legal basis of the rules establishing the EFSM was found in Art. 122 of the TFEU, with an interpretation of the provision that was generally believed to be far-fetched. Art. 122ì states that financial assistance can be provided for disasters beyond the control of the State receiving the assistance and is hence quite different from what the EFSM intended.[10] The objections raised by the establishment of the EFSM and in view of it being replaced by a permanent system for intervening in case of a crisis in the sovereign debt of a Member State, led to the introduction of a new paragraph to Art. 136 TFEU by means of the simplified revision procedure (Art. 48 EUT). According to the new paragraph, Member States, whose currency is the Euro, can establish a stability mechanism to protect the stability of the Euro zone as a whole, but it specifies that whatever the form of the financial assistance, it must always be subjected to compliance with rigorous conditions.

But, notwithstanding this, when the financial assistance system was turned into a permanent system, it was done outside the European order through an ad hoc Treaty among the States of the Eurozone.[11] This was the European Stability Mechanism (ESM)[12] under which financial assistance is granted in the form of loans, credit lines and purchase of public debt securities in the secondary and primary markets. These interventions are subject to conditions that are more rigorous than the EFSM, in that the beneficiary State must engage in a macroeconomic adjustment program and to this end a memorandum is entered into that is consistent with the economic policy coordination acts adopted by the Union under Art. 121. In the recitals of the Treaty it is stated that the financial assistance of the ESM is subject to ratification of the Fiscal Compact by the Member State asking for assistance.

It was decided to configure this instrument as an international institution that enhances the intergovernmental method, to limit the types of interventions possible. Indeed, the decision-making body of the ESM is made up of the Ministers of the Member States and the name given to it is significant: Council of Governors. Moreover, decisions are taken unanimously[13] and where a qualified majority is envisaged, the votes are weighted proportionately to the capital contributed by each Member State. The Board of Directors, being the executive body, reflects the intergovernmental structure: indeed, each Member State appoints a member of

[10]Messina (2013), p. 6.

[11]On the increased use of the intergovernmental method through international agreements among Member States, see Pinelli (2014); and Chiti (2012), pp. 786 et seq.

[12]On the ESM, Napolitano (2012), pp. 463 et seq.; Chiti (2013a, b), pp. 10 et seq.; Micossi and Peirce (2013), pp. 55 et seq. On the possibility of establishing the ESM within the European legal order, with recourse to reinforced cooperation, and on a different explanation as to why the international solution was preferred, see Messina (2013), pp. 7 et seq.

[13]On the negative consequences of this voting system, see Peroni (2011), p. 993.

the Council and a substitute. The Treaty assigns to the European Commission the task of examining the requests for assistance and the function of negotiating and signing the memorandum with the requesting State and enforcing compliance with it. The IMF and the ECB are involved in these activities, and, based on the arbitration clause, provided for by Art. 273 of the TFEU, jurisdiction for the settlement of disputes on the implementation of the Treaty is attributed to the Court of Justice of the European Union.

The intergovernmental nature of the ESM was even further emphasized by the intervention of the German constitutional tribunal that, to protect the prerogatives of the Bundestag, claimed that the German representative in the Council of Governors may vote in favour of granting financial assistance to other States only if the Bundestag has given its approval in the assembly or in the commission.[14] This creates a system where approval by one Member State (and why should this not apply to the other States?) is binding on the ESM's decisions as to whether it should intervene or not.

Also the other principle, namely achieving a balanced budget at EU level and the prohibition to incur debts, was questioned in the events reported above. The regulation establishing the ESMF entitled the Commission to raise funds by turning to the markets or financial institutions for loans on behalf of the Union (Art. 2, paragraph 1 (2)). For the balanced budget principle to be complied with formally, off-balance sheet management was envisaged for the accounting of those items. Also the ESM is entitled to borrow in the capital markets from banks, financial institutions or other persons or institutions (Art. 21), with the peculiarity that, in this case, the balanced budget principle is only surreptitiously bypassed because the budget of the EU is not directly affected by these transactions and the relevant debt is in the name of another body.

2 The Strategies Against the Crisis and the Principles of Monetary Policy

The need to face the crisis of the last few years has demanded that also the principles underlying the monetary policy be questioned. It is worth recalling that in this respect the Lisbon Treaty had not introduced any major innovations[15] because it had restricted itself to placing the ECB among the Institutions of the Union and to formally recognizing the distinction between ESCB and the Eurosystem.

The overall structure of the system was substantially the one defined in Mastricht: marked distinction between governance of the economy and governance of the currency; price stability being a top priority; structural independence of the

[14]Bonini (2012); Pinelli (2014); Chiti (2013a, b), pp. 12 et seq.

[15]Manzella (2008), pp. 278 et seq.

ECB; functional independence of actions concerning credit; influence of the Council on foreign transactions through exchange rate agreements or through the issuing of policies; elimination of the treasury in creating the monetary basis. It is this latter element that, after Lisbon, was most affected by the crisis.

In September 2012, the Steering Committee of the ECB decided to add to its monetary policy instruments, the Outright Monetary Transactions[16] in secondary markets for the purchase of sovereign bonds.[17] It is not at all new for the ECB to purchase Government bonds in the secondary markets.[18]

After all it is the purchase of public debt securities in the primary market that, together with the anticipazioni, constitutes the channel for creating money bases that is no longer allowed. Instead, when the securities are purchased in the secondary markets the money goes to the banks and is therefore an intervention on credit rather than on the treasury.

Indeed, the OMTs are quite different from the usual sovereign debt purchases in the secondary markets, both for binding and final purchases and for repurchase agreements; in many respects these differences contribute to making them similar to treasury interventions.[19]

(a) In the case of the OMTs, it is the ECB that restricts the scope of its intervention only to the purchase of sovereign debt securities and, it even establishes which Member State is involved; vice versa, the ordinary binding and final transactions or the repurchase agreements involve eligible assets, including also the sovereign debts of Member States, which is purchased if and to the extent that the banks decide to transfer this asset instead of other types of financial assets.
(b) All binding and final transactions involving sovereign debt produce the effect of supporting the price of the respective securities, but in the case of the OMTs this effect is precisely what the ECB intends to achieve and is not merely and simply an additional and indirect effect.

Finally, it is true that the OMTs have the purpose of funding banks and therefore are classified as credit instruments, but they do this, not to produce the monetary basis required to keep prices stable, but rather to support the price of the bonds of a specific sovereign debt, directly for those already issued but also indirectly for those yet to be issued; that is to say they play a function that is similar to treasury interventions.

[16]BCE, *Bollettino mensile*, September 2012. On this type of intervention, see Napolitano and Perassi (2013), pp. 48 et seq.

[17]But prior to this there had already been the decision of the ECB of 14 May 2010 that established a programme for the securities markets (Securities Markets Programmes): see Napolitano and Perassi (2013), p. 44.

[18]The repurchase agreements can be made on eligible financial assets, namely those assets listed in an ad hoc list that includes also sovereign debts; also final purchases can be made of these assets through bilateral procedures not at regular intervals.

[19]These are the grounds on which the issue of conformity of the ECB's decision to perform OMTs with the Treaty was raised before the Court of Justice, see Olivito (2013); Bilancia (2014a), p. 7.

All this explains why, in announcing these transactions, the ECB repeatedly felt the need to justify them by demonstrating that they fully complied with its primary mission which is that of guaranteeing price stability and hence they are not in contrast with (EC) Regulation 3603/93 of the Council that prohibits measures that skirt around the prohibition to fund public administrations on a monetary basis.

The arguments used in this case are that such measures are absolutely necessary to fight against the obstacles set up against the transmission of monetary policy.[20]

The arguments of the ECB are absolutely convincing. But the fact remains that such transactions determine a broadening of the intervention instruments of the ECB, at least, with regard to a strict reading of the provisions of the Treaties. And this is so because the By-laws of the SEBS (Art. 2) specifies that the primary goal of price stability must be pursued by acting "in conformity with the principle of free competition in an open market economy", this should probably rule out any intervention in the market to uphold the quotation of certain financial assets as opposed to others.

What is most interesting about this story is that the compelling arguments of the ECB demonstrate that it is not possible to guarantee price stability because it is not possible to remove the obstacles against the transmission of monetary policy, without, if necessary, intervening in sovereign debts with actions aimed at supporting their quotation. But the fact that this type of transaction may appear to be spontaneous with respect to the ECB's instrument indicates, if anything, the inadequacy of the Treaties because they do not provide the ECB with full powers for it to pursue its mission.

3 The Conditions Imposed on Member States for the Purchase of Sovereign Debt

But there is even more. The ECB links the preannouncement of the purchase of sovereign debt bonds to the adoption, by the States involved, of a series of measures that concern not only their budget policy but even their economic policy tout court, and even institutional reforms. This is the backdrop of the letter by the two

[20]Obstacles because of three sets of factors. First of all the high yield of the sovereign debts of some States overshadows other financial assets in the marketplace that have to compete against such yields and that, because they are compelled to ensure similar yields, increase the funding costs of the banks. Secondly, the loss of value of the sovereign debt reduces the guarantees available to the banks to obtain liquidity, given the fact that on the interbanking market the relevant transactions are made by using public debt securities as collateral. Thirdly, the very loss of value of sovereign debt obviously determines a worsening of the financial conditions of the players, including the banks, that have those securities in their portfolios.

Presidents of the ECB (outgoing and incoming) to the Italian Government,[21] and the links that these actions by the ECB have with the MES.

(a) The letter of the two Presidents required the liberalization of local public services, reform of collective bargaining, revision of the rules on hiring and firing, reform of the public administration to improve its efficiency, elimination of some intermediate administrative levels like the Provinces.
(b) As to the links with the ESM, a necessary precondition for these transactions is that the recipient State defines and complies with a set of rigorous conditions within the ESM and that such programme envisages the purchase of public debt in the primary market: in the presence of these two conditions, the ECB has full discretion as to whether it will carry out the preannounced transactions.

All of these aspects of the story lead to the conclusion that to combat the obstacles against the transmission of monetary policy, it is not sufficient to purchase sovereign debt that generates these obstacles in the marketplace, but it is also necessary that such measures be accompanied by specific budget policies and structural reforms by the States that issue the bonds. Moving from this premise, the letter of the two Presidents expresses the idea that it would seem to be necessary to unify the two decision-making processes, monetary policy on the purchase of sovereign debt and the economic policy, tout court. According to this idea it would be necessary to go beyond the system delineated by the Treaties according to which the two decision-making processes should be distinct and separated, one belonging to the Council through multilateral surveillance (Art. 121 TFEU) and the other to the ECB. It is irrelevant, for the purposes of this paper, to note that underlying this view is the idea that the two decision-making processes should be brought together under the ECB.

From the same premise, the required link with the ESM, instead, would seem to confirm that the two decision-making processes should be kept separate, but it would also demonstrate the need to reverse the relation because economic policy decisions,[22] adopted to impose interventions in Member States, turn into the condition for the ECB to pursue its mission for cases where it is asked to purchase sovereign debt.[23]

This is confirmation that, in actual fact, things are going well beyond the By-laws of the ECB according to which monetary stability is its top priority and, subordinately, once it is ensured, all the other goals of the Union can be achieved, including economic policy goals.

[21]On this circumstance, Boggero (2012); Olivito (2014). On the issue that this is not among the powers of the ECB, G On the issue that this is not among the powers of the ECB, Napolitano and Perassi (2013), pp. 46 et seq.

[22]According to the Court of Justice Pringle cit, the ESM is an instrument of economic policy.

[23]They suggest the ECB exercise self-restriction in its freedom of action, Napolitano and Perassi (2013), p. 51.

Indeed, there is a second explanation for the conditions imposed on States whose debt is purchased by the ECB, an explanation that is more likely even if it is very disquieting. It seems more realistic to assume that the imposition of budget policy and economic policy conditions on States whose bonds are to be purchased is required, on the one hand, by the need to overcome the opposition of some of the other States and, on the other, by the idea that ultimately it is a bail out that, as such, is to be accompanied by punishing measures or in any case dissuasive measures against any moral hazard. According to the former explanation, we end up acknowledging that the independence of the ECB, decided initially for its monetary policy decisions to be free from intergovernmental influence, is not at all feasible at least in situations of crisis because the link with the ESM demonstrates that instead there is no such independence, and instead there is dependence on institutions extraneous to the Union, underpinned—lo and behold—by intergovernmental influence.

The second explanation runs the risk of being anachronistic, if one considers that the crisis affecting the debt of some States (in particular Spain and Ireland) was caused precisely by the bailout by the banks,[24] that is to say by interventions without which the measures to be taken by the ECB would have had to be much more severe to ensure the transmission of monetary policy; furthermore, such interventions were made even more necessary also because of the insufficient surveillance on financial markets by the Union.

Ultimately it is safe to say that the crisis was dealt with using instruments that went beyond the European governance design but did not do it in the best of ways, because they strengthened intergovernmental involvement (???) and were driven by a pragmatism justified perhaps by the need for rapid action that did not allow them to design a new model considering the inadequacies revealed by the previous model.

4 Economic Policy Rules and Instruments in the Eurozone

Also with regard to economic policy, the Lisbon Treaty had inherited rules and intervention instruments from the past.[25] We need to go back to the Maastrich Treaty and to the economic convergence parameters established in view of the adoption of the Euro. The purpose of such parameters was to limit participation in the euro only and exclusively to the States whose economies presented some degrees of uniformity. This is quite understandable because by foregoing the

[24]Europe's intervention would have merely "rescued the rescuer" (Napolitano (2012), p. 461.

[25]Furthermore, under the Lisbon Treaty Art. 121 (4) is amended following the fact that the Commission may address warnings to the Member State that as a result of its behaviour runs the risk of undermining the good functioning of the UEM; in addition the representative of the State in question cannot vote in the Council.

rebalancing function of the quotation of currencies,[26] the single currency would create a truly single market which would take on the characteristics of the individual national economies, and hence these characteristics would turn into negative externalities for the Member States with the best performances.[27]

This need for convergence was not restricted only to the moment when the euro was established and to the time when the various States decided to join it. It was self-evident that the prohibition on excessive budget deficits remained and was even toughened, so much so that the monitoring procedure of the States of the Eurozone envisages sanctions for non compliance. In this way, convergence started out as a condition and requirement to join the euro but then became the rule for Member States to equally share the overall debt; recourse by each State to the financial markets is bound to impact the interest rates of the entire zone and this has an impact on all the participating States.

For the other convergence parameters their efficacy was not extended throughout the Eurozone, but nevertheless the same needs that had led to setting them as conditions for joining the euro remained and were even enhanced. Of course, in this different context, these parameters presented themselves differently even though their content remained unchanged: the point was no longer to comply with the range of oscillation of the EMS, but to balance the budget without the rebalancing function of the exchange rate market; again the issue was to ensure that the single interest and inflation rate of the Eurozone was not to be the result of the levelling produced by the single currency, but the expression of a real homogeneity of the economies of the various countries. Conceived in this way, these profiles were in fact absorbed into the economic policy that remained in the purview of the Member States (Art. 2 (3) TFEU) but they engaged to "regard their economic policies as a matter of common concern" (Art. 121 (1) TFEU). In the Treaty there is the idea of a common economic policy, not because it is the competence of the Union but because it is the outcome of the coordination of national policies, and the solution is that it embodies the need for convergence that had originally been laid down as a condition to join the euro.

The instrument offered by the Treaty for this purpose is the mechanism of multilateral surveillance, as laid down in Art. 121 TFEU, which is implemented by the Commission, by the Council and by the European Council by laying down the outline of the economic policies of Member States.

In such a context, the important profiles are no longer only those considered originally by the convergence parameters, because alongside them there may be many others and, ultimately, all those relevant to an economic policy programme. Furthermore, the consideration of these profiles needs not be necessarily targeted to goals of mere convergence between Member States, almost as if the criticalities of

[26]For a discussion on the consequences of this effect, see Bilancia (2014a, b).

[27]Del Gatto (2012), p. 43 footnote 22 emphasizes how the lack of uniformity among the economies of the States of the Eurozone commands the adoption of monetary policy measures that are procyclical for some and countercyclical for others.

the entire European economy were not important just because they are common to all Member States.

It is also worth noting that the budget policy is treated differently by the Treaty from the way the economic policy is treated. In both cases these are spheres that are left to the competence of the Member States, but while the budget policy, as a result of the prohibition to run up excessive deficits, comes under negative limitations, furthermore defined by numerical rules, aimed at preventing that the choices made by some States may generate negative externalities for the others, in the case of economic policy the restraints and limitations are by tendency positive (States are intended to do this or that) and are not necessarily aimed at preventing negative externalities.

The failure of this system occurred immediately, as a result of the 1997 regulations,[28] which, by introducing the Stability and Growth Pact (SGP), focused attention entirely on the budget policy, starting a sort of "single thought" of the Union polarized on the size of sovereign debt and of public deficits. And besides coming under the limitations established by the prohibition of running excessive deficit and guaranteed by the ad hoc surveillance procedure, the budget policy became the content of the coordination of economic policies, nay the sole content of the latter,[29] and hence also the economic policy expresses only the budget policy and does so with the same terms as the prohibition on excessive deficits, that is to say with negative limitations and numerical rules.

Another step, it too prior to the Lisbon Treaty and it too a rupture of the original design, occurred in 2005 when, following the critical situation of the budgets of France and Germany, it was decided that the GSP was to be defined no longer in nominal terms but in structural terms:[30] since then, the net debt result, with a view to the GSP, must be "Corrected according to the economic cycle" and calculated net of the one-off measures. In my opinion, the consequences of this innovation are twofold which additionally has had the merit of avoiding the pro-cyclical effects of the GSP.

First of all, the rules to be complied with in applying the GSP were expanded and, through such rules, additional technical elements were introduced that were bound to start bargaining sessions between the Member States and the Commission, whose actual political terms inevitably remain hidden behind the merely technical nature of the issues. Indeed the issue is to establish when measures to increase or reduce revenues or expenses are to be considered as one-off; and most of all, the issue is to establish the recurrence of exceptional events and determine both the potential GDP of the State involved so as to identify the direction of the cycle and its size and the extent to which it could affect the national budget.

Secondly, the rules of Art. 126 TFEU (and of the relevant protocol on excessively high deficits) and those established based on Art. 121 TFEU (the GSP), are

[28]Regulations 1466/1997 and 1467/1997.

[29]Alla (2011).

[30]Regulations 1055/2055 and 1056/2005.

formulated in totally different terms: nominal in one case and structural in the other; hence, the recurring explanation according to which the corrective and penalizing function of the prohibition of excessively high deficits was compounded by the preventive function of the medium term of the GSP, conceals two distinct limitations that are different in content and not at all coherent with each other.

5 The Novelties Introduced by the Six Pack and the So-Called Two-Pack

Among the measures adopted to cope with the crisis there was the reconsideration of this system that the Lisbon Treaty had inherited from the past: this occurred at first with the regulations and the directive that are known as the Six Pack followed by the two regulations of the Two Pack. The most important novelties here are two, in my opinion.

The first concerns the way Art. 121 TFEU was to be implemented, namely the coordination of national policies that were to generate a common economic policy: indeed the fact that this coordination too should be limited to the budget policy is outgrown;

otherwise:

indeed coordination was no longer to be limited to the budget policy.[31] In this regard, the introduction of the European semester has entailed changes in both procedure and content.[32]

The semester begins with the definition (through a procedure that involves the Commission, the Council and the European Council) of a draft for the broad guidelines of the economic policies of the Member States (Art. 121 (2)) and of their employment policies (Art. 148 (2)). Therefore the Member States are to submit stability programmes (or convergence programmes for the States outside of the euro zone) and national reform programmes: the former concern the budget policy and define the relevant medium term objectives consistently with the GSP, while the latter should include in an overall approach, but separately from public finance issues, both the economic policy *tout court* and the guidelines on the labour market and employment development.

These programmes, and hence also the national reform programmes, are evaluated by the Council that, from recommendations by the Council, provides indications to the Member States about macrofinance and macrostructural policies; and if

[31] On the marginal importance previously acknowledged to the coordination of economic policy, so much so that the guidelines were issued by the Council only every three years Boggero (2012).

[32] On the calendar of obligations required by the European semester, Boggero (2012).

such indications are not complied with they may give rise to recommendations by the Commission so that specific measures be adopted,[33] or to a warning by the Commission in pursuance of Art. 121 (4).[34]

Moreover, under the powers attributed to the Union by Art. 121 TFEU, a system was set up, it too centred on the European semester, to cope with the problems related to the macroeconomic and macrofinance imbalances among Member States.[35] Indications are provided[36] on both internal indicators (public and private debt, trends in the real estate financial market, unemployment trends, etc) and external indicators (evolution of their external accounts, saving and investment balances, export market shares, etc.) that were to reveal any imbalances[37]; it would then be the Commission that would apply these indicators (alert mechanism)[38] and start an in-depth review[39] whose outcome would be a statement that there are imbalances and even excessive imbalances, with the consequence in the former case that the Council would address recommendations to the State involved and in the latter case, subject to approval by the Council, a corrective action plan would have to be drawn up by the State involved.[40]

All this is furthermore accompanied by penalties in the form of deposits and fines to be paid by the non-complying State.

In conclusion, the importance attached to national programmes, their envisaged content, that brings together the issues of economic policy and employment policy, and the importance attached to the macroeconomic imbalances, (always in the context of the application of Art. 121 TFEU), are all elements[41] that are meant, at

[33]See the Recommendation addressed to Italy on the 2014 national reform programme [Recommendation of 8 July 2014 (2014/C 247/11)].

[34]On the European semester, Alla (2011) according to whom it would establish a link "between the sustainability of public finance and growth measures" (p. 35). For a description of the unfolding of the first European semester, Boggero (2012); on the calendar of duties, Nugnes (2013).

[35]On the control of macroeconomic imbalances, Alla (2011).

[36]By the Commission.

[37]On all of these indicators, Servizio studi e Servizio bilancio della Camera dei deputati (2014).

[38]European Commission, *Alert Mechanism Report of November 2014*, Brussels 13 November 2013, COM (2013) 790 final.

[39]European Commission, *Results of in-depth reviews under Regulation (EU) No 1176/2011 on the prevention and correction of macroeconomic*, Brussels 5 March 2014, COM (2014) 150 final.

[40]It is worth noting that the Commission made the proposal to establish forms of financial assistance for States presenting macroeconomic imbalances by creating a fund, to which the States would contribute in proportion to their gross national income, and through agreements under which the beneficiary States would commit to making the necessary reforms to overcome the imbalances. Tufano and Pugliese (2014), pp. 328 et seq.

[41]Alla (2011) highlights the link between these new elements and the goals of the Europe 2020 Strategy [EU Commission, *Europe 2020. A Strategy for Smart, Sustainable and Inclusive Growth*, Brussels Com (2010)]. Europe 2020 sets out a vision to achieve high levels of employment (75 %), R&D spending at 3 % of GDP, low carbon economy cutting greenhouse gases by 20 % and decrease school dropouts to below.

least, to attenuate the exclusive importance previously attached to the budget policy, through the GSP, even with regard to the coordination of economic policies.

The restraints on the budget policy are however of crucial importance and play an even more important role than in the past.[42] The limit on net debts, that constitutes the medium term objective, is more precise and is specifically fixed for each State (and in any case it must not drop below 1 % or, for the States with a total debt greater than 60 % of the GDP, it must not be more than 0.5 % of the GDP); in addition the structural or non-structural nature of this magnitude is defined with greater accuracy.

The most important novelties can however be summarized as follows.

- The rules on the actions taken to come close to the medium-term budget objective and the penalties envisaged also in support of the GSP (and no longer only as a way of securing the prohibition on running excessively high deficits). Indeed, the Member State that has not adopted the recommendations made by the Council, in case of significant departure from the path leading to the objective, may be compelled to take out an interest-bearing deposit;
- Unlike the past, also the GSP attaches importance to debt reduction in accordance with the 1/20 per year rule;
- The establishment of a strengthened surveillance procedure that, besides concerning the States that have requested or received financial assistance, may be activated towards those States that are in severe difficulties with regard to financial stability (this circumstance is examined by considering principally public finance data). The outcome of this procedure may be the requirement that the State draws up, in agreement with the so-called Troika (Commission, ECB and IMF), a macroeconomic adjustment programme to be submitted to the Council, which, unlike its name, is based mainly on the assessment of the sustainability of the public debt of that State.
- The control ensured by the semester, that is in itself a novelty compared to the past and also concerns the budget policy, has a follow up in the second half of the year which concerns only the budget policy this time[43] (in particular, the budget of the central administration and the draft budget plan for the whole of the public administration).[44]
- At the European level there is no judge that is empowered to ensure compliance with these restraints, nor with those on the prohibition to run excessively high deficits, not even those related to the GSP, because no infringement procedure is envisaged in case of violation. The aim of the Fiscal Compact[45] is precisely to make up for this shortcoming, namely to bring all these restraints under national

[42]On the strengthening of the GSP, Alla (2011); Messina (2013), pp. 15 et seq.

[43]See the opinion of the Commission of 15 November 2013 [SWD (2013) 606 final] on the Draft Budgetary Plan of Italy.

[44]Pinelli (2014) on the relationships between the Commission and the National Parliaments.

[45]On this Treaty see Messina (2013), pp. 21 et seq.; Perez (2012), pp. 469 et seq.; Tosato (2013), pp. 27 et. seq.

jurisdiction.[46] In the case of Italy there is the peculiarity that this has been taken even further because the constitutional law that implements the Treaty did not restrict itself to recalling the European restraints, as they are defined for specific cases in the legal order, but it has transformed them into autonomous provisions of our Constitution, bound to live a life of their own with the result that they can abolish - at least until the Constitution is taken seriously - those very margins of flexibility provided for by the European regulations.[47]

– Finally it must be recalled that in the enforcement of the rules on the budget policy and those on excessive imbalances, the Commission's position has been reinforced by establishing that its proposals are intended to be adopted by the Council if the latter does not reject them with a qualified majority (*reverse majority voting*).

6 Final Remarks

Even though the need to cope with the crisis demanded that some principles, or their consolidated interpretation, be set aside, some constants still remain.

Among them is undoubtedly the central importance attached to budget restraints. In favour of this stance is the albeit too limited recognition of the importance of economic policy objectives in the implementation of Art. 121 TFEU. The national reform programmes of the Member States are mainly considered for their links with the budget policy and are not at all seen to embody a common economic policy; it is nevertheless true that an economic policy cannot be built up only, or mostly, through structural reforms which should instead be the focus of national programmes. The structure of the European semester, that focuses on these programmes, is in fact mainly centred on stability programmes and on their respective budget restraints, so much so that the regulation on the sanctions is innovative in that it extends the penalties but it does so only to strengthen the commitments taken by each Member State to comply with its own stability programme. In practice, neither the Six Pack nor the Two Pack outlined a path to reach a common economic policy through the coordination of national policies.

Another constant is undoubtedly the overriding attention paid to convergence, that is to say to the need to make sure that each State does not produce negative

[46]Because this is not allowed, not even by the arbitration clause envisaged by the Treaty, under which legal proceedings may be started before the Court of Justice but only when the European budget restraints are not transposed into the legal system of a Member State (for an review of this jurisdiction of the Court of Justice, see Porchia (2013).

[47]And indeed, in starting the procedure for excessive imbalances, the Commission must not restrict itself to checking the debt/GDP ratio, but it must also consider various factors such as the level of public investments, the performance of private finance, the growth policies adopted by the State involved, its pension reforms, the financial assistance provided to other Member States and the contributions given to international solidarity initiatives.

externalities that may undermine the other States or the whole of the Union: when, in applying Art. 121 TFEU measures go beyond budget restraints, this is done mainly for this purpose. Also the system in support of sovereign debts and the system aimed at bridging macroeconomic imbalances go in this direction: it is significant to note that what was considered were the imbalances of one State as compared to the situation of other States, and indeed, in applying the relevant indicators, the Commission must consider the magnitude of the same indicators referred to the Union. Ultimately, the original logic of convergence parameters still persists, a logic that the Treaty confirmed, also for the Eurozone, only for the public finance and exclusively in terms of the prohibition to run excessively high deficits (Art. 126 TFEU). The coordination of economic policies envisaged by Art. 121 TFEU would have allowed in any case for the transformation of the other convergence parameters into elements of a policy, thus making them lose their mere function of forestalling negative externalities.

The most recent outcomes of the crisis appear to confirm, in my opinion, the absolute inadequacy of this approach: in a Europe where there is no growth, the solution is not to have everyone decrease to the same extent of the State that decreases less.

Finally, the constant of sterilized politics enmeshed in a web of rules[48] whose aim is to neutralize conflicts that nevertheless exist because Europe is underpinned by a rationale that is still of the intergovernmental type.[49] Rules imposed both on States and on the European Institutions for transmitting economic policy inputs to the States. The limitation, and solution, to the sovereignty of Member States fully justifies that there be a body of rules that delimit their actions and sets ways whereby each of them can coexist within the supranational order. Instead, what is extremely dangerous is a net loss of sovereignty,[50] that is to say the portion of sovereignty that is devolved to the Union to allow it to do what the States are barred from doing cannot be used because the EU cannot replace Member States for lack of powers, because it only has coordination competences,[51] and for lack of resources, since with the Lisbon Treaty there was only a strengthening of the role of Parliament on budget matters while, with regard to revenues, the intergovernmental nature and the so-called "net balance" rationale were confirmed.[52]

This inability to express an economic policy of its own, produces the result that the Union, instead of governing the market by directing it and conditioning it, ends up having the function of an acritical and passive support of the trends that animate

[48]Pinelli (2012) speaks of a "philosophy of rules" and of the "primacy of rules".

[49]About the reactions to the crisis having an intergovernmental nature, Pinelli (2014); Chiti (2012), pp. 784 et seq.

[50]Bilancia (2014a, b).

[51]For similar observations Bilancia (2014a, b), p. 12, proposes that the governance of the economy be a concurrent power of the EU, at least for the Eurozone; a similar view is held by Rossi (2013), p. 750; while Peroni (2011), p. 973 maintains the need for a revision of the TEU and of the TFEU for the creation of a political-economic power in charge of the economic choices of the Union.

[52]On this point see, Salvemini (2013), pp. 99 et seq.

the market, even where there is speculation. This is where the true paradox lies, namely that the many, and reinforced, procedures controlling the policies of Member States does not consist in the threat of sanctions, in the form of interest or non-interest-bearing deposits and in fines, but rather it lies in the disclosure to the market that rules have been infringed; in other terms it should be the market that provides the penalty to the infringement; but the crisis has demonstrated that the penalties of the market cause damage also to the Union.

The need to enable[53] the growth of the economic system requires policies that are tailored to the context and, even though there is no agreement on the strategy to be pursued to attain this goal, the idea of implementing options once and for all, valid for all contexts, can be explained but is also extremely dangerous. This explains why, whatever the composition of the bodies participating in the shaping of such rules objectively has the goal of reassuring the Member States against a supranational policy and of subjecting, for this purpose, the discretionary nature of the Commission to a stringent web of rules that is closer-knit, the greater the likelihood of such rules prevailing,[54] as occurred following the introduction of *reverse majority voting*.

The inadequacy of proceeding according to rules is made evident by the fact that economic growth, that the Union should promote, is increasingly defined also in qualitative terms, especially after Lisbon. The objectives are to promote full employment and social progress as well as a high level of environmental protection and improvement; and also social justice and social protection, gender equality, solidarity between generations and between States, and protection of minors Art. 3 (2) TFEU). A mission of this type not only requires economic policies, and not merely rules, but it also requires that it be the outcome of the fine balancing of multiple interests that should be in the purview of the Union. And these interests are no longer only those concerning the good functioning of the market, just like its relevant balance, even where it recognized the greater importance of some of them (such as for instance price stability), should not overlook the possibility that the specificities of current circumstances may demand that they be sacrificed.

For all of these reasons I have reached the - in many respects - predictable conclusion, that European governance has made a lot of progress in facing the crisis but it is still has a number of shortcomings that the crisis has emphasized and that can hardly be overcome without a reform that removes the impact of the intergovernmental dimension on the Institutions of the Union and on its relevant decision-making processes.

[53]Even when the ordinary procedures were activated, they were systematically duplicated by parallel negotiations at the intergovernmental level (Chiti 2012, p. 785).

[54]Tufano (2012), p. 155 states that the Commission has “technical powers” rather than “real decision-making powers”.

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Overcoming of Multilevel Theory, Within Relationships Among Europe, Member States and Subnational Levels of Government

Antonio Cantaro

Contents

1 Revolution

The title of the assigned paper cautiously suggests that I am addressing the "overcoming" of Multilevel Theory. However, I am known among my peers for not being prudent. In this essay, I developed a double theme: the *ascent* and the *decline of the multilevel paradigm*.

The ascent of the paradigm, considered "revolutionary" by its creators, has been explained by two distinct types of reason.

On the one hand, its extraordinary harmony with the *ideology of the Union* includes a mix of "judicial maximalism" and "political minimalism".[1] Being part of the "European area", this mix 'prescribes' that the *closer and closer regulatory*

[1] Cantaro (2003).

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integration of legal systems also results in a counterpart, namely a *weak institutional and political integration*.

On the other hand, its equally extraordinary harmony with the legal science's request to dispose of a *doctrine* in such that it (1) fully responds to the reciprocal *regulatory opening of legal systems* that belong to the European area, and (2) is able to overcome limitations and quandaries of the *monist, dualist and pluralist paradigm* with whom it has for a long time contextualized the correlation between legal systems.[2]

The fortune of the multilevel paradigm is all in *here*. And this 'here' is not irrelevant.

For about 20 years, starting from Maastricht, the *Establishment* and jurists of all disciplines have represented the European legal system as a real *constitutional system*; a *unitary* legal system, although legally pluralist and therefore deprived of that character of *exclusivity,* that a consolidated tradition strongly required to consider it a *real legal system*.

Today, I would like to draw your attention to the multilevel paradigm decline, giving us back a Union in the grip of an unquestionable *constitutional disorder*. This decline also leads the legal science to be "orphan" of a sophisticated doctrine of the "being" and the "must be" of the integrated legal system.

No one should underestimate this loss, demanding seriousness to be 'elaborated', if a new doctrine capable of understanding the *law of crisis* has to be prepared.

A *doctrine of the conflict* which could acknowledge that the *constitutional crisis of the Union*[3] should not to be ascribed to a "cynical and deceitful destiny". Rather, the constitutional crisis is a result of *different and conflictual sources of legitimacy* to which, in the globalized world, 'respond': contemporary legal systems and public decisional processes.[4]

2 Sudden Awakening

Pernice devised his construction even before the Treaty of Lisbon[5] came into force. In one of his specific contributions, as a comment on that Treaty, whose optimistic title is *Multilevel Constitutionalism in Action,*[6] he has claimed analytical perspicuity, dynamic nature of this paradigm and its persisting capability to discipline the "process" of constitutionalization of the Union.

[2]Cantaro (2008).

[3]Cantaro (2012).

[4]Cantaro (2014), p. 49.

[5]Pernice (1999), p. 703; Pernice (2002), p. 511; Pernice and Mayer Franz (2003), p. 43, on which see the critical considerations of Scarlatti (2012).

[6]Pernice (2009a), p.385.

However, currently, the problem clearly lies on developments subsequent to the Lisbon Treaty and on the lasting descriptive and normative character of the paradigm, in spite of a *law of crisis* uncovering: (1) architectural weaknesses of the constitutional Union, (2) its increased asymmetry,[7] (3) the lack of a *locus decidendi,* as well as of a *modus decidendi,* able to tackle the government of emergencies,[8] based on codified rules of Treaties.

In this regard, it is enough to look through copious publications above the veritable havoc determined by the sovereign debt crisis regarding the old economic governance framework. Even if still part of the literature, for the sense of compassion towards the nation or for justifiable embarrassment, omit "unkept promises" of the multilevel paradigm and deep hiatuses originated in the new framework. Starting from the macroscopic "rift" of its legal basis, largely beyond the law of the Union and badly carried back with subsequent major operations.

None of the "promises" of the *multilevel doctrine* has been kept, in the current context.

The *cooperative integration* among Union, Member States and subnational institutions gives way to a *coercive integration* of managerial-technocratic[9] hallmark, led by one of the Member States (Germany) and by Troika (European Commission, Central Bank and International Monetary Fund) in light of quantitative and automatic constraints established to protect the unique "value"—the macroeconomic stability[10]—at the core of the European agenda for the last decade.[11]

The multilevel system of rights protection far from enhancing guarantees and contents related to citizenship, in respect of social benefits is continuously exposed to restrictive variation, on behalf of more important budgetary constraints. Whilst regarding collective social rights and industrial relationships, "balancing" unilaterally acts for the free enterprise's benefit, legitimating those "structural reforms" that, meanwhile, are codified in the system of less virtuous States.[12]

Nevertheless, the crucial *unity of the legal system* is where the *constitutional disorder* is, figuratively, more damaging. "Promise" that, in the light of some authoritative European Court decisions, is an increasingly uncertain postulate: the principle of mutual recognition of constitutional authority among systems belonging to the European Area, the core of the multilevel paradigm, is no longer the unquestioned prerequisite of the *jurisprudence of crisis*.

Paradigmatic, in this regard, is the approach emerging from the decision of the German Federal Constitutional Court (FCC) with regard to the legitimacy of ECB's plan of interventions, the program of "Outright Monetary Transactions" (OMT). An

[7]Cantaro (2010).

[8]Mangiameli (2013).

[9]Jorges and Giubboni (2013), p. 343.

[10]Losurdo (2015), p. 108.

[11]De Ioanna (2014), p. 123.

[12]Cantaro (2011), p. 1; Cantaro and Losurdo (2013), p. 53.

approach anything but isolated, a progression of assumptions already declared in the Lisbon judgment (*Lissabon Urteil*[13]) whose influence had already been heard in other Constitutional case law. It is worth discussing.

3 Case-Law of Crisis

By order of 14 January 2014, the FCC has made a reference to the Court of Justice for a preliminary ruling against the "Outright Monetary Transactions" (OMT) program, announced by the President of the ECB on 6 September 2012. A preliminary ruling claiming the OMT's program opposition to the principles of the FCC jurisprudence.[14] In the Court's view, the purchase of Government Bonds of countries in need could expose the ECB to the risk of losses falling into disfavor of shareholder Member State governments, risking the production of burdens to be borne by the budget of that State previously unendorsed by the parliamentary body. The FCC indeed assumes that the OMT's program is not a monetary policy instrument, falling within the remit of the ECB but an economic policy instrument. The purchase of Government Bonds in the secondary market has the equivalent role of Assistance Measures of the European Stability Mechanism (ESM), hence they will violate the assumption underpinning the prohibition of overdraft facilities or any other type of credit facility mentioned in Art. 123 TFEU. According to the FCC, OMT clearly correspond to acts addressed "ultra vires". As such, they should not be applied by German institutions because their adoption would represent an illegitimate interference on plaintiffs' right to vote.

Based on this, the FCC asked the Court of Justice to deliver the correct interpretation of the EU legal provisions, "suggesting" the so-believed correct answer. According to the FCC, the only way to save OMT's legitimacy is to provide a restrictive interpretation excluding the purchase of Government Bonds for a limitless amount, thus, achieving the debt reduction of certain Member States and significantly affecting price performances.

Resorting to preliminary ruling could be interpreted as act of formal deference by the FCC towards the Court of Justice, an expression of "constitutional tolerance", of dialogue and partnership, of open-mindedness and harmony, of trust toward the "*multilevel cooperation*" *of European Courts*. Nevertheless, the substance of statements within the decision, beyond undefined outcomes from the debate with the Court of Justice (a probable "dilatory compromise"), takes another direction.

The German Constitutional Court has indeed reclaimed the role of final arbiter with regard to the extension of European Union competences, particularly when it was highlighted that the intervention anticipated by the ECB could affect also the *national constitutional identity principle* deriving from Art. 79, paragraph 3 of the

[13]Cantaro (2009), p. 121.

[14]To summarize Donati (2014).

Basic Law (*Grundgesetz*), the observance of which, after the Lisbon judgment (*Lissabon Urteil*), represents further proof of the legitimacy of EU acts. According to the FCC, OMT could, indeed, bring significant losses to the ECB and consequently to the Federal Bank (*Bundesbank*), ending up with the creation of burdens. These burdens are capable of restricting the decisional autonomy of the House of Representatives (*Bundestag*) with regard to budgetary issues, which represent the backbone of the German constitutional identity.

A *very uncooperative message*, as we can unequivocally deduce from further clarification that the FCC accepts the interpretation issued by the Court of Justice under the Decision according Art. 267 TFEU as a mere starting point, reserving identification on the core of the constitutional identity and verification on the violation of this core by the sentence. The control on the constitutional identity, according Art. 79 of the Basic Law (*Grundgesetz*), has indeed pointed out the FCC is different from the national identity control guaranteed by Art. 4, paragraph 2 TEU. While Art. 4 paragraph 2 TEU establishes a principle which could be balanced with other interests protected by the EU law, the protection of the constitutional identity core guaranteed by Art. 79 paragraph 3 of the Basic Law (*Grundgesetz*) cannot be balanced with other interests and is in the FCC's exclusive remit. Therefore, it is evident that, where the Court of Justice does not declare OMT as *ultra vires* acts, the FCC will use the control on the constitutional identity to declare those acts as non-applicable in Germany.

4 Rebels Without a Cause?

Instead of highlighting the *joint responsibility* of Courts, the Order of the Constitutional Court insists on *differences*. This raised a lot of concern among observers. However, mordant and coherent objections interposed by Franz Mayer, one of the precursors of the *multilevel constitutionalism*, expressed more than any other consideration could have ever done. The *endurance of the Multilevel paradigm* is at stake.

A doctrinal stake. The long-lasting capability of the paradigm to keep together the legal pluralism, the communion, the guarantee and the legality of the European legal system. *A constitutional stake*. To establish the *locus decidendi* of the crisis, the legitimate institutions to tackle the emergency, to trace a clear *actio finium regundorum* among what lies with the competence of both, the parliamentary representation and national governments, what lies with the competence of independent and technocratic institutions and what lies with the competence of jurisdiction.

In the long critical analysis published in the *German law Journal,*[15] Mayer tries to dismantle incoherencies, contradictions, logical fragilities, forced assertions and inconsistencies in the plot of the "narration" drawn upon by the order.

[15]Mayer Franz (2014).

The *legal cornerstone* of the passionate 'response' is "if every National Court could put forward 'its own' interpretation of the EU law, this would add up to 29 different versions and its efficacy will be trapped within national boundaries." The *ultra vires* control and the constitutional identity used unilaterally, as national obstacles to the application of the community law, threaten—emphasizes Mayer—not only the concept of uniform EU law, but also engender abuse: if all other Supreme Courts would take the same position, the Union law would become a buffet legal system, where one merely *picks and chooses* as to what rules they will follow.

The constitutional cornerstone of Mayer's reply is that, by the intervention in the euro-crisis, it is not the European Central Bank that has to overcome limits of its competences and knowledge, but the German Constitutional Court that, on the pretext of the legal issues, enters into the playing area of Central Banks, claiming a power of influence and intervention on the European economy.

Mayer is wondering, since the very beginning of its writing, if judges of the German Constitutional Court could be *rebels without a cause*. His definitive, evangelical and ironic, literary answer is that, indeed, "they do not know what they are doing" and for this reason they have to be forgiven (Luke, Chapter 23 Verse 34).

They have to be forgiven because they do not have mastery of the German Constitution (pretty much unique for judges of the Supreme Court). Or, at least, they forgot that the founding fathers embraced the European integration, starting from the preamble of 1949, aware that it is in the "German interest" that "German interests" were not perceived as German interests, but as European interests. Acknowledging as principle of Constitutional Law the disclosure towards European law, they also forgot that the German Constitutional Court agreed to this reality in the past, that current judges should merely put into practice.

Being aware of the Alzheimer's syndrome in its initial stage, which consists of short-term memory loss, I find Mayer's "verdict" non-persuasive. I believe, instead, that judges of the Federal Court are frankly convinced to fight "for a just cause". Indeed they feel legitimately appointed to the function of "sovereign guardians" of the German interest on the European area.

5 The European Disorder

Member State governments and National Parliaments, supranational and intergovernmental institutions of the Union (the ECB, the Court of Justice, the Commission, the Council, the European Parliament) are also sincerely convinced to fight "for the right cause".

All of them are thinking they can be "guardians", as the *multilevel teaching* of Pernice and Mayer has several times narrated, of legitimate interests contributing to the creation of the *European interest*. However, when all these institutions represent themselves as "rebels", "guardians" of a "right cause", "finding a balance" among respective reasons could be impossible and the disagreement, more than the

conflict in itself, will prevail, together with the identity representation of different institutions more than the mediation. It is the *constitutional disorder*, as they also learnt—from antagonistic positions—Carl Schmitt and Hans Kelsen.

The *Commission* setting itself up as unyielding "guardian" of the "financial stability", the *Court of Justice* setting itself up as an unyielding "guardian" of the full liberalization of markets, the *European Central Bank* setting itself up as unyielding "guardian" of the "monetary stability", they are not less "autistic" than the German Court setting itself up as the Lisbon judgment (*Lissabon Urteil*) unyielding "guardian" of the German vision of the European integration.

I am not defending the German Constitutional Court. Far from it. I am asserting—this is true—that: its "autism"; the Commission, the Court of Justice, the ECB and national Governments "autism" and the subsequent disagreement on which could be, both, conflicts and government of emergencies *locus* and *modus decidendi*; all of these are not the causes of the *European illness*, but its external manifestation. A severe feverish condition not sparing any of the institutions belonging to the Union.

I additionally state that the '*multilevel medicine'* is the wrong prescription; it is the antibiotic amplifying the *virus* diffusion. This is the kind of medicine that doesn't attack the sources of the *constitutional disorder*.

Its representation of the European political and legal system is, indeed, largely sympathetic with that *liquid ideology* advocating that in the post-national era the "shared sovereignty" is "here and there". And, therefore, ultimately, nowhere.

An ideology that, on the one hand, fuels the lackluster and destructive fight for the sovereignty, a *pluralism of guardians of the Constitution* among institutions forgetting to be *ruling powers*. And, on the other hand, an ideology delaying to reveal *real constituent powers* of the European society and their transparent and "fair" conflict for the sovereignty.

6 Constituent Powers

Which are the real constituent powers today? Which is the nature of their conflict? These are questions that legal science, abreast of times, should elucidate to lay the foundations for a new doctrine.

An important contribution, towards this direction, comes from the literature that approximately identifies *two different and conflicting sources of legitimacy* to which 'correspond', in the globalized world, contemporary legal systems and decision-making processes.[16]

On one side, the long lasting *legitimation of people* with their request of well-being, participation and rights as codified in the National Constitutions of the democratic and social State. On the other side, the increasingly pervasive *legitimation of financial markets* subordinating their "trust" towards "debtor States" to the

[16]Streek (2014).

"promise", which has to be made believable by the fiscal policy, stating that their credits will be honored in the first place with respect to "citizens' credits".

The sovereign debts' crisis has shown the existence of these two different *constituencies*, removed and ignored by the *multilevel constitutionalism* in the totally uncritical belief that the composition and "balancing" of *ruling powers'* interests is the only and exclusive performance to be fulfilled by a "good" legal doctrine. First the "ordinance", then people of nations and people of markets, will follow.

The radical diversity of requests that the two real constituencies of the globalized world today address to European public authorities put this paternalistic *doctrine of the harmony* out of action. The current *constitutional disorder* is risking straying dangerously into an *irreconcilable disagreement* between the "people of markets" and the "people of nations". The first is asking to declare *default* for those potentially insolvent Countries, if none of its *diktat* will be upheld. The second is threatening secession and the return to national currencies.

A way out from the disagreement is the one proposed by the recent *doctrine* (see Pitruzzella and Morrone writings) foreseeing a substantial concurrence of two *constituencies'* long-term aims.

It is a "matter of fact" that today States, to finance their debt, have to enjoy market's "confidence" and this will require the "Debtor State fiscal consolidation policy" implying severe "limitations" to citizens' expectations. Nevertheless, these limitations are as well on behalf of citizens, because the States' dependence on markets would be more relevant if those strict policies of fiscal consolidation will not be implemented. These policies also offset markets' weight, emancipate the national policy from the subordination to their dynamics and finally even let it regain, if not the primacy, at least the role of *guardian of national interests* at European level and also within relationships among Member States.[17]

I think this 'legitimistic' doctrine is missing that to comply with solvency standards as required by financial markets has so far generated a further increase of public debt[18] in glaring conflict with the national interest of Countries like Italy[19] and with the *right to grow* of European people. The harsh and extreme conflict of interests between *national constituencies* and *market constituencies* cannot be smoothed out by a 'do-gooding' doctrine.

7 Doctrines of the Conflict and "Great Style"

It is obvious that the destiny of the Union is just minimally in the hands of economists and jurists. Notwithstanding, doctrines helping to throw light on its *constitutional crisis* have to be transparent: *doctrines of the conflict*.

[17]Pitruzzella (2013).

[18]Gnesutta (2015), p. 97.

[19]Paggi (2011).

The *doctrine of the conflict* we are mentioning here is not a *disordered doctrine*. It is, instead, a doctrine that, on the one hand, realistically acknowledges conflicting requests addressed to public authorities by the "people of markets" and by the "people of Nations" and that, on the other hand, let these requests to be revealed in the *public sphere*.

It is not about harmoniously "composing", in the same way as for *multilevel constitutionalism*, "regulatory reasons" of constituent powers, but to lay down the *shape* of ruling powers' *disagreement* and to make legal and binding *decisions* taken in the public sphere visible, even when they contradict "regulatory reasons" of which they are ontologically bearer.

"Good" doctrines are those that "explicate the disagreement". The *locus decidendi* can also be unstable and provisional, but it has to exist.

In our Constitutional Law courses, it should be imparted Carl Schmitt essay: the *Constitutional Theory of Federation*. The dualism of "political existence" of this State form—observes Schmitt—is an antinomy and an immanent contradiction. However, this always open and inextricable disagreement on who should be the holder of the sovereignty is also 'the inner truth'—the essence—of the Federation. The dualism preclude, indeed, to cancel the single existence of Member States, as well as the existence of Member States cannot cancel the existence of the Federation.

Furthermore—the German jurist considers—each Member State status is modified according to common goals of the Federation, among a multiplicity of values, included "inner" values characteristic of Member States' Constitutions. This contributes to stabilize and homogenize the Federation, to maintain the balance and to continue to exist in itself.[20]

Therefore, the conflict should be explicated as well as reasons for pluralism should be recognized without annulling the sovereign decision dimension.

I would like to remind, finally, Elias Canetti enlightening writing on the parliamentary system. In the parliament, as Canetti writes in *Crowds and Power*, a "clash played out in many forms" even "with threats, abuse and physical provocation", but in the end "the actual *vote* is decisive, as the moment in which the one is really *measured* against the other", it will come to a *decision*, although provisional and reversible, that is accepted by defeated as legal and binding.

"Now no one has ever really believed – as the Bulgarian writer states – that the majority decision is necessarily the wiser. It is will against will as in war. Each is convinced that right and reason are on his side. [...] The member of an outvoted party accepts the majority decision, not because he has ceased to believe in his own case, but simply because he admits defeat".[21]

A *doctrine of the conflict, a doctrine of the sovereign decision*. At the bottom, it is all about restoring the "great style".

[20]For further clarifications Cantaro (2006), p. 507.

[21]Canetti (1984).

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European Party System and Political Integration in Europe

Adriana Ciancio

Contents

1 European Political Parties: The "Status Quo"

A realistic analysis of the current status of European parties and their role in the European political integration process needs to answer three questions.

First, as the paper's title suggests, it is necessary to address the preliminary question about the very possibility to refer today to European political parties as a true "system"; meaning whether they feature structured and stable party set-up, as well as their own (ideological and organisational) identity and characteristics, sufficiently autonomous from their original dependence from national parties.

The question seems almost rhetorical and the obvious answer cannot be but negative. Indeed, even the most recent elections for the European Parliament have revealed that they are still almost-entirely entrusted to national parties. Truly, some progress has been made towards the consolidation of a true European-party system as shown in the elections of 2014, taken place by the single nominations to the Commission presidency supported by the political entities identifying in the main

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European political families,[1] as well as by the candidates' call to present to the electorate their respective essential programs even before the vote, during debates aired on public media similar to confrontations among party leaders occurring upon national elections.

However, the anomaly still persists that suffrages expressed by electors who are *European* citizens for the appointment of a *European* institution take place with parties of essentially *national* dimension acting as middlemen. Furthermore, national parties often cannot resist the temptation to use the European Parliament campaign as a chance to still argue issues of strictly local interest and little relevant to the big issues that are currently affecting the Union's very existence.[2] This state of affairs makes it difficult for the citizens-electors to grasp the true supranational dimension of their vote.

Moreover, since the elected ones were proposed and supported by national parties, it is difficult for them to exercise their mandate in line with the primary interests of the Union. They are, therefore, driven to take charge of local political interests and in any case of State needs[3]; although the Parliament is the only European institution which features representation according to ideological affinities rather than members' countries of origin and related national interests.[4]

Hence, suffers the very nature of the representative relationship. This topic has been discussed in depth in other occasions[5] and therefore will not be covered again in this paper.

It is however important to state some considerations drawn from the creation process of European parties, which do not sprout from spontaneous phenomena of social aggregation around common ideas and political objectives, but rather as the "extra-parliamentarian projection" of political groups, which form themselves within the Parliament from the reunion of representatives from national parties with similar political profiles.[6] This is to say that European parties rather than being the result of "social outcomes,"[7] feature instead an "internal"[8]—meaning primarily parliamentarian—origin.[9] Their creation process has thus featured a "party-parliamentary group" dynamic closer to the British experience—where the so-called *Parliamentary parties*

[1]Cfr., among others, Cartabia (2014); Manzella (2014a), in agreements with the arguments previously stated by Bonvicini et al.(2009), p 182 ff., with the purpose to strengthen the Commission's democratic legitimation through the political connection with the Parliament.

[2]On the same point also Allegri (2013), p. 29 ff.

[3]Even if in an overtly politological perspective, the same facts are assessed by Goulard and Monti (2012), p. 43 ff.

[4]About the strength of "national delegations" within European groups and, therefore, in the context of parliamentary works, cfr. Bindi and D'Ambrosio (2005), p. 184 ff.

[5]Allow me to reference here the assessment already contained in Ciancio (2014b), p. 4 ff.; and Ciancio (2014a), p. 14 ff.

[6]Cfr., among others, Bardi and Ignazi (1999), p. 87; and also Ciancio (2007), in particular p. 157 ff.

[7]About parties as social groupings, for all, Chimenti (1997), p. 51 ff.

[8]According to the well-known analysis by Duverger (1961), p. 16 ff.

[9]In this sense, Guidi (1983), p. 137.

precede the *Extraparliamentary parties*[10] (which originally were mere electoral committees of the former[11])—rather than the more widespread experience of representative democracy systems of the European continent. In the latter indeed—as usually claimed—the groups represent parties' *longa manus* in Parliament, as well as the instrument for the latter's "occupation" (to use a strong expression) of the representative Assembly and, more in general, of the institutions.[12]

The peculiar group-party relation dynamic at the European level is reinforced by the provisions of the EP's general Regulation, which (also) on this point shows the influence of the French Parliament's internal organisation provisions.[13] Indeed, the Regulation refers (in Chapter IV) to internal groups within the European Parliament as "political groups"—excluding Parliamentary groupings of members affiliated only "technically", but lacking any political affinity (similar to the Italian "mixed-group" model, unknown to the European system). This provision has since forever required that members share "political affinities", in addition to the numerical and transnational characters, to constitute groups.[14] Actually, according to the interpretation given by the European case-law,[15] only shared ideological and program affinities, however generic and not excessively strict,[16] might allow EPM's groups to transcend local political particularisms and, therefore, to constitute privileged

[10]About the origins of parties in Great Britain, and in particular on the affirmation of their "national organization" in a moment subsequent to their so called "parliamentary organization", cfr. Ferri (1950), p. 13 ff.; and Biscaretti Di Ruffia, (1965), p. 755, discussing the rise of "*Parliamentary party*" in the second half of XVII century, whereas the true "*Party Organisation*" would have taken place only after 1867 with the *Liberal Association of Birmingham*. On this topic, see also Rossano (1972), p. 281 ff.; Massari (1992), especially p. 116 ff., where is highlighted how in the British system, given the original strict connection between parliamentary and extra-parliamentary parties' organization, more than "groups", it would be more appropriate to refer to parties "in Parliament"; and Tripaldi and Teklè (2001), p. 215 ff.

[11]Cfr. De Vergottini (1973), p. 168 ff.

[12]For further reference on the relationship between parliamentary groups—parties Ciancio (2008), in particular, p. 141 ff., and p. 177 ff.

[13]Art. 19, 1*Rég. Ass. Nat.*: "*Les deputes peuvent se grouper par affinités politiques*"; and Art. 5, 1 *Rég. Sen.*: "*Les sénateurs peuvent s'organiser en groupes par affinités politiques*", see Biagi (2001), p. 109 ff. About the analogies between the provisions of internal organization of EP and those of the Regulations of French parliamentary Assemblies see Guidi (1982), p. 585 ff., and Guidi (1983), p. 60.

[14]Cfr., most recently, Art. 30 of the Regulation. About the requirements for constituting groups within the EP, in detail, Baroncelli (2001), p. 14 ff.

[15]Court of First Instance, sez. III expanded session, 2-10-, joined cases T-222/99, T-327/99 e T-329/99, Martinez—De Gaulle—Front National_Bonino et al. v. European Parliament, in *Racc. giur.*, 2001, II-2823, already deeply assessed in Ciancio (2008), in particular p. 83 ff.

[16]Contrary to the provisions of the French Regulations of the Assemblies, indeed, deputies grouped within the EP are not required to sign a common political declaration, whereas, under the impulse of the presidency office, in recent years, it was introduced a canon for interpretation according to which the requisite of political affinities is considered implicit to the very constitution of the group and can be contested in the merit only in the case of overt negation of its existence by the group's very components, in which case the Parliament will have o consider whether it complied or not with the Regulation. On this point, most recently, Baroncelli (2014), p. 104 ff.

"venues", in addition to exercising specific parliamentary attributions, and carrying out significant political tasks. They consist in representing the aggregation venue of national political parties and so compete to create supra-national parties able to promote European integration, as stated by the Treaties.

2 European Parties, Fundamental Features of the Union's Political Integration

The citation calls the attention on the provisions of the Union's primary law which, since Maastricht, point to European parties as the intermediate subjects between institutions and citizens,[17] meant to shape, interpret and receive the citizens' political will and convey it into the institutions. However, comparing the norms provided for by Art. 138A, later (after Amsterdam's renumbering) Art. 191 TEC,[18] and the Lisbon's outcome, one can notice a slight difference in the wording of the provision on supranational political groupings. The difference would be of little interest were it not for the disappearance of the reference to European parties' role as fundamental "integration factors" provided for by the Treaty of the European Community, but lacking from current Art. 10, par. 4 TEU.[19]

This fact leads us to the second question relating to the actual role that the presence (*rectius*, the absence) of a genuinely European party-system plays in shaping the EU as a true political (no longer solely economic) community, willing to fund its functioning on the principles of representative democracy, as stated by Art. 10, par. 1 TEU. The article—as it is well-known—points to the Parliament as the venue of citizens' direct representation, even if it also provides for the indirect (but however democratic) legitimacy of the Councils (European and of the EU, Art. 10 par. 2 TEU) and states citizens' right to take part in the democratic life of the Union (Art. 10, par. 3), assigning European parties the creation of political awareness and identifying them as the privileged channel to express citizens' will (Art. 10, par. 4).

Moreover, extending our assessment to the whole Lisbon provisions, even with the (intended) absence of any "federalist" reference,[20] the EU is now shaped as a

[17]On this point, it is worth mentioning that the first appearance in European primary law of provision on political parties occurred at the same time with the introduction of (then called) "community" citizenship: indeed, notwithstanding the provision on political parties was included in the section of the EC Treaty relating to the Parliament, it manifestly interacts with the idea of the European system as a political, and no longer merely economical, community conclusively accepted with the signature of Maastricht.

[18]"Political parties at European level are important as a factor for integration within the Union. They contribute to forming a European awareness and to expressing the political will of the citizens of the Union". On the provision see, among others, Tsatsos (1995), p.8.

[19]"Political parties at European level contribute to forming European political awareness and to expressing the will of citizens of the Union".

[20]As underlined by Bin and Pitruzzella (2013), p. 100.

truly, even in an embryonic state, political union, sufficiently defined in its legal and institutional profile. Indeed, it is provided with common institutions and related attributions, with a defined balance of powers (legislative, executive and judicial), even if according to a scheme of collaboration and complementarity towards a reciprocal equilibrium, rather than a separation. Competences are assigned in relation with Member States. An original system of sources of law is set, furthermore destined to prevail over national ones. A Chart of fundamental freedoms (and more in general, a body of inalienable rights) is defined and European Judges recently have shown to apply them even over traditional economic freedoms,[21] in addition to supervise breaches of Union law by the Member States and also, more interesting for this discussion, by the very common institutions. Even more upstream, European case law ensures uniformity in the interpretation of the law through preliminary ruling ex Art. 267 TEU, essential for the very process of, at least, judicial integration.[22] Above all, there is a common value heritage[23] including, as declared in Art. 2 TEU, the protection of human rights, freedom, equality, democracy and, more in general, the rule of law as shared values by Member States in a society based on pluralism, non-discrimination, tolerance, justice, solidarity and gender equality.[24] These common values must serve the judiciary as canons of interpretation for and legitimacy parameters of European and national laws, as well as a warning and evaluation criterion for further requests of accession to the UE.[25]

And yet, the certainly prescriptive, as well as descriptive, force of these provisions and, more in general, of the whole legal system established by the Lisbon Treaty still seems insufficient to root a deep sense of common political belonging to the Union, as easily ascertained among European citizens.

The statement is easily verifiable: only to give one example, it is sufficient to see the genuine hostility that a good part of the British people has shown towards the European integration process.

[21] *Contra* Bin (2014), p. 504 ff., according to which, beside very limited recent exceptions (as evidenced by the famous cases *Kadi*, on terrorism, e *Digital Rights Ireland Ltd*., on privacy protection) the ECJ is not even today primarily driven to protect individual freedoms but rather, as always, the four original economic freedoms. For a different interpretation of European case-law, considering it oriented since the very beginning to the protection of fundamental rights, cfr. Galetta (2013), p. 1175 ss. On the point, see also Ciancio (2012).

[22] On the topic of the preliminary ruling ex Art. 267 TEU, see Romboli (2014), p. 431 ss.

[23] De Vergottini (2009) finds in the EU's value set-up the truly "constitutional" feature of the European system, notwithstanding a vision of the nature of the EU that he still considers strongly international and, as such, lacking the characteristics of a genuine federal political union. Similarly, Castorina (2010), p. 379 ff.

[24] On the topic, recently, Ciancio (2016).

[25] See again, De Vergottini (2009).

And yet, going back to feudal times, English was that "Lackland" King who agreed, before the Barons gathered at the Runnymede lowland, to limit his own power and acknowledge patrimonial and succession rights, as well as the habeas corpus, pioneer of what in the following centuries would be identified as the freedom of freedoms i.e., personal freedom.[26]

English were also the colonizers who, from the New World, warned their mother country to grant them representation in Parliament in exchange for the imposition of taxes and import tariffs, coherently with the motto "*no taxation without representation*", summarising the foundation principles of modern representative democracies, conventionally affirmed in the British political-constitutional experience, much before the traditional codification in the Bill of Rights of 1689.

Still, certainly English, even if hidden in anonymity, was that thinker who foresaw the need to separate the legislative from the executive power to guarantee the rights that nature attributes to men, all born equally free in nature, and that the State will later be called upon to acknowledge and, therefore, protect.[27] And this occurred, as it is well-known, almost 60 years before another old-world scholar, also to remain anonymous, building up on other philosophical assumptions, refined these considerations and neatly concluded that "*pour qu'on ne puisse pas abuser du pouvoir, il faut que (…) le pouvoir arrête le pouvoir*[28]", setting with such a statement the theoretical foundations of Art. 16 of the "*Déclaration des droits de l'homme et du citoyen*", unanimously considered by law-scholars as the corner stone of constitutionalism's achievements.

Thus, no one can doubt the contribution that Great Britain has given to the consolidation of the common constitutional heritage explicitly referenced to in Art. 2 TEU. However, especially considering the European political union project, Great Britain seems particularly wary. Indeed, not only has it always declined to be part of the common currency, which certainly represents a decisive milestone of the political community, being currency an essential declination of sovereignty. More recently, it has also demanded more and more urgently (further) restorations of its sovereignty to the cost of its own exit from the Union as the majority of the British electors has already decided, as well known, in a referendum on whether to stay in the EU (the so-called "Brexit").

Looking elsewhere, the picture does not get any fairer. Just as another example, one can consider the recent events in France, another great European country that, drawing from well-known philosophical assumptions ranging from natural law, enlightenment and rationalism, has historically contributed decisively to the foundation of the value system concisely summarised in the basic principles of the rule of law. It has recently seen the electoral triumph of the extreme nationalist right,

[26]Manifestly, the reference is to the *Magna Charta* (*Libertatum*), proclaimed in 1215 by King John Plantagenet.

[27]Locke (1690), among which in particular, see *The Second Treaty on Government*.

[28]The statement is clearly attributable to De Secondat (1748).

first in the administrative elections[29] and afterwards in the European ones.[30] The party led by Marine Le Pen focused its electoral campaign on French exit from the euro, riding the malaise that a great part of the electorate had already manifested towards the project of a European political union ever since the 2005 referendum on the "Treaty adopting a Constitution for Europe".

These examples lead us to doubt that the mere force of legal provisions would prove sufficient to make European citizens feel that *idem sentire*, which represents the necessary condition for the establishment of the (*recte*, of any) political community.

Holding this thought, one cannot but consider that in contrast with a sufficiently defined, even "sophisticated", legal institutional system—already defining the EU as a, however embryonic, political union—it is possible to perceive a manifest lack of consent towards the project of ever closer political integration among the European peoples. The reasons are to be found, among other things, in the everlasting lack of democratic legitimacy of the Union in the new and different shapes it has taken after the signature of Lisbon.[31]

Indeed, the Lisbon Treaty extended Parliament's legislative and political control powers,[32] as well as national Parliaments' participation to the European decision-making process.[33] The still-lingering issue is the profound "detachment" between European society and the Union's institutions.[34] A distance largely explained by what has elsewhere been defined as a mere "formal" representation of the EP, due to suffrage's direct expression,[35] but unsupported by a so-to-say "substantial" representation. The issue will persist as long as people's incentive to participate in the vote and what it stands for in terms of legitimisation will not be managed by parties of true European scope, but instead by national parties.[36]

[29]The reference is to French municipal elections occurred in France on March 23rd 2014, with a second ballot turn the following Sunday March 30th.

[30]For the outcomes of the EP 2014 elections, see the essays collected in Caravita (2015).

[31]About the different meaning attributable to the idea of democratic deficit of the EU after the entry into force of the Lisbon Treaty, see Manzella (2014b), p. 5 ff.

[32]In particular through the extension of the procedure, now elevated to "ordinary legislative procedure"(Art. 289, par. 1 TFEU) and the numerous occasions of political control especially towards the Commission (President nomination, censorship power, queries), which moreover is annually due to present a general relation on the activity of the Union (Art. 249, par.2 TFEU), in addition to specific relations on specific sectors; as well as towards other institutions (queries to the Council, the High representative for foreign affairs and even the ECB despite its absolute independence). It is also worth mentioning the intervention in the approval of the budget according to Art. 314 ss. TFEU. About the Parliament's competences after the Lisbon Treaty, cfr. at least Fasone and Lupo (2012), p. 329 ff.

[33]Among all, see Lupo (2014), p. 101 ff.

[34]In this way Grimm (2014).

[35]About the "formal" conception of democracy, which reveals its "essence", in procedural terms, in the selection criteria of the "leaders" by the people laying in the electoral method, see Kelsen (1995), p. 128 ff.

[36]On the point, it is possible to read again Ciancio (2014b), p. 4 ff.

Moreover, this state of affairs hinders the creation of a "European political awareness", as hoped for by the Treaties, which ever since Maastricht have identified European parties as the privileged channels to express the political willingness of Union's citizens. European Parties indeed would truly provide for the necessary integration factors. Indeed, consolidating a structured system of European parties, really bounded with society, would favour the creation, among European citizens, of that sense of common identity necessary to transpose everyone's national identity in a wider contest of supranational dimension. Vice versa, lacking any European-wide political association, functioning first and foremost as tools to foster, even before receiving, citizens' political will conveying it into the institutions, it becomes difficult to identify the essential integration factor able to replace with a general sense of belonging to the Union the lack of natural cultural identifiers, e.g. a common language.[37]

Therefore, each European political party has the fundamental task to convey popular consent towards certain (i.e. "partial") political ideas of Europe and, even most importantly, all together towards the idea itself of the EU as a true political Union. They are thus called to work in this direction to confer "effectiveness" to the European political project, in the sense of *spontaneous and generalized adherence to the Union's legal system and its values*, beyond the effectiveness achieved through judicial means, which however have so far represented an important channel for integration.[38]

Moreover, fostering an *idem sentire (de "europa")* represents the necessary step for the adoption of the "political fundamental decision". Without it, it looks unlikely (and in any case futile) to re-launch the constitutional process so long argued for to overcome the Lisbon "compromise" and all the limits it has revealed, particularly upon the spread of the crisis and the following adoption of the so-called "*a latere*" Treaties.[39]

It is also worth mentioning that nowadays at the European level, parties seem not sufficiently involved in, not to say foreigner to, to the creation of political agendas. Indeed, national parties in their traditional forms have been *in primis* cultural actors and the main characters of the economic and social planning. On the contrary, the supranational level seems lacking, so to say, such essential political function. Indeed if, on the one hand, big decisions are taken elsewhere—for instance, great issues of bioethics are either solved case by case by judges or regulated differently

[37]This is notoriously one of the positions argued for by Grimm (1996), p. 356 ff., which sees in the lack of a common language an obstacle, difficult to overcome, for the affirmation of a public opinion and a European public debate as assumptions of a true democracy in Europe and, lastly, main rational of the lack of existence of a European *demos*, which would oppose almost conclusively structuring the EU as a true political Union. *Contra* Habermas (1996), p. 372 ff.

[38]Up to the point to considering the EU already in possess of a "Constitution", even if not intrinsically connected to a state-like nature, but rather according to a notion which places the same at the centre of a plurality of (political-institutional, legal and axiological) systems, of which it would at the same time be summary and manifestation, see Ruggeri (2014), p. 473 ff. On the point also Cariola (2014), p. 203 ff.

[39]More widely on the topic, Morrone (2014a, b, c).

by national systems; and, on the other hand, macroeconomic decisions are in practice taken by the ECB (an independent, and therefore, apolitical institution by definition[40])—the capacity for integration, i.e. for identification/mobilisation of the so called European parties comes to fail and the appointments to the EU institutions seem to slack off to the application of a "Manuale Cencelli", so that each State will every time nominate the member most appreciated to the strongest national party at the time.

Therefore, European parties also ought to perform the essential task of elaborating what one might call "performances of political unity",[41] which would further contribute to the creation of European political awareness and, more in general, to performing a task which one could define of "political-cultural mediation" between institutions and citizens. The parties would receive citizens' opinions, identify and conveying their interests in the European decision-making process, through their preventive, necessary and genuine rooting in society.

3 European Political Parties' Development Prospects

3.1 Statute and Financing

The third question at this point is consequential and concerns the buttons to push to consolidate a genuine European system of mature political parties.

From this perspective, it is interesting to recall the birth and developments of the Regulation on the "statute ad financing of European parties", adopted according to the current mandate of Art. 224 TFEU (ex Art. 191, 2 co. TEC), in 2003[42] and recently (with the reform of April 2014) directed to define a unitary model of European parties independent from national parties' structure (and limits) and to favour the positive, factual and concrete commitment of supranational political associations in the elections for the European Parliament.

It is unnecessary here to retrace the details of the events that led to the approval of provisions on the financing of European parties. For the purpose of this paper, it is sufficient to signal the highlights of the evolution of a regulation, born with the ambitious name of "statute". They, far from creating a true statutory scheme common to all European political entities featuring the typical contents of party statutes, have initially pursued the (more limited) aim to define the conditions that supranational political groupings must comply with to reach the status of

[40]See Ciancio (2015b).

[41]For a similar position, see Ridola (2009), p. 6.

[42]EC Reg. n.2004/2003.

"European parties",[43] title which makes them eligible for financing from the European budget.[44]

Notwithstanding the fact that the first norms of 2003 showed the subordination of the "European party" figure to the structure adopted by parties within the national systems—due primarily to the provision (Art. 3, lett. a) requiring the legal personality in one Member State (the one in which the party had its headquarter)—nevertheless from the whole original regulation it is possible to perceive the push towards a sort of institutionalisation of supranational political groupings.[45] This was also based on the norm already mentioned and on others defining various systems of control, mostly delivered to the Parliament (Art. 5), for the verification of compliance with the requirements of the Regulation[46] and related mostly to Union's values (Art. 3, lett. c).[47] In other words, the result was at least to start the consolidation process of a European political representative system independent from national political groupings, achieved mainly through the prohibition to use funds given to European political entities to finance, behind them, national parties (Art. 7).

The purpose appeared even more evident and better served already by the first amendments, adopted according to a 2006 European Parliament Resolution.[48] Indeed, the Parliament acknowledged and urged to overcome some of the limits of the original financing system to deliver a "true and genuine statute of European political parties" with the aim to define their rights and duties and give them the possibility to obtain legal personality based on European law and acknowledged in all Member States.[49] The main goal was to make European political parties "active players in choices of European politics, connected with all levels of society and open to the effective participation of citizens not only through European elections, but also in all other aspects of European political life".[50] Therefore, on the assumption that parties at the European level are a "fundamental element to create and express public opinion, without which it is impossible to achieve further developments of the European Union",[51] the EP considered desirable to strengthen financial assistance. Hence, it launched a reform process, which ended in 2007 with the

[43]See Grasso (2010), p. 609 ff.

[44]See also Martinelli (2004), p. 418.

[45]Similarly Fusacchia (2006), p. 88.

[46]Widely on the topic, Grasso (2010), p. 624.

[47]This purpose was also behind the amendments to Regulation of EP, with the inclusion of Title XI named "Competences relative to political parties at the European level" (Arts. 198–200), which among other things confers the European Parliament President to represent the institution in the relationships with European parties (Art. 198) and gives to the President's office the task of evaluating request for financing.

[48]EP Resolution on political parties of March 23rd 2006, in GU C 292 E of December 1st 2006, 127.

[49]So n.4 of the Chapter titled "The political contest" in the Resolution cit.

[50]Point 2 of the Chapter on "The political contest", cit.

[51]Point 3 of the Chapter on "The political contest", cit.

approval, also by the Council, of the new rules on the activity and financing of European parties.[52]

Leaving out other rules, it is worth assessing those mainly intended to free European parties' activities from their dependence from national ones. In particular, the disposition increasing (from 75 % to 85 %) the maximum contribution eligible from the Union's budget (Art. 10), approved with the aim to proportionally decrease the financing by national parties. Also, at last allowing European parties to use EU contributions to finance activities connected with the electoral campaigns for the EP (Art. 8, III co).[53] Considering that such option was forbidden before, it is easy to grasp the innovative scope of the provision, which for the first time considers parties with a European dimension as entities able to autonomously commit in the elections for the European Parliament, together with and in addition to national parties. The norms also look forward to national parties' progressive dispossession, with the purpose to give a genuine European scope to electoral conference.

Also worth mentioning, among the 2007 novelties, the expectation that "European political foundations"[54] work together with parties to supplement political targets, training and information activities by carrying out e.g. "activities of observation, assessment and enrichment of the debate on European public policies and the European integration process", as well as promoting actions concerning "issues of European public policies", including organising seminars, training events and conferences with the purpose to "promote democracy".[55] It is significant that such foundations are eligible for financing only if formally associated with a European party.[56] Indeed, they are able to apply for financial contributions exclusively through existing European parties, and by doing so contribute to the strengthening of the latter's political and, one might say, also cultural mediation role.[57]

Already the approval of the first norms on European parties' financing and, even more, the 2007 amendments constituted an important step in the direction of giving to the European political debate an autonomous dimension, different from the local and national one. Such transformation has to occur through the intervention of political groupings institutionalised at the supranational level,[58] tasked with

[52]Reg. n. 1524/2007 of Dec.18th 2007, in GU L 343 of December 27th 2007.

[53]See Ciancio (2009).

[54]Art. 1 Reg. 1524/2007, amending Art. 2 of the 2003 Regulation, adding point 4 which identifies as the political foundation at the European level "an entity or network of entities" with legal personality in one Member State, "affiliated with a political party at the European level, which through its activities, within the aims and fundamental values pursued by the European Union, underpins and complements the objectives of the political party at European level".

[55]See Gagatek and Van Hecke (2011).

[56]Cfr. again Art. 1 Reg. 1524/2007 amending Art. 3 Reg. 2003.

[57]Calossi (2015), p.10 ff. argues that European foundations were created with the aim "to give Europarties a new tool to help them carry out their functions and to strengthen their direct contacts with citizens".

[58]For wider reflections on the topic, it is possible to see Ciancio (2015c).

becoming the main characters of the European elections and, more in general, required to deliver with the meaning the Treaties ascribed them, i.e. expressing the voice of European citizens, receiving their political demands, enabling their effective participation and thus contributing to the consolidation of European democracy.[59]

In this direction, the most important change seems to be the last amendment, occurred through the draft of a further new Regulation, definitively approved on April 16th 2014.[60] The main feature it provides for our topic[61] is the possibility for eligible political groupings to obtain, upon registration at the Parliament, a legal personality under European law and the relative common *status*, which allows them, through the acquisition of a single status based on Union law, independence from the national judicial features, which have so far influenced their structure and defined their limits. The purpose is to at last enable European parties[62] to deliver the objective assigned them by the Treaties, i.e. "contribute to forming European political awareness and to expressing the will of citizens of the Union".

Indeed, only through an electoral competition wholly managed by supranational political parties, it will be realistically possible to achieve the objective of gathering citizens' consent on European issues, programs, demands and ideals, thereby shaping their European "awareness" or, perhaps one could say, "consciousness".

3.2 European Parties and Uniform Electoral Law: Waiting for the Turning Point

In any case, the last amendment, expected to enter into force (only) on January 1st 2017, could not fully accomplish its desired objectives were it not matched by the adoption (at last) of a uniform electoral procedure, according to the current requirements of the first part of Art. 223 TFEU, I.[63] As long argued,[64] this would allow to present electors, within electoral constituencies of supranational scope (or a single constituency for the whole Union, even if difficult to implement in practice), unitary lists of candidates committed on common political programs and centred on genuinely European objectives and issues. Such organisation would thereby

[59]Looking sceptically at the possibility, which he now considers gone, Staiano(2012), p. 2 ff.

[60]See Allegri (2014a, b).

[61]More details about the contents of the new Regulation in Savoia (2014), p. 10 ff.

[62]Literary defined in such a way only with the approval of these last provisions (whereas previously they were still identified as parties of "European scope"), which would then manifest in their very name at last attributed to European political groupings, the intent to free them from subordination and dependence from national parties, in which they had so far been entangled.

[63]Also in this case, we refer to a not-new provision, preceded by a similar provision already stated in Art. 190.4 TEC.

[64]See, *ex multis*, Vigevani (2003), p. 175 ff.; Raspadori (2009), p. 121 ff.; Habermas (2014); and also Ciancio (2014b).

foster public debate at a supranational level as a fundamental moment[65] and truly structure Parliament elections as "authentically" European. In addition it would also constitute a further step towards the ultimate and long-argued-for consolidation of a real system of European parties sufficiently independent from national parties.

Considering actual implementation however, up until now the maximum achievement had been the formulation of a Resolution by the EP, which already in 1998 had proposed to attribute a percentage of seats based on the proportional method in the contest of a single electoral district made up the whole Union's territory.[66] At that time, the proposal was declined by the Council, which in its decision of 2002 n. 772 amending the Act of 1976 on the electoral procedure for the European Parliament, limited itself to impose on Member States only mere common general principles, among which the main one concerns the adoption of the proportional method, thereby making prevail the alternative (already anticipated by Maastricht and today by the last part of Art. 223.1 TFUE) that elections occur "according to principles common to all member states", however respecting the diversity of the single national laws.[67]

Given these precedents, there is today great expectation for the Council's final approval of the Proposal for amending the Act of 1976 regulating the election of the MEPs, contained in a new EU Parliament Resolution, finally approved on November 11th 2015.[68] Indeed, using its power provided in the same Art. 223.1 TFEU, the Parliament decided to initiate once again the reform of its electoral procedure, well ahead of the 2019 elections, with the aim of "enhancing the democratic and transnational dimension of the European elections and the democratic legitimacy of the Union decision-making process, reinforcing the concept of citizenship of the Union and electoral equality, promoting the principle of representative democracy and the direct representation of Union citizens in the European Parliament (. . .), improving the functioning of the European Parliament and the governance of the Union, making the work of the European Parliament more legitimate and efficient, enhancing the effectiveness of the system for conducting European elections, fostering common ownership among citizens from all Member States, enhancing the balanced composition of the European Parliament, and providing for the greatest possible degree of electoral equality and participation for citizens of the Union".[69]

Actually, a big part of the proposed reforms concerns the need to ensure that European citizens exercise their right to vote (and to stand as a candidate in the EU Parliament's elections) under comparable conditions across Member States, in

[65]On the current limits of the European public sphere, see Statham and Trenz (2013).

[66]According to what is referenced also by Lippolis (2002), p. 955 ff.

[67]On the topic see most recently, Chiara (2014), p. 77 ff.

[68]EU Parliament Resolution of November 11th 2015 on the Reform of the electoral law of the European Union [2015/2035 (INL)], in www.europarl.europa.eu.

[69]Point 1of the EU Parliament Resolution of 11 November 2015 on the Reform of the 1976 Electoral Act.

accordance with democratic principles—equality, above all—without any regard for either national citizenship or country of residence.[70]

Moreover, the Resolution shows the will to enhance the connection that ought to exist between the electoral procedure for the European Parliament and the role of European political parties in managing the elections, with the aim to strengthen democratic development and political integration in the EU, without forgetting the new rules for the choice of the President of the European Commission, now strictly dependent on the results of the elections as enshrined in the Treaty of Lisbon.[71]

From this perspective, the drafters have highlighted the need to show the voters, during all the campaigns for Parliament elections, the true "political" meaning of their vote beyond the choice for a particular national party because of the connection between the vote itself and its impact on the size of a European political group inside the Parliament, as well as implicitly on the election for the Presidency of the European Commission. For these reasons, it has been argued that the procedure for the selection of the leading candidates for this position should be an integral part of the election campaigns, constituting an important aspect of it, because the nomination both provides a link between votes cast at national level and the European dimension and enables European citizens to be informed about alternative political programs. Furthermore, the designation of leading candidates for the office of President of the Commission by open and transparent procedures reinforces democratic legitimacy and strengthens accountability. Consequently it has been urged that a common "deadline for the nomination of candidates by European political parties should be codified in the Electoral Act".[72] This term has been set in 12 weeks in advance of elections (Art. 3f), so as to enable the presentation of electoral programs to the voters and the organisation of political debates among the candidates.

But, above all, since European political parties are best placed to "contribute to forming European political awareness",[73] they should therefore play a stronger role in the whole management of European elections and their visibility should be increased. With this aim, it has been established to place their names and logos on the ballot papers and wherever possible on posters and other materials used in election campaigns, in conjunction with those of national parties affiliated with them. This kind of arrangements is mainly addressed to highlight the link between national parties and the big European political families, since those measures would make European elections more transparent and improve the democratic way in which they are conducted, as citizens will be able to clearly connect their vote to the impact it has on the political influence of European political parties and their ability

[70] See Ciancio (2015a).

[71] See Curti Gialdino (2014).

[72] Lett. O of the Draft Report approved last 30 of June 2015 by the Constitutional Affairs Committee of the EU Parliament [2015/2035 (INL)] in www.europarl.europa.eu.

[73] Art.10.4 TEU.

to form political groups inside the Parliament.[74] For the same reasons, the Member States are now encouraged to facilitate the provision of those affiliations on television and in other media and electoral campaign materials shall include a reference to the manifesto of the European political party, if any, to which the national party is affiliated (Art. 3e).

Last, but not least, a notable amendment to the 1976 Electoral Act is laid down in Art. 2a of the approved Resolution establishing that "the Council decides by unanimity on a joint constituency in which lists are headed by each political family's candidates for the office of President of the Commission". Actually, as argued before, this is precisely the rule that would both greatly strengthen European democracy boosting the role of the European political parties in the elections and also mostly contribute to "create a pan-European moment", enhancing the common European character of the European elections. Indeed, this purpose would be further served by lists of candidates evenly led by the leaders of the big European political families competing for the President post within a joint constituency.

For all these reasons, the desirable ultimate approval of the proposal by the Council could truly represent a fundamental turning point towards the implementation of a genuine system of European parties as necessary propulsive factor in the European political integration process.

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[74]For more details, see Ciancio (2007), p. 157 ff.

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The European Parliament and the National Parliaments as a System

Andrea Manzella

Contents

1 The New Role of the National Parliaments in the European Decision-Making Process

According to the Lisbon Treaty "National Parliaments contribute actively to the good functioning of the Union." It is the wording of Art. 12.1 of the TEU and it contains two meaningful expressions.

The first one is the word "actively", which recalls the dynamic subjectivity of the life of the Union. It is nearly a counterpoint to the mere passive right to information that for some time has been characterizing the position of national parliaments (a right that, however, remains within their competences: Art. 12.1a).

The second expression is the word "functioning": in the Treaties, this word (see Art. 1, 2 TFEU) is used to indicate the overall activities of the Union's institutions as reflected in the preamble (paragraph 7) of the Union's Treaty and in the name of the "second" Treaty, which, in fact, regulates "the functioning of the Union". It is

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interesting to note that in this second preamble emphasis is put on a "concerted action" for the "elimination of existing barriers" to achieving the Union's objectives (paragraph 4). From this point of view, it is thus possible to define a role of active participation by national parliaments. In order for the functioning of the Union to be "good" by definition, this means being "democratic," "efficient," interconnected" in a single institutional context" (these are the three specifications of the adjective "good" that can be drawn from paragraph 7 of the TEU preamble).

From the analysis of the definitions, it is clear that the "involvement of national parliaments in the activities of the Union" (paragraph 2 of the preamble to the Protocol No. 1), albeit respectful of the fundamental principle of conferral (Art. 5,2 TEU), is not a sectorial participation. Instead, a general condition of interference of national parliamentarism occurs, which, even within the limits and legal constraints of the Treaties, is a feature of the entire functional configuration of the Union. This is a natural consequence of the intrinsic political nature of parliamentarism. As a legal phenomenon of intermediation between citizens and institutions, parliamentarism, in fact, is characterized by a connotative virtue of the legal system it belongs to: beyond the specific legislative core which limits its functions.

Therefore, where Art. 10,1 of the TEU states that "the functioning" (again, this key expression) "the Union shall be founded on representative democracy", the definition "representative democracy" is used in the sense of including two phenomena of parliamentarism. The parliamentarism of national parliaments as just described, and the parliamentarism of the European Parliament as an intermediate structure between the EU institutions and its citizens.

Still in Art. 10,2 there is a first definition of the scopes of the direct representative democracy of the European Parliament and the indirect representative democracy (for the interposition of the Governments of the States, subjects of the European government's Councils) of the national parliaments. But this is a partial delimitation. It recalls the governments' responsibility in the European Council meetings "before their national parliaments", but it does not take of the powers which the Treaties assign to the national parliaments into account.

We can say that in the wording of Art. 10 of the TEU, the most precious expression is the one of "representative democracy". It is precious because, as referring comprehensively to both the European and national parliamentarianism, it states their necessary interconnection. The functioning of the Union, in fact, has to be built on both of them.

Therefore, it is a structural interconnection by its founding character and a functional interconnection because it is aimed (Art. 10 states also this) at ensuring the "functioning" of the Union (in the sense already seen: democratic, efficient, institutionally contextual). It is a particular task of the parliaments (European and national together) to ensure the democratic value throughout the Union. It is a common value of the Member States (Art. 2 TEU) and a basic "principle" of the Union (preamble to the Charter of Fundamental Rights of the EU): both on the side of the institutional organization of the Union and on the side of the constitutional organization of the States. More specifically, parliaments on the corresponding put the responsibility of government institutions (Art. 10,2; Art. 17,8) forward, which is distinctive and indispensable to any democratic parliamentary regime.

This co-participation of the parliaments in carrying out the same specific function—upholding the government's responsibility at any level of the Union's action—reveals the degree of mutual interdependence that characterizes them. The value of democracy is in fact both the founding of the Union (Art. 2 TEU) and the condition for States to me admitted to be part of the Union (Art. 49 TEU).

In all the Union's parliaments, thus, we can find the elements both of interdependence and of common purposes, what allows to speak of a euro-national parliamentary system.[1] This intercommunication was also recognized by a first and never denied—despite subsequent restrictive decisions—case law of the German Constitutional Court.[2] A case law which is anchored to a theory of "communicating vessels", by virtue of which the cession of sovereign powers in the Union could be legitimated because the control function of the national parliaments was to be replaced by the one carried out by the European Parliament. Another result of this interdependence is the notion of repeated "systemic deficit", which occurs when, in this case, the serious breach of democratic values by a Member State risks to turn automatically into a systemic dysfunction of the whole Union.[3] Hence the legal ratio of possible sanctions against the State responsible for the violation, provided by Art. 7 TEU: but the investigation of violations is significantly submitted to approval by the European Parliament (Art. 7,2).

If identified this way, the euro-national parliamentary system, at least in ultimate terms, by force of representation is: naturally open to the conflicting needs that arise from the European public sphere[4]; reactive for its intervention capacity as regards political demands from the bottom[5]; an aggregator of widespread political consensus aimed at the same legitimacy of the whole regulation of Union. Therefore, it is a system which is not a static organization but rather a dynamic process, a motion valve of the Union[6]: a characteristic of parliamentarism.

On the other hand, the euro-national parliamentary system is formed through a process of progressive institutionalization of relations between the European Parliament and national parliaments. In fact, from the origins to 1979, there has been the phase of the dual mandate, the one in which the European Parliamentary Assembly was composed of all delegations elected by their national parliaments. The direct election of the European Parliament followed, marking the phase of separation, with a constant demand for competitive autonomy both by the Union's Assembly and by the national parliaments. With the Treaty of Lisbon—and as a result and because of the vicissitudes that preceded and followed it—a third phase got started, the inter-parliamentary cooperation, which has its concrete

[1] See the essays included in the volume: Manzella and Lupo (2014). Cf. Rivosecchi (2003).

[2] Cf.: Weiler (1995); Manzella (2013); and most recently Wendel (2014).

[3] Von Bogdandy and Ioannis (2014), p. 593.

[4] Habermas (1998).

[5] On the Union's capacity to provide effective answers to these political questions, Dani (2013), p. 237 ff.

[6] Cf. Nicolaïdis (2013), pp. 351–369.

implementation models in Arts. 9 and 10 of Protocol No. 1 ("on the role of national parliaments in the EU").[7]

2 The Interparliamentary Cooperation: The Third Stage of the Development of the Euro-National Parliamentary System

This is the legal framework that allows to define the euro-national parliamentary system as an ensemble of elected assemblies which are autonomous but interdependent and have the common goal of ensuring the value of democracy at all levels of the Union's regulations through control activities and influence on government powers. But what are the concrete circumstances that make the specific systemic connections become true in the Union's life, thus proving the validity of that general definition.

The first and fundamental of these systemic connections is the dual citizenship ("citizenship of the Union" that "is additional to national citizenship", Art. 9 TEU), a condition that all voters of the European Parliament and of the national parliaments share. It is a condition that allows to exercise the right to vote for the European Parliament regardless of the condition of the residing country ("every citizen of the Union, in fact, has the right to vote and stand in elections to the European Parliament in the Member State of residence under the same conditions as the nationals of the State": this is the wording of Art. 9,1 of the Charter of Fundamental Rights).

The dual citizenship acts primarily as a systemic factor linking the European Parliament and national parliaments in the implementation of the "area of freedom, security and justice of the Union" (Title V of the TFEU).[8] It is a legal framework that concerns the innermost core of the status of citizenship: the enjoyment of the fundamental rights while respecting the different legal traditions of the Member States (Art. 67,1 TFEU); the personal and internal safety (Art. 71 TFEU); the "right to an effective remedy and a fair trial" (Art. 4 Charter of Fundamental Rights, Arts. 81 and 82 TFEU). These are topics that in their enjoyment and guarantee are covered by the citizenship and therefore get "associated" to the European Parliament and the national parliaments as for "information", "feedback" and "controls".

The second systemic connection between the European Parliament and national parliaments regards the decisions on the structural composition of the Union. Also in this case, the protection of democracy as unifying goal of the euro-national parliamentary system represents the ratio of the procedure "to become a member of

[7] Olivetti (2012), pp. 492–572; Crum and Fossum (2013).

[8] House of Lords of the United Kingdom, Select Committee on the European Union, "European Union – Tenth Report, Chapter 6: Area of Freedom, Security and Justice", session 2007–2008, http://www.publications.parliament.uk/pa/ld200708/ldselect/ldeucom/62/6210.htm.

the Union" (Art. 49 TEU). Both when it is duty to inform the European Parliament and national parliaments on the applications for the accession of new States and when the approval by the European Parliament and national parliaments (if "in compliance with their respective constitutional requirements") is necessary. The respect of the values in Art. 2 TEU, which however is a condition of eligibility, is specified in the so-called Copenhagen criteria for accession (1993). And among these, the "political criterion"—that is to say, the "stability of institutions guaranteeing democracy"—is preliminary to the opening of formal negotiations. It follows, therefore, that the enlargement to new members must first be an enlargement of the parliamentary area where the defense is in the interest of both the European Parliament and of national parliaments, within the common framework of representative democracy.

The third stage of systemic connection between the European Parliament and national parliaments is the one in which they are both actors with constituent power in the process of constitutional amendment. The precise point of transformation from an international organization into a constitutional organization can be found in the parliamentarization of the revision procedure of the Treaties. And the fact that at this crucial time national parliaments are associated with the European Parliament is another confirmation of the indivisibility of the principle of representative democracy, as a principle that determines both the constitution and the functioning of the Union. It is also a principle conditioning its constitutional organization both in the supranational institutions and in the national laws of the Member States.

If in the constituent phase the purpose of an active representative democracy in the configuration of the Union is a common element, the constitutional policy interests of respectively the European Parliament and national parliaments appear to be different. The European Assembly will have to work out a formula to balance the "institutional framework" of the Union (Art. 13 TEU) to safeguard the element of democratic accountability through its role. National parliaments will have to work towards a Union shaped in a way that does not hinder the "fundamental political and constitutional structure" and therefore also the parliamentary centrality forming the "national identity" of the Member States (Art. 4 TEU), with implications on the status of national citizenship and the consensus-support that can result from it.

In the ordinary revision procedure of the Treaties, the systemic connection between the European Parliament and national parliaments becomes co-existence as for the composition of one particular body. Article 48,3 TUE, in fact, provides for the convening of a "convention also composed of representatives of national parliaments and the "European Parliament ". The "Convention's" task is to "examine the amendment proposals to the Treaties" and to adopt a "recommendation" addressed to the governments that then will have to approve them.[9]

This is an intermediate stage of the deliberative process. The final stage will be the ratification by all Member States (which will normally involve national parliaments again, if not the celebration of popular referendums: Art. 42,4 TEU).

[9]Cf. de Witte (2012), pp. 107–127. Before the Lisbon Treaty, cf. Manzella (2002), pp. 159–182.

However, the characteristics that mark the institution of the "Convention" at this intermediate stage make it the most striking positive law element of the inter-parliamentary cooperation: it has a methodological influence on its other concrete implementations.

First, there is the numerical structural datum: the European and national parliamentary "representatives" are absolutely predominant in number compared to the other components of the "Convention", so that it would not be incorrect to call it "inter-parliamentary convention" (this is the common data that can be drawn from the composition of the two "conventions" held so far: the one drafting the Charter of Fundamental Rights of the EU 's and the one drafting the European Constitution). Then, there is the formal aspect regarding the equality and homogeneity of the "Convention's" members for voting purposes. In fact, there is no voting difference between MEPs and national MPs nor any hypothesis of separate voting based on representation. Finally, there is the functional datum of the "by consensus" (Art. 48,3 TEU) voting rules: a typical modus of the participatory-deliberative democracy (an intermediate rule between the principle of unanimity and the one of majority: that is to say, the adoption of a decision based on the absence of any precise opposition). These are all characteristics of a parliamentary system that validates a systemic communion between the European Parliament and the national parliaments also within the constitutional dimension of European Union rules, thus eroding the intergovernmental primacy formally enduring.

The fourth element of the systemic connection between the European Parliament and national parliaments lies in the procedures to guarantee the principle of conferral. The connection happens on a middle-earth field between the set of exclusive competences of the Union (TFEU Art. 3) and the national constitutional setting that defines the identity of the Member States (Art. 4,1 TEU). In this field of shared competences two ruling principles intersect. On the one hand, the "responsibility for the European integration" (to use the definition "above suspicion" of the German Law) of the national parliaments; on the other hand, the duty of the European Parliament (as of the other EU-Institutions) to respect the "national identity" of the Member States. Once again it is the general purpose of active democracy that unites the parliamentary area of the Union, by specifying the scope of "ensuring that the decisions are taken as closely as possible to citizens" (preamble Prot. 2). But the democratic criterion of proximity must be crossed with that of efficiency (Preamble TEU par. 7). "Sufficiently" meeting the objectives of the proposed action therefore determines the "level" at which action must be taken: that of the Member States or the European Union (TEU Art. 5,3).

Thus, looking at the compliance with the subsidiarity principle as a mere interest of the national parliaments is a very partial, if not wrong evaluation. This perspective should be avoided for one basic reason. As can be seen in the whole physiognomy of the regulations (and as specified dall' Art. 4,2 TEU), the "national identity" declined in the "fundamental, political and constitutional structure" of the Member States is not at all absorbed by the EU membership.[10] This area is likely to suffer

[10]Cf. Guastaferro (2012), pp. 263–318.

and, in fact, it suffers "limitations allowed" from the time of joining the EU and in the fulfillment of the "conditions of eligibility" (see Copenhagen criteria and Art. 49 TUE). But this "sovereign" area cannot vanish. If so, it would wound the same constitutional identity of the EU and its motto "united in diversity" (see Statement N. 25), which does not only express the essence of cultural diversity in the Union's structure, but also expresses a precise legal concept: the concept of national sovereignty as the basic element that legitimizes the effectiveness of the EU decisions. A concept which is therefore related to the "effective implementation of the EU law", which Art. 197 of the TUE defines as a "matter of common concern".

The control over the proper "exercise of the powers of the Union" according to the principle of subsidiarity is therefore firstly a task of the same EU institutions ("Each institution shall ensure constant respect" on its compliance: Art. 1 Prot. 2) and, first of all, as regards draft legislative acts, of the European Parliament. The latter, according to the Art. 42 of its Rules, "shall pay particular attention to compliance with the principle of subsidiarity" in the legislative process. And "the competent committee" (which is the Committee on Legal Affairs) for compliance with this principle "may decide to make recommendations to the appropriate committee (in the merits) of any proposed legislation." It should be noted that this protection by the European Parliament takes place independently of any action by the national parliaments.

Thus, there is a systemic connection framework that also becomes a procedural interconnection when national parliaments are engaged with reasoned opinions on non-compliance with the principle of subsidiarity. The final recipient of such opinions is of course the European Commission, the (almost) only body with the (practical) exclusive right of legislative initiative. However, the European Parliament is part of it procedurally: both through the obligation to "take" the reasoned opinions "into account" within the legislative process, even if they are issued by a single national parliament (Art. 7,1 Prot.n.2); and through the stronger power (exercised by 55 per cent of its members) to declare the proceedings of a legislative proposal as no further admissible if its incompatibility with the principle of subsidiarity has been declared by the majority of the voting rights of the national parliaments (and also if the Commission has decided to insist on it: Art. 7,3 Prot. 2).[11]

With a view to the leading role of national parliaments, it was possible to speak of these as "third party legislator albeit with negative powers" or even as a "virtual third chamber".[12] In an overall perspective bearing in mind the common interest of the parties involved in the procedures, it is more accurate to see in them co-operative interferences with the European Parliament, systemic factors.

If anything, talking about the distinction between the competences and the procedures to be relied upon, here a leading role as final body is carried out by

[11]Cf. Lupo (2012), pp. 108–131.

[12]Cooper (2012), pp. 441–465.

the European Court of Justice. Both when it decides on complaints of violation by legislative acts against the principle of subsidiarity, actions brought to Court by a Member State "on behalf of its parliament" and when it is called, in general, to adopt a decision on breaches of the rules of jurisdiction proposed by the European Parliament[13] (13). But this, as it is evident, is a subject that is far from the analysis of the systemic connections between parliaments and is instead part of the complex "side game" between parliaments and constitutional courts, which, among the characteristics of the current parliamentary system, is certainly not the least important.

The final point of connection between the European Parliament and national parliaments is also certainly the most important for assessing the overall "volume of democracy"[14] the system expresses. It is 'the activity where parliaments, with different formulas and intensity, carry out functions related to the control function—the influence on the decision-making process of the Union.[15] The starting point is the division, the final point is sharing.

The functional division is set by Art. 10 TEU and repeatedly emphasized in the basic text of the Union. On this basis, the European Parliament directly represents the European citizens before the EU institutions (with everything that the concept of "representation" expresses in terms of influence on the decision-making process). And the national parliaments are empowered to enforce the democratic accountability of their governments in charge (but not "covered") in the collegiality of the European Councils.

But this division (in which, however, interconnection points or even organic identification points of the recipients of the parliamentary oversight, are already evident) is only a weak formalism. It did not impede the progressive forming of a wide parliamentary area creditor of statements by the government institutions. An area in which the European Parliament and national parliaments play interdependent roles for specific purposes or even experience forms of co-existence in inter-parliamentary modules.

This area has become central in the life of the Union and now takes various forms that can be summarized in the wordings adopted in the Treaties and in the consequential rules, like "political dialogue" and "economic dialogue".

The political dialogue or "political partnership" lies within the diagram of the triangular relationship between the Commission, the European Parliament and the national parliaments. The foundation of the "dialogue" lies in the circular experience of these relations: these are much more significant than their weak legal-formal basis. In fact, on one hand there is the inter-institutional "framework" agreement between the European Parliament and the Commission, which in Par. 18 provides the "cooperation" of the two institutions "in their relations with national parliaments" (OJ L 304 of 20 Nov. 2010). On the other side, there is the

[13]Granat (2012), pp. 428–451.

[14]Schmidt (2012), p. 108.

[15]Griglio and Lupo (2012), p. 314 ff.

letter sent by the President of the European Commission to the presidents of the national parliaments on 1st Dec. 2009 (date coinciding with the entry into force of the Lisbon Treaty: the "recognition" of their "centrality in the democratic fabric of the Union "). This letter, however, is significant because it plans a simultaneous communication with the national parliaments and the European Parliament, and especially because it commits the Commission to undertake a "political interpretation" of the opinions issued by national Parliaments", "also where they indicate" "different reasons for deviations from the principle of subsidiarity." These are signs of the intrinsic "political nature" of this dialogue, which cannot be limited to a narrow pattern of bilateral relations. The parliamentary peculiarity of the "dialogue" is also highlighted by the elimination of the intermediation by governments: this happens by establishing a circuit of simultaneous availability of all the documents relevant for the EU decisions by all parliaments.

The political dialogue takes the form of an organic interparliamentary cooperation through the establishment of the EU Conference on foreign, security and defense policies (COPESC). The Conference fills two gaps. That of the European Parliament, which has guiding and administrative control powers (above all through the budget instrument on the "European diplomatic service" -Art. 27,3 TEU), but does not have co-decision or co-determination powers on the acts of the European Councils in foreign and defense policies. The weakness of the national parliaments, which have direction and control powers over their governments but have no power over non-legislative and initiative acts of the Union in this field. It is also for this reason that the High Representative of the Union for Foreign Affairs and Security Policy (Art. 18 TUE) is required to report to the European Parliament on the "progress in implementing the common foreign, security and defense policy" (Art. 36TUE), but—with a significantly different formulation—has to go before the Interparliamentary Conference "to explain the guidelines and strategies of the common foreign and defense policy of the Union."

The "economic dialogue" has its legal basis in Art. 121,1 TFUE: Member States shall consider "their economic policies as a matter of common interest". Already in this basic rule we can find a role of the European Parliament, both in the "recommendations" to the "Broad Economic Policy Guidelines" (sec. 2) and in terms of results of the multilateral surveillance (co. 5 and 6). But beyond this basic rule, the involvement—in various forms—of the European Parliament is provided for granting financial assistance (Art. 122,2), for the prohibition of credit facilities (TFEU Art. 123, 124, 125) and for the rules on excessive deficit (Art. 126 TGFUE).

But the provisions that followed along with the worsening of the Great Crisis, giving new substance to the provisions cited, have expanded the scope of the "economic dialogue" to national parliaments by making an explicit relationship between parliaments, which was, however, already underlying the strength of the concrete legal-economic experience of the Union. "The strengthening of the economic governance should include a closer and more timely involvement of the European Parliament and national parliaments" (says the cons. 11 of Reg.n.1175/2011). And national parliaments have been assigned a particularly important role in the complex process of accountability that links the Central Bank of the Union to the European Parliament in the organization of a "banking union", the fundamental

institution for the financial stability of the euro area. A role for national parliaments which even exceeds their traditional position before their respective central banks, because of their inspection powers (Art. 21 Reg. 12 Sept. 2013).[16]

On the other hand, it is natural that the interference between the European Parliament and national parliaments is particularly intense and significant in the regulation of the "European semester". This procedure provides for the assessment by the Commission and the Council of the European economic and employment policies of the Member States before they adopt decisions having a "significant impact on their budgets in the following years" (Art. 2bis 3 Reg.1175/2011). This is the most significant intrusion of the Union into the national parliamentary sovereignty because it is focused on the historical budget power of parliaments. Well, in this procedure, the counter-limit is given by the control-influence power at all stages of the procedure carried out by the European Parliament. In fact, "the European Parliament is properly involved in the European Semester in order to increase transparency, ownership and accountability of decisions" (Art. 2bis, Reg.1175 4/2011).

Experience has specified this involvement in the logical sense of an interconnection with the national parliaments. The annual resolutions of the European Parliament—"on the European Semester for economic policy coordination and implementation of its priorities"—are in fact preceded by an "exchange of views" between the Committee on Economic and Monetary Affairs of the European Parliament and the representatives national parliaments. An inter-parliamentary meeting, then, that aims at providing a background for the European Commission before it adopts its "annual report on growth", setting economic and budget priorities for the following year.

The highest point of the economic dialogue between the parliaments of the Union, however, is provided by Art. 13 of the Fiscal Compact and specifically through the establishment of an interparliamentary conference for stability, coordination and economic governance (SECG), which is composed of representatives of the "relevant" parliamentary committees. The conference "aims at improving the accountability and the democratic legitimacy of the EU economic governance by strengthening the cooperation between the national parliaments and the European Parliament, and to ensure a stronger parliamentary role in the areas covered by the Fiscal Compact".

3 The "Organic" Interparliamentary Cooperation

As we have seen, in one or another form of dialogue, these procedural twines, unified in their purpose, express a tendency towards integration which is more fully highlighted in the organic interparliamentary cooperation. That is to say, the parliamentarization process both in the political and economic sphere can create

[16]Cf. Fasone (2014), pp. 164–185.

composite structures of MEPs and national parliamentarians. And the phenomenon of the organic inter-parliamentary cooperation is the one arising most attention (but also more hesitation) for the future development of the Union.[17]

In fact, a "regular" interparliamentary cooperation between the European Parliament and national parliaments is set forth as a principle (Art. 9 of the Prot.n.2). But the inter-parliamentary cooperation structured in composite and permanent bodies has so far been carried out in three areas of competence of the Union. The institutional one (the conference of the parliamentary committees responsible for European integration: COSAC); that of foreign policy and defense (with the Conference of the parliamentary committees for foreign affairs, security and defense policy); the economic-financial one (with the Conference of the parliamentary committees for budget policies and economic governance). The last two of these conferences, set up in 2012 and 2013, have shown a strong absorption power compared to the previous practice of meetings of the sectorial committees (which were organized on variable times by the European Parliament and national parliaments).

These are three areas where the primary responsibility is on the governments of the Member States "in" the Council and in which, therefore, the parliamentary control-influence can only feebly be carried out by the European Parliament or be carried out in improper forms by national parliaments impeding the European decision-making process. The last reference is to the "fragmented control" carried out by the single national parliaments on their own governments with tools such as the "parliamentary scrutiny reserve" (see for Italy Art. 6 of Law 234/2012): tools that in practice, make the intergovernmental process difficult and create an abnormal "parlamentarization".[18]

Compared to the intergovernmental cooperation, the organic inter-parliamentary cooperation can exercise the proper oversight functions on two sides. On the one hand, the representation of the European Parliament "in" the conference can exert control-influence strength on parameter of the unified European purpose of the decision in progress. On the other hand, representatives of the national parliaments contribute strongly through conditioning based on their trust relationship with their governments and especially in the control of the constraints imposed on the economic governance, a reflection of the principle of no taxation without representation.

It is a net of reciprocal legitimacies through links: national parliaments share procedures that seek to affect a "trajectory totally irreducible to national constitutional orders", the European Parliament shares the influence on areas that are largely closed to it, such as the common security and defense policy.

That is why, faced with the phenomenon of the "intergovernmental overflowing" because of the Great Crisis, the organic inter-parliamentary cooperation through

[17]Cf. Esposito (2014), pp. 133–177; Olivetti (2012), p. 565 ff.

[18]Cf. Piccirilli (2014), p. 205 ff.

conferences appears as a democratic counterweight, a balancing resource, if not a definite solution.[19]

We are aware, in fact, to move in fields that are still open for a thorough legal drafting. The most suggestive inter-parliamentary conference—the one on economic governance provided by Art. 13 of the Fiscal Compact, where the outline of a "parliament for the euro area" can be detected—is still uncertain in the composition and decision-making ability. But the legal fact of its mere existence—along with the other interparliamentary conferences—itself produces ruling effects. Every legal system, in fact, knows institutions that can play an objective role of balance simply because of "being there", independently of the exercise of specific warranty functions.

In fact, under the pressure of the Great Crisis, new institutions and procedures have been set up in the regulations of the Union and they have to be seen as a whole, identifying the "net of their meaning" underlying them. Otherwise we would be faced with a unifying sequence based on accumulation without a global design that, even amid errors and delays, has been the political reality of the crisis legislation. There is, in short and to quote the Germans, a responsibility for the integration which ought to give birth to a comprehensive legal interpretation of acts and procedures that may otherwise dissipate if they remain in closed areas and within their current textual shortcomings.[20]

4 The Policies of Rejection to the Crisis and the New Countenance of the European Union

In the rugged short time between the signature of the Treaty of Lisbon (2007) and the signing of the so-called Fiscal Compact (2012), three basic changes occurred in the Union with "unvaried Constitution": (a) in the social order, (b) in the political order, (c) in the institutional order. These changes need to be examined separately, but obviously, altogether, they contribute to forming a physiognomy of the Union different than the one preceding the Great Crisis. This new physiognomy is marked by serious indications of structural fragility, but, at the same time, it is more mature for more advanced integration experiences.

a) Social change has occurred in the public sphere of the Union with a strong decrease of the consent for the policies of the European institutions and with a corresponding impact on the national governments carrying out those policies.

[19]On "Connection legitimisation" v. Ress (1999), p. 155; Olivetti (2012), p. 568, calls the German doctrine of *Parlamentsverbund*, as a democratic counterpart against the Union's executive power; Fabbrini (2013), pp. 1003–1029.

[20]Cf. Olivetti (2012), p. 515, the reference to the consolidation of an "integration constitutional law" and all *Integrationsverantwortung* (German Constitutional Court) of the "Lisbon judgment" of June 30, 2009.

Until now there was the democratic deficit—real and perceived- which, to an endemic extent has always been attributed to the institutions of the Union, largely because of their deviations from the model of representative democracy nationwide. What now has been added to it—through an inevitable contamination in the "union of constitutions" that is the nature of the Union[21]—is a lack of democracy for "compliant execution" of the austerity policies co-decided at the European Councils.[22] The wave of popular dissent in the national parliaments has resulted in a number of governmental crisis, accompanied by the urgent request of a balance between the doctrine of the "accounts in order"—the stability of the common currency, in particular- and the doctrine of a strong economic impact cure against the crisis: through the use of every resource available and also through a financial framework with further debts. The European Parliament has shared this revisionist economic theory in various documents (especially in its resolution of December 12th, 2013) More: within the anti-crisis set of tools, to which it has participated actively, it has worked for an equilibrium with a consistent policy of transparency and accountability (trying to "parliamentarize", through statement proposals, procedures which are out of its control, such as the so-called troika monitoring the fulfillment of the conditions imposed on countries in difficulty). However, also the European Parliament could not avoid its recomposition "crisis". The elections of 2014 marked the entry of a significant number of euro-hostile members and the creation, for the first time, of an institutional opposition within it. The crisis of consensus so far had manifested only in the low participation in the European elections, but this time it took the form of a "representation" in the central institution of democracy in the EU. The parliamentarization of the euro-hostility is a phenomenon that—if it can even be considered favorably for the strengthening of the European Parliament through a new dialectic between majority and opposition—marks the presence, at the very heart of the Union, of a "non Union", that is to say an alternative to its dissolution.

b) This observation leads to examining the changes occurred in the political order: the "new political nature" of the Commission. Its genesis is well known: the presentation for the first time of presidential candidates in the elections of 2014; the designation by the European Council of the most voted candidate, after consultation with representatives of the European Parliament; the parliamentary election of that candidate. (Art. 17,6 e7; Decl. 11). The "politicality", understood as a real turning point in the institutional nature of the Commission which has been repeatedly emphasized by the new president Junker in his relations with the European Parliament (defined with a deliberate emphasis on rhetoric as the "lighthouse of European democracy") has been streamlined in a triple aspect.

[21]Cf. Manzella (1999), pp. 923–950.

[22]Majone (2014) speaks, not by chance, of "democratic default".

Firstly, in structuring the Commission in working groups coordinated by the vice-presidents. There is a clear political sectorial responsibility that the European Parliament can uphold with greater efficiency compared to the atomized competence of the individual Commissioners. A more cohesive government form therefore corresponds to a more feasible parliamentary control condition. This new structure—in clusters—of the European Commission has given rise, and this is the second aspect, to an evident interference of the Parliament expressed through the hearings preliminary to the approval by the Commission and immediately accepted in its results by President Junker in his inaugural speech (22nd Oct.2014. Five composition adjustments emerged in the hearings: with regard to important topics such as transport, energy, sustainable development, medicinal products, space policy, and even citizenship. A more political Commission has necessarily implied an expansion of the powers of the Parliament. The third aspect related to the "new political nature" of the Commission is the most relevant. In fact, it concerns the key functions of the Commission in monitoring the fiscal and budget policy of the Member States. This control, as commonly defined, is conducted according to the so-called "philosophy of rules". That is the claim, so far, of an absolute technical nature of the Commission in its assessments, accompanied by the very considerable principle of the reverse majority (Art. 7 FC). But the lasting of the crisis made it clear that the rules that the Commission must apply are dotted with numerous assessment clauses for the economic situation, with a very high rate of discretionary power that must be defined as political. The discovery of the non-technicality of the "philosophy of rules" irresistibly calls for the attention of national parliaments, in an inevitable connection with the European Parliament; this attention is to be exercised especially in the Interparliamentary Conference for economic governance (Art. 13 FC), which seems to be its natural home.

The "new political nature" of the Commission combined with the non-technicality of many exemption clauses thus opens a field hitherto largely unprecedented in public discourse within the triangle with the European Parliament and national parliaments.

c) But the change that has affected the very structure of the Union, and what could influence its development is the process of institutionalization that has characterized the euro zone.

Already designed in the Treaties with a good legislative intuition as "a union in the Union" (see Art. 3.4 TEU), the euro area on one hand has witnessed the formation of a "special" regulatory framework connected to the needs of the common currency. A set of rules and always more stringent constraints in the budget policy of the Member States, as if to compensate the "currency without a state" through statutory conditions for an "optimal currency area". But it is also a regulatory framework which is criticized for its unilateral distortions, in the sense of vigilance on the monetary stability not accompanied by a parallel emphasis on the economic policy conditions necessary for the balance of the euro area.

On the other hand, the euro area has experienced the phenomenon of an "informal" duplication of the institutional apparatus of the Union. It has been a kind of devolution of powers because of the special monetary situation, so to allow an appropriate governance of the euro area (see Title V of the Fiscal Compact). The role of the European Council is therefore—"informally"—taken by "Euro Summit" with a chairman appointed by majority (Art. 12,1 FC). The role of the Ecofin, the meeting of EU economy and finance ministers (Art. 134 TFEU), is carried out by the president of the Eurogroup (Art. 137 TFEU), which is composed of the relevant ministers of the euro area only. But the Eurogroup has got the new task of "preparing and following up the meetings of the Euro Summit" (Art. 12,3 FC) The role of the European Parliament is formally intact, protected by the fundamental principle of the national non-discrimination between MPs who are all competent on what is happening throughout the Union. But this role, by the force of things, is endangered by the current emergence in European of the West Lothian question and especially by the establishment of the Interparliamentary Conference on economic governance (Art. 13 FC). On the other hand, the same Parliament, at the time of the crucial resolution of 12th December 2013 on the recognition of the euro area, has tilted it as an "enhanced co-operation" (pursuant to Art. 20 TEU), has dangerously opened up the possibility of the differentiation in the vote (although referred only to the governments of the Member States in the Council: Art. 20,3 TEU).[23] It is thus not surprising that authoritative voices arise more and more frequently demanding a "parliament for the euro zone." And it is interesting to note that in this process of institutionalization of the euro area, an undisputed role is played by the Commission as the common reference body for the countries of the euro area and those with a different currency. The "new political nature" of the Commission with all evidence justifies and promotes the mission of connecting the two souls of the Union.

On the other hand, the Treaty of the Fiscal Compact, which constitutes the basic legislation for the euro area, is entirely imbued with the tension for integration. Both as a transitional provision intended to be incorporated (in a precise time) within the general legislation of the Union (Art. 16 FC) and in the use of the EU's institutions as a dominant factor in the international nature of the Treaty. Both in the incursion in the constitutional legislation of the States and as a sign of reaffirmation of the "union of constitutions" which is a foundation of the Union (Art. 3,2 FC). The participation of non-euro countries in the first meetings of the Interparliamentary Conference on economic governance and the appointment of a president belonging to a non-euro country as head of the euro summit, are the latest and significant manifestations of this tension for integration.[24]

[23]Cf. Griglio and Lupo (2014), p. 15 ff.; see also Manzella (2012), pp. 141–151.

[24]See the Conclusions of the European Council (30 August 2014)—EUCO 163/14—that "welcomed" the decision of the Heads of State or Government of the Contracting Parties to the Fiscal Compact, "whose currency is the euro", to appoint polish Donald Tusk as President of the Euro Summit (doc. 11949/14).

Here it is important to note that in all three changing aspects that have transformed the Union, an active role has been played by national parliaments. In the social change, as a direct means of aggregation and rationalization—and also through the governments' measures against the crisis—of citizens confused by the wave of European disaffection. In the political change, as protagonists in claiming a new dialogue with the Commission and a more consistent interpretation of the rules. In the institutional change, as subjects that participate in the different dimensions of the inter-parliamentary cooperation as well as adhering to the self-limitations of sovereignty related to the procedures of the European Semester and to the creation of institutions operating independently from them, to control public finances (Art. 3, 2 FC).

Hence, these crucial years have witnessed the networking of the parliaments and the conceival of a parliamentary area of: quality policies, naturally far from what has marked, because of the crisis, the verticalization of the decision-making of the Union.

In this area, the European Parliament has been performing unity in front of the partial identities of national parliaments. It has stated that the "differentiation is a constitutive feature of the process of European integration and a means to enable progress," adding that "all differences respect and thus strengthen the unity of the European legal system", as long as they are "integrated in the single institutional framework of the Union" (see resolution of 12th Dec 2013). There is more: with the parliamentarization of the euro-hostility, which has inevitably emerged in the 2014 elections, the European Parliament has become a widespread extra-parliamentary political energy collector. The uncertainty of the outcomes of this operation cannot, at present, cancel its merits in the European public sphere.

Within the transformation of the State-nation and the construction of member States that auto-limit their sovereignty for the construction of an architecture for cooperation, the European national parliaments are to be the central seam of a democratic process of integration.

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The Current State of the Governance of the Eurozone and the Increase in the European Democratic Deficit

Paola Bilancia

Contents

1 The European Integration Process Facing the Challenge of the Economic Crisis

The European integration process have been experiencing, during the recent years of severe financial, economic and occupational crisis, a phase of reconsideration of balances and objectives which may lead to significant developments, with unavoidable repercussions on national constitutional systems. After all, the latter have been involved in a differentiated way in the more recent steps of the aforementioned process: for example, only the countries that subscribed to the new structure of the "European" economic governance (as shaped by the two Treaties that will be analyzed in the following sections) are currently being required to comply by reforming their constitutional systems.

An important milestone on the new governance system has been the approval, in 2012, of two important Treaties introducing respectively the ESM and a new set of

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rules on stability, coordination and economic governance (the so called Fiscal Compact). On the one hand these Treaties unquestionably bring acceleration on the road towards the European integration process and the development of the economic union, on the other hand they draw a clear line between countries belonging to the Eurozone and countries belonging "just" to the European Union. This fact, combined with the perception that the reform is basically the product of the pressure of the events and of the threat of some State's default, requires a careful analysis of its constitutional impact on the national legal system, also in the light of the fact that the dynamics of the Greek crisis and its recent developments, highlights that these procedures, if taken separately, cannot grant a solution to the Eurozone's problems.

We must ask ourselves, it seems, whether—and above all to what extent—the renewed European integration process will affect the member State's constitutional structure—the Italian Constitution having already been revised as required by the so-called Fiscal Compact Treaty—and consequently the retrenchment of national sovereignty. We should also ask ourselves whether this new phase represents a real breakpoint at which governance of the economy is abandoned at a national level, or whether it is the natural continuation of long-standing progress towards the creation of a system with more federal characteristics instead.[1]

2 An Ongoing Process and a First Stepping Stone: The ESM Treaty

As I argued in the previous section, the recent ESM and so called Fiscal Compact Treaties are the product—and a late one under many aspects—of a complicated progress that started with the emergence of the Greek crisis[2] and with the circumstance that the European Treaties and the secondary law did not enclose specific and organic rules in the event of a member State's public debt collapse. The worsening of the crisis made it necessary to deal with this gap in EU law, especially because the attack by financial speculators progressively started targeting other countries (Ireland, Portugal and, later, Italy and Spain). Hence, starting in 2010, the European institutions and member States began a process of redefinition of the European economic and financial governance, which initially led, based on Art. 122, § 2 of the TFEU, which by using a rather imprecise wording allows financial interventions aimed at helping a Member State in difficulties, to the adoption of a Regulation (Council Regulation 407/2010/EU) that laid down the conditions and procedures needed to grant the EU's financial assistance to a Member State in severe economic

[1] On these issues see Bilancia (2014).

[2] For an in depth analysis of the innovations in the European system of public finance, that preceded the signing of the two Treaties in 2012, and of the issues and contradictions that characterized, even at that stage, the eurosystem, see: Pitruzzella (2012a), pp. 9 et seq.; Dickmann (2012a), pp. 1 et seq.

difficulties and the introduction of a small fund, to which the European Commission would have access (so called EFSM). The Member States then took an obligation to field wider resources to address the crisis by creating an *ad hoc* "State rescue" fund, called EFSF, by forming a specific organization comprising the Eurozone countries.[3] The restructuring of the economic governance continued with the so called Euro Plus Pact, which was approved by the Heads of State and Heads of Government of the Eurozone in March 2011, and was then ratified by the European Council. The Pact, which is binding for the Eurozone countries—and that was agreed upon also by Bulgaria, Denmark, Latvia, Lithuania, Poland, and Romania—focused on the need to improve the coordination of fiscal policies, and obliges participating States to increase their efforts in four macro-areas: competitiveness, employment, sustainability of public finances, and strengthening of financial stability. The process continued with the introduction, by the European Council of 8 November 2011, of the so called European Semester, which established a procedure aimed at reinforcing the synergy between European Institutions and member States with regard to the surveillance of the latter's budgetary policies. The so called European Semester consists of the introduction of a series of procedures that must be enforced during the first 6 months of each year, which allow to define and schedule of national economic and budgetary policies, under the coordination of the EU Council and the European Commission. As a matter of fact, the aforementioned procedure makes it possible to coordinate and, *de facto*, controlling *ex ante*, the economic policies of the Eurozone States, thus clearly narrowing the national governments' margins of action: the budget laws passed by the member States in the second semester must take into account the instructions and recommendations received.

With the so-called Six Pack, which was approved in October 2011 by the EU Council following an opinion from the European Parliament, the EU took its commitment further, thus attempting to fill the legislative voids in the field of common governance of the economy through secondary law and by using the Community method. In fact, the package of laws consists of six Regulations and one Directive, aimed at reinforcing the (preventive) supervision action on public budgets and macro-economic imbalances, and to increase the effectiveness of corrective actions in the event of excessive State deficits, by introducing a series of procedures that assign a pivotal role in the control of national budgets to the European Commission and the EU Council. This package indubitably constitutes the most significant—in the sense of the most stringent—set of measures approved prior to the two 2012 Treaties (on the ESM and the so-called Fiscal Compact): the binding rules outlined in the so-called Six Pack already imposed significant limitations upon State sovereignty in the economics area.

[3]The organization was founded in June 2010 as a limited liability company under Luxemburg law. The only stakeholder was, as a matter of fact, the Grand Duchy of Luxemburg. The organization then entered into an agreement with 16 other States of the Eurozone that, after having subscribed their respective shares, became stakeholders as well. It is interesting to stress out that, compliant with the society model that was chosen, the States take their decision by voting based on shares and not on a *per capita* basis.

Overall, however, these significant reforms (the Six Pack and financial surveillance) have proved lacking in two respects: on the one hand, they did not do enough to counter the attacks by financial speculators on certain sovereign debts, also because of the scarceness of the resources effectively made available to protect the member States that were most severely afflicted by the crisis; on the other hand, they have been inadequate from a European constitutional development point of view, as a reform of the Treaties that would allow a rapid acceleration in the creation of effective common governance of the economy and ultimately of a more political Europe was not included.

Recognizing the need to continue with the task of restructuring the economic governance of the monetary union, in 2012 the Eurozone States gave birth to two new Treaties that, however, as it was not possible to continue by using the Community method because of the British veto, came into being outside of the European law's scope, as mere international Treaties.

In February 2012 the ESM Treaty was signed in Bruxelles. This Treaty is a natural evolution of the EFSF, which, as it was mentioned in the previous sections, was created in 2010. Although it is true that this fund allowed interventions in support of Ireland, Portugal, and Greece, it is equally true that it showed some flaws, such as its temporary nature—as the duration of the EFSF was limited to three years—and the scarcity of the resources at its disposal, that did not allow an adequate level of protection for those countries subject to attacks by financial speculators. This is one of the reasons why the new stability mechanism can now benefit from payments of capital by the Treaty's parties, whereas the previous system was based on guarantees provided by the States, and was therefore more exposed to pressures stemming from rating agencies' evaluations. First of all, therefore, the ESM is an attempt to institutionalize and stabilize the support system for the Eurozone countries. The ESM's aim is to mobilize resources and provide support to those States experiencing, or threatened by, "severe financing problems" (Art. 3 of the Treaty). To this end, the ESM is provided with the power to raise funds by issuing capital market instruments or by entering into financial agreements (or agreements of another kind) or arrangements with its members, with financial institutions, or with third parties. In concrete terms, this 'shield' that protects the Eurozone takes the form of an international financial institution, with its seat in Luxembourg, that every Eurozone country is a member of, despite it being open to participation from every other EU member State.

Moreover, it is extremely important to highlight that the European Council had to approve an amendment of the TFEU and, more precisely, to Art. 136, to make the ESM more "coherent" with the EU's primary law, thus confirming the existence of a legislative void in the Treaties with respect to interventions to support member State in difficulties.[4] In fact, according to the new Art. 136 of the TFEU, "*the*

[4]The amendment of Art. 136 TFEU, on behalf of the European Council on the 19–20 December 2010 and 23–24 April 2011 meetings, was implemented by means of a simplified revision procedure as outlined in Art. 48, § 6 TEU, to allow the adoption of a stability mechanism aimed at protecting the stability of the Eurozone. The revision process was necessary also because of 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". As stated by the revised Art. 136 of the TFEU, the granting of financial assistance must be subject to a "*strict conditionality*".[5]

Potentially, the ESM has a rather significant scope because it has a wide range of instruments at its disposal that go from granting loans to its members to the purchase of bonds issued by member States on the primary and secondary markets, as well as providing loans for the recapitalization of banks and other financial institutions. However, the organizational structure of the ESM seems exceedingly complex, however, and its decision-making process appears to be anything but streamlined: there is obviously a risk that this will affect in a negative way any real chance to make successful use of the instruments provided by the Treaty. Basically, the ESM has a tripartite governance structure, consisting of a Board of Governors, a Board of Directors, and a Managing Director, who may also have a secretariat. The deliberating body, the Board of Governors, is the direct expression of the States that are parties in the Treaty, because it consists of the national Finance Ministers. The Board of Governors may decide to assign its presidency to the President of the Eurogroup, or it may decide to elect a member of its board that will stay in office for two years. Meetings of the Board of Governors may be attended by the European Commission's vice-president for economic and monetary affairs, the President of the ECB, representatives of non-euro area member States participating in a specific stability support operation, and representatives of institutions such as the IMF, but only as observers. The Board of Directors is entrusted with the task of ensuring that the activities of the ESM are carried out in compliance with the limitations imposed by the Treaty, as well as other duties entrusted to it by the Board of Governors. It consists of Directors and substitute Directors appointed by the respective member States. It is, as a matter of fact, the body to which the more technical questions are entrusted, and its role will depend on the range of duties that the Board of Governors decides to delegate to it in the management of the ESM's activities. The final managing body, the Managing Director, is appointed by the Board of Governors for a 5-year term, which can be renewed only once. The Managing

fact that the Lisbon Treaty of 2007 outlines some provisions that diverge from the implementation of support mechanisms for States facing a crisis.

[5]For an in depth analysis of the legal basis for the ESM, see Napolitano (2012a), pp. 463 et seq. As noted by the author, this amendment to the Treaties is aimed at strengthening the legal foundations for the new support system and gives an answer to the objections concerning a possible conflict between said support interventions and the European Treaties. Article 125 TFEU, in fact, states that "*the Union shall not be liable for or assume the commitments of central governments, regional, local or other public authorities, other bodies governed by public law*"; Art. 123 TFEU prevents the EU from buying quotas of a member State's public debt; Art. 122 § 2 TFEU, lastly, states that a bail-out by the EU should be permitted only if an emergency in a member State is originated by severe and serious causes (such as natural calamities) outside of said State's control. The adoption of an *ad hoc* rule in the Treaties should therefore implement a provision that allows an exception to the general anti-bailout rule.

Director conducts the current business of the ESM under the direction of the Board of Directors, whose meetings he or she chairs.

At a first glance at the EMS's organizational structure, it is evident that the prevalently intergovernmental nature of its new financial stability mechanism. The States, and the national governments in particular, are the main actors, entrusted with the task of taking all the decisions, while the "European" institutional presence in this body is limited to participation, as mere observers, of the European Commissioner for Economic and Monetary Affairs and of the President of the ECB. However, according to the Treaty, the EU's institutions must participate in the complex decision-making process needed to unlock access to the funds in their entirety.

Decisions relative to the granting of support for the financial stability of member States are taken by the Board of Governors, and the intergovernmental nature of the decision-making mechanism is substantiated by the way in which decisions are adopted, as they may be adopted by mutual agreement, by a qualified majority, or by a simple majority. All of the most important decisions—that is, those relating to the granting of support—must be unanimous. The ESM therefore replicates one of the most significant shortcomings of the intergovernmental method, as it allows each State to exercise a veto power that can put a stop to any decision-making mechanism in those areas of the Treaty that are most important (according to Art. 4, § 3, of the Treaty, abstentions do not prevent the adoption of a decision by mutual agreement). Nevertheless, it allows the adoption of a procedure that derogates to the principle of unanimity, strictly in cases of emergency, to protect the financial stability of the euro area: it is up to the European Commission and the ECB to determine when a state of emergency exists, and therefore to permit the adoption of a decision which is not unanimous, but adopted by a qualified majority (85 % of the votes casted). "Ordinary" decisions require a qualified majority of 80 % of the votes casted. It should be recalled, however, that the number of votes held by each member is equal to the number of shares assigned to it out of the total capital paid into the ESM. Therefore, this is not a case of one vote for each State, but rather of a "weighted" vote based on the actual contribution that each State makes to the stability mechanism (in terms of percentages, Germany's is at 27.14 %, France's is at 20.38 %, and Italy's is at 17.91 %). The aim of this carefully-contrived procedure seems to be that of giving Germany and France a veto power in all cases, and once again to de facto bind the decision-making process—also in the case of decisions taken by a qualified majority—to an intergovernmental logic based on the Franco-German leadership.[6]

The complexity of the ESM increases if one takes the procedure required to unlock assistance to a State in difficulty into account. A request for support must be presented by a Member State to the Chairperson of the Board of Governors, which in turn will ask the European Commission to review the case, together with the ECB. On the basis of the European Commission's evaluation concerning the State's public debt, the Board of Governors may decide to grant the required assistance. The European Commission, together with the ECB and, if possible, the IMF, is then

[6]On the voting procedure in the ESM see: Padoa Schioppa (2012).

entrusted with the task of negotiating a memorandum of understanding with the State. The memorandum must outline a program of macroeconomic adjustments to address the State's situation of financial weakness. Subsequently, the European Commission has the task of signing the memorandum of understanding on behalf of the ESM, although the prior approval of the Board of Governors is required. The European Commission, in cooperation with the ECB and the IMF, is then responsible for monitoring the compliance by the State with the terms and conditions enclosed in the memorandum of understanding, to which the provision of financial assistance is subject.

The involvement of the European institutions in the new financial stability mechanism is also empowered by the regulations regarding the settlement of disputes between a member State and the ESM. The clearly predominant role of the Board of Governors is confirmed by the fact that it also has the duty to decide on disputes relating to the application of the Treaty, but in the event that a State fights the decision of the Board of Governors, the case is submitted to the Court of Justice of the EU, whose decision is binding for the parties to the matter, so that this is a non-appealable ruling.

There is no question that the new mechanism aimed at sustaining financial stability contains a number of issues. The complexity of the procedure and of ESM's governance does not appear fit to propel the creation of a mechanism able to rapidly deal with crises of national public debts. The predominantly intergovernmental nature of the ESM is confirmed by the pivotal—possibly excessively so—role played by the Board of Governors (and therefore by national governments) in the decision-making process: the Board of Governors is entrusted with the most important decisions, starting with the right to choose in complete autonomy when and if to grant assistance to a State requesting it; as a matter of fact, the Board also acts as a Court of first instance in the event of a dispute between a State and the ESM. The Treaty has also *de facto* reproduced the most important problem in the intergovernmental method, which is the lack of decision-making capacity; this is the same deficit that has historically hindered the European integration process in non-Community pillars such as the JHA and CFSP. Besides guaranteeing every Member State a veto power on the most important decisions, the Treaty ensures that countries such as Germany and France will also have a veto power in the cases in which a unanimous or consensual vote is not required.

The Treaty also appears anomalous by its very nature because, although it places itself outside the scope of EU law, it resorts to European institutions—such as the European Commission, the ECB, and the EU Court of Justice—to manage the financial stability mechanism in practice. Moreover, with regard to the role of European institutions, it is noteworthy that the European Parliament has been excluded from the decision-making procedure: its involvement is limited to the right to be informed periodically about the ESM's operations by the European Commission and the EU Council. Also to be considered is that, at present, the only parties of the Treaty are the Eurozone countries, so that inclusion of the European Parliament—which represents the citizens of the entire EU—would not have been justifiable. The indisputable step forward towards the construction of a European governance of the economy achieved by the Treaty (although it is currently limited

to the Eurozone) therefore also clashes—according to some scholars—with the long-standing question of the democratic deficit, also in the decision-making system. This defect is all the more evident if one considers that, while excluding the European Parliament, the Treaty has elected to involve an international organization like the IMF, which the citizens of Europe undoubtedly do not perceive to be an institution able to represent their will and interests.

Despite the aforementioned critical issues, the Treaty still represents a significant step towards both the stability of the Eurozone and economic integration. By effectively shaping the ESM, a European fiscal institution of some sort has been created, an institution that can rescue countries in crisis, and which can at the same time represent an initial stepping stone towards the creation of a European Treasury with provided with federal funding and able to coordinate the economic policies of the member States.[7] In this process, the States that signed the Treaty have maintained absolute control over the decision-making process through the Board of Governors, although it should be borne into mind that a fundamental role in the development of the restructuring program that the applicant States must present to receive financial support, as well as in monitoring compliance with the program, has been entrusted to European institutions (the European Commission and the ECB).

It will therefore be up to each national parliamentary system to assert its political direction before the governmental representatives involved in the decision-making process: and above all it will be the task of the national Parliaments of the Eurozone, each according to its national specificities, to implement the conditions imposed by the ESM's decision-making circuit and negotiated by the various governments in the event of a call for financial assistance.

3 The Second Piece of the Puzzle of the New Governance: The So Called Fiscal Compact Treaty and Its Connection to the ESM

A month after the approval of the ESM,[8] 25 member States of the EU, excluding the United Kingdom and the Czech Republic, signed the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union—known as the Fiscal

[7]On the ESM as a stepping stone towards the creation of a European Treasury with federal budgetary powers, that could coordinate the economic policies of the member States, see: Majocchi (2011); the author states that the first stepping stone towards the creation of a European federal economic and financial policy may be the creation of a European Fiscal Institute. This body would be able to bail-out countries that are exposed to the risk of a public debt crisis. The next step should be the issuing of eurobonds, to provide the financial means needed to sustain a plan for the strengthening of European economy. Lastly, the budget, funded only with EU's own resources, would be managed by a federal European Treasury.

[8]The Treaty was signed on the 2nd of March 2012, and should enter into force starting from the 1st of January 2013, subject to the condition that, as stated by Art. 14, § 2, 12 parties whose currency is the Euro ratify it, or from the first day of the month following the 12th ratification, if precedent.

Compact. With this new Treaty, the parties have progressed in the strengthening of the instruments aimed at facing the Eurozone economic crisis, and have taken the process of economic integration a step further. The intention, as Art. 1 of the Treaty states, is to strengthen the economic pillar of the EU by reinforcing budgetary discipline through a fiscal compact, and to strengthen the coordination of national economic policies.[9]

In this case, too, the instrument chosen is an international Treaty developed outside the EU's legal framework, involving European institutions to varying extents nevertheless. The Fiscal Compact confirms the close connection and interdependency between the new ESM and a new European budgetary pact, and consequently between the ESM Treaty and the so called Fiscal Compact Treaty, as the latter states in its Preamble that the granting of financial assistance to States requesting it (under the ESM) will be subject to ratification of and compliance with the so called Fiscal Compact.

The core of the Treaty is undoubtedly the "*golden rule*" of the balanced budget which the parties must implement in their legal systems. Differently put, States must have a balanced (or in surplus) structural budget, and this rule will be deemed to have been respected if the annual State balance does not exceed the limit of a structural deficit of 0.5 % of GDP, whilst in accordance with Art. 3, § 1, letter (d), when the ratio between public debt and gross domestic product is noticeably below 60 % and there are no risks to public finances, the limit of the structural deficit can be 1 %. This rule can be derogated from by States only under the exceptional circumstances described in Art. 3, § 3, letter (b) of the Treaty, which states that the term "exceptional circumstances" means unusual events outside the control of the contracting party concerned which have a major impact on the financial situation of the public administration or periods of severe economic downturn. In the event that significant deviations from the objective of balancing the budget are observed, an automatic adjustment mechanism is provided for, obliging the State in question to implement measures to correct the deviations over a defined period of time span. The Treaty then provides that within 1 year after it comes into force, the golden rule must be translated into provisions of binding force and permanent nature, and preferably—but not necessarily—constitutional in nature as well. It is evident that these are rules relating to budgetary rigor that very much recall the constitutional amendments adopted in Germany in 2009, and they therefore suggest a 'Germanization' of the Eurozone's rules; this is also consistent with the increasing leadership assumed by Berlin in recent years in management of the economic crisis through its rigorist approach.[10] The so called Fiscal Compact also intervenes in the area of public debts of the States, aiming at promoting a more careful approach to

[9]For an in depth analysis of the so called Fiscal Compact, see Morgante (2012b). On the choice of acting outside of the scope of European law by means of the so called Fiscal Compact, see: Della Cananea (2012), pp. 6 et seq., the author finds that this inevitably provides for an even more "*a la carte*" Europe. The author consequently asks himself if and in which measure the EU can survive a differentiation of this kind.

[10]On the fact that the rules on budgetary rigor enclosed in the so called Fiscal Compact closely resemble the constitutional reforms adopted by Germany in 2009, see: Fabbrini (2012), p. 435. In

national budgets. In fact, it obliges States with a public debt exceeding 60 % of GDP to reduce it at an average rate of one twentieth per year.

In the same way that the Treaty on the ESM, although outside the scope of EU law, actively involves the European institutions in the governance of the financial stability mechanism, the so called Fiscal Compact provides for their active role in ensuring compliance with the balanced budget rule. In this case, however, there is a substantial difference with regard to the ESM. By requiring that the balanced budget principle be introduced into domestic legal systems through legislation at a constitutional level, the so called Fiscal Compact makes the States, and in particular their national Constitutional Courts, responsible for verifying compliance with this principle; ensuing from this obligation is the problem of how to proceed before the Constitutional Courts in the event of a violation of this parameter, as well as the question of judgment on the merits, which the Italian Constitutional Court is undoubtedly unable to perform: a breach of the budget balancing regulations might be problematic in any case when it comes to asking the Constitutional Court to decide on issues of constitutionality[11] and above all, once jurisdiction has been established, to evaluate and analyze economic data which fall outside its current expertise.[12] It is therefore difficult to imagine how a European action in proceedings relating to excessive deficits, which will be discussed shortly, can be dealt with only at a later stage, because the Constitutional Court would have jurisdiction at the first instance.[13]

The Treaty provides for the European Commission to be called upon first to develop common principles that must guide the parties of the Treaty when implementing the proposed adjustment mechanism at a national level, in the event of significant deviations from the objective of balancing the budget. If a State is subject to the excessive deficit procedure as defined by Art. 126 of the TFEU, the so called Fiscal Compact obliges it to develop a program which includes a detailed description of the structural reforms to be implemented to correct the excessive deficit. This program must be submitted to the European Commission and the EU Council for approval. Subsequently the European Commission and the EU Council have the task of monitoring the implementation of the program. Within the scope of an excessive deficit procedure, a member State must comply with the European Commission's recommendations: here, the Treaty introduces a 'State-

particular, on the reform of Art. 109 of the German Constitution, as amended by the so called *Föderalismus-Reform II* of July 2009, see: Pedrini (2011), pp. 391 et seq.

[11]On the possible deficit of constitutional protection with regard to the rules on budget balancing see: Scaccia (2012); on the same issue see also Pace (2011); Bognetti (2011).

[12]It is not possible to analyze this aspect in this work. It is nonetheless interesting to highlight that some decisions of the Italian Constitutional Court were already based on the new Art. 81 Const. (among others, decision n. 20/2015), while other decisions, that had the same article as a parameter, did not take it into account (among others, recently, decision n. 70/2015).

[13]On the connection between the European excessive deficit procedure and the intervention of the Constitutional Court see Morgante (2012b) *cit*.; the intervention of the Constitutional Court should limit, according to the author, the use of the excessive deficit procedure.

rescue' clause which allows the contracting parties to prevent the application of the measures imposed by the European Commission when a qualified majority votes against the proposed decision. The European Commission and the EU Council must also be notified in advance of national plans to issue public debt to ensure the enhanced coordination of proposed government debt issuing.

The involvement of the European institutions in the application of the so called Fiscal Compact also extends to monitoring the application of the Treaty (Art. 8). As a matter of fact, "multilateral supervision" is provided for: this envisages the initial involvement of the European Commission, which presents the States with a report concerning the implementation of the budget balancing rule in the different national legal systems and of the adjustment mechanism, which kicks in when there are significant deviations from the medium-term objectives. If the European Commission finds that a State has failed to comply, one or more of the other States may apply to the EU Court of Justice, which in turn exercises the role of guardian of the Fiscal Compact Treaty—partly because an application can be made by States regardless of the European Commission's report—and its decisions are, as always, final and binding. In this case too, a decision finding that the Treaty's rules have been breached may include an evaluation of the adequacy of the measures taken by the State by means of an assessment—and this is a new development for the EU Court of Justice—of its economic (and social) policies.

Apparent in the procedures established by the Treaty, as in the case of the ESM Treaty, is the absence of the European Parliament. The Parliament is not involved in crucial decisions relative to assessment of compliance with the principle that States must balance their budgets, and only in the so called Fiscal Compact the Parliament has the limited role of being called upon, along with national Parliaments, to promote and organize a conference involving the representatives of the European Parliament Committees with competence in the field and those of national Parliaments, in the course of which budgetary policies and the implementation of the Treaty may be discussed. The Treaty also involves the national Parliaments (of the contracting parties) in preparation of the adjustment mechanism, the contents of which must respect "[their] prerogatives" (Art. 3, § 2), while some commentators have raised doubts on whether these provisions are sufficient for the construction of a European democracy.[14] Significant in this regard is the route taken by the Federal Constitutional Court of Germany with its decision of 12 September 2012 in a preliminary judgment on the ratification of the two Treaties; while opening the way for their implementation, the Court emphasized the defining role of the German Parliament, not only ensuring that it would be fully informed on the work of the ESM, but also stressing the full jurisdiction of the Bundestag on variations to the capital paid into the Fund. Although it is true that the Treaty does not expressly provide for a right of withdrawal, it is also true that customary

[14]On the involvement of the national Parliaments in the so called Fiscal Compact see: Manzella (2012). The author hypothesizes a euro-national Parliament network, supporting the new economic and financial policies as a good (maybe the only) way to build an acceptable democratic framework.

international law recognizes the possibility of doing so by mutual agreement. Hence in a situation in which the circumstances that provided the foundation for the signing of the Treaty change, it will always be possible to unilaterally denounce the Treaty itself.

The aim of the so called Fiscal Compact is to improve national government accounts, based on the idea—as often argued by the German government—that healthier public finances less subject to indebtedness are essential to successfully address and overcome the severe economic crisis in the Eurozone. With the coming into force of this Treaty, therefore, national budgetary policies will be significantly constrained to attainment of the objective of financial equilibrium, although in compliance with each State's specificities. It is precisely this aspect that emerges in all its relevance: it will be necessary to understand to what extent adjustment to a policy of financial rigor within the member States can actually come about if use is made of flexibility criteria based on the differing characteristics of the economies of the Eurozone countries. The Treaty undoubtedly reinforces the supervisory role over the state of national budgets (or better, finances) undertaken by the European institutions, and in this regard the European Commission has indeed been assigned a leading role. At the same time, however, the obligation to codify the balanced budget rule within national constitutional laws clearly pursues the objective of making States more responsible, while giving national constitutional Courts a potentially important supervisory role.[15]

4 Italy Adjusting to the New Model: The Reform of Art. 81 of Constitution

In the light of the above, Italy diligently adopted this set of relevant innovations in April 2012, when it amended its Constitution as required by the so called Fiscal Compact, adding the "golden rule" of balancing its budget by means of Constitutional Law no. 1/2012 on the "introduction of the balanced budget principle into the Constitutional Charter", and in July 2012, when it ratified the ESM and Fiscal Compact Treaties. The new regulations enclosed in this Constitutional law set out

[15]On the one hand, the new rules on the balancing of the budget appear innovative and effective, on the other hand the same thing can't be said about the Treaty's provisions regarding the coordination of the economic and governance policies in the Eurozone. More precisely, the Treaty just demands that the parties unite in a joint effort towards an efficient functioning of the economic and monetary Union (Art. 9). With regard to the governance of the Eurozone, the Eurosummit is institutionalized: the Eurosummit consists of the meeting between the Heads of State or Government of the countries of the Eurozone, and is a separate entity from the European Council (the EU institution formed by the Heads of State or Government of the member States of the EU). The Eurosummit was conceived as an evolution of the Eurogroup and was designated by the then President of the French Republic, in 2008, as the economic government of the Eurozone (taking the place of the Eurogroup itself), to face the banking crisis. A permanent Presidency was appointed (the term lasts two and a half years, and is renewable), which is elected at the same time of the President of the European Council.

the essential elements of the balanced budget principle; they amended Arts. 81, 97, 117 and 119 of the Constitution; and they deferred the obligation to establish detailed rules to a special strengthened law to be passed by 28 February 2013.[16] The new Art. 81, paragraph 2 of the Constitution entrusts the Parliament with the task of adopting (by an absolute majority of the members of each Chamber) a law establishing the contents of the budget law, the fundamental rules, and the criteria aimed at ensuring that budgets are balanced, as well as that the debt of the entire public administration sector is sustainable.[17]

By constitutionalizing the principle of balancing "budgetary income and expenditure" in Art. 81 of the Constitution, the reform has rooted the golden rule on the functioning of the public sector, which will be obliged to guarantee that the budget is balanced and that the level of debt is sustainable (Art. 97 of the Constitution). The picture is completed by two amendments aimed at strengthening the State's competences on control of public budgets, thus centralizing them, thereby restricting the role and scope of action by local governments. The first amendment centralizes some of the State's legislative powers on the harmonization of government budgets by amending Art. 117 of the Constitution, which transfers the matter from the sphere of joint State-Region competence to a sphere of exclusive State power. The second reduces the level of financial autonomy of local government bodies established by Art. 119 of the Constitution, and ties it to compliance with the balanced budget requirement and conformity with the economic and financial obligations imposed by European law. The new system by which local governments must rationalize their expenses, as outlined in Art. 119 of the Constitution, therefore serves to complete the "multilevel" financial system, which comprises the provisions of European Treaties, the undertakings relative to balancing the State's budget, and the similar undertakings of financial rigor for regional administrations and local authorities. This reshaping of Art. 119 of the Constitution, which is the fundamental rule for the Italian model of fiscal federalism, appears to be in line with Law no. 42/2009 on fiscal federalism, which included among its most important purposes that of curbing and rationalizing regional and local government expenditure.[18]

The transfer of state sovereignty that was prompted by the ESM and Fiscal Compact Treaties must, therefore, be considered from another point of view. One consequence of ratification of the Fiscal Compact and codification of the balanced budget principle in the Italian Constitution is a twofold upwards centralization of powers: Europe significantly reduces the autonomy of State budgetary policies, while at the same time the State centralizes competences on State budgets, thereby curtailing the (financial) independence of local government bodies. Yet we should

[16]On the fundamental aspects of the law enforcing Art. 81 Const. see, among others: Dickmann (2013).

[17]For an in depth analysis of constitutional law n. 1/2012 see: Morgante (2012a); Lupo (2012); Canaparo (2012); Dickmann (2012b).

[18]On the reform of Art. 119 Const. see: Scuto (2012).

not be surprised to witness a centralization of powers at times of crisis: after the onset of severe economic crises, federal governments have always centralized powers. With its budget balance reform, Italy is trying to achieve precisely what Europe is seeking to accomplish despite numerous problems. The financial autonomy of local governments has been expressly reduced, and harmonization of public budgets has changed from being a joint power to the sole competence sphere of the State, similarly to what is happening with the essential levels of public services regarding civil and social rights, which must be guaranteed by the State through the exclusive competence provided by Art. 117 of the Constitution. However, although the economic crisis may lead to the recentralization of competences, there may also be a tendency to reduce policies that protect social rights, and consequently a retrenchment of the welfare system to which European citizens have become accustomed.[19]

The social market economy model is clearly the one to which democratic Italy has subscribed. At the same time, we know that Europe was born with an economic heart. A Europe of rights still has not been adequately developed, and the case law of the EU Court of Justice as it interprets and balances competing rights will be crucial to this end. For that matter, EU law has only limited legitimacy to operate in the field of social rights; protection of these rights is firmly in the hands of the member States (and their domestic institutions). Italy, as well as the other member States, as described in the previous sections, gave up part of its economic sovereignty to the European institutions, and indeed it has been the intervention of the European legislator that has provided content and meaning to Italy's economic constitution. A good example of this is provided by Art. 41 of the Constitution, which was filled with content by the Community legislator, thus limiting or eliminating the possibility to develop a domestic economic policy. The danger that European legislation and European law may invade and permeate the provisions of the economic Constitution is a well-known issue[20] and it has undoubtedly returned to the forefront in the wake of recent legislative developments at European level following the crisis. It is perhaps unthinkable that those areas of sovereignty ceded over time may be recovered, especially today amid the economic and fiscal crisis. At the same time, though, while still complying with the rigor imposed on the Eurozone countries at the European level, it looks necessary that the content of social rights and the level of welfare is protected, starting from a Constitutional requirement that already (and still) exists.[21]

[19]On the possible tendency to reduce the policies aimed at protecting social rights and, therefore, to compress the welfare system that the European citizens are accustomed to, see: Dickmann (2012c). The author highlights that the main issue is not whether the States must forfeit other parts of their national sovereignty, but whether they have to forfeit crucial expressions of national sovereignty too, such as social expenditure in its traditional forms (e.g.: healthcare, social security).

[20]On the risk of an invasion by European legislation and European law, that are permeating the rules of the economical Constitution, see Bilancia (1996).

[21]On the issue see, among others Morrone (2014).

5 A New Model with an Old Problem: The Democratic Deficit in the European Economic Governance

It should be borne in mind that the European integration process has seen previous sprints forward by some member States willing to accelerate the transfer of sovereignty in certain areas. Evidence of this is provided by the developments that led to the adoption of the 1985 Treaty of Schengen, and more recently to the entry into force of the Prüm Convention in 2005 (aimed at stepping up security in 'critical' areas such as terrorism, cross-border crime, and illegal immigration, providing for the collection and exchange of sensitive date such as digital fingerprints and DNA, and strengthening the exchange of information between signatory States to combat these phenomena more effectively), both of which were created outside EU law. The two Treaties described in the previous paragraphs, if analyzed in their fundamental aspects, appear to be destined to have a relevant impact on the national constitutional systems.

It has already been stressed that these Treaties, from a legal point of view, are international Treaties adopted outside of the EU's legal framework. However, these Treaties have deep connections, with regard to their functioning, to the European institutions. Therefore, they generated a sort of "hybridization"[22] between the international law instruments and those of the EU. Moreover, the Fiscal Compact Treaty makes a number of references to EU law, states that its application must be compatible with it, and requires that its content be incorporated into European law within five years after its entry into force (Art. 16).

Clearly, the first element of discontinuity with respect to previous attempts at integration outside European law was the significant role played by the European institutions in the ESM and the so called Fiscal Compact. In fact, the system rests on the intergovernmental method (and therefore on relations among States), but at the same time strengthens the powers of control of the Commission, but also those of the EU Court of Justice and the ECB. Consequently, while the intergovernmental aspect seems to be prevalent in the ESM, it tends to diminish in the so called Fiscal Compact, where the role of the European Commission is more evident. Moreover, the second element of discontinuity is the relevant constitutional impact of the so called Fiscal Compact on national systems so that for the first time a European regulation is expressly required to be transposed into a national context by means of a source of constitutional level.

The two Treaties unquestionably represent a significant step forward towards European integration (if these Treaties are then incorporated into a future EU Treaty), and as said, they must be regarded as a genuine "constitutional turning point in the European integration process"[23]; moreover, this is a turning point which

[22]On the ESM Treaty and the Fiscal Compact Treaty as a hybridization of the tools on international law and European law see Napolitano (2012b), p. 145.

[23]The quote on the "constitutional turning point in the European integration process" is from Napolitano (2012a), *cit*. p. 468. The author describes an implicit constitutionalization process of the EU, skillfully hidden behind the financial crisis and the crisis of the sovereign debt.

has occurred in substantial continuity with progress towards fiscal controls which, as we have seen, has been underway since 2010, which represent a natural evolution of the so-called Six Packs and Euro Plus Pact[24] further progressing in the direction marked out by the 1992 Treaty of Maastricht and the Stability and Growth Pact of 1997, which introduced rules limiting public deficit and debt in ratio to GDP (3 % and 60 % respectively). This development inevitably has a similarly significant impact on national systems, and first and foremost implies a further, notable, transfer of sovereignty: the constitutional implementation of the golden rule compliant with the conditions that were laid down at a European level, with the aim of reaching agreement within a European scope, and with a strict system of controls applied by the European Commission and the EU Court of Justice; the agreement upon a new compression of the States' autonomy in budgetary policies; the joint provision of financial resources to grant stability in the Eurozone and to allow the saving of the countries facing a crisis and the clause that financial support is subject to compliance with the budget balancing rule by the States. The outcome has been the creation of a high level of co-penetration between budgets and domestic financial resources, thus laying the foundations—more or less deliberately—for the creation of a federal-type of European Treasury.

But at this point we once again encounter one of the main obstacles to integration (of the Eurozone). The progress towards integration in economic governance does not yet seem adequate from the point of view of its democratic legitimization, and there is a risk that the long-standing problem of the EU's democratic deficit will be exacerbated and amplified. As we have seen, there may be a reason for the exclusion of the European Parliament from the decision-making processes. The Fiscal Compact Treaty presages a form of inter-parliamentary cooperation, coordinated by the European Parliament, which involves the Parliaments of the Eurozone countries in the discussion of issues relating to the application of the Treaty; this is clearly not enough because the European Parliament and the national Parliaments have no real powers. The focal point of actual decision-making power at a European level, defined as control over the political power to take decisions that condition domestic policies, does not find its core within the bodies provided with a democratic legitimization, except for a mild form of "inter-parliamentary collaboration". It is surprising in a negative way that, after the Treaty of Lisbon of 2007 had provided for the closer involvement of national Parliaments in decision-making processes through the so called early warning system, Europe has decided not to increase the level of democracy in the new Eurozone system by allocating—for example—a significant role to national Parliaments, which will only be able to intervene *a posteriori* by implementing conditions effectively decided at a different level.[25] The rigor required (and imposed) by the two Treaties clearly calls for a

[24]For a combined analysis of the so called Fiscal Compact and the Stability and Growth Pact, as amended by the so called Six Pack, see Pitruzzella (2012b), p. 427.

[25]On the new inter-parliamentary cooperation and on the "multilevel parliamentarism" after the implementation of the so called Fiscal Compact, see Manzella (2012) *cit*. The author highlights

serious application of the principle of cooperation between institutions (Art. 4, § 3 of the TUE) by the States, but it appears to forget about the principle of subsidiarity, which could have been expressed in the form of greater participation by national Parliaments. And yet the issue cannot go unheeded, as a high level of fiscal and economic integration cannot be achieved without applying the principle of 'no taxation without representation'. This issue must be resolved, now more than ever: whilst in the past the problem of the EU's democratic deficit was mitigated by the fact that the EU frequently provided European citizens with tangible benefits, at present the inevitable sacrifices which financial rigor demands, and will continue to demand, must also be accompanied by improvements in the level of democratic legitimization in decision-making processes regarding the governance of the Eurozone. This is of the outmost importance firstly to protect fundamental rights, such as social and political rights, with regard to the progressively decreasing role played by institutions that are representative of the States, and thus requires a careful protection by the national representative bodies and the Courts.

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that a euro-national parliamentary network supporting the new economic and financial policies may be the only road towards an acceptable democratic framework.

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The Impact of EU Policies on the Organization and Functioning of the Member State in the Midst of an Economic Recession

Enzo Di Salvatore

Contents

1 European Integration and the Community Method

On 27 May 1982, during the ceremony for his just-awarded honorary degree by the University of Padua, *Altiero Spinelli* recalled that the three European Communities were characterized for "a difficult institutional compromise between the three forms of Europeanism": the *functionalist*, the *confederal* and the *federal* one.[1]

[1] Spinelli (1984), pp. 17 ff., 32.

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This compromise formally involved the community organization, but not the functions.[2]

In fact, although each institution represented the expression of a specific and different principle,[3] the effective exercise of the functions remained built around the doctrine of functionalism (or, perhaps more accurately, the doctrine of neo-functionalism), which is based on the fact that "Europe"- as *Robert Schuman* said on 9 May 1950 -" cannot be done at once, and will not be built all at once", but "will stem from concrete actions creating a de facto solidarity" among Nations. The construction of a new European order would have only been possible only by fostering the development of certain minimum conditions. These conditions would have been satisfied through the *spillover*: a mechanism based upon the progressive and incremental integration of "non-confrontational" areas.[4]

For this reason, the EU integration process had to concern only the sphere of the *economy* and the objectives set by the Treaties had to be achieved using a new method: the *Community* method. Thus, the exercise of the governmental power was consequently linked to the notion of *supranationality*,[5] to the sharing of the same power on devolved areas by Communities and Member State, and to the principle of *institutional equilibrium* (namely the so-called "institutional triangle" Commission-Parliament-Council) in opposition to the principle of *division* or *separation* of powers, which informed the horizontal relations between the constitutional bodies of the Member States.

Community law presented typical effects deriving from the "*supranational*" concept, such as the ability to find immediate application into Member States' legal systems (i.e. perfect subjective rights in favor of the citizens) and to potentially prevail over *any* conflicting national law.

Functionalism and neo-functionalism meant that, in exercising the Power, "*the form could legitimately follow the function*".[6] Consistent with that scenario, Treaties would not have had to express on the outcome of the ongoing process (except for the ECSC, whose Treaty fixed its duration in fifty years). These doctrines, in fact, put beyond discussion both the issues of sovereignty and of the future existing conditions of Member States.

Furthermore, in the technocratic concept of power according to which it could only concern "low" politics,[7] the question of democratic legitimacy of decisions would have been rather worthless. Indeed, the inviolability of Member States *sovereign power* would have been demonstrated only by a formal reference to

[2]This compromise, however, did not prevent Ipsen (1972), pp. 197 ff., from defining the European Communities as "purpose associations".

[3]The Commission of the functionalist principle; the Council of the confederal principle; the Parliament of the federal principle: see Spinelli (1984), pp. 32 ff.

[4]Mascia (2001), pp. 31 ff.

[5]Cfr. Ipsen (1973), pp. 211 ff. Now in Ipsen (1984), pp. 97 ff.

[6]Ipsen (1972), p. 982.

[7]Explicitly against this concept Ipsen (1984), pp. 11 ff., 21.

those primary law provisions according to which any revision of the Treaty would necessitate a unanimous vote (Art. 263 EECT) and any application to become member of the Community should have been the subject of an agreement between the Member States and the applicant State with the following ratification by "all the contracting States in accordance with their respective constitutional rules" (Art. 237 EECT).

2 The Objectives and the Trend Towards the "Globalization" of the European Communities Action

In accordance with Art. 2 of EECT, the Community should "promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increased stability, an accelerated raising of the standard of living and closer relations between its Member States". To achieve these purposes, Art. 2 provided for two instruments: the establishment of a common market and the progressive approximation of the economic policies of Member States. The following Art. 3 indicated, therefore, further means that the Community could have used to pursue those general goals. The problem was, indeed, that the purposes set out in Art. 2 EECT were not *merely economic*.

As *Walter Hallstein* in 1969 clearly stated, it would have been incorrect to affirm that the process of integration was made up of three stages, through which *customs union, economic union* and *political union* would have been progressively realized.[8]

Since the beginning, these stages were in the process of integration, although in different ways. Indeed, the Community had a *general* competence in economics, beyond the fact that the Treaty contemplated different modes of its exercise: for given sectors (commerce, agriculture, transport) the legislation should have been *common*; for others (e.g. social policy) the Treaty opened to a mere *collaboration*; for all the other sectors the *economic policies* of the Member States should have been subject to *coordination*. Thus, despite the functionalist and neo-functionalist doctrines did not explain what could be the conclusion of the integration process, it was clear that the exercise of power within the Community was leaning towards "globalization", causing *political* effects.[9]

In sum: it should have been excluded—recalling *Hallstein*'s words—that "a subject that was not specifically mentioned as a Community issue (was) excluded from the Treaty; even the unidentified objects of economic policy (would have been treated) according to the rules of the Community".[10]

[8]Hallstein (1971), p. 97.

[9]Hallstein (1971), pp. 27 ff.; cfr. also Everling (1993), pp. 936 ff., 938.

[10]Hallstein (1971), p. 102.

Since the Community was empowered to intervene through specific *measures*, the Treaty provided different instruments for each mode of action. In the same way, the intensity of the global direction on areas not immediately referring to the range of *common* policies originated from the practice of Community to resort to *implied powers* and to the *approximation of legislations*.

3 The Features of European Policies

From the very beginning, Treaties expressed the idea that the integration process could be realized through several techniques. In fact, as this process has become more urgent, these methods have been balanced and used in different ways.

Apart from this, it should be noted that each method seems to follow a "*policies* approach".[11] However, the meaning of this term appears unclear, as the European Treaties regulate the policies, but do not provide any definition of them.

Meanwhile, neither scholars involved in studying *European policies* on various grounds provided any definition.[12]

Now, we could analyse which elements European policies have in common moving through an inductive method from both Treaties and practice. Thus, it can be stated that: *every European policy is a public policy and a juridical macro-notion connected to the European Union common objectives which could involve the entire legal sphere of both European Union and the Member States. Given their global, dynamic and cross nature, they could materially affect even those fields that do not belong to the competence of the European Union.*

More generally, these policies have a horizontal and vertical impact on Member States' legal systems. Moreover, their exercise is flexible, unless the Treaties state differently.

1. *European policies* are *public* policies, because they postulate, in various degrees and broadly, the necessary intervention of the public power.[13] A public policy is not necessarily a *common policy*, given that *common* policies are mostly covered by the 24 Titles contained in Part Three of the TFEU, to which the "simplified revision procedures" (provided by Art. 48, § 6 ff., TEU) applies.[14] One of the

[11] Art. 16 TEU, concerning the functions of the Council, rightly opposes "policies" to "coordination"; this does not mean however that the coordination function may not follow a "policies approach", as discussed below.

[12] For a problematic summary of the topic see Picozza and Oggianu (2013); see also Morata (2002), pp. 3 ff., 20 ff.

[13] On the problem, see again Picozza and Oggianu (2013), pp. 3 ff.; within a different scientific perspective—which reverses the assumption expressed above—see also Giuliani (2006), p. 13: "there is a public policy whenever there is a collectively perceived problem whose solution is not left to a mere interaction between individuals".

[14] *Common* is, for example, even the *commercial policy* which is connected to the *external action* of the Union, under Arts. 206 ff., Part Five of the TFEU.

provisions concerning the *Common Foreign and Security Policy* expressly states that the competence of the Union "shall cover all areas of foreign policy and all questions relating to the Union's security, including the progressive framing of a common defence policy that might lead to a common defence" (Art. 24 TEU; see also Art. 42 TEU). This circumstance proves that between the two concepts there is no coincidence.
In any case, the principles of *coherence, effectiveness and continuity* provided for in Art. 13 TEU would apply, within the institutional framework of the Union, to any type of policy;

2. Every European policy is a *macro-notion*, because it brings together multiple objects and topics. The Treaties often juxtapose this definition and the notion of "sector", which does not clearly define the material field. For this reason someone talks about "sectoral EU policies".
3. This *macro-notion* has *legal nature*, because the field of action is delimited by an *ad hoc* legal basis established by the Treaty. However, this legal basis may be weakened by use of the implied powers clause or the approximation of the laws to achieve certain targets.
4. The actual exercise of European policies must serve the purpose of realizing the EU *common objectives*.[15]
Beyond any possible classification of the policies, it would be useful to observe that the Law of Treaties—which has experienced a remarkable expansion of the number of policies and even of the common objectives—considers *all* policies as *means* and some of them (at the same time) as goals, thus requiring an integration in the definition and implementation of the policies themselves (e.g. with regard to the protection of the environment: see. Art. 3 TEU and 11 TEC).
The necessary link between *common EU objectives* (those, so to speak, "general" in Art. 3 TEU and those "sectoral" relating to the individual policy) and *European policies*, expresses—as stated above—an authentic *political* relevance of the entire European action, although it is more evident in relation to certain policies (such as the Member States' *economic* policies, which will be discussed below).[16]
5. European policies may invest the *entire legal sphere of both European Union and Member States*. It means that they are able to encompass both regulatory and administrative activity of both levels of government. Within the institutional framework of the Union, the European Council defines "the general political directions and priorities" (Art. 15 TEU), whereas the Council "shall carry out policy-making and coordinating functions as laid down in the Treaties" (Art. 16 TEU). Member States in reality exercise the European policies in connection

[15] Art. 1 of the TEU states, indeed, that the objectives set by the Treaty are common to the Member States, whilst Art. 3 enables the Union to pursue these objectives. This provision is, however, linked to the one contained in Art. 7 of the TFEU, which states that "The Union shall ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers".

[16] In this respect, see already Monaco (1965), pp. 34 ff., 36 ff.

with the type and *measure* of the Union's intervention, according to specific jurisdictional rules laid down by Arts. 2 ff. TFEU and also in accordance with the provisions of the Treaties relating to each area (Art. 2, § 6, TFEU). Although the TFEU states the intention to "determine the areas, delimitation of, and arrangements for exercising its powers", it is hard to contain EU actions within well-defined areas. This is not only because of the wide range of competencies conferred to the European Union (exclusive, concurrent, supplemental, etc.),[17] but mostly because of the *global, dynamic and transverse* character of policies which, for this reason, are in a position to materially affect even areas not expressly conferred to the competence of the European Union.

6. In general, the impact of European policies on the domestic level could first regard the distribution of functions between all the local authorities (*vertical* incidence) and between the different Member States' bodies or authorities (*horizontal* incidence). From this point of view, the Court of Justice held that European law cannot determine the articulation of responsibilities and obligations between central or local authorities in federal or regional States.[18] Meanwhile, it is a long time since the Italian Constitutional Court has admitted that, despite "the implementation in the Member States of the Community rules [should] take into account the structure (centralized, decentralized, federal) of each of them", "in derogation [...] of the domestic constitutional order of competencies, the Community may lawfully provide, in order to fill organizational needs, some forms of self-execution. Thus, it could provide domestic legislations waiving the normal constitutional distribution of competencies, with the exception of the fundamental constitutional principles".[19]

For example, in the field of electronic communications, the European Community confers the implementing competence to the State, although on the domestic level, the matter "regulation of communication" belongs to the concurrent legislative power of the State and the Regions.[20]

Moreover, European policies may even reflect on the meaning of institutes, matters and, ultimately, on the normative meaning of principles expressed in the internal ground (constitutional, legislative, etc.). The proof is—to do even one more example—that "Protection of Competition" originally ruled by Law N. 287 of 1990 and later counted among the exclusive competence of the State by Art. 117, paragraph 2, of the Constitution, should be interpreted in the meaning of EU law, not "only in a static sense, as a guarantee of legislative adjustments and restoration of a

[17]On the new allocation of competencies (after the entry into force of the Lisbon Treaty) see, among others, Schütze (2008), pp. 709 ff., as well as Colasante (2012), pp. 65 ff.

[18]ECJ decision 12 June 1990, case C-8/88, *Germany v. Commission*, in *Racc.*, 1990, I-2321; on the point, allow me to make reference to Di Salvatore (2003), pp. 267 ff., 276 ff.

[19]Italian Constitutional Court, decision 24 April 1996, n. 126, in *Giur. cost.*, 1996, 1044 ff., 1058. For a comment, see Anzon (1996), pp. 1062 ff.

[20]On this topic, allow me to make reference to Di Salvatore (2005), pp. 3200 ff.; in this respect, see already Pace (2004), pp. 939 ff., 954.

lost balance", but also in a dynamic sense "that justifies public measures to reduce imbalances, to promote conditions for a sufficient market development or to establish competitive structures".[21]

This reasoning—obviously—assumes that the incidence of European law on the distribution of functions stems from legally binding Union acts, so that, internally, the derogatory effect on the competence distribution may be formally legitimized by an express or implied constitutional authorization (Art. 11 and Art. 117 of the Italian Constitution). The fact that the legal system *spontaneously* adapts to European Union law or suffers its influence when this is not legally imposed, as in the case in which the state legislator takes action to tackle legal domestic situations or when all of this is a result of a non-binding act of the Union, should not be so relevant.

4 European Governance and the Open Method of Coordination

It is widely believed that the gradual self-restraint of the European Union's authoritative functions and the greater openness for the different territorial government levels and the civil society have influenced the European policies management.

This management model is summarized in the concept of *governance*[22] that—as stated in the White Paper on *Governance* adopted by the European Commission in 2001—indicates "the rules, processes and behaviours that affect the way in which powers are exercised at European level, particularly with reference to the principles of openness, participation, accountability, effectiveness and coherence".[23] According to the Commission, "the linear model, according to which the policies are adopted and imposed from above, must be replaced by a "virtuous circle", based on feedback, networks and involvement at all levels, from the definition of the policies to their implementation". This would require: (1) an evaluation of

[21]Italian Constitutional Court, decision 27 July 2005, n. 336, in *Giur. cost.*, 2005, 3165 ff., 3185 ff.; see also Italian Constitutional Court, decision 13 January 2004, n. 14, ivi, 2004, 237 ff., 248; Italian Constitutional Court decision 27 July 2004, n. 272, ivi, 2004, 2748 ff., 2756. Similar things could be said with reference to the energy sector (Art. 117, paragraph 3 of the Italian Constitution), although energy was formally included among Union's policies only with the entry into force of the Lisbon Treaty: Art. 1 of Law n. 239 of 2004 on the reorganization of the energy sector, after an explicit reference to "principles deriving from Community law and international obligations", provides that "the objectives and lines of the national energy policy, as well as the general criteria for its implementation at local level, are developed and defined by the State which shall also use the means of coordination and cooperation with local self-government provided for by this law".

[22]On the constitutive elements of this notion Quermonne (2005), pp. 119 ff.

[23]Cfr. on this regard Mangiameli (2008), pp. 131 ff., 160 ff; in the White Paper it is deemed that these principles are essential for a "good governance" and necessary to strengthen the principles of subsidiarity and proportionality.

convenience about an EU intervention and, if so, the evaluation of the necessity to adopt a legislative act; (2) an evaluation of the need to intervene with legislative acts combined with *soft law* acts; (3) the use of the most appropriate instruments (preferring directives rather than regulations) whenever it is deemed necessary to intervene with legislation to achieve the objectives of the Union; (4) the recourse to "co-regulation" acts, that means the combination of "legislative and regulatory binding actions taken by principal stakeholders, on the basis of their knowledge and practical experiences"; (5) that a Community action has to be complemented or reinforced by the "open method of coordination".

From a formal point of view, and after the failure of the Treaty establishing a Constitution for Europe (2004), the recommendations made by the Commission in the White Paper have been partially accepted in the Lisbon Treaty, because of both a renewed discipline of the democracy instruments[24] and an increased enhancement of the *open method of coordination*.[25] This has also been a result of the *substantial* (but uncompleted) abandonment of the *intergovernmental method* because of the suppression of the II and III pillar. Without considering the issue of the participation in the management of European policies, it seems appropriate to focus on the *open method of coordination*, but in light of the economic policies coordination, which is implemented by the Council.

The *open method of coordination* has been formally introduced by the "Lisbon Strategy" of 2000 to tackle unemployment resorting to investments in the information society, in research and innovation, in innovative companies (especially SMEs), in economic reforms, in social protection, etc.[26] The "Lisbon Strategy" tried to define the "contents" of this method, "designed to help Member States in progressively developing their own policies", by *establishing guidelines for the Union*, the *determination of qualitative indicators and useful benchmarks* for the comparison between best practices; by *translating these European guidelines* into national and regional policies; by *monitoring, verification and peer review*.[27]

Now, despite the development of the method contents (and despite the White Paper on European *Governance* in 2001) the outcome was, however, moderate. For this reason, in March 2005 the Brussels European Council intervened again on the "Lisbon Strategy" to revamp it, believing that there was the need "to refocus priorities on growth and employment".[28] "Europe"—we read in the Presidency Conclusions—"must renew the basis of its competitiveness, increase its growth potential and its productivity and strengthen economic and social cohesion, aiming

[24]On "participatory democracy" instruments, allow me to make reference to Di Salvatore (2012), pp. 45 ff.; on the strengthening of national parliaments' role see Villani (2011), pp. 785 ff.

[25]Cfr. e.g. Art. 168, § 2, par. 2, TFEU (public health), Art. 173, § 2, TFEU (industry), Art. 181, § 2, TFEU (research and technological development).

[26]On this—and also on the regulation of this method provided for by the Treaty establishing a Constitution for Europe (2004)—see Metz (2005), pp. 136 ff.

[27]Cfr. Lisbon European Council 23–24 March 2000, Presidency Conclusions.

[28]On this, briefly Baroncelli and Farkas (2008), p. 5.

knowledge, innovation and the development of human capital". Reading carefully the conclusions of the Presidency it can be understood that, however, according to the European Council these objectives could be of course achieved by strengthening the open method of coordination, but without neglecting the fact that the new strategy presented "three dimensions": the *economic, social and environmental* one. This would have required a strengthening of macroeconomic conditions of the European Union and, *therefore*, a more effective coordination of economic policies of the Member States in the Council under Art. 99 TEC.

For this aim, in fact, the Council issued a new approach, based on a *three year cycle* composed by the following *phases*: (a) the Commission shall submit a strategic report, which is discussed in spring by the European Council. Therefore, the European Council shall adopt *political guidelines* for the economic, social and environmental strategy; (b) in accordance with the provisions of Arts. 99 (economic policy) and 128 (employment) TEC and the *conclusions* of the European Council (or *rather*: the *policy guidelines*), the Council shall adopt a set of *integrated guidelines*, namely: *broad guidelines* on economic policy and *guidelines* on employment; (c) on the basis of the *Integrated Guidelines*, Member States shall define the "national reform programmes" (which should be subject to consultations with all stakeholders at regional and national level, including parliamentary bodies). The Commission shall submit a "Community Lisbon Programme" corresponding to the national program, on the measures to be taken; (d) each year, Member States shall send a report to the Commission. These reports are collected in a single document, which distinguishes the different areas of action and indicates the measures taken during the previous twelve months to implement the national plans; (e) each year the Commission shall refer to the European Council about the implementation of the strategy. The European Council assesses the progress made and expresses its opinion on the necessary adjustments to the *integrated guidelines*; (f) as far as the *Broad Economic Policy Guidelines*, the existing multilateral surveillance mechanisms are applied.[29]

In 2010, on the basis of the Commission Communication "Europe 2020", the European Council adopted a new strategy proposing new targets for the European Union, related to employment, research and innovation, energy and climate change, education and poverty alleviation. Therefore, the Member States are called to fix their national targets upon these few "main purposes" consulting the Commission.[30] The Council clearly states that "all common policies (...) will have to

[29]However, these prescriptions have changed since the "European Semester" rules have entered into force with EU regulation (EU) No. 1175/2011; on these rules, see in para 5: there is no more three-year cycle and the Council does not adopt integrated guidelines anymore (cfr. on this regard also Boggero (2012), p. 3).

[30]As far as Italy is concerned, it has to achieve by 2020 the following goals: employment rate: 67–69 %; research and innovation: 1.53 % of the GDP; Co2 gas reduction: −13 %; renewable energies: 17 %; efficiency—reduction of energy consumption (mtoe): 27.90 %; rate of school drop-out: 15–16 %; tertiary education: 26–27 %; reduction of risk of poverty/social exclusion of population (number of persons): 2,200,000.

support the strategy." We are in the midst of an economic crisis and it is admitted that the achievement of new objectives must go through the "restoration" of macroeconomic stability and the "return" to the sustainability of public finances. This is why the new strategy claims to be based on the strengthening of the coordination of the Member States' economic policies and on a more effective alignment of national reform programmes and stability and convergence programmes.

5 The Economic and Monetary Union (EMU) and the Coordination of the Member States' Economic Policies

In light of the Treaty, the Economic and Monetary Union (EMU) is a "tool" to achieve the goals set out therein (Art. 3 TEU),[31] among them: the guarantee of "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, and a high level of protection and improvement of the quality of the environment" and the promotion of "economic, social and territorial cohesion, and solidarity among Member States". Art. 119 TFEU states that "For the purposes set out in Art. 3 of the Treaty on European Union, the activities of the Member States and the Union shall include, as provided in the Treaties, the adoption of an economic policy which is based on the close coordination of Member States' economic policies, on the internal market and on the definition of common objectives, and conducted in accordance with the principle of an open market economy with free competition" and that "concurrently with the foregoing, and as provided in the Treaties and in accordance with the procedures set out therein, these activities shall include a single currency, the Euro, and the definition and conduct of a single monetary policy and exchange-rate policy the primary objective of both of which shall be to maintain price stability and, without prejudice to this objective, to support the general economic policies in the Union, in accordance with the principle of an open market economy with free competition".

EMU is based upon a formal distinction[32] between *monetary* and *economic* policy[33]: the former shall ensure price *stability* and is entrusted to a technical and independent body (the ECB and the central banks of the Member States, "which constitute the Eurosystem and conduct the monetary policy of the Union"[34]); the

[31]With reference to Art. 2 TEC cfr. Basso (2008), pp. 333 ff., 334.

[32]In this regard, see *Rapport sur l'Union économique et monétaire dans la Communauté europé enne* (so-called *Rapport Delors* of 12 April 1989, downloadable at www.cvce.eu).

[33]Cama and Giraudi (2002), p. 29.

[34]ECJ decision 27 November 2012, case C-370/12, *Pringle*, pt. 49 (not published yet); on this decision, see Chiti (2013), pp. 148 ff., as well as de Witte and Beukers (2013), 805 ff.

latter, that affects *political* decisions,[35] is entrusted to the joint action of the Member States and the Union.

Despite, however, the "monetary policy for the Member States whose currency is the euro" is attributed to the exclusive competence of the Union,[36] the interdependence with *economic policy*[37] is—from a functional point of view[38]—very wrapped,[39] as each member State is required to implement its economic policy "in order to help achieve the objectives of the Union, as defined in Art. 3 TEU"[40] and to agree to coordinate it with that of other Member States within the Council,[41] on the assumption that the economic policies of the Member States constitute, in fact, "a matter of common interest".[42]

Meanwhile, the provisions of the referral for a preliminary ruling of the ECJ from the BVerfG[43] (January 14, 2014) concerning an ECB resolution (namely, on the purchase of government bonds on the secondary market) confirm that the exercise of monetary policy produces its effects beyond the strictly monetary sphere. In the opinion of the German Federal Constitutional Court the purchase of government bonds on the secondary market could be seen as an *ultra vires* act of the Union, going beyond the powers explicitly conferred to the EU.[44]

The blurred line between monetary and economic policy has, indeed, accentuated with the sovereign debt crisis, which weakened the EMU, both in relation to the deficit/GDP ratio and to the government debt/GDP ratio. And this from the

[35]For this reason it should be always linked to democratic procedures: in this regard Donati (2013), pp. 337 ff., 338.

[36]Art. 3 TEU.

[37]Cfr. Padoa Schioppa (1991), pp. 26 ff., who deems that "economic policy" could be divided into three sectors: market policy (including infrastructure-services and labour market), development policy (especially territorial rebalancing policy) and macroeconomic policy (corresponding to monetary and fiscal policy).

[38]Basso (2008), p. 385; cfr. also Maestro Buelga (2012), pp. 23 ff., 33 ff.

[39]Certainly in respect of *budget policy* (as proven by the regulatory framework cited below in this paragraph), but also in respect of *fiscal policy* of Member States (on which, see Ferrante (2006), p. 63 ff.; Basilavecchia (2008), pp. 417 ff.).

[40]Art. 120 TFEU.

[41]In fact, Art. 145 TEEC, besides other different forms of coordination (for a list, see Boeckh (1958), pp. 339 ff.), already provided that "to ensure that the objectives set out in this Treaty are attained, the Council shall, in accordance with the provisions of this Treaty, ensure coordination of the general economic policies of the Member States".

[42]Art. 121 TFUE.

[43]See Olivito (2013).

[44]On this problem—which dates back to *Mangold ruling* of 2010 (BVerfGE 126, 286 ff.)—allow me to make reference to Di Salvatore (2013), pp. 73 ff., 99 ff.; after all, it is the same prejudicial question raised by the German judge that, when it asks whether the OMT programme violates the Bundestag's budget responsibility (which is constitutionally guaranteed, also in relation to Art. 79 of the GG), makes clear that the blurred boundary we are talking about presents another issue to resolve, related to the democratic principle: cfr. Olivito (2013).

crisis that hit Greece in 2009 and which was subsequently extended to other Member States.

Within the system of EMU the European Union (and the other Member States) could have not provided financial assistance to support countries in difficulty, in the light of the "no-bailout clause".[45] It could have been only possible on the basis of the exception laid down by Art. 122, § 2, TFEU.[46]

The establishment of the *European Financial Stabilisation Mechanism* (EFSM)[47] and then of the *European Stability Mechanism*[48] and also the approval of the *Fiscal Compact*[49] represent the attempts to remedy to the weakness of the EMU model.[50]

At the same time, the EU has launched a series of actions which have influenced—weaving them completely—both the monetary and economic policies.

With the judgment on the *Pringle* case of 2012,[51] the Court of Justice has clearly stated that while *price stability* is the main objective of *monetary policy*, which remains in the hands of the European Union, *safeguarding the stability of the euro area* as a whole is a goal which lies outside of the formal monetary policy and

[45]Art. 125, § 2, TFEU: "The Union shall not be liable for or assume the commitments of central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of any Member State (. . .). A Member State shall not be liable for or assume the commitments of central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of another Member State (. . .)"; on the *bail-out* ban, see Mostacci (2013), pp. 481 ff., 504 ff.; see also Häde (2002), pp. 1314 ff., and references to additional definitions given by regulation (EC) no. 3603/93 of the Council provided therein.

[46]Art. 122, § 2, TFEU: "Where a Member State is in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control, the Council, on a proposal from the Commission, may grant, under certain conditions, Union financial assistance to the Member State concerned. The President of the Council shall inform the European Parliament of the decision taken."

[47]Regulation (EU) no. 407/2010; it is useful to remind that on 9 May 2010 Member States of the Eurozone established the European Financial Stability Facility (EFSF).

[48]To approve the Treaty Establishing the European Stability Mechanism (2011), the Council has adopted a decision (2011/199) which amended Art. 136 TFEU through the simplified procedure provided for by Art. 48, par. 6, TEU, adding a new paragraph: "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."

[49]Treaty on stability coordination and governance in the economic and monetary Union (2012). The ESM (which replaced the EFSM) could be considered as complementary to the *Fiscal Compact*, given that the respective treaties would promote budget responsibility and solidarity within EMU. The 5th preambulatory clause of the ESM Treaty provides that the granting of financial assistance, in the framework of new programmes under ESM, is dependent on the ratification of *Fiscal Compact* by the ESM Member concerned and on compliance with the requirements provided by *Fiscal Compact*.

[50]Cfr. Mangiameli (2013), p. 9; on the "coordinated bilateral loans system", which preceded the adoption of the measures we are briefly talking about, see Napolitano (2012), pp. 383 ff., 390 ff.

[51]ECJ decision 27 November 2012, case C-370/12, cit.

which can be attributed to the category of "*general economic policies in the Union*", however supported by the European System of Central Banks.[52]

In this context, the ESM seems to represent "a complementary element of the new regulatory framework for the strengthening of the economic *governance* of the Union".[53]

For the Court of Justice, in fact, while Arts. 123 and 125 of the TFEU, together with a series of regulations of the European Parliament and of the Council of 2011, have a preventive nature, as directed "to reduce as much as possible the risk of sovereign debt crisis", the ESM "aims to manage financial crisis which could survive despite the preventive actions implemented".[54] That is the reason why the Court has met no obstacles of much importance in affirming that the ESM falls "in the field of economic policy".[55]

As far as the interweaving with the *economic policies* of the Member States, the Court of Justice clarifies that the provisions of the ESM Treaty must comply with EU law and, *therefore*, also with the measures taken under the *coordination of the economic policies of the Member States*.[56] The strict conditionality imposed by the ESM Treaty and commensurate to the support instrument identified—which may take the form of a macro-economic adjustment program—does not constitute in itself "an instrument of coordination of economic policies of the Member States", but is "directed to ensure compliance of the activities of the ESM, in particular, with Art. 125 TFEU and coordination measures taken by the Union".[57]

6 The Phases of the Cycle of Member States' Economic and Budgetary Policies Coordination (the "European Semester")

The European economic *governance* system demonstrates that the *monetary* and *economic* policies (taken in a broad sense)[58] are absolutely interdependent and also that they strongly impact both on the domestic ground and on the policy followed by national Parliaments and Governments, in relation to the organizational structure as well as to the functioning of the state.

[52]Art. 127 TFEU; cfr. Basso (2008), pp. 357 ff.

[53]Pt. 58.

[54]Pt. 59.

[55]Pt. 60; cfr. also pt. 160: "The activities of the ESM fall under economic policy" and "the Union does not have exclusive competence in that area" (although we have to remind that ESM Treaty contracting parties are just Member States and not the Union itself).

[56]Pt. 69.

[57]Pt. 111.

[58]See fn. 39.

The *Delors Report* in 1989 stated that the *economic union* should be inspired "*par les même principes d'économie de marché sur que ceux lesquels fondé est l'ordre économique de ses Etats membres*" and that, despite the "common thread" of their economic systems, Member States could make different political choices.[59] However, the adoption of the *Stability and Growth Pact* (1997) and of the subsequent European acts have gradually reduced the available political action of the Member States.[60]

The current *cycle of economic and budgetary policies coordination* (called "European Semester") is divided, as it is known, in a preparatory phase and in three stages.[61] The preparatory phase begins in November (of the previous year), when the Commission publishes an annual growth survey (AGS, which contains the Union's policy priorities for the following year) and a report on the alert mechanism (which analyses macroeconomic developments in each Member State). Right from this stage the Commission may address *recommendations* to Member States.

The annual analysis presented by the Commission is discussed from December to January, both within the various formations of the EU Council (depending on the type of policy concerned) and in the European Parliament, which may publish a

[59] *Rapport Delors*, cit., 8.

[60] On the basis of a report presented by the EMI in 1996, on 17 June 1997 the European Council adopted a resolution on the Stability and Growth Pact. The resolution and regulations (EC) no. 1466/97 and no. 1467/97 constitute the original nucleus of the so-called Stability and Growth Pact (SGP). According to it, Member States which, complying with the so-called Maastricht criteria, decided to adopt the Euro, should continue to ensure, over time, that their budget deficit does not exceed 3 % of GDP and public debt is maintained below 60 % of GDP. To this end, a particular infringement procedure was provided, called "Excessive Deficit Procedure", divided into three stages (warning, recommendation and sanction). In practice, however, the use of this infringement procedure has proven difficult, as demonstrated by the failure to inflict sanctions against Germany and France. The SGP has been later amended, first with regulations (EC) no. 1055/2005 and 1056/2005 and then with three regulations contained in the so-called six-pack (regulations (EU) no. 1173/2011 on the effective enforcement of budgetary surveillance in the euro area, which provided an effective, preventive and gradual system of enforcement mechanisms, through the imposition of sanctions against Member States whose currency is the euro; no. 1175/2011, amending Regulation (EC) no. 1466/1997 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies; no. 1177/2011, on speeding up and clarifying the implementation of the excessive deficit procedure), completed with two additional regulations governing the new procedures for the surveillance of macroeconomic imbalances and a directive on national budgetary frameworks (regulations (EU) no. 1174/2011, on enforcement measures to correct excessive macroeconomic imbalances in the euro area; n. 1176/2011 on the prevention and correction of macroeconomic imbalances; directive 2011/85/EU on requirements for budgetary frameworks of the Member States). The legislative framework is completed by the so-called two-pack, made up of regulations (EU) no. 472/2013 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 no. 473/2013, on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Euro-area members; Declaration n. 30 annexed to the Final Act of the IGC which adopted the Treaty of Lisbon makes specific reference to the SGP (hints on this topic are contained in Bilbao Ubillos (2009), pp. 113 ff., 115 ff.).

[61] Art. 2-bis regulation (EC) no. 1466/97, as amended by regulation (EU) no. 1175/2011.

report and express *guidelines* in relation to employment policy. In March, on the basis of the AGS and the *conclusions* of the EU Council, the European Council defines the *political guidelines* and the Council shall adopt a *recommendation* containing the *broad guidelines* that the Member States must follow in preparing their *national stability and convergence programs* and their national reform programmes.[62]

The second phase begins in April: by April 15 (no later than the end of the month) Member States shall submit their *stability and convergence programmes* (with their medium-term fiscal strategy) and *national reform programmes* (to outline the structural reforms to implement, particularly with regard to growth and employment). In May, the Commission assesses national reform programs and presents a set of country-specific recommendations ("recommendations of recommendations"). In June the EU Council discusses the Commission's proposals, adopts them in their final version and submits them to the European Parliament for approval. In July, the EU Council adopts the specific recommendations and the Member States are required to implement them.

The third phase begins in this month, when Member States will have to consider the recommendations made by the Council with respect to the national budget of the following year. The cycle begins again in November.[63]

It should be kept in mind that Member States receiving financial assistance together with an economic adjustment program are not required to present stability programs and are not subject to any "thorough examination" about macroeconomic imbalances.[64] To receive financial assistance Member States must carefully implement the adjustment programme.

7 The Impact on the Organization and Functioning of the Member State: The Italian National Reform Programmes

The impact of this legislation on the Member State's organization and functioning is not a result of a spontaneous adjustment of the state legal acts related to the so called EU *soft law*, but stems from genuine legal acts. Even though the European Court could always pronounce about violations in the procedure for the adoption of

[62]Simultaneously, if, as a result of a "thorough investigation", it is found that the risk of macroeconomic imbalances in some Member States is high, the Commission may make recommendations aimed at correcting such imbalances (regulation (EU) no. 1176/2011).

[63]We have to remind that regulation (EU) no. 473/2013, cit., has added a "common budgetary timeline" to the "European semester (cycle)".

[64]Cfr. regulation (EU) no. 472/2013 Arts. 10 and 11.

recommendations, *guidelines*, *conclusions* or *broad guidelines*,[65] and although the Treaty separately regulates the *economic policies coordination* and the *excessive deficit procedure* (both are anyway considered within the Chapter I dedicated to *economic policy*), with the new "European semester"—as seen—it was decided, in fact, to bring *multilateral surveillance and budgetary surveillance* together in a single (multi step) cycle to coordinate the policies themselves *in advance*. In this way, the Council could still adopt *sanctions* against recalcitrant Member State.[66]

Some examples of this impact in relation to the Italian experience will be here exposed.[67]

As known, on 24 and 25 February 2014, the named President Renzi explained the government programme to the Parliament and won its confidence. On April 22, the Government presented the National Reform Programme and the Stability Programme 2014 at the European level to allow a simultaneous evaluation of the

[65]Cfr. ECJ decision 13 July 2004, case C-27/04, *Commission v. Council*, in *Racc*., 2004, I-6679 ff., concerning the suspension of Excessive Deficit Procedures against Germany and France (about that, see Strazzari (2006), pp. 317 ff., 339 ff.); it is hardly necessary to recall that, in relation to recommendations, the Court of Justice stated that: "the measures in question cannot therefore be regarded as having no legal effect", indeed, "national courts are bound to take those recommendations into consideration to decide disputes submitted to them, in particular where they are capable of casting light on the interpretation of other provisions of national or Community law" (ECJ decision 13 December 1989, case C-322/88, *Grimaldi*, in *Racc*., 1989, 4416 ff., on which see Baroncelli and Farkas (2008), pp. 7 ff.).

[66]Consider, for example, regulation (EU) no. 1173/2011, cit., whose Art. 1 provides as follows: "This Regulation sets out a system of sanctions for enhancing the enforcement of the preventive and corrective parts of the Stability and Growth Pact in the Euro area."; as well as regulation (EU) no. 473/2013, cit., which "sets out provisions for enhanced monitoring of budgetary policies in the Euro area and for ensuring that national budgets are consistent with the economic policy guidance issued in the context of the SGP and the European Semester for economic policy coordination" (Art. 1). Art. 3 of this regulation provides that "the Member States' budgetary procedure shall be consistent with: 1) the framework for economic policy coordination in the context of the annual cycle of surveillance, which includes, in particular, the general guidance to Member States issued by the Commission and the European Council at the beginning of the cycle; 2) the recommendations issued in the context of the SGP (. . .)". Arts. 11 and 12 of Chapter V, devoted to "ensuring the correction of excessive deficit", deal with the risk of non-compliance by the Member States with the deadline to correct the excessive deficit and the consequences that result from measures taken by the States, which are taken into consideration by the Commission for the adoption of recommendations to impose non-interest-bearing deposits (in accordance with Art. 5 of regulation no. 1173/2011) and by the Council when it has to decide whether there is an excessive deficit (ex. Art. 126, § 6 TFEU).

[67]The European cycle of economic policy coordination has led the Italian Parliament to amend, inter alia, the state regulation on the cycle and instruments of planning and budget, which is contained in Art.7, Law 31 December 2009, no. 196 *("Legge di contabilità e finanza pubblica")*: see Art. 2, Law 7 April 2011, no. 39 ("Amendments to Law 31 December 2009, no. 196, resulting from the new rules adopted by the European Union on the coordination of Member States' economic policies"): cfr. Donatelli (2013), pp. 9 ff.

programmes, so that inevitable correlations could have been properly assessed.[68] Despite the programme presented by Prime Minister Renzi to the Italian Parliament was largely inspired by European recommendations previously provided (and not yet implemented),[69] the government reform measures that Members of Parliament were called to evaluate were not detailed at all. At European level, however, the government presented a detailed plan,[70] which became subject of a "recommendation of recommendation" addressed on June 2 by the EU Commission to the Council, along with a document evaluating the programme itself. The Council recommendation followed on July 8.

Among other things, the Council requested to guarantee the independence and full operation of the Parliamentary Budget Office as soon as possible and no later than September 2014, in time for the evaluation of the draft budgetary plan in 2015[71]; to specify the competencies at all levels of government; to enhance the

[68]The first section of the DEF (Economy and Finance Document) bears the Stability Programme outline, the third section bears the National Reform Programme outline; both are presented at European level by 30 April (Art. 9, Law no. 196/2009, as amended by Art. 1, Law no. 39/2011).

[69]Cfr. Pitruzzella (2014), pp. 29 ff., 39.

[70]In relation to National Reform Programmes, it has been noted that, at domestic level, Regions are now involved both in the elaboration of the programmes and in their implementation process (Addis and Casamassima (2013), pp. 15 ff., 99 ff.). In truth, there are not two really distinct phases as the participation of the Regions does not result in proposals to be eventually accepted and included in the National Programme. The process starts with an input of the Conference of Regions and Autonomous Provinces, which asks each region to give an account, by filling in special forms, of regulatory and non-regulatory actions planned or implemented both in relation to the Recommendation adopted by the Council during the previous year and to the targets set out by Europe 2020 for each Member State. The regional administration shall, therefore, draft its contribution and shall refer it to the Regional Board, which takes note by resolution; the contribution is subsequently sent to the Conference, which in turn draws up a unified and detailed document and sends it to the (national) Government (cfr. e.g. Conference of Regions and Autonomous Provinces—"*Programma Nazionale di Riforma 2013 – Focus delle Regioni e delle Province Autonome*"—13/010/CR6c/C3). In this way, the Government has any relevant information to make a correct drafting of the new national reform plan and to review the status of implementation of reforms in the Regions.

[71]The 2015 draft budgetary plan is available here: www.mef.gov.it. With regard to this document, as is well known, Vice President of the Commission Katainen sent the following letter to the Minister of Economy Padoan: "Dear Minister, First and foremost, I would like to thank you for the submission of Italy's Draft Budgetary Plan (DBP) for 2015, which we received on 15 October (together with) complementary tables on 16 October. I am also grateful for the letter accompanying the DBP and which clearly makes the case that the budgetary strategy of Italy is to be considered within the overall agenda for structural reform. Compared to the 2014 Stability Programme, Italy's DBP postpones the achievement of the MTO to 2017 and slows down the reduction of the debt-to-GDP ratio in the coming years. As a result, the DBP plans to breach Italy's requirements under the preventive arm of the Stability and Growth Pact (SGP). According to our preliminary analysis—on the basis of the recalculation by the Commission services using the commonly agreed methodology—Italy plans a significant deviation from the required adjustment path towards its medium-term budgetary objective (MTO) in 2015 based on the planned change in the structural balance. Moreover, the planned change in the structural balance for 2015 would also fall short of the change required to ensure adherence to the transition debt rule as this requirement

effectiveness of anti-corruption measures and to review, to that end, the prescription regulation by the end of 2014, strengthening the powers of the national anti-corruption authority; to assess, by the end of 2014, the effects of the reforms of the labor market, especially as far as the dismissal procedures are concerned; to approve the list of strategic infrastructures of the energy sector and to strengthen port management services and the links between the ports and the hinterland.

As remarked earlier, an overall assessment of the measures undertaken by Renzi's Government must be counterbalanced by the recommendations previously made by the EU to Monti and Letta's Governments.[72]

On 6 July 2012 the Council asked Italy, with a Recommendation on the *2012 national reform plan* presented by Monti's Government, to ensure that the implementation of a balanced budget provision in the Constitution was consistent with the framework of the Union; to carry out proper coordination between different levels of government; to implement the so called *spending review*; to reform the civil justice system and to reorganize the courts.

In the following recommendation of 9 July 2013, concerning the *National Reform Programme 2013* presented by Letta's Government, the Council went back on the reform of the civil justice system and the reorganization of the courts ("there is a need to quickly complete the reform of civil justice, giving effect to the reorganization of courts, shortening the duration of proceedings and reducing the volume of the backlog and the amount of litigation"); furthermore, the recommendation urged to take action to reduce the number of provinces; to "open up local public services to competition" (following the ruling of the Constitutional Court in July 2012); to implement the National Energy Strategy (SEN) approved on March 2013; to proceed with the establishment of the "regulatory authority of Transport responsible for highways, airports, ports and railways, which must be independent, with all the necessary resources for its operation and empowered to impose sanctions".[73]

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is even more stringent than the required adjustment path towards the MTO. Against this background, further exchanges of information have already taken place between your services and the Commission (. . .). I am writing to consult you on the reasons why Italy plans non-compliance with the SGP in 2015. I would also wish to know how Italy could ensure full compliance with its budgetary policy obligations under the SGP for 2015. The Commission seeks to continue a constructive dialogue with Italy with the view to come to a final assessment. I would therefore welcome your view at your earliest convenience and if possible by 24 October. This would allow the Commission to take into account Italy's views in the further procedure".

[72]The recommendations read as follows: "The analysis (. . .) shows that (. . .) Italy is experiencing macroeconomic imbalances, which require monitoring and decisive policy action" and that "In a context of protracted weak growth and persistently low productivity, risks stemming from the very high level of public debt and the weakness of both cost and non-cost competitiveness have significantly increased".

[73]It is hardly necessary to mention that on 5 August 2011 even the European Central Bank intervened against Italy with an informal letter sent to Prime Minister Berlusconi, calling for the adoption of specific measures on two fronts: economic growth and sustainability of public finances. In the letter even the course of action was indicated: as far as the first front, by

8 Follows: Actions Taken by the Italian Government in Implementing the Recommendations Adopted at the European Level

Some examples of actions taken by Italy following the *recommendations* adopted by the EU are:

(a) *judicial system*. With the legislative decrees nos. 155 and 156 of 2012, the Government has implemented the Enabling Law no. 148 of 2011 on the reorganization of judicial offices in Italy. These decrees have reviewed the judicial districts and have dictated the new organization of the courts of first instance by suppressing 31 courts, 31 public prosecutors, 220 sub-offices and 667 offices of Justice of the Peace;

(b) *civil trial*. A DDL (Government's bill) connected to the Stability Law 2014 enabled Government to lay down rules for the efficiency of the civil trial. This regulation, among other things, sought to promote civil deflation backlog, establishing, among the principles and criteria, that "the court may define the first instance judgements through the ruling together with a statement of facts and laws relevant for the decision and for the delimitation of the ruling's subject, recognizing the right of the parties (upon request and only after payment of a share of the duty imposed for the appeal) to obtain a full motivation of the decision to contest/challenge" and that "the motivation of the appeal ruling could refer (partly or fully) to the motivation of the challenged decision" (this would have required a constitutional check ex Arts. 24 and 113 of the Italian Constitution.). Finally, it is relevant to recall the Decree Law n. 132 of 12 September 2014, providing urgent measures of "*dejurisdictionalization*" and other interventions for the definition of the backlog in civil court proceedings. The main changes provided by the Decree concern: the decisions of pending cases by transferring them in forensic arbitrations; reconciliation with assistance of lawyers (assisted negotiation); assisted negotiation in cases of separation and divorce; the simplification of procedures for separation or divorce (agreement received by the officer of civil status); changes to the system of compensation of costs (losers refund the costs of the lawsuit); the transition from ordinary to summary procedure (simple cases require a simple proceeding); statements made to the lawyer (the lawyer can hear the witnesses out of the process); the halving of the terms of court's

Decree-Law; as far as the second one, with constitutional revision. On the economic growth side, Italy would have to undertake the liberalization of local public services and professional services; the reform of collective wage bargaining; a revision of the legislation on recruitment and dismissal of workers; on the sustainability of public finances side, instead, Italy's intervention would have to relate to, among other things, the pension system; the reduction of public employment costs; the abolition of provinces. On this, cfr. Olivito (2014); instead, Napolitano (2012), p. 406, writes about the introduction of a "new form of conditionality".

holiday period (the holiday period in the courts will range from August 6 to August 31, while it previously ranged from 1 August to 15 September);

(c) *public spending*. Actions of rationalization and containment of public spending, which affected regions and local authorities and which have been laid down with the laws of stability in 2012, 2013 and 2014;

(d) *work*. Law n. 92/2012 (so called "Fornero Reform")—characterized by provisions in favor of workers' *flexibility*—and the latest DDL n. 1428/2014, "Enabling the Government to reform welfare support provisions, employment services and active policies, and concerning the reorganization of employment relationships, maternity support and reconciliation of life and work". Art. 4 of the recalled DDL, dedicated to the reorganization of the contractual forms, expressly provides that the Government shall adopt—within six months after entry into force of the law—one or more legislative decrees containing measures for the reorganization and simplification of the pre-existing contractual types, in accordance with the principles and management criteria (provided for therein) "that take into account the objectives set out by the European Union's annual guidelines on employability" (it is assumed that the reference is made to the legislative decrees and not to the principles and criteria). This text is now replaced by the maxi-amendment presented by the Government[74]—and on which confidence was voted—on October 8. The text now is: "in accordance with the following principles and criteria, consistent with the regulation of the European Union and with international conventions." Then, the list of principles and criteria follows and the letter b) states: "to promote, in line with EU directives, the permanent contract as a privileged form of employment contract, making it more affordable than other types of contract in terms of direct and indirect costs".[75]

(e) *provinces*. The government first took action through Decree-Law no. 201/2011 ("Salva Italia" decree, converted with amendments in Law no. 214/2012), then through Decree-Law no. 95/2012 (converted with amendments in Law no. 135/2012) and, on the basis of the latter, through Decree-Law no. 188/2012, not converted, however, into law. With Judgment no. 220 of 2013, the Italian Constitutional Court ruled against some articles of Decree-Law no. 201/2011 and no. 95/2012, criticizing the reordering through emergency decrees.[76] Recently—waiting for the ongoing constitutional reform—Law n. 56/2014 ("Law Delrio"), laying down rules on metropolitan cities, provinces, unions and mergers of municipalities, has been approved.

[74]If the DDL had not been changed, the range of the limits to the legislative decree would have been further expanded by virtue of a decision of the Italian Parliament; when it is clear, in fact, that this range is integrated by obligations arising from the EU legal order, when these are related to a legally binding act, in our case, the conclusion would be another: unless we believe, of course, that binding effects stem also from guidelines adopted at European level (see also paragraph 7).

[75]For an analysis of previous National Reform Programmes, not taken into consideration here, see Addis and Casamassima (2013), pp. 76 ff.

[76]Cf. Olivito (2014), p. 9.

(f) *energy*. With recommendation of 9 July 2013, the Council asked Italy to implement the National Energy Strategy (SEN), approved on 8 March 2013 with an inter-ministerial decree (Minister of Economic Development and Minister of the Environment, Land and Sea), which did not have regulatory nature.[77] The Decree-Law n. 133/2014 (so-called "Sblocca Italia") intervenes (also) in the implementation of the SEN and promotes the realization of some projects included in the National Reform Programmes, e.g. the *Trans Adriatic Pipeline* (TAP). From this point of view, the Decree-Law, apart from referring to certain specific works, qualifies all the projects related to the supply and transportation of gas[78] and those related to the prospecting, exploration and production of hydrocarbons as *strategic, of public utility, unavoidable and urgent*.[79]

[77]Indeed, by referendum (on 12 and 13 June 2011), the electorate repealed paragraphs 1 and 8 of Art. 5 of Decree-Law no. 34/2011, as converted into Law no. 75/2011, repealing, with that, also the legal foundation of the National Energy Strategy, although the Strategy had been recalled by Legislative Decree. no. 93/2011 of 1 June 2011, so just few days before the electorate could decide. Art. 1, paragraph 2, of the Legislative Decree, in fact, provided that within six months of its entry into force, the Ministry of Economic Development, in accordance with the procedure set out therein and in line with the objectives of the National Energy Strategy, would have defined a set of "ten-year scenarios" for the energy policy of the country and the President of the Council of Ministers would have pointed out, on the basis of such "scenarios", the minimum need for construction of facilities and infrastructures which would have been also relative—but only in part—to hydrocarbons. Now, with Legislative Decree. no. 93/2011, the Government implemented the mandate contained in Art. 17 of Law June 4, 2010, no. 96, laying down the principles and guidelines for the implementation of certain EC directives. So that the Legislative Decree adopted by the Government would be vitiated by excessive delegation, given that: (1) in the enabling Law there is no reference to the National Energy Strategy (assuming that the referendum intervened on the rules and not on the provisions formally brought to the attention of the electorate, each rule linked to the Strategy has to be considered invalid); (2) even if we try to see in the Law an implicit mandate to develop the contents of the Strategy, there is no doubt that this mandate does not refer to every single object of the Strategy, such as the one related to the re-launch of liquid and gaseous hydrocarbons (p. 111 ff.).

[78]At European level, Art. 170 TFEU provides, indeed, that "to help achieve the objectives referred to in Arts. 26 and 174 and to enable citizens of the Union, economic operators and regional and local communities to derive full benefit from the setting-up of an area without internal frontiers, the Union shall contribute to the establishment and development of trans-European networks in the areas of transport, telecommunications and energy infrastructures"; on the other hand, Art. 122 TFEU provides that: "without prejudice to any other procedures provided for in the Treaties, the Council, on a proposal from the Commission, may decide, in a spirit of solidarity between Member States, upon the measures appropriate to the economic situation, in particular if severe difficulties arise in the supply of certain products, notably in the area of energy".

[79]Cfr. Art. 194, par. 2, TFEU, which states that the Member State has the right to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply, without prejudice, however, to Art. 192, par. 2, letter c), where it is provided that the Council, acting unanimously, shall adopt: "measures significantly affecting a Member State's choice between different energy sources and the general structure of its energy supply".

(g) *Constitution*. Parliament adopted Constitutional Law no. 1/2012 and introduced the principle of a balanced budget in the Constitution (Art. 81 Const.); this change was followed by the adoption of Law n. 243/2012 (although such acts are mainly connected to the approval of the *Fiscal Compact*). Art. 81, second paragraph of the Constitution states that "borrowing is allowed only for the purpose of considering the effects of the economic cycle and, with the approval of the Chambers adopted by an absolute majority of its members, in case exceptional events occur". This thing ends up affecting even the relationship between legal sources, as that provision[80] would appear as a derogation from the rules on emergency decrees provided for in Art. 77 Const.[81] Or, from another point of view, it would appear as an establishment of a new "figure" of "atypical" decree-law, given that any measure that the Government would eventually take would be "strengthened" by the prior and necessary authorization of the houses. The Constitutional Law no. 1/2012 has also amended Art. 97, first paragraph, Const., Art. 117, second paragraph, Const., and Art. 119, first and sixth paragraphs, Const.; the same Constitutional Law, following a specific request of the Union, provided for the institution, within the Chambers, in respect of their constitutional autonomy, of an independent body with specific tasks: 1) analysis and verification of fiscal developments 2) assessment of compliance with budgetary rules. The institution of such a body was concretely demanded to the Law implementing Art. 81, sixth paragraph, of the Constitution.[82]

The described scenario is now enriched by DDL n. 1429/2014 of constitutional revision, especially as far as changes to Title V of the Constitution are concerned (e.g. the abolition of provinces and the revision of the legislative power's division).

9 Conclusions

The evolution of the methods of European public policies management—the communitarian, intergovernmental and open method of coordination—has been stopped by the financial and economic crisis: nowadays the economic *governance* is at the centre of the European integration process, and its progressive discipline seems to slowly affect the very essence of the State, while the European Union—despite it is no more qualified as an *association of aim addressed to a functional*

[80]It is hardly necessary to see that Constitutional Law no. 1/2012, however, reserves to the Law of Parliament, (see Art. 81, par. 6, Italian Constitution) the exact qualification of what is meant by "exceptional circumstances".

[81]See Art. 6, Law no. 243/2012.

[82]Art. 5, par. 1, letter f), Constitutional Law no. 1/2012, and Art. 16 ff., Law no. 243/2012 (Parliamentary Budget Office).

integration, still lacks many essential features of a *Federation* and obviously lacks any *political* responsibility which logically would ensue.[83]

Without any change to the Treaties and thanks to a significant resort to international law,[84] the economic *governance* affected the distribution of powers between the Union and the Member States. Moreover, the exercise of the "economic and monetary policy" has often been recessive in favour of other policies and, through the coordination of economic policies of the Member States, the EU intervened—albeit indirectly—in areas which are functionally related to the economic policy of Member States, regardless of an *ad hoc* legal basis identified in the Treaty.

This system caused many consequences on the organizational ground of Member States, despite the assurances provided by the constitutional judges of the Member States, starting from the German Constitutional Court, which in its case law made the Union's action (and, therefore, the legitimacy of the integration process) subject to the respect of fundamental rights, to the principle of democracy, constitutional identity or explicitly conferred powers.[85]

From this point of view, the strengthening of the executive national power seems to correspond to a weakened role of the parliamentary assemblies, all for the benefit of an implicit relationship of trust between national governments and EU Institutions.

It is not possible to predict the outcome of the European integration process. Compared to the ongoing "mutation"—hopefully not irreversible—we can only endorse what *Hans Peter Ipsen* expressed years ago: that the logical order of the neo-functionalist belief can be soon reversed and *the function can finally follow the shape*.[86]

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[83]Not by chance, Mangiameli (2013), p. 15, says that "from an economic perspective a real European Union responsibility is missing", because of the fact that the exercise of economic policy is a prerogative of certain Member States; this prevents the Union from formulating "a real (European) economic policy".

[84]Napolitano (2012), p. 423.

[85]On the development of this case-law, allow me to make reference again to Di Salvatore (2013), pp. 73 ff.

[86]Ipsen (1972), p. 983 [English Translation by O.M Pallotta].

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Was It Appropriate to Include Structural Parity in the Constitution? Notes for Beginning a Discussion on the Cognitive Democracy Crisis

Paolo De Ioanna

Contents

1 A Preface, and Also a Summary

Asking ourselves if it was appropriate to include the so-called budget structural parity in the Constitution appears, at first glance, to be a rather simplistic question, and in any case, one that goes back primarily to an area of topics and issues of an essentially economic nature; probably, from this economic perspective, the vast majority of economists in the service sector would answer the question with a substantially negative response: for those same reasons of which President Obama was reminded in the famous letter written to him in August 2011 by the Nobel prize winners; reasons that seem to me decidedly supported by observations of what transpired in the European, American and global economy when the crisis flared up again after 2008. On this issue the economic literature and even the IMF went back to an appreciation of the self-propelling function of public investments, expressing

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both caution and perplexity with regard to the significance and effectiveness of fiscal stabilization policies coupled with regulatory mechanisms that were too rigid, rapid and automatic.[1]

Perhaps, if we wanted to conceptualize the economists' criticism, we could say that the development of economic systems is the expression of correct strategies, adapted to the concrete historical reality of economic systems: not the expression of rigid and predetermined rules. If we think we can predetermine a rule (and even grant it the assertiveness of a constitutional principle) then we are presupposing that the "final" strategy has been identified, and corroborated by an examination of the long-term facts; but that is clearly in contradiction with the very nature of the science of economics (and, for that matter, of every science, hard or soft): and in our case, in contradiction with the very observation of reality, which should form the basis of any attempt to explain economic processes and to express them as models.[2]

Nevertheless, if, on the other hand, we mean to contextualize the question, and to refer it specifically to the Italian situation and to the forces that drove and led to this choice, in the second half of 2011, then the question reacquires a specific value from

[1]See Saraceno (2014). As maintained recently by Larry Summers, historially low interest rates make the expected yield from infrastructure investments particularly high for the United States. In his last editorial in the Financial Times, the ex-Secretary of the Treasury under Bill Clinton goes so far as to affirm that public investment today represents the forbidden dream of every economist, a 'free lunch.' This is even true for the euro zone, where debt is inferior to that of the United States (94 % of GDP). If we lived in an ideal world, a vast plan of public investments at the European level would be launched, for example in energy transition projects, financed by shared debt. This will not happen, despite the fact that the eurobond, project bond and other similar proposals are periodically re-launched, on account of the opposition by Germany and a few other countries. The necessary re-launch of public investment therefore will have to take place at the national level. And it is difficult to imagine that a public investment program of the dimensions necessary for recovery can be undertaken without bending the political and institutional rules.

For this reason, the English experience of the last decade can come to our aid. The "golden rule" adopted by the then Chancellor of the Exchequer Gordon Brown in 1997, abolished in 2009, provided that the government should guarantee medium-term budget parity, but that, contextually, investment expenditure could be financed by issuing debt. The principle is simple and irrefutable. Investment creates public capital, the payment of which can thus be shared with future generations that benefit from it; current expenditure, on the other hand, must be financed by the present generation that benefits from it. The golden rule therefore respects the criteria of intergenerational equity and, it can be shown, stabilizes public debt.

The golden rule seems to return to the debate on European fiscal governance. With Kemal Dervis I recently maintained that the definition of "public investment" could be made to depend on the economic policy priorities of the Union, to become a topic of discussion among the European Council, Commission and Parliament, and so to become an embryo of European industrial policy. And an article by Senator Monti in the Financial Times a few days ago brings again to the fore of the European policy debate the idea of eliminating investments from the calculation of the deficit.

The two countries that have re-launched the topic of public investment, France and Italy, should seize the occasion and try to push for a change in European fiscal rules. This alone would allow for the re-launching of public investment to such a degree as to re-start the economy. Above all, it would be the only way to fill the investment gap that is hindering potential European growth.

[2]On the use and the cognitive limitations of the econometric models, see Klein (1986). On the current analytical stage of economic science, see Basu (2013).

which it can be useful to attempt a response, though a necessarily provisional and articulated one. And in this perspective, it seems necessary to me to situate the question at the intersection of three analytical directives: the first, historical; the second, political-institutional; and the third, lastly, pertaining to economic theory.

From this viewpoint, it perhaps then becomes useful to turn to two explanatory categories that express the Italian cultural development in the judicial-institutional and the political-philosophical fields over the course of the century just ended: *the material constitution and the concept of hegemony*. Perhaps by using these categories we can try to give a less simplistic response to the structural parity question, and one more coherent with the vast array of analytical objectives implicit therein; a response that allows a glimpse of the complexity of scenarios that present themselves to Italy and above all to Europe, both having chosen to entrust the control and the convergence of budget policy, and more in general of economic policy, in member countries to established quantitative rules that are rigid and, what's more, even debatable in terms of their very analysis and methodology: rules that in Italy were then translated into a regulation-based and very articulated means of operation, with regard to its contents and sources.

The conclusion derived from this line of reasoning (which represents in a number of ways a line of thinking that I have been pursuing since the middle of 2011 and that has to do with how I have always interpreted, procedurally speaking, the constitutional limits established under Art. 81 of the Constitution) suggests a substantially negative judgment, both as far as the contents of the structural parity principle and the judicial methods chosen to incorporate it into our regulatory framework; this negative judgment, above and beyond the economic data, is ultimately concerned with a problem of a specifically judicial-institutional profile, *one pertaining to the internal cognitive nature of the democratic processes*. It originates in fact from the breakdown of this crucial parameter, as a result of the procedure that determines the so-called MTO (Medium-Term Objective) through of a kind of broad legal deferral to EU regulations, a procedure sanctioned by Art. 5 of Constitutional law no. 1 of 2012 and by the so-called "reinforced law" no. 243 of 2012. It is precisely the outcomes, both formal and substantial, of this deferral that destabilize an essential point in the fabric of our democracy: that of the real possibility of constructing a procedure and a fiscal- and budget-policy outcome that remain in the dominion, for informational as well as deliberative purposes, of the agencies of our representative democracy.[3]

In a manner of speaking, the new Art. 81 of the Constitution can perhaps be read, in good faith, as a kind of reinforcement of the criterion of debt sustainability, which can in turn ultimately be determined with tools that remain in the critical dominion of those agencies that determine policy direction (Government and Parliament); the composition of a possible medium-term balance could in fact be reconstructed through the autonomous, critical, and monitorable choice on the part of the agencies of the Italian democracy and through the relative new judicial

[3]On the same line of argument, see De Ioanna (2012); De Ioanna (2013); and De Ioanna (2014).

measures on matters of public policy. I am referring to the quality of the automatic budget stabilizers and to the possibility of reconstructing a structural path that incorporates a debt share in line with the reconstruction of the potential development of our economy, where the composition of elements that form the potential development hypotheses remain in the control and in the cognizance of the agencies of our democracy. It is, on the other hand, the specifications provided by the other aforementioned sources, and the way in which we defer to these sources, that undermines the criterion of an autonomous and plausible reconstruction of the path to sustainability: and that creates a *hetero-direct procedure* for which, in my opinion, it does not seem possible to identify solid bases of constitutional legitimacy.

This interpretation clearly derives from the assumption that internal limits (counter-limits) exist that are as essential as the very values that inform the constitutional order; values that include, with a structural function, full knowledge of, the ability to have knowledge of, and the dominion (even technical) of the deliberative processes through which the political will of the Government and Parliament are expressed. In other words, the democratic principle impedes (for our Parliament as well, not just for that of the Federal Republic of Germany) the assumption of decisions that will affect the financial situation of the citizens and put conditions on other constitutionally recognized social and individual liberties, when the agencies responsible for their assumption do not possess the tools to understand and to determine the content of these choices, choices that are not technical and cannot be delegated; at least not as long as Europe maintains its current institutional organization.

It is not a matter of discussing the plausibility of the choice of qualified majorities for certain decisions to pass (indeed, an absolute majority was required by parliamentary regulations for the opposite view to pass, for the infringement of Art. 81 of the Constitution issued by Commission V—Budget); it is not even a matter of putting to discussion the plausibility or the suitability of constitutional regimes that determine the procedures for choices related to production and to the financing of public goods, a classic topic of public economic theory from Pantaleoni and Wicksell to Buchanan; rather, it is a matter of the plausibility of an inherent constraint whose reconstruction or whose ability or be reconstructed, ex ante and ex post, becomes again, de jure or de facto, a heteronomous process, characterized by highly virtual and technical criteria—discretional, to which the mechanism for incorporating the Fiscal Compact in our regulatory framework legally defers.

It is a matter therefore of the intrinsic content of the collective choice, of the ability to have knowledge of it and to reconstruct it according to clear and comprehensible hermeneutic canons.

Where, though, we assume that with the revision process as per Art. 138 of the Constitution it is possible to delegate to external sources, which have been approved according to formally correct procedure, crucial choices for our socio-economic development, regardless of the ability to control and determine the content of these choices and of their effects on the judicial and financial situation

of the citizens, we can consider the judicial-constitutional dialogue essentially closed.

In conclusion of this long preface, we have observed just in recent weeks that the debate on how the MTO is constructed, and in particular on the role of the NAWRU (Non-Accelerating Wage Rate of Unemployment) in the definition of the differential between the effective GDP and the potential GDP (output gap), has become public. And from this debate, of which there is a distinct echo in the same official documents of the Government, the characteristics of this same process, entirely virtual and in part arbitrary, are finally emerging; they have been discussed by many and have been highlighted for some time in the institutional and economic literature[4]; thus what emerges is the profound necessity to give back to the democratic debate and to the real cognizance of the citizens a sense of transparent and therefore democratic participation in the collective choices made.

This debate has "unveiled" the fact that the MTO is not a snapshot of what is real but rather a forecasting device of a highly regulatory nature, constructed virtually, that must make the economies of the member countries converge. It is a regulatory device that governs *the material constitution* of the EU; a device around which a technical hegemony has been constructed that is subject, as to be expected in a scientific theoretical debate, to revisions more or less radical. A case in point is the discussion on the procedural and theoretical means for defining the good times and bad times of a cycle, means derived entirely from adjustments born of the dialogue among authorities, completely removed from the public domain. The "unveiling" of the virtual and conventional nature of the internal motor of the MTO jeopardizes not only the reputational function of the quantitative rules, but also the informational function of the regulatory process.[5]

2 Fiscal Rules and the European Constitutional Tradition

The organizational and analytical structure of the European constitutional tradition (and of the Italian one in particular) is built on four pillars: the law as a specific social technique that rules society; the defense of individual liberties; the social rights that give substance to the exercise of individual capabilities (to use the terminology of A. Sinn); lastly, the most important pillar in my opinion, representative democracy as a source of legitimization of legislation; at the basis of this source of legitimization, however, there should be—and this is the thesis of the

[4]Most recently by Boitani and Landi (2014).

[5]For a complete and documented account of the parliamentary debate under the new constitutional framework on budgetary balance, see Bergonzini (2014). For a first juridical reconstruction of the new constitutional context, see Luciani (2012); Luciani (2013); Lupo (2012). The journal *Quaderni costituzionali* devoted the 1st issue of 2014 to budgetary discipline. The essays of Della Cananea and Morrone deserve a particular mention.

present reflection—a cognitive deliberative structure that gives substance and form to all the other categories.

The process of constructing an integrated European area tries to hold together these four categories, within a framework that makes of the common market (the four freedoms) the material economic infrastructure to be implemented and defended.[6]

All the same, if we come to argue, as has happened recently, for inclusion in the acquiesce of a reformed Fiscal Compact, which should be made by law to exclude investments from the MTO (the golden rule) or if we affirm the same thing in terms of generational equity,[7] we in fact introduce an economic argument that leans toward the implausibility and/or inappropriateness of any rigid constraint on parity, in all its variants. And in any case, if the intent is to add to the regulatory framework, it is necessary to allow for elements of flexibility and fluidity of the rules, that make it possible to follow real processes and that do not presume to dominate reality based on voluntary and functional systems. It is interesting to note that even if we try not to avoid the well-known critical observations of G. Guarino on the Community and constitutional legitimacy of the 1997 constraints,[8] we come back to the issue of the ratio of sustainability of the debt cost (through interest) and GDP growth; we come back to a classic question of economic theory that also goes back to the unreasonableness of any rigid constraint between debt and GDP; in fact, precisely from an inter-generational perspective, convergence is almost unanimous on the need to safeguard at least investments and public interventions of an infrastructural nature that the present generation turns over to future generations, through debt transactions over the medium-long term as well. But in this way we come back to the nucleus of concepts and economic theories that have always laid the ground for the evolution of public budget institutions and that do not lend themselves to being made the basis of constitutional formulas: precisely because of their intrinsic evolving nature.[9]

But perhaps this line of argument advises us to take yet one step back: many jurists align the problems of judicial simplification with the idea of competitiveness in economics: a competitive judicial system must be simple and transparent; this seems like an almost obvious conclusion; and yet it bears a formidable (precisely in that it is mechanical and taken for granted) ideological significance; the law must be at the service of the market's economic competition. But why does this affirmation seem obvious when it is nothing of the sort? What happened to the analytical foundation that binds the law to the human being and to the realm of his collective

[6]On the same possibility of rebuilding some sort of European *lex fiscali*, see in particular Della Cananea (2014).

[7]Cf. Baratta (2014) and Caravita (2014).

[8]Guarino (2014).

[9]On the opportunity to exclude, *de jure condendo*, investments from the MTO formula, thus adopting some kind of golden rule, see De Grauwe (2013). On the importance of structural investments in intergenerational relations, see Caravita (2014) and Baratta (2014). The position of Giuseppe Guarino is comprehensively presented in *Cittadini europei e crisi dell'euro*.

and individual liberties; the foundation that is echoed exactly in the very tables that constitute the Union (TFEU); what happened to these analytical elements that historically can exist only thanks to robust public regulatory action? Simply put, they have gotten lost in the shuffle and have been incorporated into the mainstream of liberal economic thought that has become simultaneously the regulatory structure of the ends and the means of Community law. It is precisely this analytical historical context that appears to be in jeopardy; if we do not start with this basic element, everything becomes problematic and unclear. If we do not find a measure of distance from the flow of the present, we cannot understand how it is that we reached this (provisional) conclusion; we must ask ourselves how appropriate a rule is if, to be made effective, it requires growing measures of restrictive policies that render the rule's practical validity implausible; that is, the rule does not come into action (ten countries are currently in a state of excessive deficit) because it does not work. So let us try to get to the root of this conflict between ideology (as an abstract theory of the functioning of the real) and the workings of real economic processes.

3 Modification of the Constitutional Framework: A Series of "Plans – Sources" to Secure Policy Choice

It is perhaps necessary to start from a basic anthropological fact: collective thought does not exist as a biological fact, it sees itself in (or passes through) the procedure that creates within the social reality a technical common ground of a cognitive process that becomes a behavioral norm assumed by the collectivity; a norm understood and perceived by the collectivity as operational and in fact operational and sanctioned. Naturally we can construct multiple decision-making paths of the collective choices relative to production and financing of public goods, starting from the "rule" of unanimity that Wicksell models after the Pareto efficiency; even so, it is not a matter here, as observed earlier, of discussing the constitutional procedure behind a fiscal choice as it affects today or tomorrow; here, what is rather at hand is the absorption into the Constitution of a very specific fiscal policy rule that responds to a very specific conception of and about the functioning of the economy; and the referral of the rule's concrete numerical embodiment, relative to our economic system, to a technical-political agency that concretizes it from criteria and conventions that lie substantially outside the cognitive domain of the Parliament and even the Government.

Now, what took place in Italy in the second half of 2011 was, in my view, an exquisitely political transaction, carried out through judicial-institutional means. At the bottom of the transaction is the idea that the workings of the democracies of member countries, if left to their own devices, are destined to make financial choices that endanger the foundational rules of the Community: first and foremost, that of the non-transferability from one country to another of financial obligations and burdens of any kind.

The modification to Art. 81 of the Constitution and similar laws (Constitutional Law no. 1 of 2012; the "reinforced" law no. 243 of 2012) take the form of a *series of "regulatory plans – sources", devised to secure policy choices.* It is therefore necessary to *understand and analyze (in concrete terms) the reasons underpinning this circumstance, which, historically speaking, appears to be a transaction of "profound manipulation" of our Constitution.* It is necessary to begin with an analysis of the real state of economic and cultural relations: where does the heart of the constituent process lie? Inside and/or outside the national dynamic of political forces and executive leadership? It is necessary to analyze the forces that have acted and that have been "enacted". We must understand the lay-out of the labyrinth of Community rules within which constitutional balances are manipulated. Key to this understanding are the so-called technicians, who thus have a predominant role in this entire process; a role that, in some sense, is the constructive key to the whole of the judicial infrastructure of the Community.

Practically speaking, it is rather easy to show evidence of the connection between the reactions and imbalances of the financial markets, and the crisis of the European institutions. Starting with the Euro Plus Pact (March 2011) so as to arrive at the so-called Fiscal Compact, the dynamic of the European political forces has put at the center of every institutional solution, in the concrete interaction of countries, a single organizational and analytical dimension: the credibility of their commitment to fiscal discipline with regard to financial markets. This, in substance, seems to be the vision of the crisis according to Germany, followed by the Nordic countries. The fiscal rules are thus made more and more complex and articulated, and more and more entrusted to the power and the value of the hierarchy of the source, Community and national, in which they are inserted. Rules that therefore are drawn into an episteme that is exquisitely judicial-financial in nature, with a projection into the theory of so-called fiscal constitutionalism. It is in fact the uncertainty as to the application of the Community constraint (ultimately still political-procedural) that reveals, even if at a non-Community level (the Fiscal Compact), the preference for the internal acceptance of constraints through sources of constitutional value. As is well-known, this is not a question of judicial obligation, but rather it will be absolved to the letter by our politicians. Thus, we have fiscal rules that are constructed in a virtual manner, ex ante and ex post, along a parameter that it is not given to observe in the economic statistics: that of the gap between the effective GDP (observable) and the potential GDP (virtual); virtuality reconstructs the past based on the present (and this, too, would seem an abstruse means of conventional regulating) to redirect policy choices along pre-determined paths.

In the economic literature, this virtuality and regulating of constraints is born precisely of the "desire" to reinforce the credibility of political decision-makers who, according to the literature, are for a series of reasons considered to be adept at declaring their favor for fiscal discipline but who practice it in an incoherent manner. But this analytical interpretation (very debatable, as well, in terms of the analysis of historical events; crisis is not generated by imbalances in public finance but by imbalances in private bubbles) has in the opinion of many, including myself,

a profoundly negative and destabilizing impact on the heart of the institutions of cognitive democracy and on its very functional essence, which is based, in a nutshell, on the formation of a collective critical consensus determined autonomously by the representative and political decision-making institutions. (Government and Parliament).[10]

4 A Qualitative Change in the Nature of Macroeconomic Forecasting Tools

In reality all the literature that exalts the presumed advantages of introducing "virtual" fiscal rules, which manipulate present and past, departs from a point of substantial mistrust for the outcomes of representative democracy in terms of efficient control of resources; but it does not attribute any weight at all to the concepts of equity and equal participation in the decision-making process; that is, to the intrinsic value of democracy. In fact, all this literature is focused on the positive effects of the greater credibility that the decision-maker would receive in the valuation of the financial markets; but the de facto effect that this dominance of the valuation of the financial markets conveys on the balance of the concrete lives of the citizens and on the functioning of the representative democracy is inadequate; in other words, the error of this literature probably lies in the mixing up of the reputation of the markets and that of the citizens as far as democratic institutions are concerned; they are two distinct historical-analytical planes; democracy is a machine that is a bit more complex than believed to be by supporters of fiscal rules translated into judicial constraints; even if, of course, the democratic process cannot avoid considering the financial markets.[11]

The sticking point of democratic institutions lies in the transformation of forecasting tools, which have to do with economics and accounting, into procedural tools that, through a series of conventions (technical ones, shall we say) produced by an uncontrollable and democratically non-legitimate process, delimit and expropriate the realm of choices that is the expression of democratic representation. In my view, this is where there comes to be a qualitative change in the nature of these tools; from forecasting tools, which support the cognitive process of the democratic decision-maker, they become heterogeneous prescriptions put forth as the pre-established end of a legislative process that is no longer governed by the choices of the representatives of the citizens. But this situation weakens the demonstrative value of the legislative procedure and depletes the democratic policy process of the responsibility and criticality that characterize it.

[10]This reconstruction gathers several analytical assumptions. The most direct one, with regard to the article, can be found in Luhmann (1995) and Habermas (2014). This subject has also been addressed in De Ioanna and Landi (2012).

[11]De Ioanna and Landi (2012).

In this perspective, then, the two ideas of political and economic integration that have in reality dominated the field in recent years, two profoundly different ideas, should be carefully re-examined, in terms of their historical-institutional evolution: the Freiburg school of thought: in a nutshell, every man for himself, economies must therefore proceed according to their expansive power (technological, cultural, judicial, organizational), in a word, power of the single countries; and the democratic vision of Monet, Spinelli, Delors, Padoa-Schioppa, etc., Europe as fresh territory on which to build a democracy with a federal base of political equals mindful, though, of diversities.

In the utilization of these two ideas, the law plays a crucial role; in the events of recent years, however, the law has played both in a docile manner (in the renunciation of basic principles) and a firm one (in the application of procedures), procedures for guaranteeing a result predetermined by the so-called technicians: and this, this is the heart of so-called "executive" federalism. If we admit that the functional method is worn out, then it is necessary to know how to draw some conclusion from this assumption; above all, if we admit that economic governance no longer holds, and that it doesn't hold precisely for reasons linked to the functioning of financial markets, there is an internal contradiction between the functional method in Europe and the functioning of international financial markets.

In this context the position of the German Federal Court on the MTOs established by the ECB seems crucial: the *German Federal Court (BVG)* fully assumes the analytical positions of the German central bank on the non-monetary nature of the MTOs and in this way clearly shows member states the limit that the integration process has reached. We are at the critical junction for understanding the direction in which it will be possible to proceed in building a "federal" development of the integration process, or rather, in securing and trying to stabilize the present situation.

Now Art. 2 of the statute of the European System of the Central Banks and the ECB subordinates the activity of the institution to the achievement of the objectives expressed right in Art. 3 of the EU Treaty, which in clause 1 defines as the main objective of the EU the promotion "[. . .] of peace, its values and the well-being of its peoples," specifying further in the text that "The Union shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child. It shall promote economic, social and territorial cohesion, and solidarity among Member States." This is a point that is rarely remembered (see: 2014, G. Nocella, "In attesa di condanna," paper).

The federal court explains why the behavior of the ECB is external to the Treaties, but all the same it remits final judgment, in terms of Community regulations, to the European Court. This sort of preliminary deviation makes it possible to take some time; but the substantial question has now been asked and cannot be avoided. Gaining time means finding room to solve the crux of the problem only if we propose again, as we will explain below, a new focus on Community action. If everyone keeps the same positions, there is no solution; the outcome is certain. If, on the other hand, we recognize that it is necessary to renew our focus, our

operational horizon, then there is hope. And as far as focus, our points of attack are now clear: new monetary policy and Community investments outside the constraint of the budget; reinterpreting this constraint in the light of altered economic conditions in the euro zone and reviewing the limits of the action of the ECB are two sides of the same coin: but they are two sides that must be examined democratically, with full causal cognition (like for the Bundestag from the laws of the BVG from the European Parliament); and here we find the true heart of the democratic characteristics that the European construction must assume.

5 Automatic Pilot

The technique of legal deferral to the labyrinth of rules of the Community and its Treaties (Sixpack, Twopack, Fiscal Compact) is the tool devised to weaken the cognitive function of the parliamentary democracy.[12]

The mechanism of the *so-called automatic pilot* (suggested by the governor of the ECB and repeated by Economy and Finance Minister Padoan in his long interview in "La Repubblica" on September 24, 2014) calls into play the heart of the question of cognitive democracy; let me explain with a specific reference to what we are talking about: the economists who praise the automatic pilot warn us that: (a) the effort to adjust the public budget was formidable in Italy, as witnessed by the volume of primary surplus achieved cumulatively in the last 15 years, if with non-linear trends; (b) the banking system has displayed a significant endurance; (c) all the same, real growth remains low or negative while inflation is flat: this creates the mix for low nominal growth; (d) all of this creates a substantial problem for the management of the debt dynamic: in fact, if nominal growth were on the lines of 2 % or slightly higher, according to the ECB statute, the automatic pilot, according to the ECB's interpretation, would allow for a slow decrease in debt, only, however, on certain further conditions: that interest remains low (less than nominal inflation), the primary surplus remains at current levels and nominal growth remains above or equal to 2 %. So, in this context, if we put together a bit of inflation and a bit of real growth, debt would fall progressively and automatically; but the elements of uncertainty and conditionality immediately appear so substantial and profound that it seems incorrect to speak of an automatic pilot; there's very little automatic about it. Or better yet, it is reasonable to affirm that if the constraint must by necessity incorporate (and the statistics show this to be the case) some errors or objective uncertainties, the automatic nature of the mechanism compounds the error before it can be fixed; and even then, the correction follows a long and complex procedure. Therefore it is the very idea of the automatic pilot (the virtual forecasts transformed into judicial constraints, even at the constitutional

[12]See Habermas (2014).

level) that seems cognitively wrong—not to mention unfounded in economic theory (letter from USA economists to Obama).[13]

6 The Reputational Function of the Constraint Turns into Its Opposite

From all this, three ideas emerge as crucial for the purposes of the discussion on cognitive democracy: (a) the possibility of understanding and dominion, on the part of the democratic decision-maker, of the technical elements at play; (b) the value per se of a virtual forecasting mechanism, wholly economic, that is transformed into a judicial constraint; (c) the reputational function of a constraint, so obscure and fluid: reputation, then, with respect to what parameter?

The very reputational function of the constraint turns into its opposite; if I respect the constraint and its effects prove recessive, the political sanction is linked precisely to the negative effects resulting from the respect of the constraint. The reputational function turns into its opposite. The recent European elections are a clear warning in this sense. These are crucial elements for the purposes of qualifying the real nature of the mechanism that we understand to be constructed.

These considerations do not put into question the theoretical debate that has gone hand in hand with the idea of clearer construction of indicators and forecasting methods for public finances; *the information problem* remains a central issue. Herein lies the relevance of the topic of transparency and the breaking down of the Government's information monopoly. In these terms the idea of creating neutral agencies for the evaluation of forecasts is both reasonable and plausible, but only within a context that means to preserve the cornerstones of cognitive democracy. Third-party agencies that enter the discussion, on the same technical plane, and produce information are, then, useful; thus, in Italy (and also in other democratic countries) we find the institution in Parliament of budget services (1989). The breaking down of the Government's information monopoly certainly renders the democratic discussion more transparent and discourages the use of accounting tricks that hide the reality of things. But what reality: that of an overall analysis of the state of the economy or that of the adherence to a forced hetero rule, conventional, itself not transparent or reasonable? This is the point where economists who sustain the goodness of fiscal-rules-made-law enter fully into the terrain of political-institutional analyses. But as we have observed, if the rule is too obscure, too complex, counter-deductive, discretional, and anyway dependent on a specific vision of the functioning of the economy, contradicted by the facts, it is the very reputational function, on which the supporters of fiscal rules insist, that falls short; the citizen-elector cannot impress a positive value on the adherence to a bad rule or one that is at least too fluid and dependent on a multiplicity of variables

[13]In this regard, see Offe (2014), Pedone (2011) and Verde (2013).

outside the control of the decision-makers**.** But the political convenience exists only if the whole mechanism of European rules contains elements for the control and auto-correction of processes that balance the asymmetries of growth and competitiveness and give a sense of credibility and transparency to the operation, which remains essentially political-institutional.[14]

7 Independent Macro Forecasts: A Crucial Issue for Deciding

There is no doubt now that, as far as the Community is concerned, the idea of fiscal rules is in fact the idea of restriction of policy choices, starting with the proposal of Community regulation COM(2011)821, which requires member states to institute (and make functional) independent fiscal agencies to oversee the application of fiscal rules at the national level; but the idea of instituting in Parliament, within the realm of its constitutional autonomy, an agency to which to attribute the tasks of analysis and verification of the trends in public finance has been discussed since the 80's and has been put into practice, if with growing reluctance, since 1989; the change wanted by the European Commission is to tie the operations of these agencies to the evaluation and the observance of more and more rigid and labyrinthine rules, established in European headquarters.

In reality, behind the theoretical veil that continues to exalt the decision-making function of the legislative Assemblies in the fiscal policy domain, the Community regulations are born of the functionalist and executive view of the integration process, which tends to drastically restrict the role of the representative Assemblies, entrusting all the substantial choices to the executives. In the understanding of the Council, the independent fiscal organisms should be making use of an institutional machine that has eliminated de facto from its functioning the mediation and the synthesis of political representation, centering the entire process around the Governments and the European Council itself. But to guide this process there have to be heteronomous rules and national agencies that monitor their observance, agencies in the "neutral" service of this concept that incorporates a federalizing process directed by executives. It is exactly this process, however, and the concept that has so far sustained it, that seems irremediably stuck; a different focus is needed to build Europe.

Therefore, the problematic issue, for the purpose of safeguarding a democratic context, lies not in the methodological implementation of credible, transparent, and monitorable public finance forecasts independent of the Executive monopoly, a process to be both supported and valued; it lies rather in the transformation of this forecasting framework into judicial and numeric constraints, inserted into the laws of single countries based on the hetero-direct processes not validated by any

[14]See Landi (2013).

democratic discussion and made rigid precisely to avoid an examination of the reasonableness of their methodological bases.

If rules, tools, and procedures have to be part of the same whole, it is crucial that this whole have within it the elements of democratic legitimacy, cognitive flexibility and rapid revision of the rule in case of error; and all this within the control of national Parliaments and the European Parliament. The Fiscal Compact most strongly represents the crisis of democratic legitimacy of the European integration process. So, if the constraint is obscure, opaque and counter-deductive, there is no room for any process that wants to make transparent the process by which forecasts are built. What there is room for is the prevalence of a technocratic and ideological vision that has already invaded the constitutional fabric. For this reason, I have spoken in the past of "betrayal by the clerics"; because the "clerics" were unable to defend the reasons behind a cognitively founded democratic deliberation, one based on the knowledge with which they were entrusted and on the functions they were asked to carry out.

8 A New Focus for European Integration

What idea of development of the European collective is there behind this technocratic vision? What purpose does the law serve according to this vision? If it were an epochal change (as the Ordoliberalists sustain) Europe appears perhaps to have no future, if it adopts this recipe based on no bail outs; it seems destined to disintegrate or to accept a German hegemony; but why should it?

If on the other hand it assumes a new focus (anti-cyclical budget policy; partially monetized debt and a central bank with the power to intervene; a banking system monitored and guaranteed at European headquarters), then a way out opens up; but to work, a new democratic focus is required: that is, a Parliament with fiscal powers; determination of the amount of debt coherent with the cycle; coordinated fiscal withdrawal, European welfare, European investments, etc. In other words, democracy!!! This is the cornerstone of the constitutional structure of the European states.

The focus has to work based on the principle of cognitive democracy; it has to give a clearer footing to this principle; it is not abstract trust in reason, but the limited trust in the possibility to build a reasonable consensus based on the state of the knowledge and on the effective participation of the citizens in the decision-making process. If the subjects that give body to the European constitutional material do not succeed in recreating a true consensus on the purposes and the means of the focus of integration, the hegemony of the idea of Europe remains confined to a limited group of specialists, adherents of the Freiburg School (often without even realizing it); what is needed to re-launch a strong idea of a democratic Europe, however, is big democratic parties of the masses, on a European scale. The function of the formation of a democratic European public opinion is therefore crucial. And in this political-cultural operation the leverage of fiscal policy (rates,

taxes and debt) remains central in supporting the role of a single currency; but rates, taxes and debt require real nucleuses of representation and democratic decision.[15]

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[15]Maybe, if we want to save the historic idea and the poltitical prospect of a union founded on the rule of law (see Vauchez 2013 and, more broadly, Blanke and Mangiameli 2006), finding a solution to the relation between decmocratic representation and technocratic decision-making remains critical.

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Rules and Procedures for Italy's Participation in the European Decision-Making Process: The System Outlines in Act 234/2012 and by the Regional Laws

Antonino Iacoviello

Contents

1 Introduction

The issue dealt with in this paper is particularly vast and complex; indeed it has to do with all the national rules for Italy's participation in the formation and implementation of European regulations and policies.

It is an issue that has for some time been the subject of scientific and institutional debate, and it continues to attract special interest.

The European integration process progressively shifted the regulation of several subject matters to the supranational level; as a result, the European legislation now

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significantly affects the national legislation. In much the same way, public policies are delineated at the European level and then are implemented at the national level (suffice it to think of the policies on energy, the environment, and agriculture).

In this context, the definition at the national level of effective systems for participating in the European decision-making process takes on strategic importance for the Member States in that each must be in a position to identify the national interests to be negotiated at the European level and then ensure that the obligations arising from membership in the European Union are complied with in a timely manner.

In the case of Italy, with reference to various matters of European interest, public policies are articulated on a territorial level.

In a series of matters that coincide with those attributed to the European institutions, legislative and administrative competence is entrusted to the Regions either on an exclusive or concurrent basis; it has therefore been necessary to identify instruments and procedures that are capable of involving all the institutional levels including the social forces in the ascending phase of the decision-making process.

The national legislation on this matter was recently renovated through Act 234 of 24 December 2012, bearing the title of "General rules on the participation of Italy in the formation and implementation of the legislation and the policies of the European Union", that entered into force in 2013 and that replaced Act 11/2005[1] preserving it's basic structure.[2]

The preceding act introduces a comprehensive reform of the way Italy participates in the European decision-making process: similarly to Act no. 11/2005, it regulates the procedures and instruments available to the State and regional institutions for participating in the formation and implementation of European regulations and policies.[3]

This is one of the most important regulatory reforms of the 16th Parliament that is the result of the merging of four bills initiated by Parliament and of a bill initiated by government approved after having gone through a parliamentary process that considerably involved the European Policies Committees of the Chamber and of the Senate.

The final text reflects the complexity of the matters that are subject to legislation: the Act consists of 9 Chapters, 61 Articles (more than double those of Act 11/2005) and 209 paragraphs; it also contains more than 16 references to subsequent acts (regulations, ministerial decrees, interministerial acts, besides several referrals to parliamentary rules, whereas in Act 11/2005 there were only a few references.[4]

[1]On "*General rules on the participation of Italy in the regulatory process and on the procedures for fulfilment of a community obligation*".

[2]For a first examination of the novelties introduced by Act 234 of 2012 see Caretti (2012), p. 837; Favilli (2013), p. 701, and also Aa. Vv. (2013a) and Aa.Vv. (2013b).

[3]At regional level, the regulatory framework of reference on this matter is supplemented by interventions at various levels that describe the internal organization and the procedures for participating in the shaping and implementation of European law.

[4]On this issue see Bartolucci and Fasone (2014), p. 5.

The firsts Chapters of the Act delineate the role of the various entities involved in the definition of the national position (Parliament, Chapter II, Government, Chapter III, Regions and Local Governments, Chapter IV, Social Parties and Production Sectors, Chapter V); Chapter VI deals with the fulfillment of obligations arising from Italy's membership in the European Union; Chapter VII regulates litigation before the EU Court of Justice; Chapter VIII regulates the procedures concerning the sector of State aid subjected to control by the European Union, while Chapter IX contains transitional and final provisions.

Act 234/2012 represents the final phase of a process aimed at reorganizing and systematizing the amendments made to Act 11/2005 over the years, made necessary also considering the need to adjust the national order to the novelties introduced by the Lisbon Treaty and to the new European institutional framework.

The organizational and procedural model delineated by the aforementioned law, as occurred with the previous law, reflects the structure of the European decision-making process characterized, as is well known, by a "natural" prevalence of national executive bodies, watered down by the progressive strengthening of the role of the European Parliament and of national parliaments now envisaged by the Lisbon Treaty that has modified the institutional structure of the Union and of its decision-making process.

The most significant novelties concern the involvement of Parliament in the formation of European regulations and policies, and the procedures and instruments for adjusting the national legislation to the European regulations, resolving the criticalities that had emerged in the practical application of Act 11/2005 and, more in general, adapting it to the Lisbon Treaty also in linguistic terms.

Moreover, Act 234/2012 introduces some novelties also with reference to the Regions' contribution to the definition of the national position to be supported at the European level.

The involvement of this level of Government in the formation of European law deserves closer attention for at least two orders of reasons: first, it is essential for identifying national interest with reference to European dossiers, consisting of all the expectations of each level of government identified considering the needs of the communities of reference; second, it constitutes a resource for contributing to the consolidation of European democracy.

It is precisely with reference to this latter aspect that the Regions, being proximity institutions, take on a leading role in bridging the increasingly growing gap between European citizens and the EU institutions.

Indeed, they represent the most effective level of government for making known the benefits of European policies at the territorial and local level where they often have an impact on the promotion of economic development and social cohesion; this is a particularly important aspect in the current social context that deserves the utmost consideration as demonstrated by the choice of putting Europe's communication activities at the heart of EU planning for the future in order to enhance the people's perception of the EU.

In other words, the Regions and local government are privileged instruments for improving the people's perception of Europe which constitutes one of the main

goals to be reached by boosting the process of European integration and by remodulating European politics and governance.

The unifying element of the model delineated by Act 234 may be found in the coordination of the levels of government through an articulated system of procedural and organizational coordinating moments[5]; indeed this law ensures the involvement of all the constitutive bodies of the Republic, and it envisages adequate coordination in the ascending phase and in the implementation of European obligations.

In order to fully understand the participatory system outlined in the law, we need to identify the task entrusted to each level of government in the definition of the national position and in the implementation of European obligations.

The definition of the national position cannot forego the analysis that all the "points of contact" between internal and European order can contribute; in the same manner, with reference to the implementation of European law and policies, and more in general with reference to the fulfillment of the obligations deriving from membership in the European Union, it is necessary to involve all the decision-making levels in order to ensure greater efficacy and a reduction in the time to implementation.

This paper examines the instruments and procedures available to Italy for its participation in the European decision-making process and, in particular, the coordination bodies between the different levels of government, the instruments and procedures for defining the Country's position in the European negotiations, and in passing, mention will be made of the instruments for the periodical adjustment of the National order to the European order.

2 Instruments and Procedures for Defining the National Position To Be Negotiated at the European Level

Over the years, participation in the ascending phase of the European decision-making process has taken on increasing strategic importance for Member States as demonstrated by the current debate on the main points of the new European policy (from austerity policy, to the policy of growth). It enables each Country to bring the needs and expectations of citizens and businesses to the European level and contribute to shaping the European policies (think of the recent experience in the reform of the Common Agricultural Policy). From a different standpoint, it allows to improve the people's perception of Europe which is felt to be distant and often alien to the circuitry of democratic representation.

The ability to effectively impact the European decision-making process is conditioned by the timely unfragmented identification of the Country's interest in

[5]On the difference between procedural and organizational coordination, refer to D'Atena (2013a, b), p. 347 and, with special reference to participation in the European decision-making process, pp. 384 and 385.

the various European dossiers, considering the impact on the domestic level and, during the programming phase, the needs and expectations of businesses and of the people.

Each State needs to develop a strategic vision on the European dossiers, identify its interests and promote them in the European debate, upholding the Country's position in the negotiations at the institutional level.

For this purpose, it must endow itself with instruments and procedures for coordinating all the institutional entities that in different capacities contribute to defining the national position.

With reference to Italy, Act 234 dedicates special attention to the discipline of procedures for the formation of the national position to be negotiated at the European level that constitute the essential moment for an effective participation in the ascending phase of the decision-making process.

The formation of the national position is a summary of the contribution of the central and peripheral administrations, of Parliament, of the Regions and of the local governments, called upon respectively in their field of competence, to ensure that an evaluation is made of the impact of the European legislative initiatives and formulate concrete proposals that may be useful to defining a unitary national position on each European dossier.

The multiplicity of institutional entities raises, on the one hand, the problem of ensuring coordination among the various central administrations that have competence in the subjects of European interest, and on the other, facilitate the coordination of the institutional bodies involved in the European policies.

Hence, the coordination system, as pointed out recently by the results of a fact-finding survey on how the Country deals with EU-related issues carried out by the Senate of the Republic, represents an instrument of fundamental importance for participating in the European negotiations.[6]

With a view to strengthening horizontal and vertical coordination between the various decision-making centers, the legislator has updated the rules on the system of organizational and procedural coordination points among the institutional entities involved in defining the national position given the results already obtained from the implementation of the instruments governed by Act 11/2005.

2.1 Coordination Bodies for Defining the National Position To Be Negotiated at the European Level

The task of defining the national position on individual dossiers in discussion at the European level, as envisaged by Act 11/2005, is entrusted to Government that must

[6]Senate of the Republic, XIV Standing Committee (EU Policies), *Indagine conoscitiva sulsistema Paese nella trattazione delle questioni relative all'UE con particolare riferimento al ruolo del Parlamento italiano nella formazione della legislazione comunitaria*, 16th Parliament, can be found on the web site www.senato.it.

consider the approaches of the various administrations, of the acts of Parliament and of the observations of the Regions and Autonomous Provinces.

For better coordination between the various decision-making levels, the organizational model already delineated in the mentioned Act 11/2005, has been partially revised.

The role of the Presidency of the Council of Ministers, through its Department for European policies, is confirmed. This body coordinates the administrations of the State that are competent by sector but also the administrations of the Regions and of the Autonomous Provinces and of the social partners where envisaged, with a view to defining the national position to be negotiated at the European Union level, without prejudice to the role of the Ministry for Foreign Affairs in matters related to the relationship with the European Union.[7]

At the Department there is an Interministerial Committee for European Affairs (CIAE),[8] and also a Committee for evaluating European Union acts: these two bodies are the real seats of coordination between the central administrations, but they also provide coordination with the territorial and local administrations.

The CIAE, regulated by Art. 2 of Act 234/2012, is the main site for coordination in defining the Government policy guidelines in the process for establishing Italy's position while the European Union acts are being drawn up; its function is to ensure coordination between state administrations in order to avoid fragmenting Italy's position that in the past used to be defined by the individual administrations in their respective sectors of competence.

The seat where the national positions are defined, that will then be expressed by Italy at the European negotiating table, is the Technical Committee for the Assessment of European Union Acts, set up at the Department for European Policies.

The Department provides technical support for their functioning and it continues to play the traditional coordination function with the Ministry for Foreign Affairs for the definition of the national position to be supported in the European negotiations.[9]

The Interministerial Committee (formerly CIACE, set up in pursuance of Art. 2 of Act no 11/2005), is a body having variable composition designed to facilitate

[7]For a thorough discussion of the coordination system for participating in the ascending phase of the European decision-making process, out of many contributions, refer to Astone (2007), p. 159 *ff*.

[8]The CIAE is chaired by the President of the Council of Ministers or by the Minister for European Policies; its members are the Minister of Foreign Affairs, the Minister for Regional Affairs and the other ministers responsible for the subject-matters affected by the measures under discussion and the items on the agenda for its meetings. The Committee is assisted in its institutional work by a Standing Technical Committee and a Secretariat which, under its Rules of Procedure adopted by Decree of the President of the Council on 9 January, 2006, coordinates the work of the various departments concerned in defining Italy's official position to be adopted at the European level.

[9]The secretariat of CIAE, that also provides support for the functioning of the Technical Committee that assesses European Union acts, is provided by the Department for European Policies that also makes arrangements for staffing needs by using staff coming from other administrations, even regional administrations, in accordance with paragraphs 7 and 8 of Art. 2 of Act 234/2012.

the coordination and cooperation among the Administrations involved *ratione materiae* in the proceeding for the definition of the national position to be represented in the European decision-making places: it is chaired by the President of the Council of Ministers or by the Minister for European Policies, and consists of the Minister for Foreign Affairs, the Minister of Economy and Finance, the Minister for Regional Affairs, Tourism and Sport, the Minister for territorial cohesion and the other Ministers having competence over the subjects on the agenda of the meetings; for the matters that are of interest for the Regions and Autonomous Provinces, participation in the meetings of the Committee is extended to the president of the Conference of Regions and Autonomous Provinces or to a president of a region or autonomous province holding a proxy and, for their respective fields of competence, the president of the National Association of Italian Municipalities (ANCI), the president of the Union of the Italian Provinces (UPI) and the president of the National Union of Mountain Municipalities, Bodies and communities (UNCEM).

The meetings of CIAE are prepared by the Technical evaluation committee, to which the law assigns the task of coordinating the various administrations involved in defining the national position to be negotiated at European level, with the aim of facilitating the definition of Italy's position during the formation of European regulatory acts.[10]

More specifically, the Technical Evaluation Committee performs a preliminary activity that consists in gathering and assessing the requests coming from the various administrations, also the regional local ones, on the issues being discussed at the European Union; it considers the Government policies and builds up the Italian position to be negotiated during the formation of the European Union regulatory acts.[11]

Besides these central bodies there is the standing Conference for relationships between the State, the Regions and the Autonomous Provinces of Trento and Bolzano, and the State-city and local governments Conference, where discussions are held on the aspects of European policies that affect the Regions and Autonomous Provinces, the former, and local governments, the latter.[12]

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[10]The Technical Evaluation Committee is made up of the representatives of the Ministries having competence over the matters being discussed at European level, who are the spokespersons of their respective Administrations. The activities of the Technical Committee are carried out in groups that do the preparatory work for the specific issues. The composition and functions of the Committee are laid down in Art. 19 of Act 234/2012 that has enhanced the Committee's in defining Italy's position in the making of the normative acts of the European Union.

[11]When subjects devolved to the Regions and Autonomous Provinces are dealt with, a representative from each Region and Autonomous Province appointed by their respective Presidents shall participate in the works of the Technical Committee, as well as representatives indicated by ANCI, UPI, and UNCEM for the respective areas of competence of the local bodies (Art. 19 (5) Act 234/2012).

[12]Art. 22 of Act 234/2012 envisages that, every 4 months, a special session of the State-Regions Conference be convened to discuss the aspects of European policies that affect the Regions and Provinces, the so-called European session, where the Conference is called upon to express its

The law does not envisage a specific delimitation of the areas of intervention of CIAE, restricting itself to envisaging that "*it performs its tasks in compliance with the powers attributed by the Constitution and by the Act of Parliament, to the Council of Ministers and to the Permanent Conference for relationships between the State, Regions and Autonomous Provinces of Trento and Bolzano*".

Failure to specifically define the scope of competence of the Committee could generate doubts regarding the risk of overlap with the other institutional fora for coordination.

In particular, the involvement of regional representatives in the works of the Committee raises the problem of an overlap with the Standing Committee on Relationships between the State, Regions and Autonomous Provinces of Trento and Bolzano, identified as the privileged coordination forum also for European matters.

In practice, the intervention of the Committee has restricted itself to coordinating activities for the definition of the national position on some specific sectors characterized by a marked interdisciplinary nature and by the ensuing concurrent powers among the various state administrations.

A procedural pattern has set in whereby on the one hand the State-Regions Conference is the forum for coordinating the definition of the national position on devolved matters, on the other hand, the CIAE is the forum for coordinating the central administrations (and in particular the Ministers who, in turn, are competent for the various issues on the agenda).

Hence there is no overlap; however, there are no cases of agreements at the State-Regions Conference level on European legislation proposals on matters devolved to the Regions and Autonomous Provinces.

We may therefore deem that the involvement of the Regions in the works of the Committee has encouraged a dialogue with central government on individual issues that has entailed, in practice, a *de facto* replacement of the overall procedural model represented by the institutional discussion within the State-Regions Conference.[13]

In other terms, deeming that the instruments described thus far are sufficient, the Regions have not felt the need to interact with Government in that forum.

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views on the general policies and on the drafting and implementation of the normative acts of the European Union that affect Regional competences, and ensure reconciliation of national policies concerning participation in the ascending phase of the European decision-making process, with the needs veined by the Regions and Autonomous Provinces of Trento and Bolzano for matters over which they have competence. Similarly, Art. 23 of Act 234/2012. Similarly, Art. 23 of Act 234/2012 envisages that a special session of the State-Cities and local governments Conference be convened at least twice a year for reconciling the aspects of European policies that affect local governments.

[13]The result is that the enforcement of Art. 24 (4) of Act 234/2012 is quite remote. The article states that "If an EU legislation proposal concerns a matter attributed to the Regions or Autonomous Provinces and one or several Regions or Autonomous Provinces make the request, the Government shall convene the standing Conference for relationships between State, Regions and Autonomous Provinces of Trento and Bolzano, in order to reach an agreement in accordance with Art. 3 of Legislative Decree 281 of 28 August 1997, within 20 days. After this deadline and in cases of motivated urgency, the Government can proceed even if no agreement has been reached".

The coordination model for the definition of the national position is hence articulated at three levels: a first level of general coordination with functions of institutional coordination with the Ministry for Foreign Affairs and support for the regular functioning of the coordination bodies represented by the Department for European policies of the Presidency of the Council; a second level, represented by the CIAE, of a political nature, has the task of agreeing on the Government guidelines in the process for defining the national position to be negotiated at European level; a third, of a technical nature, with operational coordination functions represented by the Committee for the evaluation of the European acts that have two tasks: defining the positions to be promoted at European level, after having received requests from the various administrations on matters up for discussion at European level, including regional and local matters; and, overseeing the execution of decisions made by CIAE which is entrusted with coordination tasks in case there is no agreement at the technical level.[14]

Ultimately, the technical standing Committee is the operational coordination body where the national positions on draft European acts are defined; CIAE has the role of setting the policy guidelines. The result is a model that is the national version of the European Union Council (Council) whose works are prepared by the COREPER.[15]

Within each administration units for evaluating European Union acts have been set up that monitor the activities of the administrations that are important at the European level also with the aim of contributing to the shaping of European law in the matters over which they respectively have competence: the evaluation units perform an analysis of the impact of European legislative proposals in the sectors of interest, they ensure support to the representatives of the administrations they belong to in the coordinating bodies and draw up the technical reports indicated in Art. 6 (4) of Act 234/2012.

In the definition of the national position, account must be kept of the guidelines of Parliament and, where envisaged, of the Regions and of the Autonomous Provinces expressed according to the procedures described below.

2.2 Involvement of Parliament in the Ascending Phase of the Decision-Making Process

Consistently with the model outlined in the Lisbon Treaty, and in particular with the new role attributed to the national Parliaments, Act 234/2012 enhances the role of Parliament in the definition of the position to be negotiated at European level.[16]

[14]For more information on this point Saltari (2013), pp. 475 *ff*.

[15]On this aspect see Cartabia and Violini (2005), pp. 485 *ff*.

[16]On the role of national Parliaments in the European decision-making process see, among many contributions, Manzella and Lupo (2014); Olivetti (2012), pp. 485 *ff*; Gianniti (2010), pp. 171*ff*;

Chapter III of the Act, dedicated to Parliament's participation in the definition of Italy's European policy and in the drafting process of European Union acts, regulates the forms of dialogue between Parliament and Government in the ascending phase, as well as the forms of dialogue between Parliament and the Regional Legislative Assemblies, given the prerogatives listed by the Lisbon Treaty to enable national Parliaments to contribute to the good functioning of the European Union.

In particular, it regulates the transmission and examination of European documents and draft legislation by introducing a series of information and consultation duties for the Government; it also regulates the participation of the Chambers in the shaping of the acts of the European Union, in verifying respect for the subsidiarity principle and political dialogue with the European Union institutions; finally it envisages that the Chambers be heard on financial and monetary matters and other forms of involvement consistently with the space for participation opened up by the Lisbon Treaty.[17]

The innovations in the legislative framework are basically two: strengthening the Government's duty of disseminating information which constitutes a precondition for exercising the powers of policy making and control that are typical of Parliament, and coordination between Parliament and Government, that is most opportune on the one hand to avoid divergent positions at the European discussion table and on the other to give more weight to the Government's position in European negotiations; however, they also concern the regulation of how to be directly involved in the European decision-making process and how to exercise the powers of the Chambers with reference to the simplified procedures for the revision of the Treaties and other decisions of the Union, whose entry into force is subject to prior approval of the Member States consistently with the rules defined at the national level.

In this paper the focus is on the general instruments allowing Parliament's direct and indirect participation in the creation of European legislation and policies.[18]

The precondition for an efficient participation of the Chambers in the European decision-making process is the availability of adequate, qualified and timely information by Government that comes to add to that already provided by the European Institutions.

Arts. 4, 5 and 6 of the Act being commented on here, contain a number of innovations aimed at improving and expanding the information to be provided to

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Caretti (2010). With reference to the national model, see Esposito (2013); Capuano (2011), pp. 519 *ff*; Rivosecchi (2013), pp. 463 *ff*; Fasone (2010), pp. 41 *ff*.

[17]And finally Chapter II of the law regulates the prerogatives of the Chambers with regard to the simplified procedures for amending the Treaties, the application of the so-called "passerelle clauses", decision whose entry into force is subject to approval by Member States, and the so-called "emergency brake" that a Member State can use in the cases envisaged by the FTEU requesting that decisions that are particularly important for national interests be referred to the European Council (Arts. 11 and 12 l. 234/2012).

[18]The prerogatives of the Chambers mentioned in footnote 16, instead, shall not be considered. On this, among other contributions, see Favilli (2013), pp. 714 *ff*.

the Chambers in order for them to exercise their policy making powers on European matters.

In particular, Art. 4 extends the duty to provide information already envisaged in the previous Act 11/2005 to a broader scope of matters that include also the "informal" meetings that are typical of the European negotiations and the functioning of the institutions of the Union; it also introduces the obligation for Government to inform the Chambers in a timely manner about any initiatives or issues concerning foreign policy and common defense submitted to, or being examined by, the European Council; it also envisages that the reports and information notes drawn up by the Permanent Representation of Italy with the European Union be transmitted to the Chambers, which adds to the Government's duty envisaged in Art. 3 (3) to provide the Chambers' offices at the European Institutions with all the Representation's documents and information. Having access to such documentation enables the Chambers to dispose of particularly qualified and updated information and instruments that cannot be found in the traditional information circuits so that it can be fully cognizant of the developments in European policies.

Art. 5 is specifically devoted to ensuring forms of consultation for the Chambers on agreements on financial and monetary matters that, in pursuance of Art. 4 (4) must also be disseminated and consulted under the procedures laid down by the upgraded law and dealt with in the new Art. 81 (6) of the Constitution on the coordination of economic and budget policies and on the functioning of financial stabilization mechanisms.

Also with reference to the participation of the Chambers in the making of European regulations, Art. 6 comprises what was already envisaged in Art. 3 of Act 11/2005, by introducing the obligation for Government to ensure "qualified and timely" information by means of a memo that describes the draft acts of the Union and a technical report drawn up by the administration having competence in that subject field.

More precisely, according to Art. 6 of Act 234/2012, in cases of "special importance" or upon request by the Chambers, along with the draft acts of the European Union, the Government shall forward a memo containing an evaluation of the draft, indicate a tentative date for discussion and adoption, emphasize urgent aspects needing attention, if any and, where several acts are transmitted, a ranking order of priority of the various acts.

Furthermore, in order to facilitate the work of the Chambers, within 20 days from the forwarding of a draft legislative act of the Union to the Chambers, the administration having most competence on the subject at hand shall draw up a technical report indicating that the legal basis is sound and that there is compliance with the principles of subsidiarity and proportionality, offering an overall evaluation of the draft and of its negotiation prospects highlighting the points deemed to be consistent with national interest and the points for which changes are deemed necessary, and the impact of the draft act on the national legal system, on the powers of the Regions and local governments, on the organization of the public administrations and on the activities of citizens and businesses.

The technical report is to be accompanied by a table where the provisions of the draft act are matched against the national rules in force.

With reference to the European draft acts other than legislative acts it is not clear what are the parameters to distinguish the cases of special importance and what body has competence to take the relevant decisions.

This is, however, a problem of little practical importance in that each Chamber can be asked to provide an explanatory note; in practice, the Government identifies the cases of special importance that are worthy of being dealt with in greater detail, whereas each Chamber can ask for explanatory notes on specific cases.

Ultimately, the amendments made to the provisions of Arts. 3 and 4 of Act 11/2005 are more specific in indicating the Government's disclosure obligations and they define concrete ways for achieving the goal of ensuring that the Chambers receive qualified information.

As a result of the novelties described, there is an increased level of knowledge about how European policies are developed and about the negotiations relevant to the individual draft regulatory acts by Parliament, which is thus put in a position to exercise the prerogatives that have been acknowledged at the European and domestic level.

If these instruments are actually activated there will be positive effects on Parliament's participation in the decision-making process and on our compliance with European duties; the administrations will be facilitated in implementing the European policies because they will be working on acts that have already been examined in the ascending phase, whose impact on the domestic legal system is already known.

Besides the above described information instruments there are also the Government Reports envisaged by Art. 15 of Act 11/2005, regulated by Art. 13 of Act 234/2012 that include the previous rules with few changes to them.[19]

The instruments for involving the Chambers in the European decision-making process and the ways in which the prerogatives provided by the Lisbon Treaty are exercised are governed by Art. 7 and subsequent articles of Act 234/2012.

Art. 7 confirms the obligation already envisaged by Act 11/2005, as amended, requiring that the Government shall express a position that considers the policies defined by the Chambers, and strengthens it in order to make Parliament's contribution to the shaping of the national position more effective.

In particular, it envisages that if it deviates from the policies of the Chambers, the Government shall report to the competent parliamentary bodies providing adequate motivations on the position it has taken.

The policies of the Chambers give the Government a margin of flexibility that is consistent with the need for a dynamic interaction with the other States within the European Institutions and in particular in the Council; however, in regard to the previous regulations, the reporting obligation explaining the reasons that have

[19]For sake of completeness, let us mention the Memo required under Art. 17 of Act 234/2012 that refers to the appointment of Italian members to the European Union Institutions; this is absolutely new. In the Memo, the Government is required to describe the procedure followed to make the proposals or designations, the reasons for such choice and the CV of the persons proposed or designated, indicating the assignments they carried out in the past or are carrying out at the present time.

prevented acting consistently with the indications provided by the Chambers undoubtedly strengthens the coordination between Parliament and Government.

Again with reference to the coordination between Parliament and Government, the rule mentioned above extends the field of action of Parliament that can now intervene not only in the meetings of the Council of the European Union (Council), but also in the meetings of the other institutions; in addition, the Chambers are now called upon to contribute to the policy making and control activities also on economic and financial matters that are of great importance given the need to work out a strategy for curbing the crisis, now planned mainly at the supranational level.

Albeit with some amendments, Act 234/2012 also confirms the possibility for each Chamber to ask Government to put a reservation for parliamentary scrutiny on a European draft act envisaged by Act 11/2005.

With respect to the previous rule, Art. 10 of the Act envisages that the reservation should not be placed automatically by Government at the beginning of Parliament's examination of an EU act, but upon request by the Chambers; however, as already envisaged previously, in "cases of special importance" it can also be placed by Government.

Placing the reservation for examination prevents Government from taking a position in the Council on the act being examined by the Chambers up until Parliament's pronouncement, or in any case for a maximum term of 30 days from the notification that a reservation is placed.

Upon expiry of the 30 days, the Government can in any case proceed with the activities aimed at making the European acts, regardless of Parliament's pronouncement; on the contrary, if the Chambers express their view within the deadlines, the Government is obliged to comply with Parliament's position.

The reservation of parliamentary scrutiny is therefore an instrument for involving the Chambers in the European decision-making process. It is optional but nevertheless useful also for Government as a negotiation instrument at the European level.[20]

On the whole, the result is a new configuration of the power of policy making and control by Parliament on the work done by Government, characterized by a greater margin of action for the Chambers in defining the national position to be negotiated at the European level, consistently with the enhancement of the role of national parliaments in European governance.

Besides these rules on the way in which Parliament is involved in defining the national position to be negotiated at European level, that delineate a more marked role in directing and controlling Government, there come to add rules that are specifically dedicated to the direct participation of the Chambers in the European decision-making process: Art. 8 of the law regulates participation in controlling the correct application of the principle of subsidiarity, and coordination with the regional legislative assemblies; instead Art. 9 regulates participation in the so-called political dialogue, namely submitting proposals on all the draft regulatory acts and consultation documents sent by the Commission.

[20]Since this is only of domestic interest, and especially considering the little time available to the Chambers, this institute has not been used very much in practice.

With reference to the participation of the Chambers in verifying compliance with the principle of subsidiarity, Art. 8 virtually contains the provisions of Protocol 2 on the application of the principles of subsidiarity and proportionality attached to the Lisbon Treaty,[21] with the addition that a motivated opinion needs to be sent also to Government in order to avoid expressing divergent positions.[22]

In a manner that is consistent with the aims of controlling subsidiarity, Art. 8 (3) is an instrument that enables national parliaments to express their opinions on the appropriateness of a European action instead of the State, Region or Local Government since it envisages that the Chambers can consult the councils and assemblies of the Regions and Autonomous Provinces which, in accordance with the provisions of Art. 25 of the same law, can send their observations to the Chambers in time for the parliamentary scrutiny.

The involvement of the Regions is therefore merely a possibility; however, even in the absence of a specific obligation to consult the regional Councils on European draft acts on devolved matters, the involvement of the regions is ensured in practice by the systematic contribution of some Regions, among which in particular Emilia-Romagna, Marche and Abruzzo that in recent years have autonomously sent reasoned opinions that were included in the parliamentary debates..[23]

Again, referring to the participation of the Chambers in the ascending phase of the decision-making process, Art. 9 of Act 234/2012 introduced a reference to the so-called political dialogue, considered to be only an internal activity by each Chamber and, spontaneously, by some Regional Councils with reference to the manner of defining their respective contributions.[24]

In order to ensure coordination with the regional legislative assemblies, the documents sent by the Chambers to the European Institutions within the framework of the political dialogue consider the observations and proposals, if any, formulated by the Regions and Autonomous Provinces of Trento and Bolzano.[25]

[21]On the *ex ante* control exercised by national Parliaments, refer to Favilli (2011), pp. 268 *ff*; on the control *ex post*, see Mangiameli and Iacoviello (2013), pp. 1718 *ff*. With reference to the Italian Parliament, although written in light of the regulatory framework existing before the entry into force of Act 234/2012, see D'Addio (2010), pp. 107 *ff*.

[22]Cfr. Favilli (2013), p. 710.

[23]A balance for an adequate consideration of the regional contribution will have to be sought in the parliamentary rules, to which the law refers. On this point see Bartolucci and Fasone (2014), p. 14.

[24]In the literature it has been observed that the recognition of "political dialogue" by the national legislation seems to be unique for Italy compared to other Member States; cfr. Bartolucci and Fasone (2014), p. 23.

[25]At the European level the so-called "political dialogue" has turned out to be the main communication channel between the Commission and the national parliaments (in 2012, 593 opinions out of 663); one might conclude that national Parliaments have preferred to interact on the points of fact of the legislative measures and strategic policies rather than on the control of subsidiarity. Moreover, often, control on subsidiarity was used more as a political rather than technical instrument for asserting national interests and positions; on this see *Rapporto 2013 sulla legislazione tra Stato, Regioni e Unione europea*, Volume Two, Tome II, Camera deideputati, Osservatoriosullalegislazione, p. 547, from which the data presented above have been taken.

2.3 The Role of Local Governments: Participation Instruments and Procedures

With reference to the making of the European regulations and policies, the contribution of the Regions is of fundamental importance if the specificities and expectations of the territories are to be appropriately considered in defining the national position to be negotiated at European level, and also for evaluating the impact of European policies on the Country.

The procedures and modalities enabling the Regions and Autonomous Provinces to participate in the formation of European law are governed by Act 131 of 5 June 2003 that contains "*Provisions for adjusting the legal order of the Republic to Constitutional Law no 3 of 18 October 2001*" and by Act 234 of 24 December 2012 containing "*General rules on Italy's participation in the shaping and*in pursuance of Art. 117 (5) of the Constitution, the abovementioned laws delineate two ways in which the Regions and the Autonomous Provinces can participate in the drafting of the normative acts and policies of the European Union: the first is direct and is regulated by Act 131/2003, that occurs within the institutional organization of the European Union and consists in the participation of regional representatives in the procedure for adopting the final act through the government delegations: the second is indirect and is governed by Act 234/2012 that occurs within the national legal order and consists of all the procedures for defining the national position to be negotiated at the European level.[26]

The Regions have integrated the national legislation by regulating the matter in their Statutes and regulations and by adopting specific regional procedural laws having the task of regulating the internal organizational modalities for participating in the European decision-making process.

In most cases, the formulation of principles is entrusted to the Statutes that have little legal efficacy, while the specific rules on the internal organizational modalities and procedures for defining the regional position are entrusted to the internal rules of the Councils or regional laws of procedure; only the Statutes contain direct provisions on the internal organizational profiles, albeit with reference to the regional procedural laws.[27]

The various regional procedural laws envisage different internal organizational and procedural models that in some cases have proven to be particularly effective.

Although there is a spontaneous convergence towards a substantially homogeneous organizational model, in particular in the more recent laws, the Regions have delineated autonomous organizational models with their own procedural rules for participating in the European decision-making process.

[26]The two participation modalities are only apparently distinct in that the procedure for adopting European acts is in any case one; on this see Mastroianni (2006), p. 170.

[27]With reference to the provisions of the statutes on regional involvement in the ascending phase refer to Paterniti (2012), p. 157 *ff*.

A common result of the experience of the various Regions is the strengthening of the role of the Regional Councils.

The internal organizational choices made by the Regions to capture the space for participation opened up by the national legislator have indeed reduced the original imbalance between the Regional Executives and their Councils by strengthening the participation of the regional legislative Assemblies, called upon in some cases to cooperate with the Executives to define a common position within regional participation in the formation of European law.

2.3.1 Direct Participation

The instruments for enabling the Regions and Autonomous Provinces of Trento and Bolzano to take part in the so-called direct ascending phase of the European decision-making process are regulated mainly by Art. 5 of Act 131/2003, recorded as "*Implementation of Article 117(5) of the Constitution on the participation of the Regions in Community matters*", that envisages the possibility of appointing regional representatives to the government delegations involved in the procedure for adopting the final act, and the possibility of designating a head of delegation in agreement with the Government and the Presidents of the Regional Executives and of the Autonomous Provinces.[28]

Regarding devolved subjects, the Regions and Autonomous Provinces contribute directly to the formation of the European normative acts by participating in the activities of the Council and of the working groups and of the Committees of the Council and of the Commission through the government delegations.[29]

[28] Art. 5 of the Act lays down that the Regions and Autonomous Provinces can also ask the Government to challenge the acts that are deemed to be illegitimate before the Court of Justice of the European Union. The Government is obliged to make the complaint when requested by the State-Regions Conference with an absolute majority of the Regions and Autonomous Provinces. Moreover, at the European level it is envisaged that regional representatives should sit on the Committee of the Regions, a consultative body made up of the representatives of the regional and local bodies of Member States, currently regulated by Arts. 305, 306 and 307 of the Treaty on the Functioning of the EU. The Italian delegation to the Committee of the Regions comprises 24 members (plus 24 substitute members), of which 14 represent the Regions and 10 represent the local bodies. The Regions designate 14 members and 8 substitutes; the Provinces designate 3 members and 7 substitutes; the Municipalities designate 7 members and 9 substitutes. The designation procedure of the Italian members is regulated by Art. 27 of Act 234/2012, that reflects the provision of Art. 6-*bis* of Act 11/2005, introduced by Act 88 of 7 July 2009 (2008 Community Act). For thorough information on the problems ensuing from the representation method and breakdown of members refer to D'Atena (2013a, b), p. 386 *ff*. On the role of the Committee of the Regions in European *governance* see Mangiameli (2008), p. 370; see also Domenichelli (2003), p. 250 *ff*; Falcone (2003), p. 247 *ff*.

[29] On the participation of regional representatives in the works of the Council and of the Commission, see Di Salvatore (2008), p. 121 footnote 29; for further information refer to Iurato (2005), p. 123 *ff*.

The modality for designating the regional representatives in the government delegations, like those for identifying the Head of delegation for the subject matters listed in Art. 117 (4) of the Constitution, have been defined by the State-Regions Conference with the general cooperation agreement between government, Regions and Autonomous Provinces of Trento and Bolzano for the participation of the Regions and Autonomous Provinces in the formation of community acts, signed on 16 March 2006 (Act no 2537/CSR).[30]

A first implementation of the Agreement, except for some isolated cases, was recorded only in 2012, namely 6 years after signing it by submitting to the State-Regions Conference the list of regional experts appointed to participate in the government delegations that participate in the activities of the working groups and committees of the Council and of the Commission. No agreement seems to have been reached for designating a President of the Regional **Executives** or of the Autonomous Provinces to act as Head of Delegation.[31]

Having obtained the list of regional experts opens up new important opportunities for the participation of Italian Regions in the making of European law in that it is a precondition for a systematic participation of the Regions in the ascending phase of the European decision-making process (direct participation), with ensuing advantages for the regional system both from the technical standpoint—because it increases the amount of information that is available—and also from the purely political aspect for the possibility of representing the interests of this tier of government at the European level.

[30]The agreement is envisaged by Art. 5 of Act 131/2003, that entrusts the definition of the modality for designating the regional representatives in governmental delegations, and those for designating a president of a regional government or of an autonomous province as head of delegation, to an agreement that is to be reached by the State-Regions Conference, in compliance with specific criteria, designed to ensure a balance between the expectations of the ordinary and special Regions and to ensure a united position for Italy in the discussions at the European level. The Constitutional Court, in judgment 239 of 2004, in *Giur. Cost.*, 2005, p. 2510 et seq., with a note by Ghera (2005), p. 2510, stated that "... with specific reference to the procedure through which the Regions and Autonomous Provinces are to participate in the so-called "ascending phase" of community law... the Constitution has not envisaged a concurrent competence, but has entrusted to a State law the task of regulating the procedures for regional participation". According to the Court the legal basis for the State's power to regulate the procedures for regional participation in the ascending phase of the decision-making process of the European Union is to be found in Art. 117 (5) of the Constitution, and not in paragraph 3 of the same Article. Hence this matter is among those over which the State has exclusive competence. On this point see also, among others, Violini (2005), pp. 225 *ff*; and Di Salvatore (2008), p. 119.

[31]Failure to implement the Agreement depends on the complexity of the procedures and on the criteria identified: in some cases, as for the designation of regional experts, the Agreement envisages a further agreement by the State-Regions Conference that presupposes a convergence of interests and positions between Regions and Autonomous Provinces that is difficult to reach. For a more thorough discussion on the contents of the Agreement refer to Iacoviello and Saputelli (2011), pp. 640 *ff*.

It is important to emphasize, however, that the regional representatives do not operate in the interest of the region they belong to, or groups of Regions, but in the interest of the State.[32]

Although there are no specific rules, by referring to the Treaties and considering the provisions of the 2006 Cooperation Agreement, it can be deemed that where they are designated they represent the whole of the Country.[33]

In this sense, it seems that if they are appointed to be members of the government delegations they contribute to negotiating issues in the interest of the State, based on the national position previously agreed upon with Central Government; if they are appointed to be Head of Delegation, for the matters listed in Art. 117 (4) of the Constitution, they operate as "spokespersons" of the Member State and they have the task of maintaining the national position defined at the domestic level.

2.3.2 Indirect Participation

The participation of the Regions and of the Autonomous Provinces in the formation of the national position to be maintained at the European level during the ascending phase of the decision-making process (so-called indirect participation) is regulated by Chapter IV of Act 234/2012.

In a nutshell, the instruments that enable participation are the possibility of submitting observations to Government on the texts being discussed at the European level (that however are not binding), the possibility of forwarding observations to the Chambers with regard to the correct application of the principle of subsidiarity and of the political dialogue, the mechanism for working out agreements at the State-Regions Conferences and the scrutiny reservation upon request of the State-Regions Conference.[34]

With regard to the previous normative framework, Act 234/2012 introduced some new elements that should further encourage the regional contribution to defining the national position on draft acts of the European Union.

A first element of novelty is the strengthening of the information disclosure obligations on acts being discussed at the European level which, as already stated, constitutes the basic element of the system for involving the Regions in the

[32]This issue has already been dealt with in the literature: see Bientinesi (2008), pp. 187*ff*; Paterniti (2012), p. 88, as well as Nicolini (2009), p. 196.

[33]In this sense, see among others Cannizzaro (2003), p. 5 *ff*, according to whom "decentralised bodies can... take on importance in the institutional dynamics of the Union, but only by replacing the State in presenting a position that in any case is ascribable to the State".

[34]As regards devolved matters, the representatives of the Regions and Autonomous Provinces can be convened to take part in the working groups set up within the Technical Evaluation Committee, with the assignment of preparing the works for the Committee itself, for the definition of Italy's position to be negotiated at the European Union in agreement with the Ministry for Foreign Affairs and the Ministries having competence over the various matters (Arts. 19 (5) and 24 (7) of Act 234/2012).

definition of the national position to be negotiated at the European level: as in the past, the task of ensuring adequate and timely information to the body of local and territorial governments is entrusted to the Government that is confirmed to be the central element of the mechanism for participating also in the new normative framework.

According to the provisions of Art. 24 of Act 234/2012, the President of the Council of Ministers, or the Minister for European Affairs, contextually forward upon reception, all the draft European Union acts, as well as all the preliminary acts for formulating the latter and their amendments, to the Conference of Regions and of Autonomous Provinces and to the Conference of the Presidents of the Legislative Assemblies of the Regions, that in turn further the acts to the Executives and to the Councils.

With reference to the draft legislative acts of the European Union concerning matters devolved to the Regions, the latter receive the same information that is forwarded to the Chambers: in particular, qualified and timely information is provided on the developments of the decision-making process via the reports drawn up by the state administrations competent by subject matter that contain analyzes and additional detailed information among other things, on conformity of the draft acts with the principles of subsidiarity and proportionality and on the financial impact and effects on the national system, on the regional competences and local governments (Art. 24, (2), of Act 234/2012).[35]

A second new aspect is the extension of the deadline for using the participation instruments available to the Regions and Autonomous Provinces.

Regarding devolved matters, the Regions and Autonomous Provinces can forward their remarks to the President of the Council of Ministers and to the Minister for European Affairs, within 30 days from reception of European legislative proposals sent to them by the Government, notifying the Chambers and the Conferences at the same time (Art. 24, (3), of Act 234/2012).

Moreover, within 30 days from reception of the acts concerning devolved matters, one or several Regions can ask that a State-Regions Conference be convened in order to reach an agreement; the State-Regions Conference has the power to ask Government to place a scrutiny reservation when the act is being discussed by the Council of the European Union (Council), similar to what is envisaged for Parliament. In this case the President of the Council has the duty of communicating to the Conference that the reservation has been placed; the Conference may issue its pronouncement within 30 days from the communication by the Government, after which the Government, as expressly envisaged by law, may in any case proceed with the activities for forming the European acts. Except for the case where an examination is requested, after 30 days from reception of the draft

[35]EU bills and legislative proposals of EU acts are forwarded telematically to the Conference of Regions and Autonomous Provinces and to the Conference of Presidents of the Legislative Assemblies of the Regions and of the Autonomous Provinces, by the Secretariat of the Interministerial Committee for European Affairs (CIAE).

normative act for which the Conference was convened, as also in cases of motivated urgency, the Government can proceed even if no agreement has been reached (Art. 24 (4) and (5) of Act 234/2012).

Finally, Art. 24 of Act 234/2012 envisages the obligation to inform the Regions and Autonomous Provinces on the drafts and on devolved matters that are on the agendas of the meetings of the European Council and of the Council of the European Union (Art. 24 (8), (9) and (10) of Act no. 234/2012).[36]

Besides increasing the time available to the Regions, the observations no longer have to go through the Conferences; now they are directly sent to Parliament by the Regional Executives and Councils, depending on the internal organizational models of each Region. This has simplified the procedure and increased the time available to the Regions for defining their position.

Also the quality of the information forwarded and the way in which the observations on the acts are forwarded have been modified.[37]

While the forwarding of all acts to the Regions,[38] even those on matters falling outside their remit, may be a questionable practice, a result of the novelties introduced by Act 234/2012, is that the Regions and Autonomous Provinces will be able to rely on being informed about the more important acts and will receive the reports drawn up by the administrations having specific competence on the subjects, thus simplifying their work.[39]

Flagging the more important acts, out of the many that are sent every year, and the forwarding of the reports should streamline the work for identifying the acts of interest for the Regions on which to concentrate their policy activities.[40]

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[36]As regards devolved matters, the representatives of the Regions and of the Autonomous Provinces are convened to take part in the working groups set up in the Technical Evaluation Committee, with the task of preparing the work of the Committee itself, with the aim of defining Italy's position to be upheld at the European level in agreement with the Ministry for Foreign Affairs and with the Ministries having competence over the various matters (Art. 24 (7) of Act 234 of 2012).

[37]The system for forwarding and informing about acts through the e-europ@ platform has been replaced by a streamlined and faster method based on the database of the "Extranet-L" Council that is directly accessible on the internet. The new modalities for programming and managing the information flow between central administrations and between the latter and the recipients of the information have considerably improved intra-government coordination and the quality, quantity and timing of the reports sent by Government to Parliament and, in general, the flow of information and documents that are necessary for defining Italy's position in the "ascending phase". On this see Department for European Policies of the Presidency of the Council of Ministers (2014), p. 280.

[38]On this point see Di Salvatore (2008), p. 130.

[39]In 2013, 8 reports were forwarded drawn up by the central administrations having competence mainly in pursuance of Art. 6 (4) of Act 234/2012.

[40]During the first year of enforcement of Act 234/2012, the Secretariat of CIAE sent a total of 6746 documents to the recipients of the qualified documents, among which the Conference of the Regions and of the Autonomous Provinces and the Conference of Presidents of the Legislative Assemblies. Of the 6746 documents 153 were the drafts of legislative acts (41 directives, 90 regulations and 33 decisions) and 168 were non legislative acts (5 green papers, 106 communications

The model of regional involvement in the definition of the national position to be negotiated at the European negotiations delineated in Act 234/2012, like the previous law, ensures adequate consideration of regional interests without undermining the autonomy of the Government at the European table.

The position expressed by the Regions is not binding on Government; however, Art. 13 of Act 234/2012 envisages that the Government is under the obligation to indicate what initiatives it has taken and what measures it has adopted following the observations made by the Regions.[41]

Hence, although the position expressed by the Regions is not binding on Government, it certainly has political value that will be all the more important the greater the degree of sharing at the local level.

The duty imposed on Government to report on how it follows up on the positions expressed by the Regions allows for a political verification that does not go without effect.

Regional participation in the indirect ascending phase is finally extended to verifying compliance with the principle of subsidiarity by the regional Councils and of the Autonomous Provinces of Trento and Bolzano, already directly envisaged by Art. 6 of the Protocol on the application of the principles of subsidiarity and proportionality attached to the Lisbon Treaty.

By implementing the provision of the Protocol annexed to the Lisbon Treaty, Art. 25 of Act 234/2012 envisages that the assemblies and councils of the Regions and of the Autonomous Provinces of Trento and Bolzano may send in their observations to the Chambers in time for parliamentary scrutiny, while notifying at the same time the Conference of Presidents of the Legislative Assemblies of the Regions and of the Autonomous Provinces.

The regional legislative assemblies have dedicated specific attention to this issue at the normative level with reference to internal organization and in practice with various resolutions that were considered when approving the motivated opinion by the Senate.[42]

This is an opportunity for participation that has been welcomed with interest at the regional level and it has opened a new channel for dialogue between Parliament and the Regions on matters of interest for Europe, contributing to playing down the role of prevalence traditionally played in this area by the regional executive bodies.

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and 57 other documents deemed to be important). These data are taken from the already mentioned Department for European Policies of the Presidency of the Council of Ministers 2014.

[41] Art. 13 envisages two Annual Reports by Government. A programmatic statement indicating the orientations and priorities that will be pursued the year following the submission of the report and makes reference to developments in European integration, to institutional profiles on the functioning of the European Union and to relevant policies. The other report describes the activities carried out and results achieved. Any information about follow up on initiatives related to regional observations are to be indicated in the Final Report on Italy's participation in the European Union (Art. 13 (2), letter d) of Act 234/2012).

[42] On this point see Odone (2013).

Being involved in verifying the correct application of the principle of subsidiarity opens up new scenarios for a true participation of the Regions in defining the national position in the pre-legislative phase within the political dialogue that constitutes a privileged channel of collaboration between national Parliaments and the Commission.

Ultimately, the expectations of those Regions that had focused their attention on the desirability of enjoying qualified and timely information on European draft acts envisaged for Parliament have been met. They had also asked, as said earlier, to increase the time available for using the participation instruments.

Welcoming the requests coming from the Regions should hopefully encourage a broader participation of the Regions in the ascending phase of the decision-making process that, up until now, in spite of the evolution of the legislation implementing Art. 117 of the Constitution, does not appear to be systematic.

Few Regions have ensured their contribution in recent years, using, moreover only some of the instruments of participation: namely observations on draft European normative acts according to the provisions of Art. 5 (3) of Act 11/2005, that is today Art. 24 (3) of Act 234/2012, and observations concerning their oversight on the correct application of the Principle of subsidiarity; to the contrary there are no requests to convene the State-Regions Conference to reach the agreement envisaged in Art. 24 (3) of Act 234/2012 (already envisaged in Art. 5 (4) of Act 11/2005), nor have the Regions participated yet in the national coordination tables.

Starting from 2010, there have been cases of observations on draft European normative acts and the first contributions to exercising oversight on the correct application of the principle of subsidiarity.

From 2011 there was an increase in the cases of regional participation in the formation of European law and policies, in terms of observations on the merits of some proposals for European regulations, and observations on subsidiarity: in particular there were 7 cases of observations forwarded on the proposals for European normative acts by the Emilia-Romagna Region, 5 by the Calabria Region, 2 by the Sardinia Region, as well as a few by the Veneto Region; during that same year 5 resolutions were sent in pursuance of Art. 6 of the Protocol of Annex 2 to the Lisbon Treaty by the Calabria Region, 3 by the Emilia Romagna Region, 6 by the Marche Region, 2 by the Sardinia Region and by the Autonomous Province of Trento.

The following year there were 7 cases of observations on the merits of the draft European normative acts by the Emilia-Romagna Region, one case respectively for the Veneto, Abruzzo and Umbria Regions plus 4 resolutions by Emilia-Romagna on subsidiarity oversight and one by the Veneto and Marche Regions.

In 2013 there were 8 cases of observations on the merit of draft European normative acts by the Emilia-Romagna Region, five of which contained remarks also on the oversight of subsidiarity, one case by the Regions of Marche and Abruzzo (that also participated in public consultations initiated by the European Commission); there are also 2 resolutions by the Abruzzo Region on subsidiarity oversight, some cases of participation in remarks by the Committee of Regions

(e.g. Marche and Piedmont), as well as some contributions to the so-called political dialogue (Calabria Region).[43]

It does not seem possible to take a stance on the incidence of the position expressed by the Regions that have actually given a contribution to the shaping of the national position to be negotiated at European level because information on the follow-up by Government to the regional observations have not been made available in a systematic manner.

It is instead possible to make some remarks on the manner in which the instruments for participation were used by the Regions and Autonomous Provinces, also with a view to highlighting the elements to be enhanced in order to facilitate a regional position that is widely shared on the European dossiers of greatest interest.

From the analysis of the data, two particularly important elements emerge: the first is the fact that in some cases the observations focus on the merit of the acts and on compliance with the principle of subsidiarity; the second instead is that the observations refer mainly to the same acts.

The first element highlights the fact that controlling subsidiarity has facilitated the collaboration and coordination of regional assemblies with Parliament: indeed, the Regions expressed their views without any specific request being made by Parliament, showing that they are aware of the importance of there being coordination between national parliaments when participating in the drafting of European law.

The second element highlights the spontaneous convergence of some Regions on the same issues: this circumstance, from a first standpoint makes it possible to reflect on the possibility of building a fast track to facilitate the concentration of regional interests by sharing regional resolutions containing the policies for participating in the drafting of European law; from a different standpoint it suggests that it should be easier to make resolutions on individual draft acts and observations on the control of subsidiarity in order to enable a discussion on the dossiers by the Regional Councils which should contribute to the decisions on such dossiers.

This could encourage more Regions to give their contribution and perhaps even lead to having them express a common position.

Overall, the system delineated by Act 234/21012 allows all the constitutive bodies of the Republic to contribute to defining the national position to be negotiated in the European negotiations ensuring at one and the same time that the Government has a margin of autonomy that is indispensable for an effective discussion with the representatives of the other Member States of the Union.

Similarly, as is pointed out further on in this paper, this ensures that the European obligations are fulfilled in full respect for the autonomy of each level

[43]The data come from the Annual Reports on the legislation of the State, Regions and European Union, of the Observatory on the legislation of the Chamber of Deputies, available on the web site of the Chamber of Deputies, www.camera.it, and in particular from Part II, Trends and problems of regional legislation (edited by ISSIRFA-CNR).

of government, except for the substitute power of the State envisaged to avoid delays or breaches in case of inertia by sub-state bodies.

3 Adjustment of the National Legal Order to the European Order

The State, the Regions and the Autonomous Provinces share the task of implementing the directives and the other obligations deriving from the law of the European Union respectively for the matters over which they have legislative competence.

Chapter VI of Act 234 regulates the instruments and procedures for fulfilling the obligations deriving from Italy's membership in the European Union.

The techniques for implementing European law are the traditional ones, namely direct implementation, legislative delegation, deregulations, government and ministerial regulations, administrative implementation; the implementation instruments instead have changed.

The annual Community Act, envisaged for the first time by the La Pergola Act and then confirmed by Act 11/2005, was replaced by two distinct laws, the "*legge di delegazione europea*" and the "*legge europea*", which ensure that the national system is periodically adjusted to the European system: the former contains only the legislative delegations and authorizations for implementation through regulations; the latter instead contains the measures for the direct implementation of European Union acts, as well as provisions that amend or repeal state provisions that are challenged for infringement or that are pending before the European Union Court of Justice.

Under the new model presented in Act 234/2012, at State level, the European directives will be substantially implemented through delegated decrees, and the other acts through the Annual European law.[44]

In order to ensure greater flexibility in fulfilling the European obligations, alongside these instruments there are also alternative instruments for the transposition of individual European normative acts, or for particularly urgent cases.

Having these two laws instead of the original annual community law is functional to cutting down the time for implementing European laws: in particular, it responds to the need to overcome the severe delays in transposing the directives and the other acts of the European Union because of the complex approval procedure, that had become particularly problematic in recent years (in 2011 and in 2012 the annual community law was not approved).

At present the infringements made by Italy are 102 of which 82 are a violation of the European Union law and 20 for failure to transpose the directives; this is a positive result over the figures for past years when the number of infringements was

[44]For further information refer to Favilli (2013), p. 732 *ff*; and also Savino (2013), pp. 470 *ff*.

very high. The number however still remains quite high and it hurts the credibility of our Country at the European level.[45]

To reduce the risk of infringements for failure to transpose the European directives, two parallel instruments were prepared to ensure the periodical adjustment of the national order to the European order, in the attempt to overcome the criticalities that undermined the efficacy of the annual community law, that progressively turned into an *omnibus* measure with the ensuing burdening of the approval process.

This is the way in which Italy intends to make up for the traditional delay in transposing EU directives. In the new normative context delineated by the Lisbon Treaty Italy is exposed to the risk of monetary sanctions in the case of the new infringement procedures for failure to transpose the European directives.

A further stimulus to a timely transposition derives from the Government's duty to periodically monitor the infringement procedures and inform Parliament about the results illustrating the reasons for failure to implement the European Directives within the deadlines indicated therein.

3.1 The "legge di delegazione europea" and the "legge europea"

The "*legge di delegazione europea*" and the "*legge europea*" are the instruments for ensuring the periodical adjustment of the national order to the order of the European Union.

Under the "*legge di delegazione europea*" provisions are adopted every year for conferring legislative delegations to the Government. These are aimed "*exclusively at implementing the European directives and framework decisions to be transposed into the national system, excluding any other provision for legislative delegations that are not directly related to the transposition of European legislative acts*"; the Government further has delegations for modifying or repealing state provisions in force that are in contrast with European law, as well as for the sanctions for violations of normative acts of the European Union, also for matters devolved to the Regions. The same annual law also identifies the fundamental principles for the transposition of directives and the implementation of European Union acts, as well as the provisions authorizing Government to transpose the directives through regulations.[46]

[45]The number of infringement procedures refers to the month of October 2014; in the fourth quarter of 2014, the number of infringement procedures dropped to 89 cases, of which 74 were cases of violation of European law and 15 were for failure to transpose the directives. The data are taken from the database of the Department for European Policies of the Presidency of the Council of Ministers, available on the web site www.politicheeuropee.it.

[46]According to the provision of Art. 35 of the law, that contains the provision of Act 11/2005, authorization is necessary for the directives dealing with matters that are of exclusive competence

With the European annual Act a series of provisions were adopted to fulfill the obligations deriving from Italy's membership in the European Union: provisions amending or repealing state laws in force that are in contrast with the obligations deriving from the European Union: provisions amending or repealing state provisions in force against which there is an infringement procedure initiated by the European Commission or judgments of the Court of Justice; provisions required to implement or ensure the implementation of European Union acts; provisions required to execute International Treaties concluded within the framework of the external relations of the Union; provisions issued in exercising substitute powers as per Art. 117 (5) of the Constitution.

The procedure for the annual approval of the "*legge di delegazione europea*" and of the "*legge europea*" begins with verification of the degree of conformity of the domestic system with the normative and policy acts issued by the organs of the European Union.[47]

Every four months, the Government transmits a report on the state of conformity of the domestic order with the European acts to the Chambers and to the Conferences, which in turn transmit them to the Regions and Autonomous Provinces; in much the same way, for devolved matters, the Regions and the Autonomous Provinces verify the state of conformity of their legal order indicating the list of directives they have transposed and the references to any annual transposition laws, and they then forward the results to the Department for European policies by the 15th of January every year.

These reports are summarized in the national report that accompanies the draft annual delegated law that is submitted to the Chambers every year by the 28th February, after having received the opinion of the State-Regions Conference; with the report, updated as at 31 December of the previous year, the Government reports on the state of conformity of the domestic order with European Union law and on the state of infringement procedures, if any; it also provides the list of directives of the European Union that have been transposed or are to be transposed through the administrative route, it provides the list of directives transposed through a regulation and the list of measures that the Regions have adopted to transpose the directives on devolved matters and finally it explains the reasons for any element that has been omitted in the delegated law of the European Union directives whose

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of the State, already regulated by a law but not covered by an 'absolute legal reservation'; in these cases, the directives to be implemented directly are indicated in a list attached to the annual delegation law. Prior authorization instead, is not required, as in the past, for the directives on matters over which the State has exclusive powers but that are not deregulated and are not covered by a legal reservation. The European delegation law will have to indicate the rules to be repealed starting from the entry into force of the deregulation rules.

[47]Art. 32 of Act 234/2012 also regulates the principles and guidelines for delegating the implementation of European Union law, based on the principle of regulatory and administrative simplification and on the principle of fair collaboration and coordination among administrations, prohibiting the adoption or persistence in the use of levels of regulation higher than the minimum levels laid down in the directives. The general principles indicated in Art. 32 reflect those contained in Art. 2 of the last Community Laws approved by Parliament. cfr. Favilli (2013), p. 741.

transposition term has already expired and of those whose deadline expires in the period of reference.

Where necessary, the Government is empowered to present by 31 July every year, subject to the opinion of the State-Regions Conference, a further bill with the same title as the annual bill entitled "*Delegation to Government to transpose the European directives and to implement other European Union acts*", completed by the subtitle "*Second half-year "legge di delegazione europea"*"; in this case the contents of the delegated act remain the same, but there is no requirement to attach the explanatory report that instead must be attached to the "*legge di delegazione europea*".

There is no deadline for submitting the annual European Bill, which is hence an additional instrument available to Government.

Concerning the procedural rules envisaged by Act 11/2005 for the periodical adjustment of the national order to the European legal order, there are a number of novelties that are worth considering.

From a first standpoint, the deadline granted to Government has been rightfully extended to consider the regional reports on the adjustment of their legal systems to the European order, which in the past was limited to a few days.

From a second standpoint, the deadline for implementing the legislative delegations has been shortened to two months from the transposition deadline set forth in each directive, namely three months from the date of entry into force of the "*legge di delegazione europea*" for the directives whose transposition deadline has expired or is close to expiry, or within twelve months from the date of entry into force of the law in the case of directives that do not envisage a deadline for transposition.

Furthermore, the legislator has provided that the legislative decrees issued to implement the legislative delegations should be accompanied by a table where the provisions envisaged therein are matched against the provisions of the directive being transposed, to be drawn up by the administration that has the highest institutional competence over the subject matter of the directive. This instrument will facilitate the verification of conformity of domestic law with European law and will facilitate the correct implementation of European Union law; from this latter standpoint, the drafting of the comparison table should prompt the interest of the administration right from the stage where the draft of the European act is submitted, with a positive impact also on participation in the ascending phase of the decision-making process. Moreover, this will ensure a timely assessment of the draft and of its effects on the legal system, useful for the Department for European Policies, for Parliament and for the Regions, as well as for those who participate in the European negotiations. And finally, with reference to the descending phase, identifying the domestic rules that need to be changed or supplemented will simplify the approval of the transposition act of the European legislation.

In other terms, during implementation, the administrations having competence on the subject matter will work on acts that have already been analyzed and whose impact on the domestic system has already been examined.

The useful instrument, introduced by Act 11/2005, whereby the State legislator cannot make laws on matters devolved to the Regions and Autonomous Provinces, is confirmed.

The new system that periodically adjusts the Italian order to the European order considers the extensive parliamentary debate that takes place when approving the law, which highlights the criticalities of the annual community law that have emerged during recent years.[48]

In the first year of application of the law, the instruments for periodical adjustment have proven to be effective: over relatively short time spans the acts approved were the 2013 "*legge di delegazione europea*", Act 96 of 6 August 2013 and the 2013 European law, Act 97 of 6 August 2013; in addition the "*legge di delegazione europea*" was passed in the second semester (Act 154 of 7 October 2014, entitled *"Delegation to Government for the transposition of European directives and implementation of other European Union acts*") and the 2013 *bis* European law (Act 161 of 30 October 2014, entitled "*Provisions for the fulfilment of obligations arising from Italy's membership in the European Union").*[49]

3.2 Other Instruments for Fulfilling Our European Obligations

Furthermore, Act 234/2012 envisages the possibility of adopting ad hoc delegated laws other than the annual "*legge di delegazione*"; in such cases the delegated decrees must however be adopted in full compliance with the principles and general criteria laid down in the "*legge di delegazione europea*" for the year of reference.

[48]In particular refer to the observations of the Rapporteur for the reform bill of Act 11/2005 (Reform Bill 2646) in Committee XIV of the Senate of the Republic, that can be found on the web site of the Senate of the Republic, which extensively reflect the criticalities of the annual community law, and also to the hearing of the Head of Department for the Coordination of Community Policies based with the Department for European Policies, with reference to a fact finding mission promoted by Committee XIV of the Chamber of Deputies on Italy's system for participating in the European decision-making (*Indagine conoscitiva sulsistema Paese nellatrattazione delle questioni relative all'UE con particolare riferimento al ruolo del Parlamentoitaliano nella formazione della legislazione comunitaria),* Session 136, Wednesday 12 January 2011; the reports of the sessions can be found on the website of the Chamber of Deputies.

[49]The 2013 *bis* Leggeeuropea, although not expressly envisaged by the law, intervenes in many matters (including the free movement of people, goods and capitals; tax matters, labor and social policy; environment; competition; delays in making payments; equal opportunities between genders; fishing; European Certificate of Succession). Its aim is to close 8 infringement procedures, solve 15 cases of EU Pilot, transpose a directive whose deadline was last January and adjust the national order to the interpretations principles laid down in a negative judgment issued by the European Court of Justice on public contracts.

There are also other instruments for particularly urgent cases, as well as for particularly important cases.

Art. 37 of Act 234/2012 envisages the possibility to adopt ad hoc provisions for the implementation of normative acts or judgments of the Court of Justice, with deadlines earlier than the date of entry into force of the "*legge di delegazione europea*" or of the European law relative to the year of reference.

The Government can therefore have recourse to "extraordinary" bills, or decree laws, to implement an individual act. It can also have recourse to specific bills, as envisaged by Art. 38, for the implementation of European acts that refer to matters of State competence, in cases of special political, economic and social importance considering also parliamentary policy acts. In such cases, provisions allowing for delegated legislation cannot be made, nor can any other provision be made, not even where there is uniformity of subject matter, unless they are related to the implementation or application of the normative act being transposed, or unless the nature or complexity of the regulations makes them indispensable; this instrument allows for greater involvement of Parliament, as against the delegated law that instead refers implementation to the delegated decrees, watering down the overriding role of Government that manages the implementation of European law almost exclusively, with the exception of the contribution of the Regions.

Alongside the new space for participating in the formation of the laws and of European policies, Parliament is given the possibility to make a deeper analysis when implementing European duties with major consequences in terms of the democratization of the European decision-making process.

3.3 The Contribution of Local Government

Regarding devolved matters, the Regions and the Autonomous Provinces of Trento and Bolzano, work with the State to ensure that the obligations arising from Italy's membership in the European Union are fulfilled.[50]

Although Act 234/2012 introduces innovative instruments for adjusting the domestic order to the European order, as regards the way in which the Regions take part in the descending phase of the European decision-making process, it nevertheless confirms the previous normative framework, except for a more constant monitoring of what the Regions do in this area.

Consistently with the model that has become consolidated, Art. 29 (3) of Act 234/2012 confirms that, with regard to the matters devolved to them, the Regions periodically verify the state of conformity of their orders with the European order; unlike the past, as already pointed out, they are under the obligation of forwarding

[50]On this issue refer to D'Atena (2013a, b), p. 389 *ff*, and the references provided therein. See also Nicolini (2009), p. 89 *ff*, as well as Saputelli (2012), e Scarlatti (2013).

the results of the verification to the Presidency of the Council of Ministers by 15 January every year.

The Presidency of the Council of Ministers, by talking into account the results of the regional verifications, prepares a draft "*legge di delegazione europea*", the Report that contains also the measures adopted by the individual Regions and Autonomous Provinces to transpose the European Union directives on devolved matters, and the draft European law, if any.

According to the provision of Art. 40 of Act 234/2012, the Regions and Autonomous Provinces can immediately implement the Community directives on devolved matters; instead, with regard to concurrent matters they are obliged to comply with the fundamental principles laid down by State law that cannot be overruled by the regional law and that in any case prevail over any non-compliant regional provision that has already been issued.

In case of inertia by the Regions, since the State is the sole body accountable in case of non-fulfillment of the obligations arising from Italy's membership in the European Union,[51] there is a substitution mechanism based on which the State can transpose the European acts on matters devolved to the Regions.

The act adopted by the State, that legislates instead of the defaulting Region, enters into force only upon expiry of the term indicated in the directive being transposed, and it stops being effective upon the entry into force of the regional implementation act.

Hence the substitute powers of the State are supplementary, anticipated and yielding, so as to ensure adequate guarantees to avoid violations that would run the risk of sizing down the acknowledged scope of action of the Regions and Autonomous Provinces.[52]

[51]At the European level, it is up to the Member State, whatever the division of powers on its territory, to adopt all the measures of a general and special nature aimed at ensuring that the obligations deriving from the Treaty and those ensuing from the acts of the European Union institutions are complied with.

[52]The substitute power of the State is regulated by Art. 41 of Act 234/2012; the mechanism whereby the State substitutes the Regions is that already provided for in the 2001 Community Law, and confirmed by the subsequent 2002 and 2003 Community Laws, aimed at avoiding delays in the adoption of community directives because of lack of action by the Regions in devolved matters following the entry into force of Constitutional Law no. 3 of 2001. In judgment 425 of 10 November 1999, the Constitutional Court points out that the substitute power of the State is justified by the *power-duty of the State to ensure fulfilment of Community obligations, for which the State is accountable across the national territory*. (Cfr. Corte costituzionale n. 425/1999, in *Giur. Cost*., 1999, 3726, with comment by Guzzetta 1999, p. 3746 *ff*); according to the Court, "*The State is empowered to step in with its laws where the Regions fail to act, while the Regions and Autonomous Provinces have the power to use their competences at any time, thus making the State regulations inapplicable*". The regulation of the substitute powers of the State provided for in Art. 41 of Act 234 of 2012, that is consistent with the previous provision provided for in Arts. 11 (8), 13 (2) and 16 (3) of Act 11 of 2005, comes to adds to the provision of Art. 8 of Act 131/2003 enforcing the substitute power envisaged in Art. 120 Const., whereby the State can act towards the organs of the Regions where they fail to comply with Community regulations.

In particular, this mechanism enables the Regions that are "best equipped" to transpose the normative acts of the European Union on devolved matters and at the same time it enables the State to avoid sanctions for default caused by the inertia of the "less equipped" Regions.

The State may also provide for the transposition of the European legislation on devolved matters in cases of urgency; according to Art. 41 (2) of Act 234 of 2012, the Government informs the bodies holding the power to act, setting a deadline for fulfillment, after a discussion at the State-Regions Conference; in case of failure to act, the Government starts the procedures for exercising its substitution rights. Even in these cases, any measure adopted by the State must explicitly state the substitute nature of the power it is exercising and that the provisions contained therein can be overruled by the Regions.

The involvement of the Regions in the preparatory phase of the drafting of the European delegated bill and of the European law, together with the substitution powers of the State, offers a comprehensive framework for the adjustment of the domestic order to the European order.

The coordination system is completed by the mechanism for redress by the State towards the defaulting Regions envisaged by Art. 43 of Act 234/2012, which has transposed Art. 16bis of Act 11/2005 plus Art. 6 of Act 34/2008 (2007 Community Law), for the cases of non-fulfillment of the duties arising from membership in the European Union, with payment being made from the European Agricultural Guarantee Fund (EAGF), the European Agricultural Fund for Rural Development and other funds for structural purposes.[53]

Therefore also the Regions have come to grips with the problem of identifying the best suited instruments for avoiding delays or default in the transposition of European acts on devolved matters.

Many Regions, more than two thirds of the total, have adopted the national model and therefore they draw up an annual law on adjustment to European law; the names given to this type of law vary from Region to Region; the others continue to use sectoral laws and administrative measures, that in any case are also used by the Regions that have opted for an annual law on the adjustment to European law.

The compulsory content of the regional European laws and the dates of their approval are regulated in regional "procedural" laws that are classified as sources for law-making in that they regulate regional participation in the implementation of derived European law.[54]

[53]From the procedural standpoint, the amounts due, that in any case cannot exceed the charges attributed to the State, is laid down in a decree of the Ministry of the Economy and Finance that is to be adopted within 3 months from notification of the enforceable judgment against the Republic of Italy. On the responsibility of the State and of the Regions for infringements of the European Union law on the issues linked to the enforcement of the right of compensation, see Bertolino (2009), pp. 1298 *ff*, and the literature referred to therein.

[54]Among the Regions that have approved comprehensive laws on the participation in the formation and implementation of European Union law, the Campania Region is the only one that has not envisaged the instrument of a Regional "*legge europea*", although the title includes the wording

The widespread use of the annual transposition law also at the regional level, took inspiration from Act 11/2005, and was then confirmed by Act 234/2012: according to the provision of Arts. 8 and 16 of Act 11/2005, and now of Art. 29 of Act 234/2012, it is indeed possible to introduce also at the regional level a law for periodical adjustment to derived European Union law that allows to unify all the regional actions, whether they refer to devolved matters or concurrent matters, thus ensuring that there is compliance with the fundamental principles laid down in the State law.[55]

Having recourse to the Regional European law, as occurs at the national level, enables the Regions to fulfill their duty regarding the implementation of derived European law in reasonable lengths of time, as well as significantly cutting down state interventions that would otherwise compress and even eliminate the space for action provided for in the revision of Art. 117 of the Constitution.

By using the regional European laws, the Regions and the Autonomous Provinces can therefore systematically participate in the descending phase within defined deadlines which shelters them from sanctions imposed as a result of delays or default.

However, in practice, although in most organizational models delineated by the regional procedural rules, the laws on periodical adjustment of the regional order have not been used much; the Regions have preferred the traditional instruments for implementing European law.[56]

In order to monitor the process for implementing European law by the Regions, Act 234/2012 entrusts to the Government the task of drawing up periodical progress reports on the transposition of the directives and on the infringement procedures that have been initiated, to be forwarded to the Chambers.

An ad hoc report must be submitted every six months to inform the Chambers on progress made in implementing the directives by the Regions and Autonomous Provinces on devolved matters.

Art. 40 entrusts the definition of the modalities for identifying the directives on devolved matters to an agreement that is to be reached in the State-Regions Conference.

The timely definition of the criteria for identifying the directives of regional competence would allow to solve the uncertainties in identifying the boundary between matters reserved to the State and matters devolved to the Regions that has

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"*legge comunitaria regionale*". For details about the contents and approval procedures refer to Scarlatti (2013), pp. 26 *ff* and to Bertolino (2009), pp. 1272 *ff*; see also Saputelli (2012), pp. 3 *ff*, Pastore (2009), e Odone (2007), pp. 325 *ff*.

[55]Notably Art. 29 of Act 234/2012 envisages that the government report that accompanies the draft Community bill must provide "*a list of normative acts with which the individual Regions and Autonomous Provinces have implemented the directives on devolved matters, also with reference to the annual transposition laws approved by the Regions and Autonomous Provinces, if any*".

[56]The Regions that actually did adopt the regional *legge europea*, as follow up on the regional "procedural" laws, but not in a systematic manner, are only Friuli Venezia Giulia, Valle D'Aosta, Marche, Emilia-Romagna, Abruzzo and Veneto.

often entailed some uncertainty also as to the identification of a space for regional action with regard to the implementation of European Union law.[57]

This would therefore facilitate the work of the Regions, with ensuing benefits also in terms of timely adjustment of compliance with European duties.

4 Final Remarks

The system outlined by the legislator for Italy's participation in the European decision-making process involves all levels of government present in the Country, as well as the social partners.

Coordination between the institutional bodies of the Republic is adequately ensured both as regards the ascending phase and with reference to the implementation of European obligations.

The innovations made to the model that has already been used in practice should help solve the criticalities that emerged in practice when implementing the rules and procedures already envisaged in Act 11/2005.

Worthy of attention are those that refer to Italy's participation in the ascending phase of the decision-making process: from a first standpoint they are of strategic importance since they are aimed at improving the instruments for ensuring adequate consideration of national interests when defining a unified position to be supported at the European level; from a second standpoint, as said earlier, by upgrading the instruments for participation they contribute to making the European institutions less alien to the people.

The title of the Conference prompts some thoughts on the relationship between European policies and the national orders with special reference to the economic policy in times of crisis.

The political debate in recent years has constantly shown that European policies, especially those drawn up to react to the economic and financial crisis have heavily conditioned the domestic policy choices in Member States and have hence affected people's lives because they bear the brunt of the austerity policy.

European policies are usually perceived as being imposed from above by institutions that are extraneous to the traditional circle of democratic policy representation.

The problem of facilitating democratic participation in the European decision-making process presents itself as being more urgent than ever before, especially in the various countries, through the institutions that are closest to the people.

[57]Think, on the one hand, about the cross-cutting nature of some matters attributed to the legislative competence of the State (see the judgment of the Constitutional Court no 303 of 2003, in *Giur. Cost.*, 2003, with a comment by D'Atena 2003, pp. 2776 *ff*, and Anzon 2003, pp. 2782 *ff*); on the other hand, think of the possibility acknowledged to the state legislator who can intervene by default also in matters that have been devolved to the regional legislator (on this issue refer to D'Atena 2003, pp. 21 *ff*).

By taking due account of the novelties introduced by the Lisbon Treaty, Act 234/2012 has not only opened up new spaces for the participation of national parliaments in the formation of European policies and European law, but it has also opened up new prospects for attaching greater importance to the expectations and needs of the territories in the definition of the national position.

With reference to the involvement of the Regions in defining the national position to be negotiated at European level, the system delineated by Act 234/2012 seems to be the best possible one: indeed, the Regions are called upon to contribute to identifying the national interests and to assess the potential effects of the European regulations and policies given the specificities of the individual territories; all this without undermining the negotiation autonomy of the Government at the European table.

The novelties introduced by Act 234 simplify the procedures for the participation of the Regions and they extend the deadlines for using the available instruments; however, they do not contribute to solving the two biggest problems that interfere with the Regions' participation in the ascending phase of the European decision-making process: the difficulty in analyzing and managing the information about the draft acts in discussion at European level, on the on hand, and the lack of a unified position on the other.

In order to reach the goal of facilitating implementation of the regional contribution to defining the national position to be negotiated at European level, the regional organizational models would have to be revised and a seat for interregional coordination would have to be identified.

With reference to the first aspect, it would be desirable to spread the use of the internal organizational models that have proven to be most effective in practice in recent years.

The entry into force of Act 234/2012 is a useful opportunity for reaching this goal in that it requires intervention for maintaining the regional procedural laws.[58]

On this occasion the Regions could consider the experience accrued in the Regions that in recent years have constantly dedicated attention to their relationships with the European Union (in particular the Emilia-Romagna Region but also Abruzzo and Marche)[59] and have endowed themselves with uniform internal organizational solutions.

[58]For instance with reference to the ascending phase, it is necessary to extend the deadline for transmitting the observations on the merit of the European draft legislation to 30 days. Instead with reference to the implementation of European law, it is necessary to envisage conformity checks of the regional order so as to allow for the forwarding of the report on the state of conformity of the regional order with the European order within January 15 of every year, in accordance with the provision of Art. 29 of Act 234/2012.

[59]These Regions have organizational models that are particularly effective and that besides ensuring cooperation between the regional Government and the Councils, allow for the involvement of their communities. The organizational model used by these Regions is based on a constant exchange of information between the Government and the Council and on an effective coordination of activities; the key moment for the planning of activities is the analysis of the annual program of the activities of the Commission and of the report on the state of conformity of the

In this way the difficulties in analyzing and managing the information about draft acts being discussed at the European level could be attenuated, that affect the instruments available to the Regions for participating in the decision-making process.

Up until the revision of the international organizational models, the goal of greater regional participation could in any case be ensured by sharing information and regional observations, also with the help of it tools.

The Regional Councils could share both the resolutions that identify the devolved matters among those in the legislation program of the Commission, and the resolutions mentioned in Arts. 24 and 25 of Act 234/2012, after examination and approval by the competent Committees in accordance with the procedures envisaged by the Regional procedural laws or by their internal rules.

In this way, by benefitting from the work done by the Regions that have invested most in relationships with the European Union, all the Regions would in any case be in a condition to contribute to the definition of the Country's position to be negotiated at the European level; moreover, the preconditions would be created in practice for a convergence of regional positions.

The organizational coordinating body for sharing information could be the Conference of the Presidents of the Legislative Assemblies of the Regions and Autonomous Provinces, which is already quite active in this field.

Of course, greater investments would have to be made in terms of staffing and technical resources.

Consolidating a widely supported regional position would allow for a greater impact by the regional contribution in defining the national position, although there are cases where the position of individual Regions has been enhanced at the national level.

As already stated, the model defined by Act 234/2012, quite rightly, does not envisage that the regional position be binding; the impact it may have in defining the national position is only political, and is affected by the number of Regions that take position.

Hence only a broadly backed position at the regional level could condition the Government, even if there is no obligation in this sense.

The coordination fora envisaged by the implementing laws of Art. 117 (5) of the Constitution have not proven to be adequate for ensuring a summary of the regional positions; what is missing therefore is an institutional forum representative of the local bodies where a unified position can be identified.

New prospects could be offered by the bill that amends Part Two of the Constitution; the Senate could indeed be the body that could ensure the political

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regional order with the European order; in this stage the acts of regional interest, and hence to be monitored, are identified and policies are defined for adjusting the regional order. During the year, the Government and the Council monitor the selected acts and initiate procedure for approval of the observations on points of fact and for verifying compliance with the principle of subsidiarity.

and legislative coordination between the State and the Regions on the relationships with the European Union, although the text appears to be vague on this point.

The regional contribution could be enhanced by attracting attention to the pre-legislative phase of the European negotiations, which is the real negotiating table.

The regional contribution to the political dialogue by forwarding resolutions and opinions to the Chambers, at least with reference to the European dossiers of greater interest, would enable Parliament to consider the needs and expectations of the territory, as well as the impact of the European policies on the local reality.

In this way a political contribution would be offered during the planning of European policies that perhaps could be more effective than the technical contribution given when approving the drafts of the European acts, when there is less room for negotiation.

Ultimately, the instruments are available; what is required is a more widespread awareness of the importance of active participation in the formation of European policies and European laws, together with the recruitment of leaders who are capable of understanding the potential of the territories of reference and who can influence the long-term political actions in order to promote their development.

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Italy and European Economic Policies: When It Is Time to Change the Paradigm

Stefania Gabriele

Contents

1 The Worst Recession of the Post-war Period

Since 2008, Italy has been in the crisis storm. If the short growth in 2010–2011 gave rise to the hope that the worst was over, later the situation plummeted, with a further 2 years of fall in production. Even the illusions of recovery after the stabilisation of GDP at the end of 2013 have been wiped away by the data of the beginning of 2014, while the feared deflation materialised in the summer, with various negative monthly indices of consumer prices.[1] Economic indicators show a rather dramatic situation: general (12.6 % in July 2014) and youth (42.9 %) unemployment rates

[1]Istat (2014), *Prezzi al consumo*, Statistiche flash, 28th November.

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doubled in respect to January 2008; per capita real income in 2009 was lower than in 2000; household purchasing power decreased by 10.4 % in 2013 respect to 2007; industrial production decreased by about one quarter. Social effects are also alarming: absolute poverty among individuals increased from 4.1 % in 2007 to 9.9 % in 2013 (14.8 % in the South), and by now involves 1.4 million minors; serious material deprivation, stable at around 7 % until 2010, more than doubled in the following 2 years (affecting a quarter of individuals in the South), then declined slightly in 2013 to 12.5 %; the percentage of those who are not able to get a protein-based meal at least every two days, at about 6 % in 2007, was at 14 % in 2013, and in the same period the percentage of those who declared themselves unable to adequately heat their homes[2] almost doubled. Health services rationing is evident in the clogging up of A&E, because of the lack of beds (as also reported by doctors unions[3]), whereas self-reported unmet needs for medical care for being too expensive is increasing in the first quintile, according to Eurostat data. Moreover, suicides increased during the crisis, reversing the previously decreasing trend: it is difficult to interpret this data, but it has been estimated that 290 cases of suicide or attempted suicide, until 2010 alone, can be linked to the recession.[4]

What are the reasons of all that? Besides the initial fuse—the spark that made financial markets explode in the States—and particularly regarding the second peak of the crisis, the causes are also to be found in the policies adopted by the EU.

Now that the limits of pro-cyclical economic policies are evident to everybody, the emphasis has been shifted to long period objectives and potential GDP, to be increased by the so-called "structural reforms", mainly aimed to increase competitiveness and productivity. In European documents the possibility that some slowing in severity could possibly be exchanged for certain structural measures emerges. By this way peripheral countries of the euro-zone are trying to make their way out. However, the focus on reforms appears to be a further step toward a strategy of state and welfare "retrenchment" and labour weakening. Such a strategy is difficult to carry on in democratic systems, even if sapped by years and years of crisis. Moreover, the European Commission (EC) has outlined a route for strengthening the Union in which the enforcement of democratic processes is the point of arrival, instead of the departure, which will come after, and not before, the almost complete control on fiscal policies and the surveillance of social policies.

Below we briefly retrace the route taken in Europe in reaction to the crisis, remembering the main steps in the fields of monetary and fiscal policies, describing in some detail the body of rules and obligations which has come to engulf the

[2]Data source is ISTAT: ISTAT, 2014, *Occupati e disoccupati, dati provvisori*, Statistiche flash, 29th August; ISTAT, 2014, *Noi Italia*; ISTAT, 2013, *La situazione del paese*, Rapporto annuale 2014, May; ISTAT, 2014, *Produzione industriale*, Statistiche flash, 12th September; ISTAT, 2014, *La povertà in Italia*, *anno 2013*, Statistiche report, July.

[3]ANAAO, Assomed, 2014, *Pronto soccorso al collasso in tutto il paese: i medici in prima fila nella denuncia e nella difesa del servizio pubblico*, National Secretariat Press Release, 17th January.

[4]De Vogli et al. (2012).

economies of the weaker countries of the euro, and that in Italy there has also translated into constitutional reform. Then we shall examine the weak points of the adopted approach, beginning with fiscal multiplier estimates and the paradoxes of debt algebra. After we put under the lens two other controversial aspects, namely the asymmetry in the evaluation of member countries' macroeconomic imbalances and the uncertainty surrounding the identification of budget objectives, subject to the ambiguous concept of potential output. After the discussion of European short term economic policies, we shall consider the structural policies, aimed to permit recovery in spite of austerity, to show that the effects of the recommended reforms, and in some cases their same design, are actually uncertain. Lastly, we shall explain how the idea of a suspension of democracy has gained ground in Europe, to conclude highlighting the involved socio-economic and institutional risks.

2 Fiscal Policies and Monetary Policies in Europe

After the collapse in 2009, recovery has been encouraged by expansive monetary policies (interest rates reduction and other, *non conventional* measures),[5] while fiscal countercyclical policies were disliked in Europe, being in contrast with the principal purpose, stabilising public finances.[6] In certain cases the latter have been weighed down by bank bailouts, individually managed by single countries. The crisis exploded because of private debts that have so infected sovereign debts. The fall of GDP made it more difficult to hit European public finance targets, which were set in relation to GDP. The decline of confidence, after a period in which public bond interest rates were nearly aligned, produced a widespread fear for Euro solidity, because the strict rules of European governance—previously adequate to sustain credibility, revealed at that moment their shortcomings, including the absence of any sort of last resort guarantee both in the face of banking crises and in that of sovereign debt, as the failure to save Greece made clear. Italy was in the middle of the storm, because of its historically high public debt, which in the new situation of financial market uncertainty was becoming a risk factor of note.

The increase in the *'spread'* in so-called peripheral countries has been met by austerity, aimed to restore financial solidity so as to ensure the return of confidence. Nevertheless, the results were different from expectations. Markets were not satisfied by government's efforts. One reason was that they envisaged the risk of a perverse effect of fiscal severity on financial stability because of the depressive

[5]See on this subject Visco (2013).

[6]Even if some countries, including Germany, have made a widen use of these policies. In other countries, like Italy, the automatic stabilisers have mostly worked (revenue reduction following GDP fall and increase of the expenditure for the social shock absorber, as unemployment benefits and, in Italy, the so called *Cassa integrazione Guadagni*).

impact on GDP.[7] Even the reinforcement of European instruments to sustain banks and sovereign debts through specific funds, to put up a *firewall* against speculation, has not been very effective in modifying expectations, because of the slow pace of implementation, its cumbersome and uncertain enforcement and the subordination to further obligations.[8] The ECB had to intervene resolutely, pushing itself to the limits of its possibility, given the mandate received, and not without polemics unleashed by 'virtuous' countries.[9] The LTRO (Long-Term Refinancing Operation) program to fund banks—that in turn could buy the sovereign debt of weak countries—was launched, and then the announcement was given on the ECB decision to directly purchase sovereign debt in the secondary market, focused on the shorter part of the yield curve, without setting *ex ante* quantitative limits, to control the course of interest rates in case of speculations (OMT, *Outright Monetary Transactions*). This measure was also strictly conditioned to the adoption of austerity programs. The *spread* has, however, fallen significantly in the most at-risk countries, even if few believed that the merit was because of austerity and many congratulated the ECB President.

3 Fiscal Consolidation in Europe and Italy

Meanwhile, precisely in the years of the crisis, several measures to reinforce the fiscal consolidation were introduced. Among the most relevant are the ones known as the *Six pack*, *Two pack*, and *Fiscal compact*. It is useful to remember their main features, to offer an idea of the severity of fiscal policies and of the inflexibility of the adopted rules.

The *Six pack* (in force since 13th December 2011) concerns, besides fiscal surveillance, macroeconomic surveillance in EU (with the so called *Macroeconomic Imbalance Procedure*). As for the former, the two arms of the Stability and Growth Pact have been strengthened: the *preventive arm* and the *corrective arm* (i.e. the excessive budget deficit procedure). The concepts of significant deviation from the Medium Term Objective (MTO) and of the adjustment path have been

[7]See for example Standards & Poor's, 2012, *Credit FAQ: Factors behind Our Rating Actions On Eurozone Sovereign Governments*, 13th January, available at the address http://www.standardandpoors.com/ratings/articles/en/us/?articleType=HTML&assetID=1245327305715.

[8]To realise the firewall the new ESM (European Stability Mechanism) has been juxtaposed with the previous EFSF (European Financial Stability Facility), with a global starting combined lending capacity of 500 billion. Help is conditional to the adjustment programmes.

[9]It is well known that the German Constitutional Court has been asked about the problem of the legitimacy of ECB actions, in relation to the OMT, and has in turn brought the action to the European Court of Justice.

settled; a bond to primary expenditure growth (not financed by greater revenues)[10] was introduced; the debt parameter became more important, with the possibility to launch an excessive deficit procedure if the debt does not approach the target of 60 % in relation to GDP at a sufficient pace[11]; the decision system on sanctions was modified and made easier thanks to the strengthened role of the European Commission (EC).[12] As for macroeconomic surveillance, a warning system based on ten (modifiable over time) indicators concerning the major sources of possible imbalances has been fixed.[13] In case of relevant macroeconomic imbalances the country is expected to submit a corrective action plan, complete with a 'road map' and deadline table.

The Treaty on Stability, Coordination and Governance (TSCG) in EMU, known as *fiscal compact,*[14] entered into force on the 1st of January 2013, confirming and strengthening the already adopted bonds, imposing a balanced structural budget. It also requires transposition of the obligations in National (possibly constitutional) law, so as to lock them down permanently in the regulation system of member

[10]For countries that have complied with the MTO the limit for expenditure increase is given by the medium term growing rate of potential GDP; instead, for those who have not complied with it, the limit is lower, to such an extent as to allow an annual reduction of the budget structural balance by at least 0.5 % of GDP (the reference expenditure is net of certain items and consider a pluriannual average for investments).

[11]See Ministero dell'economia e delle finanze (MEF), Ragioneria generale dello Stato (RGS), *L'attuazione del principio costituzionale del pareggio di bilancio, legge 243 del 2012*, Note brevi, 2013, February; CE, Economic and Financial affairs, *Six Pack? Two Pack? Fiscal compact? A short guide to the new EU fiscal governance*, available at the address http://ec.europa.eu/economy_finance/articles/governance/2012-03-14_six_pack_en.htm; CE, 2011, *EU Economic Governance "Six Pack" enters into force*, Press release database, MEMO/11/898, Brussels 12/12/2011, available at the address http://europa.eu/rapid/press-release_MEMO-11-898_en.htm.

[12]The sanctions, when a State does not conform to a Council recommendation to reduce its excessive deficit, can gradually arrive at 0.5 % of GDP; they are decided through a "reverse qualified majority voting" rule (a recommendation or a proposal of the Commission is considered adopted in the Council unless a qualified majority of Member States votes against it). The same mechanism is adopted on the macroeconomic surveillance side: in case of non-compliance with a recommendation an interesting-bearing deposit is imposed at first, then a fine (0.1 % of GDP).

[13]At the beginning the follow indicators have been identified: current account balance (asymmetric thresholds +6 % and −4 % of GDP); net international investment position (−35 % of GDP); 5 years percentage change of export market shares measured in values (−6 %); percentage change in nominal unit labour cost (+9 % for euro zone and +12 % for non-euro zone countries); percentage change of the real effective exchange rates relative to 35 other industrial countries (−/+5 % for euro zone countries and −/+11 % for non-euro zone countries); private sector consolidated debt (160 %); private sector credit flow (15 %); year-on-year changes in house prices relative to a Eurostat consumption deflator (6 %); General Government sector debt (60 %); unemployment rate (10 %).

[14]It is an international treaty, signed by 25 member States of EU (except the United Kingdom and Czech Republic).

countries, otherwise at risk of not being able to use the support mechanisms for financial stability if needed.[15] The rules provide: a balanced budget implies a structural deficit (adjusted for economic cycle and net of one-off and temporary measures) of a maximum of 0.5 % of GDP at market prices (1 % if debt is much lower than 60 % and with no risks for long term sustainability), except for the case of temporary deviations in exceptional circumstances[16]; it is the EC which proposes the timing of the convergence through the MTO, in the assessment of the objective the expenditure trend is also considered, in the presence of significant deviations from MTO or from the path towards MTO a correction mechanism (to be set at the national level) should automatically be activated; the country subject to excessive deficit procedure must establish an economic partnership programme with a detailed description of the structural reforms required to be submitted to the EU Council and the EC for approval, in the framework of the surveillance procedures. The qualified majority voting application is extended to the taking of decisions (EC proposals or recommendations) in the various stages of the excessive deficit procedure. Concerning the debt/GDP ratio, the approaching to 60 % must take place at the rate of one-twentieth per year and the non-compliance can lead to an excessive deficit procedure.

In Italy, Constitutional law n. 1 of 20th April 2012 (entered into force on 1st January 2014) has also been approved, modifying Art. 81 of the Italian Constitution to acknowledge the balanced budget rule. In truth, it does not explicitly require a *zero deficit*, only a less strict *equilibrium*[17] between State receipts and expenditures, considering the opposite stages of the economic cycle. It also imposes on every public administration (PA) the need to ensure balanced budgets and public debt sustainability, consist with EU regulation. Indebtedness is allowed only as a consequence of economic cycle effects or when exceptional circumstances occur, and requires a prior Parliamentary authorisation adopted with an absolute majority of members. The Constitutional law was applied by reinforced law n. 243 of December 24th 2012, which defines the PA balanced budget as corresponding to the MTO, with an automatic transposition of possible European rule changes into national law.[18] Periods of serious recession concerning the Eurozone or the entire EU and unusual uncontrollable events, including serious financial crisis and natural disasters which have a major impact on the general financial position of the country,

[15]See the notes in the preamble of the Treaty text and the considerations of the Treaty establishing the ESM.

[16]Unusual and uncontrollable events which have a major impact on the financial position of the government or periods of severe economic downturn as set out in the revised stability and growth pact. The temporary deviation does not endanger fiscal sustainability in the medium-term.

[17]Note that the transposition of the "budget balance *rule*" in the Italian Constitutional system has resulted in the statement of the "balanced budget *principle*". Hence, the Italian constitutional interpretation of the European setting on the one hand allows more margins of manoeuvre, while on the other turns a discussed technical rule into a fundamental concept.

[18]See Ragioneria Generale dello Stato, *L'attuazione del principio costituzionale del pareggio di bilancio, legge 243 del 2012*, "Note brevi", 2013, February.

have been defined as exceptional events. Whenever one of these circumstances occurs the Government may deem it necessary to temporarily deviate from the MTO and, after consultation with the EC, can ask Parliament for the authorisation (with an absolute majority) to upgrade the programmatic public finance goals, indicating the extent and length of deviation, the aim to which the resources possibly obtained on the market will be devoted and the adjustment plan. With the law n. 243/2012 a rule on expenditure has been introduced as well, as provided by the Constitutional reform.

The *Two pack* (entered into force on 30th May 2013) is a couple of regulations that further strengthen the Commission surveillance powers on eurozone countries' budgets, introducing into European law some aspects of the *fiscal compact* (which is an international treaty, as seen). The first regulation provides specific dispositions for monitoring and assessing draft budgetary plans—in the framework of the European semester, and for the correction of excessive deficits. The second one disciplines the enhanced surveillance for countries with serious difficulties in keeping financial stability, those receiving financial assistance or with a program of financial assistance at the end. The Commission is supposed to give an opinion on the budget draft, and in the surveillance framework the implementation of previous recommendations is also monitored. The EC would not get to have a real veto power,[19] but, in case of serious non-compliances with the SGP, can request a revised draft budgetary plan. Moreover, the EC can make a recommendation to member States subject to excessive deficit procedure to take action aimed at avoiding non-compliance. Enhanced surveillance also allows the Commission to propose that the Council recommends a member State to adopt corrective measures or to prepare a macroeconomic adjustment project plan if it deems further actions necessary to confront the risk that this country could cause difficulties to the financial stability of the eurozone. Furthermore, the *Two pack* contains a referral to the EC for the examination of possible mechanisms aimed to favour the realisation of some public investment programmes. The EC has since evaluated the possibility of an "investment clause", so as to admit possible temporary deviation from OMT, but with the imposition of a series of restrictive conditions (negative growth or less than the potential, deficit not higher than 3 %, compliance with the debt rule, investment projects co-financed by EU with direct and verifiable positive effects in the long-term).

The succession of these measures shows how all European attention[20] has been addressed at keeping public finances under control, to reduce the danger that some country, through out of control fiscal policies, could produce problems for the stability and endanger the whole area. Indeed the crisis was interpreted as a public

[19]CE, 2013, *Entra in vigore il "two-pack": completato il ciclo di sorveglianza di bilancio e migliorata ulteriormente la governance economica per la zona euro*,—MEMO/13/457, May 2013, available at the address http://europa.eu/rapid/press-release_MEMO-13-457_it.htm.

[20]And hence National attention.

finances crisis, instead of as a financial crisis because of debt deflation[21] and/or a balance of payments crisis.[22] Actually, even the macroeconomic indicators provided by the *Six pack* could favour a broader analysis of the problems, but this tool was only partially exploited, as we will see after.

4 Austerity and Fiscal Multiplier

In 2012, the failure of austerity policies was apparent, with a GDP growth rate in the eurozone once again negative; the dramatic result of Greece (−7 %), the alarming figures of Portugal (−3.2 %) and Italy, Slovenia and Cyprus (about −2.5 %). Even in Germany a slowdown occurred (+0.7 %), while in France growth was interrupted. The situation was different elsewhere, with global GDP increasing by about 3 % and a rise of 2.8 % in the United States that had adopted expansive fiscal policies and did not experience the double recession.[23]

What made the situation even more disturbing was not only that a clearly negative correlation has been revealed between the intensity of austerity and product growth, but also a positive association between austerity and debt/GDP ratio.[24] Thus, wider restrictive manoeuvres have been associated with greater GDP drop and also to a more sustained increase of debt in relation to GDP.

Only with great difficulty has the situation been acknowledged. The forecasts of International bodies and many public and private institutions were often revised downwards,[25] while the date of the alleged recover was gradually shifted over time, until the international scientific community admitted that the effects of fiscal consolidation policies on economic systems during a recession had been significantly underestimated.

At this point, the discussion focused on the value of the fiscal policy multiplier, that is the parameter that measures GDP change due to a variation in public revenues or expenditures. The IMF u-turn[26] caused a sensation, when in autumn 2012 it was acknowledged that GDP missed forecasts by about 1 % for each point of fiscal consolidation,[27] with a greater error on the expenditure side.

[21] See Visco (2014).

[22] Cesaratto (2013).

[23] The source is IMF, *World Economic Outlook Database*, April 2014 for world GDP; for the other data Eurostat, *Statistics database*, 13 May 2014. This data does not consider the revision of GDP series based on the new Eurostat criterion.

[24] See e.g. De Grauwe and Ji (2013) and Krugman (2013).

[25] For the Italian case, see e.g. Gabriele (2013).

[26] See FMI, 2012, *Coping with High Debt and Sluggish Growth*, "World Economic Outlook", 2012, October, and Blanchard and Leigh (2013).

[27] The multiplier implied in forecasts was then underestimated by about 1.

Economic literature[28] confirms the difference between expenditures and revenue multipliers, the former being higher, and claims that the parameter is greater in recession periods, when restrictive policies are underway, with flexible exchange rates, i.e. precisely in the current crisis situation. Instead, the multiplier is as low as the economy is open and could become negative in the presence of a large public deficit or debt.[29] It is just the idea to face a negative multiplier which has fed the "myth of the expansive fiscal consolidation" (the expression is by Nuti[30]), created in the nineties based on a series of studies that detected a positive relationship[31] between deficit reduction—better if obtained by expenditure cuts[32] and growth,[33] or between high public debt and low growth, as in a famous paper by Reinhart and Rogoff.[34] This paper indicated the 90 % debt/GDP ratio over which the debt would become a serious hindrance for growth. Recently, the controversy on these studies' reliability was very heated,[35] also because of the revelation of material errors and of the exclusion of some countries from the analysis of Reinhart and Rogoff. The relevant problem, however, is that the direction of the causality is not obvious at all, i.e. one can wonder if it is public debt—or expenditure—that negatively influences GDP and its growth, or rather that growth allows fiscal consolidation. Certainly, the emphasis on possible consequences of high public debts obscures private debt risks, which would be evident if some further attention would be given to this issue.[36]

The diversification of the value of the multiplier in different situations should at least suggest adapting policies to the conditions that actually take place, but instead fiscal consolidation was pursued, and mostly from the expenditure side (that has a higher multiplier). Thus, fiscal policy was substituted by excessively rigid behavioural rules.[37]

[28]See Tancioni (2013) and Batini et al. (2012).

[29]The results of estimations on multipliers closely depend on the adopted hypothesis, which in turn descend from the reference theoretical setting (see for example Batini et al. 2012; Cozzi 2013).

[30]Nuti (2013).

[31]This relation was traditionally explained by the lower crowding out of private investment—and possibly consumption—which could result from a change in the interest rate; afterwards the possible effect on consumption has been emphasised because of an improvement of confidence and to the expectations of lower taxes (or a lower increase in taxation) and hence a higher income in the future.

[32]In contrast with the evidence on expenditure and revenue multiplier's values.

[33]For example in Giavazzi and Pagano (1990) or in Alesina and Perotti (1995).

[34]Reinhart and Rogoff (2010).

[35]See Nuti (2013) and for an account of the argument, Melloni (2013).

[36]See D'Elia (2009).

[37]A demonstration, based on debt algebra, of the groundlessness of the unchanging fiscal policy rules assumption is in D'Elia (2013).

5 Algebra and Fiscal Policy

The reasoning on the effects of fiscal consolidation can be completed considering the fact that, for reasons of arithmetic, when the debt/GDP ratio is high, it is very likely that increasing deficit spending engenders a *reduction* in the same ratio (Nuti, 2013), and vice versa when a cut occurs—as expenditure is also recorded in GDP.[38] It is easy to explain this phenomenon intuitively from the trivial fact that when the ratio between two variables is above one, an increase of the numerator and the denominator of the same amount (assuming for simplicity a multiplier of one) implies a reduction of the ratio. Therefore, a positive variation in public expenditure fully covered by debt would make the debt/GDP ratio decrease. However, it is necessary to consider not only the counting impact of a greater expenditure, but also its overall, eventual effects on the economic system (and hence on GDP), i.e. the actual value of fiscal multiplier. We have seen that the multiplier is significantly higher than one in a recession, such as the current one. Consequently an *increase* in expenditure could generate an *increase* in the debt/GDP ratio, as expected by austerity advocates, only if the initial level of this ratio is quite small, and in any case lower than 100 %; it can be shown that the threshold above which an expenditure increase reduces the ratio, instead of increasing it, depends on the multiplier value.[39] Symmetrically, in conditions like the ones with which our country is experimenting; with deep recession, a high multiplier, a debt/GDP ratio greater than 100 %, an expenditure cut can make the debt/GDP ratio increase.[40] Hence, the fact that austerity measures have opposite effects to those desired and that debt/GDP ratio passed from 103 % in 2007 to 133 % in 2013 are not surprising. The analysis can be better articulated and qualified[41] by considering some other aspects like the tax burden, the level of interest rate on debt and foreign relations, but the fact stands that, in a recession and with very low or zero interest rates, *deficit spending* policy tends to be self-financing, whereas austerity brings a vicious circle in which fiscal consolidation targets move away instead of approaching.

Even more serious is the European situation as a result of fiscal consolidation policies adopted across the whole continent. The more so as the strongest countries, which would have been able to perform a towing function of the entire area with

[38]It is well known that some public expenditure items, as public employment remunerations, are fully accounted for in GDP, due to an accounting convention (remunerations actually conventionally represents a component of General Government value added).

[39]The higher the multiplier, the lower is the threshold for debt/GDP ratio (Nuti 2013 and D'Elia 2013).

[40]In a recent econometric study (Beqiraj and Tancioni 2014) it emerges that the risk linked to sovereign debt can worsen the effects of a contraction, especially if obtained on the spending side, because a rise in the debt/GDP ratio occurs, which increases the *spread*, and through the raise of the interest rate the restrictive (Keynesian) effect intensifies. The hypothesis of expansive fiscal contraction would not be empirically relevant.

[41]See DeLong and Summers (2012) and D'Elia (2013).

expansive policies aimed at enhancing demand and imports, have rather played on the competitive disparity, wage restraints and labour market flexibility to achieve a wide balance of payments surplus.

6 Macroeconomic Imbalances in Europe

During 2013, many European economies stopped shrinking, even if the eurozone has again suffered a drop in GDP of about half a percentage point year on year.[42] Nevertheless, in the first semester of 2014, there was a slowdown in the area, with France in stagnation in the second quarter and negative signs on German GDP. Italy again moved into recession. If the hope was that foreign demand would drive investment recovery (while fiscal policies would be maintained largely restrictive in many countries and consumptions would remain weak), then that recovery did not occur.[43] Meanwhile, exports have weakened, while Europe has also been affected by the consequences of the Ukraine crisis. The ECB continued to adopt expansive monetary policies, with low interest rates and starting other non conventional policies, even in consideration of the inflation rate drop well below the target of 2 %.

At the same time, the mechanism envisaged by the *Six pack* developed to the in-depth review (published in March 2014[44]), of the 16 countries with imbalances, identified by the previous alert mechanism report of November 2013, and of Ireland (having left the adjustment program to follow the normal surveillance procedures).[45] A significant asymmetry manifested in the assessment of affected countries evaluation and the importance attributed to each indicator. According to the Commission, 14 States presented some imbalances, but in only 3 cases these imbalances were deemed excessive. Italy was among the latter, because of its high public debt and its weak external competitiveness, ascribed to the disappointing growth of productivity. These troubles could have repercussions for the whole eurozone, given the size of the country.[46] The recipe proposed for Italy was that of

[42]Whereas in the EU28 GDP had stabilised (+0.1 %). In Greece (−3.9 %), Cyprus (−5.4 %) and Italy (−1.9 %) the fall in GDP was still relevant.

[43]Ifo, Insee, Istat, 2014, *Euro-zone economic outlook*, 10th January; ISTAT, 2014, *Nota mensile sull'andamento dell'economia italiana*, August.

[44]CE, 2014, *Results of in-depth reviews under Regulation, (EU) No 1176/2011 on the prevention and correction of macroeconomic imbalances*, Communication from the Commission to the European Parliament, the Council and the Eurogroup, COM(2014), 150 final, Brussels, 5th March.

[45]CE, 2013, *Alert Mechanism Report 2014*, Report from the Commission to the European Parliament, the Council, The European Central Bank and the European Economic and Social Committee, COM(2013) 790 final, Bruxelles, 13th November.

[46]The two other countries with excessive macroeconomic imbalances were Croatia and Slovenia, whereas France, Spain and Ireland required decisive policy action and specific monitoring according to the Commission.

high primary surpluses[47] and a strong GDP growth. The finger was still pointed at the risk that structural budget adjustment and debt decrease could prove insufficient in 2014. Furthermore, the wage rigidities that prevented a wage differentiation in line with productivity developments and with the local conditions of the labour market[48] were criticised.

The case of Germany was handled differently, though its balance of payment in surplus[49] over the threshold of 6 % for 6 years (a different and greater limit compared with the one envisaged for the symmetrical case of deficit, as seen above) caused serious troubles for other countries: imbalances were not considered excessive. The EC merely noted that German demand should increase more, reducing the dependence of the economic system on exports, and specifically suggested increasing investment by promoting efficiency, especially in the service sector, to raise labour supply and potential growth. Wage increase policies aimed to sustain consumption, which could easily have helped to strengthen demand, increase imports and re-balance the accounts among eurozone countries, were instead not emphasised at all.

The approach requiring symmetry in the adjustment of unbalanced countries, as in the case of the Bretton Woods agreements,[50] is in practice seldom followed[51]: even if admitting that Germany's dependence on exports and the weakened growth of this big country could imply some risks, the Commission wrote that ample surpluses do not cause similar problems to substantial deficits, evidently forgetting that one country's surplus of external accounts must necessarily correspond to other

[47]In the in-depth examination document for Italy (EC, 2014, Directorate-General for Economic and Financial Affairs, 2014, *Macroeconomic Imbalances Italy 2014*, European Economy, Occasional Papers 182, Brussels, European Union, March) it was judged, albeit through a stylised projection exercise, that a primary surplus of 5 % of GDP would be able to secure the downward trend of debt/GDP ratio for the period 2016–2020. However the same document admitted that it would be difficult to obtain such a surplus with weak economic activity and deflationary pressures.

[48]Credit recovery and capital market development encouragement was expected, as well as an increase in the importance of high export potential chains and innovative firms. Other problems characterising Italy were recalled, such as: public sector and judicial system inefficiency, the weakness of corporate governance, the intensity of corruption and fiscal evasion, the lack of human capital, issues to which we will later return.

[49]The indicator used for macroeconomic surveillance is a 3 year average of current account balance in percentage of GDP. Data used in the statistical annex to the Alert Mechanism Report 2014 arrived at 2012 (EC, 2013, *Statistical Annex of Alert Mechanism Report 2014*, Commission Staff Working Document, available at the address http://ec.europa.eu/economy_finance/economic_governance/documents/alert_mechanism_report_2014_statistical_annex_en.pdf).

[50]In the statement to be used by British Ministers prepared with the collaboration of J. M. Keynes to explain the agreements progress on the so called "scarce currency" clause it was written that "The Americans offer voluntarily to abjure their former stranglehold on the world's economy and never again to allow their hoarding propensities to force deflation on others"—as reported by Harrod (1951). Harrod tells that Keynes was sceptical on the possibility that this clause was introduced. Perhaps he perceived that it would be hardly applied.

[51]See Caffè (1978) (fifth revised edition, edited by N. Acocella, 1990) on the developments after Bretton Woods.

countries' deficit. Maybe the idea was a constantly growing, whole Europe towed by the rest of the world, an option not exactly shared by external partners. In fact, the eurozone current account surplus came to about 200 billion euros, surpassing China's, which decreased from 10 % to 2.5 % of GDP between 2007 and 2013.[52]

It is definitely clear why the *Documento di economia e finanza* (DEF) 2014 expressed a request for homogeneity and symmetry in the assessment of the imbalances of countries and in the application of corrective measures, with a disagreement on the judgment of excessive imbalances for Italy.

7 Structural Balance and Potential Product

Likewise, in the 2014 DEF it was underlined that the structural deficit computation is subject to technical non-objective and discretionary decisions. The issue is not without consequences, because it affects the usable margins of flexibility with respect to the MTO, which have revealed to be very limited.

In practice, the interweaving of the various constraints makes it difficult to realise an anti-cyclical policy, and an important role is played by the structural balance. At this purpose, it is to be noted that the structural balance calculation made in Brussels has been the object of much interesting criticism.[53] The devil is in the details, thus we are forced to specifically examine this aspect.

To measure the structural balance, which is important for respecting the balance budget rule, it is necessary to depurate the effects of the cycle. Then the crucial issue is the *output gap* evaluation, i.e. the distinction between "potential" GDP that could be obtained with the available factors of production, and actual GDP, which is different because of cyclical fluctuations. In the setting, the basis for these estimates—very controversial for both the theoretical framework and the different calculation techniques[54]—there is an equilibrium unemployment rate (generally called NAIRU), compatible with prices and/or wages stability, coherent with potential GDP, on which the structural deficit has to be calculated. The NAIRU does not imply the absence of involuntary unemployment, which would depend on the rigidity of the labour and/or products (poor competitiveness) market and not on a shortage of demand.[55] The latter, and in general monetary and fiscal policies, could at most help to bring unemployment back toward the NAIRU. Anyway, the higher the estimate of equilibrium unemployment, the lower the potential GDP, the higher the structural deficit and the lower the cyclical deficit. The Commission has,

[52]De Nardis (2014).

[53]CER, 2014, *Pacta servata sunt*, Rapporto CER, Aggiornamenti, 25th March; Fantacone et al. (2014).

[54]Palumbo (2013b), who shows that often the potential GDP is merely estimated based on the actual GDP trend.

[55]See Vianello (2005) and Palumbo (2013b).

over time, increased the value of the estimated equilibrium unemployment rate, from 7.5 % in autumn 2011 to 10.4 % for 2013 and 11 % for 2015 in the winter of 2014.[56] Hence, in Italy the desirable unemployment rate, apt to avoid excessive increases in wages and inflationary pressures, given the production capacity, would reach 11 % according to the EC. Even more surprising are the estimates for Greece and Spain, surpassing 20 % in 2014 and 2015. The peculiarity of these results appears evident, considering that at these times the inflationary risk was replaced by the more formidable one of prices deflation. The researchers of the Centro Europa Ricerche have also calculated the structural balance with different hypotheses of equilibrium unemployment, and have observed that, if the latter was at 9 %, the budget would be broadly balanced, and if it would be even lower, a surplus would emerge. In short, in the first place the evaluations on the gap from the MTO are very unstable, i.e. they change significantly depending on whether the hypotheses or calculation techniques are slightly altered, and this reduces their reliability. In the second place, the EC has read an important part of the unemployment during the recession as structural unemployment, so underestimating the effects of the cycle, or of the crisis. Moreover the tendency of NAIRU estimates (and then of potential GDP estimates) to consistently change over time, absorbing most of the actual unemployment rate variability,[57] is a contradiction already identified in the literature. The reasons of this bias have been ascribed to the attempt to save the very concept of equilibrium rate, which in order not to be 'emptied' of theoretical content and empirically 'elusive' must presuppose some convergence, over time, to the actual rate.[58] But in this way the potential growth rate ends up chasing the actual one, and not vice versa.

8 Another Point of View

The economists following a completely different theoretical approach, the one of growth driven by demand, admit that in recession productive capacity can be destroyed; because of the closure of firms, the dispersion of fired workers (whose

[56]CER, 2014, *op. cit*. The EC actually refers to the NAWRU (Non-Accelerating Wage Rate of Unemployment).

[57]To explain NAIRU changes, at least in the short/medium term, the concept of labour market hysteresis has been introduced—i.e. an influence of actual unemployment on equilibrium unemployment (Palumbo 2013b). Delong and Summers (2012), for example, remind us that hysteresis can be explained by phenomena such as the marginalisation of long-term unemployed, or the failure to set out a career in the case of young people, and moreover, looking beyond the labour market, one can observe the effects of recession on future economic activity as a result of the displacement of public resources from physical and human investments to the more pressing social policies, the abatement of physical and R&D investments, the change in managerial attitude and the reduced dissemination of information.

[58]Palumbo (2008, 2013b).

ability remains unused), the fall in investment (not even realised to renew obsolete plants) and the reduction in participation rate because of discouragement of the labour force.[59] Nevertheless, it is generally deemed that economic systems have reserves of productive capacity,[60] or in any case the latter can increase if the demand increases, even if it is not observable as excess of productive capacity in a given moment.[61] The increase in productive capacity takes place via investment, which in turn is spurred on by growing demand: "a strong dynamism of the market favours both the diffusion of new technologies, and production on a large scale of the capital goods incorporating them and their perfecting through the learning processes related to production (and to the dialogue between producers and users). (.. . ..) As for the negative consequences of innovative processes in the social field, it is clear that they are attenuated in a dynamic macroeconomic contest, which allows the absorption of workers expelled from production, whilst in a stagnant environment their missed reabsorption further worsens the situation and generates resistance to the introduction of innovations.".[62]

Then, to also increase long time growth, policies for the recovery of the demand would be required, which should be matched by industrial policies, innovation policies, education, training and research policies, aimed to support the production adjustment.[63] Also because there is evidence of a resizing of productive capacity in the years of the crisis.[64] There would be no reason to sacrifice consumption or to reduce wages.[65] The risk of an excessive imbalance in foreign accounts because of the unavoidable increase in imports would evidently be substantially reappraised if the demand boost were to be accomplished in the whole EU.

[59]Nuti (2013) and Vianello (2005).

[60]Even if difficulties and bottlenecks can obviously be encountered.

[61]Garegnani and Palumbo (1997).

[62]Vianello (2005), p. 36. The text is translated from the original Italian. Vianello continues explaining that the same reasoning also applies to the industrial delocalisation processes, which in a context of growth can "create without destroying" (ibidem, p. 36), because of the simultaneous requalification of the productive apparatus, whilst in stagnation leads to a contraction of national productive base. See also Palumbo (2013a) about the causal effects of growth on productivity, also in the long term.

[63]At present in Italy the problem is the extent to which the industrial system has been devastated by the crisis, and thus how able it could be to quickly react to demand increases, rather than let them be absorbed by imports.

[64]Palumbo (2013a).

[65]See Garegnani (1979) and Garegnani and Palumbo (1997).

9 "Structural Reforms" Recommended for Europe and for Italy

In the view of the EC, however, fiscal consolidation is addressed to ensure stability, and competitiveness has to be boosted by some policies for the competition and labour market, whilst in the long term growth will be restored through further "structural reforms", aimed at potential GDP growth.[66] These measures generally concern[67] market regulation and competition (resulting in an abatement of *mark-up*[68] and administrative barriers to the entry of new firms), R&D expenditure (incentives to firms' investment and possibly an increase in public expenditure in this field), human capital investments (to raise the share of high-skilled workers), tax structure (tax shift from labour to consumption, to spur labour market participation and increase competitiveness through a sort of "fiscal devaluation"), labour market participation (especially to increase the participation of low skilled men and women, also through childcare services improvement), active policies (to facilitate the matching of labour demand and supply, also through training), unemployment benefits generosity (decreasing their proportion in relation to the remuneration, to push wages down and labour supply up). Industrial policy has instead been subordinated to competition policy, and also the recent document[69] for the industrial renaissance, called *industrial compact*, which proposes a target—not over-ambitiously—of 20 % for the share of manufacturing on GDP, although it seems to slightly switch the focus on industrial policy strategies, does not question the *fiscal compact* and does not allocate new resources for a common action (apart from European funds already in place, of which Italy is guiltily unable to make effective use).[70]

[66] Actually, the measures proposed for the short term are in part confused with those for the long term, both essentially being supply side policies.

[67] See the second chapter (*The growth impact of structural reforms*) in EC, 2013, *Quarterly Report on the Euro Area*, Vol. 12, n. 4.

[68] That is, the profit expressed as a percentage of the production cost.

[69] EC, 2014, *Communication For a European industrial renaissance,* COM (2014), 14 final, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Brussels, 22nd January.

[70] It has to be noticed that in Italy competition and financial constraints in part represented an alibi for a carelessness toward policies for productive activities also motivated by the difficulty to carry out consistent and transparent choices (aggravated by the varied commingling of public and private interests) and an incomplete and asymmetric federalism. Brancati (2014) observes that state aid to firms fell in Italy from the early nineties and now much more than in other European countries, becoming extremely limited in absolute terms and by international comparison (e.g. standing much lower than in Germany); public guarantees are more relevant, but not enough to turn the tables. See also Brancati (2012).

For Italy, the recommendations are many.[71] Trying to select the main fields on which action is required, we firstly observe that policies to increase flexibility and contain labour cost, to raise productivity and competitiveness, are suggested. If any perplexity has emerged about the suggestion to act on wages, in front of the daunting performance of demand in recent years, then tax wedge cuts have been favoured. However the latter should be realised without increasing deficit, mainly through consumption and/or property and environmental taxation rises. Active policies are recommended to raise labour supply and to diminish the *mismatch* between supply and demand. With double-digit unemployment and youth unemployment exceeding 40 %, recently it was still required, even if with fewer emphasis compared to the past, to favour elderly participation in the labour market, possibly postponing retirement age,[72] as if there were full employment and the limit to growth would derive from demographic trends and the willingness to work. Some more recent documents[73] concede that labour market reforms realised in the 90s deteriorated the youngest and the most educated wages, while pension reforms made their entry in the labour market increasingly difficult. It is also acknowledged that a loosening of labour protection legislation and a revision of market regulation have already occurred (certified by ad hoc OECD indicators' variations), but it has been witnessed that the expected results did not realise. On the labour market side, it would be necessary to assure wage moderation, to overcome segmentation and to introduce a more integrated social safety net: objectives which it seems should be mainly pursued through a greater flexibility in output, reforming the collective bargaining to ensure wage differentiation and, given budget constraints, pursuing a rebalance between the benefits granted to different categories of unemployed workers.[74] On the side of product market, it is above all recommended to continue the liberalisation of the services sector. Furthermore, there is a propensity to attribute the failure of already implemented reforms to the inefficiency of public

[71]See for example the already quoted *position paper* on the in-depth review on Italy developed within the macroeconomic surveillance and the Commission Staff Working Documents for the Assessment of the 2013 and 2014 national reform and stability programme (EC, 2013, *Assessment of the 2013 national reform programme and stability programme for Italy accompanying the document Recommendation for a Council Recommendation on Italy's 2013 national reform programme and delivering a Council Opinion on Italy's stability programme for 2012–2017*, SWD(2013) 362 final, Brussels, 29th May; EC, 2014, *Assessment of the 2014 national reform programme and stability programme for ITALY Accompanying the document Recommendation for a Council Recommendation on Italy's 2014 national reform programme and delivering a Council Opinion on Italy's 2014 stability programme*, SWD(2014) 413 final, Brussels, 2nd June).

[72]See for example the *Position Paper on the Position of the Commission Services' on the development of Partnership Agreement and programmes in ITALY for the period 2014–2020*, Rif. Ares (2012) 1326063—09/11/2012.

[73]See again the in-depth review on Italy developed within macroeconomic surveillance.

[74]In general, even recognising the substantial growth of poverty and social exclusion in Italy, the EC only proposes a recalibration of social expenditure, recovering resources for social care from those of pensions. In fact over time savings obtained from social security cuts have not been allocated to straighten social programs.

administration. In fact incitements to rationalise public expenditure, to reform Public Administration and the justice system, to modernise corporate governance, to fight corruption, tax evasion and the shadow economy are also part of European recommendations to Italy. The reference to old and unresolved problems offers a justification to some assertions about the failure to implement the reforms, and it is useful for explaining the disappointing effects of the numerous actions taken, mostly in the fields of labour and pensions.[75] Juxtaposing the core measures on labour and product market with some other measures, mainly defined and qualified by the widely shared goals driving them, such as increased transparency, reduced waste and decreased costs for businesses, reinforces the idea that all the recommended actions represent uncontroversial choices. Nevertheless, behind the stated goals, on this side and beyond the Alps, there seems to be a great deal of confusion on the tools, namely the nature and concrete design of the steps, and uncertainty over the effects. One can be puzzled in front of the variety of actions classified as reforms, included some discussed institutional interventions, whose economic effects are generally irrelevant or essentially unquantifiable.[76] It seems that the aim of reducing public expenditure at any cost, regardless of its multiplicative effects on product, together with the State role in the economy, trumps the goals in terms of efficiency increases and waste cuts, in the short as in the long term, while a general retrenchment leaving space to the private sector also in the field of welfare is pursued, such as in Greece and Spain even in the health sector. This serves as the background for the Italian misunderstanding on education and research expenditure, with the cuts implemented within austerity policies and reforms. A rethinking on these cuts only recently seems to have come into play. Indeed the EC suggests increasing budget allocations to education, to overcome the system shortages, especially the low skill of the labour force, early school leaving and low participation in the labour market.[77]

[75]The in-depth review document on Italy focuses on the lack of reforms in the past (EC, 2014, *Macroeconomic Imbalances Italy 2014*, cit., p. 10), instead of admitting that the effects of the numerous implemented actions have been of no importance or opposite to those expected (it does not seem necessary to list the numerous reforms of pensions, of labour market, and even of Public Administration, as well as the measures of regulation, liberalisation, and privatisation, overall in the field of public services, realised in the last two decades); the EC communication of March 2014 instead claims that the benefits of the adopted reforms are hindered by public and private inefficiencies, corruption and fiscal evasion (EC, 2014, *Results of in-depth reviews under Regulation (EU) No 1176/2011 on the prevention and correction of macroeconomic imbalances*, cit.).

[76]Consider for example that the Technical Reports do not even quantify the budgetary effects of the abolition of provinces (decree-law 138/2011), and the saving due to the successive decree-law 201/2011 have been indicated in only 65 million.

[77]Besides, Brussels has commented on the low returns to education, and a calls for a higher wage differentiation to stimulate further studies, though it is acknowledged that the characteristics of labour demand, and hence the production structure, are important as well.

10 The Uncertain Effects of Reforms

To estimate the possible effects of reforms, DSGE (Dynamic Stochastic General Equilibrium Models) models[78] are generally used by central banks and international bodies, and now even economic Ministries. The impact of reforms is simulated through the introduction of exogenous *shocks*. Essentially one merely *hypothesises* the effect of some measures on certain parameters (e.g. mark-up, productivity, wages, labour supply), and assesses how the imposed change influences the overall economic system. These models do not, however, allow an assessment of the ability of specific reforms to actually affect economic variables; such an evaluation would rather require a punctual study of the intervention features and of its adequacy in the context where it is applied.

In the models adopted the demand role is not relevant. Thus, the question does not arise over whether a higher labour supply could be absorbed by the market, or whether a wage reduction, compressing consumptions, could worsen firms expectations, even because the effects are essentially evaluated with concern to the potential product and the medium-long term.[79]

In a more general view, looking better at the analysis of the mechanisms that should produce the expected results and at empirical studies, one realises that the effectiveness of structural reforms is not at all obvious in economic literature. For instance, concerning the increase in the degree of competition on products market, it has been observed that economic theory does not ensure a positive effect on productivity and growth in every space-time context, nor have empirical studies solved the problem, the results being contradictory.[80] As for privatisations, Florio[81]

[78]These models, while assuming a perspective of general equilibrium and rational expectations, are not really able to consider the changes in the overall system of consumer preferences in the face of reforms such as those that allegedly upset their lifestyle. Indeed the results depend in a crucial way on the fact that everybody firmly believes in the model predictions, otherwise the long-term equilibrium—and the outcome of the reforms—could be very different or may even result in several possibilities of equilibrium. Moreover the use of "representative agents" impedes the possibility of taking into sufficient account the diversity of behaviour and distributive phenomenon.

[79]Even if the literature on the effects of reforms concedes that there may be some adjustment costs, especially with regard to interventions in the labour market and to periods of depression. See for example Lusynian and Muir (2013).

[80]Podrecca (2013). The quoted review shows that microeconomic studies generally find favourable results on locative efficiency (decrease in mark-up and prices, business selection), but uncertain results on technical efficiency (connected to organisational and management aspects) and dynamic efficiency (innovation and introduction of new products and processes), whereas macroeconomic studies reveal the absence of a direct relationship between product market reforms and productivity growth in industrialised countries.

[81]Florio (2007).

reminds us that the empirical evidence for their effects is at least controversial.[82] Moreover the same author[83] observes that, even from the point of view of public debt sustainability, besides the debt/GDP ratio, real and financial assets, also producing a return, are relevant too: therefore the sale of public assets can be considered to overcome possible inefficiencies in their management or if it is convenient (a matter to evaluate case by case), but it is not a panacea that solves the fiscal crisis.

As for the labour market, the aim of the measures would be to reduce the so-called "wage mark-up", i.e. the share of wages that would exceed a hypothetically "competitive" level, because of institutional reasons connected to workers' bargaining power.[84] In concrete terms, it seems that reforms could have achieved positive effects on labour supply and possibly employment before the crisis, but have even brought negative consequences on growth and productivity, whereas they have driven down wages and worsened the quality of jobs.[85] Linking the variation in OECD indicators of labour protection and the change (or rate of change) in productivity levels, no association or even a positive association have been found in OECD countries, in the Eurozone and in Italy.[86] In Italy, from the mid-nineties to now, and especially until 2003, the labour protection index has collapsed, while productivity fell dramatically. It was probably the case that flexibility and reduced protections, as well as low wage costs, prompted firms to invest less in training and innovation, preferring competition on costs instead of on technologies. Hence the increase in low-skilled and unstable employment has negatively affected productivity.[87]

Ultimately, many studies, above all by International organisations (OECD, EC, World Bank), acknowledge the intensity of deregulation effort of product and labour markets in Italy since the mid-nineties[88], as seen above, while in the meantime productivity has shown particularly bad performances and growth has

[82]In fact the most solid investigations do not point out significant differences in productivity/efficiency between public and private bodies, whereas there would be significant effects of regressive redistribution, also because privatised enterprises often pass under the control of manager and financial investors who do not have the characteristics of risk-taking and innovation usually ascribed to private investors.

[83]Florio (2013).

[84]See Zenezini (2013b).

[85]See Zenezini (2013b); Zenezini (2013a); Damiani et al. (2012) estimated that the liberalisation of fixed-term contracts would imply small effects on employment and higher effects on the precariousness of work relationships and on salaries in Europe.

[86]Pini (2013). Besides the mere association between variables, even an econometric estimate (Damiani et al. 2011) aimed to assess the effects of the deregulation of fixed-term jobs on the so-called "total factor productivity" has showed that these effects would be unfavourable—and this is ascribed to the lack of stimuli to workers' training and qualification. The effects of the modifications on regular job constraints would not be significant. Instead, some positive effects on productivity seem to emerge from product market deregulation and R&D.

[87]Pini (2014a, b).

[88]Zenezini (2013a, b).

been very weak, even before the crisis. Today, in a period of aggregate demand depression, facilitating layoffs and the opening of new businesses can produce an increase in unemployment.[89]

11 The *Blueprint* and Suspended Democracy

The difficulties and failures of the actions taken have resulted in an intense debate among economists. The usual critical voices of those who assign an absolutely paramount role to aggregate demand have been accompanied by the reservations of many, who, considering the present recession as a particular case, perhaps not exemplified by the ordinary performance of the economy (although mentioned in the most popular manuals), have recommended to apply specific and appropriate tools. Nevertheless, even if the mainstream perhaps does not anymore represent the *main* tendency, it is retained in Europe as the *dominant* tendency.

This seems to be the inspiration of the so-called "Blue Print for a deep and genuine economic and monetary union",[90] an important document which explains the long-term EC strategy, splitting it in three phases.

The 2012 document assigns a priority in the short-term to the utilisation of *Six pack*, *Two pack* and Single Supervisory Mechanism, which should be followed by a Single Resolution Mechanism for banks.[91] Still in the first phase, the one we are experimenting with, it was planned to develop some other actions, such as to increasingly tighten the bonds around national policies. The definition of the Multiannual Financial Framework (MFF) was already identified as an opportunity to link funding through the various European Common Strategic Framework funds with the National Reform Programmes, the Stability and Convergence Programmes, as well as the country-specific recommendations adopted by the Council for each Member State. This mechanism, already set out with the MFF 2014–2020, in some way also tends to submit these funds to rigorous macroeconomic conditions, with the possibility of rescheduling or suspension of payments and possibly of commitments by the Commission. The aim was to use resources to enact structural reforms, especially in the fields of the labour market, competitiveness and quality of government. Moreover the *Blue Print* aimed at ex-ante coordination of major reforms (also envisaged by the Fiscal Compact) and at the creation of a "Convergence and Competitiveness Instrument", i.e. a further system of contractual arrangements on reforms, underpinned by financial support, within

[89]See for example Rodrik (2013).

[90]EC, 2012, *A blue Print for a deep and genuine economic and monetary union. Launching a European Debate*, Communication from the Commission, COM(2012) 777 final/2, Brussels, 30.1.2012.

[91]Some steps toward a Banking Union were accomplished between 2013 and 2014, as is well known, although with great caution regarding the execution of the resolution mechanism.

the EU surveillance framework, compulsory for euro area Member States subject to an Excessive Imbalance Procedure.[92] This action is also in progress, with the intervention of the European Council of 19th–20th December 2013 and the indication of the areas to be tackled (labour and product market, public sector efficiency, research and innovation, education and professional training, social inclusion).[93] It in fact seems that the promoted hypothesis is to use *spending power*[94]—even if in some cases observing mandatory rules. Spending power is a typical tool central governments are used to adopting in federal states, to condition the other layers of government.[95]

In the second phase (medium term), which would require modifying the Treaty, it was planned to reinforce budget coordination, with the possibility of requiring national budgets modifications or to veto, to increase the eurozone fiscal capacity based on its own resources to sustain the relevant structural reforms in large economies under distress, and to extend coordination and surveillance to the labour market and social policies. At this point it would be possible to allow the introduction of instruments to face the problem of public debt reduction, as the setting-up of a redemption fund (an idea elaborated by the German Council of Economic Experts) and/or the common issuance of short-term government bonds by eurozone Member States (eurobills).

Only in the third phase, indeed at the end of the third phase, according to the Blue Print, "appropriate democratic legitimacy and accountability of decision-making" would be required (p.30).[96] The process would seem to develop beyond legitimacy and democracy until the penultimate step. And what if the citizens, once democracy rules are adopted, chose to free themselves from the policies adopted until the day before, and to decisively turn in a different direction? What if they considered it unacceptable even now to be deprived of the right to control their budget, i.e. of democratic control over spending policies and its financing?[97] It is

[92]The Blue Print (p. 21) claims that the arrangements that would "set out the more detailed measures which the Member State commits to implement" should obtain "the endorsement of its national parliament where appropriate under national procedures". But this has little meaning, where these arrangements will be required.

[93]For more details, see the Camera dei Deputati website, *Strumento di convergenza e competitività*, Temi dell'attività parlamentare, Documenti, available at the address http://www.camera.it/leg17/561?appro=927&Strumento+di+convergenza+e+di+competitivit%C3%A0.

[94]See on *spending power* France (2001) and Watts (1999).

[95]Moreover the Blue Print advanced the intention to promote public investments, representing a "relevant factor" to be considered when deciding whether to start an excessive deficit procedure and an element to be specifically evaluated within the assessment regarding adherence to the expenditure rule. Hence the possibility of considering some investment programmes, thanks to the specific clause, as a temporary deviation from the medium term budgetary objective or the adjustment path towards it—even without applying the so-called "golden rule", according to which investment expenditure would be fully outside the constraints.

[96]Besides a full banking, fiscal and economic union, the building of a stabilisation scheme to absorb asymmetric shocks and the possibility to issue stability bonds.

[97]The reference on this issue is Nitti (1907); see also Di Majo and Paradiso (2011).

doubtful that claiming that the "level of democratic legitimacy always needs to remain commensurate with the degree of transfer of sovereignty from Member States to the European level" (p.35) is sufficient. Instead the question arises on who acquires the share of sovereignty ceded by the member States.[98]

12 Conclusions

Short-term economic policies imposed in the Eurozone have had self-defeating effects on the economy and dramatic consequences on social conditions within peripheral countries, including Italy. Neither the heated debate on them, nor the empirical evidence on recession, on worsening living conditions, nor on the same public finance imbalances growth were enough to change the direction in which the European winds blow, where the priority is always fiscal consolidation. Not even the relative success of Eurosceptic forces in the European parliament elections seems to have induced a deep reflexion on the risks and on the ways in which dissatisfaction could be channeled. Today, to favour growth, the so-called "structural reforms" are recommended, but they are not likely to serve as a cure—even if some stated goals can appear not only acceptable, but also a priority in Italy. However, some other reforms, often the most emphasised, seem essentially aimed to make work fully pay all costs of the crisis, loaded with the burden of ensuring the recovery of lost competitiveness, and with it GDP growth and the sustainability of public finance, through precariousness and the decline in wages. However, the weakness of labour discourages investment in innovation and training, and in addition results in sluggish demand and generates a risk of deflation.

A further note concerns the reasons that led not only to accepting, but often to promoting an ever larger system of restrictions to economic policies, that made it impossible to adequately address the crisis. The introduction of rules, both for deficit and spending growth, and for the debt trend, especially in Italy, forms part of an approach aimed to constrain policy choices, deemed irresponsible in its spending behaviour and then in need of discipline and of "guardians", just like a minor. It is quite evident that a guardian of excellence has been identified in the central bank: firstly the Bank of Italy, through the "divorce" from the Treasury in 1981, then the ECB, that does not guarantee sovereign debts of member countries. The same financial markets have been viewed as a watchdog of policy too. The EC in turn fully plays this role. The desire of "guardianship" has spread in Italy as a reaction to the inability of politics to find tax coverage for the additional expenditures that a modern European State required, and has subsequently been accepted as an apparently wise option facing a political power which revealed itself to be unfit to contain lobbies, combat corruption and enforce the paying of taxes. But the power of the rules, which was offset against political power, as we have seen, is not without

[98]Mangiameli (2013).

costs, nor is it neutral. As observed by Mangiameli,[99] the acceptance of rules is subject to the democratic legitimacy of those who impose them, and that they be exclusively aimed at safeguarding peace and the growth of wealth.

Hence, if Europe wants to survive, it has to straighten both its economic governance, consider different approaches from the past, as well as its democratic representation. It has been observed by Florio[100] that democratic State legitimisation is closely related to a collective recognition of the services rendered by the State itself, and it is then essential to start thinking on the relationship between ownership rights and real democracy, moving the focus of this reflection to the EU level. On closer inspection, the issue is linked to the matter of building a European identity, that is, a matter of "nation building".[101]

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[99]Mangiameli (2013).

[100]Florio (2007).

[101]On the controversial concept of "nation-building" see Connor (1972), France (2009), and Telford (2003).

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The Constitutional Sovereignty of Member States and European Constraints: The Difficult Path to Political Integration

Stelio Mangiameli

Contents

1 The Sovereignty of Member States

There has been a longstanding discussion on the constitutional sovereignty of the Member States of the European Union. And it is still "the Gordian Knot" of the European integration process and as such inescapable, especially at a time when the economic and financial crisis that is shaking the European edifice is doing so in a way that does not have precedents in the history of European integration.

The issue of sovereignty can be overlooked or set aside only if there is a misunderstanding about the origins of the European phenomenon and about the terms and conditions of the entire process. Only such a misunderstanding could induce anyone to believe that the construction of Europe is doomed to fail and that the idea of political integration is unfeasible.

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Firstly because any form of integration between States cannot but have political meaning and, moreover, because political integration between States always entails an opening if not a true surrender of a portion of national sovereignty.

Sovereignty is a juridical quality of States, the most precious quality because it is their very substance.

Kelsen discounted this aspect.[1] He removed it from the sphere of the State and indicated International Law as foundation for the state. This is the outcome of an option (a peaceful and democratic option) that presupposes that the validity of the state order is not original, but is derived from International Law where the *Grundnorm* has its place.

However Kelsen's monistic theory runs up against an unforgettable lesson of history, namely that of the dualism between internal order and international order, whose distinction is based on sovereignty. Indeed, it pertains to *imperium* (sovereignty) and is the hallmark of the legitimation (of the qualification) of the State. *Imperium* is a supreme power but in any case throughout history it has obeyed juridical limits that are inherent in the very essence of law—or subsumed in state law by morality, by religion, etc.,—and that allow the sovereign to concretely form the territorial legal order in an original and independent manner from the other orders to which it is related.

Right from its origins, and as it developed over several centuries, and notwithstanding *Bodin's* theory, sovereignty[2] was never an absolute and unlimited power, a power not delimited by the law,[3] and the kings who thought otherwise were beheaded.

Its essence was formulated during the Middle Ages by *Bartolo* to indicate the situation of pre-eminence of those who hold a position of supreme command within any hierarchical order; this was so for the kings (*rex superiorem non recognoscens in regno suo est imperator*) and it was so for the towns ("*civitas superiorem non recognoscens*", within one's territory "*tantam potestas quantum imperator in universo*", and hence "*ipsamet civitas sibi princeps est*").[4] Universal authorities were the counterpart of sovereign orders. They ended up playing a political role with the *Peace of Westphalia*, whose treaties lay down the sovereign legal capacities that constitute the right to wage war and stipulate peace, according to the concepts theorized by *Grotius*.[5] Once the political task of the universal authorities was accomplished, sovereignty was to preserve a relative value, whereby different states could relate to each other within a common legal-institutional framework (that had characterized the *Societas Christiana*).

From the internal point of view, and apart from the question as to whether sovereign power belonged to the *regnum* (the people) or to the king (a matter that

[1] Kelsen (1989).

[2] Ventura (2014).

[3] Bodin (1988–1997).

[4] Bartolo da Sassoferrato (1983).

[5] Grozio (2010).

was lively debated[6] from the very start), and going beyond the formal aspects, it can be stated that not only is sovereign power not deprived of material limits, but from the standpoint of content it is the status that is most crowded with obligations and functions. Suffice it to recall *Hobbes*' teaching on the contract between the sovereign and the people, according to which a Government and "the expert politicians in each State" must act for "the good of the citizens during earthly life", ensuring: "1. defence from their external enemies; 2. conservation of peace; 3. wealth compatible with public security; 4. that they enjoy moderate freedom".[7] And for *Hobbes* "The duties of the sovereign are summarized in these words: *the good of the people is the supreme law*" and sovereigns have the duty to "obey reason in every matter to the extent possible".[8]

Defense and peace are the supreme goods of coexistence that are entrusted to the sovereignty of States, as are the enjoyment of rights, security and justice for the citizens so that there is well-being for all.

For their defense, and to maintain peace and enable their well-being to grow and develop, the State enters into alliances (*foedera*) with other states and from this there generally derive mutual obligations whereby they regulate their prerogatives in relation to both war (and peace) and well-being; at times, to stabilize the alliances, the institution of obligations is accompanied by the creation of a higher power among themselves that is articulated into rules forming an organization to which they submit; that is to say they create a common order that is other than the international order.

By instituting the *foedus,* they restricted their sovereignty as they gave life to an entity with a sovereign power that acted on their behalf, but they did not lose their sovereignty nor did they diminish it. Sovereign quality remained intact although it was enacted in a special manner.[9]

This representation, that seems to be impossible to those who follow Bodin's theorem, is instead perfectly compatible with the historic condition of sovereignty on which all forms of political integration are based, albeit with different hues, in that the alliances between States, that take on a stable and rules-based order, give life to a "dual political life" which "is precisely the essence of the federation", at least up until the time when unification is complete with the choice to attribute sovereignty and hence "the issue of sovereignty remains always open between federation and its Member States, until the federation as such exists alongside the Member States as such", provided that "neither the federation acts like a sovereign

[6]Althusius (2009).

[7]Hobbes (1948), p. 273, who in his conclusions states "Rulers cannot contribute more to the happiness of their citizens than by giving them the possibility of quietly enjoying the well-being they have acquired through their industriousness, safe from war and civil strife".

[8]Hobbes (1948), p. 270. In defining the *recta ratio*, Hobbes himself speaks about "natural, moral and divine law", he does not consider it in an objective and Aristotelic manner, but rather subjectively as the expression of sovereign will.

[9]There is a vast literature on federalism, for an analysis of the subject see Di Salvatore (2008), p. 20 ss.; Di Salvatore (2013).

toward the Member State nor the Member State acts like a sovereign towards the federation.[10]

By considering these fundamental ideas and elements, we can understand the argument of those who want the sovereignty of Member States of the European Union to be the frame of reference of the entire integration process because any form of integration among States will always have political implications, and the political integration among States will always entail an opening up of national sovereignty.[11]

2 The European Communities: Setting Aside the Ius Belli and the Common Market

Secondly, the issue of sovereignty is the right key to reading not only the 70 year-long historic process since the end of the Second World War, but also in relation to the current issue of political integration where everyone discovers that currency is the expression of sovereignty, even without the existence of a European State. This does not lead us to state that currency is compatible only with the State that mints coins. On the other hand, economic history does not indicate this absolute link between State and money,[12] and also within international trade, currencies have always behaved autonomously with respect to the States themselves, and this is also the case of the Euro. Otherwise how could a currency without a State compete with the currency of the State that has the strongest military apparatus in the world?

To understand our specific integration process, we need to go back once again to those days after the end of the war and the beginning of reconstruction. There were men who were wearied by that terrible war, they were committed to peace and determined to do whatever it would take to make peace a permanent condition.

The European institutions were based on this idea of peace, and not only on the market; and peace—as *Immanuel Kant* has taught us[13]—is a legal construction that transcends international law and national law. It requires a new legal horizon made essentially of transparent trust, sound collaboration and common institutions: in one word they need an order that is other than the state order and international law, as is the case with federalism for instance.

Most of the founding fathers of Europe were federalists: *Altiero Spinelli* and *Ernesto Rossi*, who wrote the *Manifesto for a Free and United Europe* between the

[10]Schmitt (1981), pp. 486–494. Note that the connotation with which *Schmitt* uses the term "federation" goes beyond the logical scheme of the distinction between Confederation of States and Federal State (v. p. 477) and the teaching on this point appears to be particularly significant, in that it allows to perfectly position the European experience in its entirety.

[11]Patroni Griffi (2015).

[12]On this point see Cipolla (1974, 1982).

[13]Kant (2008).

winter of 1940 and the spring of 1941 during their internment on the island of Ventotene; also the Frenchman *Jean Monnet* was a federalist: on 5 August 1943 in Algiers he stated: "There will never be peace in Europe if the States reconstitute themselves on the basis of national sovereignty. ... [this] presupposes that the states of Europe should form a federation or European entity that turns it into a common economic unit".

Monnet then worked on the "*Schuman* declaration", pronounced at 16 h on 9 May 1950 in the Hall of the Clocks at the Quai d'Orsay and according to which:

> World peace can be safeguarded only through creative efforts, commensurate with the dangers that threaten it. The contribution that an organized and vital Europe can give to civilization is indispensable for the maintenance of peaceful relations.
>
> ...
>
> Europe was not made and we had war.
>
> ...
>
> Europe cannot be built all at once, but rather through practical achievements and, above all, by creating genuine solidarity.

The ECSC was born from that speech without which nothing of what we have achieved would have been possible, including the longest period of peace and cooperation that the European Continent has ever known.

We cannot fail to note that the call to uphold the highest values like peace and freedom, was a clear reference to the historic events of the past, stigmatized in the preamble of the ECSC Treaty of 1951, where the contracting Parties resolved "to substitute for historic rivalries a fusion of their essential interests; to establish, by creating an economic community, the foundation of a broad and independent community among peoples long divided by bloody divisions; and lay the bases of institutions capable of giving direction to their future common destiny" (par. 5).[14]

The ECSC was not only an international agreement for mining coal and producing steel, but an agreement on the *ius ad bellum*. Through that deed, the six Countries that signed the Treaty decided to set aside the right to wage war against each other.[15]

Was not this a true limitation to national sovereignty? Was not this an authentic beginning of political integration?

Any disputes among the six States that signed the Treaty would be dealt with in principle in a political setting pictured as a "triangle" proposed by *Monnet*: a High Authority that proposes, a Council that decides and a Consultative Assembly that gives its opinions. Enforcement of the law produced by the Community would be entrusted to a Court of Justice and never again to weapons.

But the setting aside of the *ius belli* within the Community was not the only promise made in the preamble. For that ruling class—made up of learned men like *Schuman* and *De Gasperi* whose frontiers had shifted during their lifetime and who were so far advanced in their thinking—enabling Europe to unite was an idea that

[14]See Monaco (1970), pp. 30–33.

[15]On this point see Mangiameli (2013c), p. 8.

seemed to be achievable at the time.[16] Thus, from coal and steel they moved to defense, and the 1952 Treaty contained a mechanism for the creation of a *European Political Community* (Art. 38 EDCT)[17] with a clearly federative structure under which joint political institutions[18] would be instituted at first, including a two-chamber Parliament with a Chamber of the Peoples elected through direct universal suffrage, and a Senate, elected by national Parliaments, that was to take care of foreign policy; the application of the EDC Treaty included control over a European army and the progressive implementation of a common market.[19]

But the history of European integration was not characterized only by moments of solidarity; it also contains "*fractures*". The French National Assembly caused the first fracture on 30 August 1954 when it did not ratify the EDC Treaty, thus blocking the idea of political union.[20]

Paradoxically, after this, although the six States had set aside the defense issue and the creation of a supranational institution of a political nature, at the Intergovernmental Conference held in Messina in 1955, they decided to proceed with the integration of their national economies. The political effect of this decision was, 2 years later, in 1957, the signing of the Treaties of Rome that established the European Economic Community and the European Atomic Energy Community.[21]

In that historic moment (1955–1957), leaving aside the nature of the provisions of the Treaties based on a functionalist methodology, the act that was knowingly being made was an actual transfer of some national sovereignty, and hence, it was an act of authentic political integration.[22]

The EEC Treaty was approved with the idea that sharing the economies of the contracting States would in any case generate peace and freedom among the European peoples, and hence, the program of political unity was not defeated but merely postponed until the time was ripe. From this vision there ensued also the policy of an incremental integration process whereby the key institutions of a

[16]Vayssière (2009), pp. 31 ss.

[17]Preda (1989), pp. 575 ss.

[18]Gori (1953); Raison (1988); Preda (1992), pp. 367–392; Levi (1992), pp. 393–406; Reuter (1965); Preda (1994, 1996); Bernath (2001); Sangaletti (2004).

[19]Bertozzi (2003), pp. 70 ss.

[20]See Olivi (2001), pp. 41 ss.; Gilbert (2005), pp. 33 ss.; Morelli (2011), pp. 81 ss.

[21]As is well known, the Foreign Affairs Ministers meeting in Messina decided to entrust the task of drafting the new treaties to a committee of experts appointed by the governments and by the European Institutions of namely "the creation of a common organization for the peaceful development of atomic energy and the institution of a common market to be set up step by step through a progressive reduction of the quantitative limitations and unification of customs regimes». The political coordination of the Committee was entrusted to the Minister for Foreign Affairs of Belgium, Mr. Spaak. The preparatory work of the Committee ended with the approval of a report that was submitted to the Council of Ministers of 6 that met in Venice at the end of May 1956. This was the basis for the Treaties of Rome."

[22]On this issue see also Bruno (2012).

modern political democracy were reproduced in the European political system, in a stepwise manner (citizenry, representation, decision-making process, etc.).

It is well known that, in the EEC Treaty there is a discrepancy between the preamble and the rules laid down in the Treaty itself,[23] in that the aim of the Community was to regulate the economic life of the contracting parties and create, for economic purposes, a common legislation, whereas the preamble focuses on the more complex issues of European history.

The 1957 preamble, which today constitutes the preamble to the TFEU without a single word being changed, expresses aims linked to economic activities ("a concerted action in order to guarantee steady expansion, balanced trade and fair competition"; "unity of their economies and to ensure their harmonious development by reducing the differences existing between the various regions and the backwardness of the less-favoured regions"; "a common commercial policy, progressive abolition of restrictions on international trade"); but on the other hand, by continuing with the peace-making effort in the Continent, supreme values were asserted that clearly transcended the mere economic sphere ("the defence of peace and freedom"; "the solidarity which binds Europe and the overseas countries and desiring to ensure the development of their prosperity, in accordance with the principles of the Charter of the United Nations"), thus drafting an unparalleled program of European political integration ("Determined to establish the foundations of an ever closer union among the European peoples"; "ensure the economic and social progress of their countries by common action in eliminating the barriers which divide Europe"; "constantly improving of the living and working conditions of their peoples"), open to the outside world ("calling upon the other peoples of Europe who share their ideal to join in their efforts").[24]

Today it is difficult to fully realize what those years of the mid twentieth century must have been like as the European sovereign states moved away from the *Westphalia* history.[25] But that historic framework must necessarily be borne in mind, especially at this point in time, when the Member States and the European citizens are put to the test as they try to cope with the difficult economic and financial crisis.

3 The Evolution of the European Order

In any case, with the 1957 Treaties, the European tier was established and so all that needed to be done was to set it going. If we were to give a technical definition of the European Communities, we would say that they were instituted as international

[23] Smit and Herzog (2006), § 2.03.

[24] Kulow (1997).

[25] On the repercussions of the crisis on Member States see, among others, the volume edited by Vipiana (2014).

organizations of scope having a regional nature, founded on the full sovereignty of the Member States and without a sovereignty of its own.[26]

However, this was clearly a narrow definition that was to be questioned and contradicted in a matter of a few years as European integration proceeded.

After all, the very shaping of the common market was to require more than mere economic cooperation.

The quantum leap occurred first, thanks to the diffusion of supranational legislation powers on many other subjects and matters that were functional to the establishment of the common market but that entailed overcoming the strictly sectorial nature of European powers[27]; and secondly, to a considerable extent, to the process of constitutionalization of Europe.[28]

The expansion of European powers and the constitutionalization of European integration occurred through different paths and over long time spans.

With reference to the exercise of powers, and apart from the "picklock" powers (approximation of legislations [Art. 100] and implied powers [Art. 235]), during a first stage, the sizing of such powers depended on the purpose-related interpretation and the practice of connection that found a valid support in the case law of the Court of Justice,[29] which—with the *Stauder* judgment and other subsequent judgments[30]—opened up also to the recognition of fundamental rights in the European legal system.[31] It is also known that the Court of Justice asserted that Europe is not only a "new type of legal body in the field of international law" (*Van Gend en Loos*, 1963), but also a "community of law" with "a basic Constitutional charter represented by the Treaty" (*Les Verts*, 1986), a concept that was further confirmed by stating that "the EEC Treaty, albeit concluded in the form of an international agreement, constitutes the constitutional charter of a community of law" (Opinion 1/91, on the creation of the European economic space).[32]

In 1964, *Walter Hallstein* (the first president of the European Commission) clearly expressed this constitutional aspect of the European legal system when he stated that "*rather than being a traditional convention on international law, this framework treaty of life policies, basis for institutions, generator of rights and*

[26]On the positions of scholars on the embryonic phase of the European Community see Caggiano (2013), pp. 441 ss.

[27]For a reconstruction of implied powers and for the flexibility clause, see Anzon (2003) and also Calvano (2005).

[28]von Bogdandy (1999).

[29]On the role of the Court of Justice in the initial consolidation of the European order see Mangiameli (2008a), pp. 213 ss.

[30]Cf.: Court of Justice, judgment of 12 November 1969, Case 29/69, *Stuader*, in *Racc. Uff.* 1969, 419; judgment 17 December 1970, case 11/70, *Internazionale Handelsgesellschaft*, in *Racc. Uff.* 1970, 1125; judgment 14 May 1974, case 4/73, *Nold*, in *Racc. Uff.* 1974, 491; judgment 13 December 1979, case 44/79, *Hauer*, in *Racc. Uff.* 1979, 3727; judgment 13 July 1989, case C-5/88, *Wachauf*, in *Racc. Uff.* 1989, 2609.

[31]Mangiameli (2008b), p. 325 ss.

[32]Mancini (1972), p. 713 ss.; Tizzano (1994), p. 926 ss.

obligations for each citizen as for the highest state authorities, actually evokes the construction of a modern state and enables us to be the citizens of a federal republic and not hesitate about the nature of the Constitution".[33]

We must recall, furthermore, that starting from 1970, "European political cooperation" was set up among the Member States and within the European sphere, which was to be a means for coordinating the foreign policy of Member States. In 1979 the first European Parliament elections by universal suffrage were held.

On 19 June 1983 a "Solemn Declaration" on the European Union was made by the Council of Europe in Stuttgart, in which the Member States, "resolved to continue the work begun on the basis of the Treaties of Paris and Rome and to create a united Europe", stating that they were "determined to achieve a comprehensive and coherent common political approach and reaffirm their will to transform the whole complex of relations between their States into a European Union".[34]

This process had a first formal moment which was the 1986 European Single Act that created the dualism of the European Union: on the one hand, the "Communities functioning according to their own rules" and, on the other, "European cooperation between signatory States on matters of foreign policy, endowing the Union with the necessary means for action".[35] The ESA lays the foundations for the economic and monetary union and it states that the "idea of Europe" is linked to the "need for new developments (that) correspond to the wishes of the democratic peoples of Europe, for whom the European Parliament, elected by universal suffrage, is an indispensable means of expression". The ESA further regulates the new subject matters that go beyond the "common market", such as social policy, economic and social cohesion, education, technological research and development and the environment.

The change introduced through this act is not merely quantitative but qualitative. Albeit with a mix of community and intergovernmental methods, a characteristic that will continue also into the next stage, with the ESA we are already in the midst of a federalization process, if not an established federation notwithstanding the fact that many elements that characterize political integration are still missing.

With the *Maastricht* Treaty, there was further consolidation and clarification for both the aspect taken on by the European Union and for the reorganization of European policy regulations with the acceptance of what was defined as the "three-pillar system" with regard to competences.[36]

In this connection the articles of the European Treaties (TEU and TEC) show up a European system that is quite different from the one that came about with the 1957 Treaties. Indeed, besides the economic themes, that furthermore take on a strong

[33]"*Plus qu'une convention classique du droit des gens, ce Traité-cadre de politiques vivantes, base d'institutions aux pouvoirs étendus, générateur de droit et d'obligations pour chaque citoyen comme pour les Autorités les plus hautes des Etats, n'évoque-t-il pas la constitution d'un Etat moderne et nous permette en citoyen d'une république fédérale de ne pas hésiter sur la nature de cette Constitution?*" (see Malandrino 2005).

[34]Centre Virtuel de la Connaissance sur l'Europe (CVCE) (1983).

[35]SEA, *Preamble*, second paragraph.

[36]Mangiameli (2005).

political meaning, as is the case with the single currency and the statement of the "principle of an open free competition market economy", the provisions of the Treaties focus on the assertion of the "identity" of the Union "on the international scene"; on the strengthening of fundamental rights "through the establishment of a European citizenship"[37]; and on the configuration of the Union as a "space of freedom, security and justice where freedom of movement is ensured together with appropriate measures as regards the controls on the external borders, asylum, immigration, prevention of crime and fight against crime".[38]

To this we must add the solemn proclamation of principles contained in the homogeneity clause of the EU according to which "the Union is based on principles of freedom, democracy, respect for human rights and fundamental freedoms and the rule of law, principles that are shared by the Member States.[39]

In this way the European Council, that up to then was an international forum formally external to the European order, was institutionalized and the legal system was constitutionalized through the strengthening of the European Parliament with direct participation in the legislative procedure as co-legislator[40]; and respect for fundamental rights recognized in the Constitutions and in the laws of Member States and in the European Convention for the protection of human rights and in the European Social Charter that—already widely affirmed thanks to the case law of the Court of Justice—are qualified, in Art. 6.2 TEU, as general principles of Community law and will successively be proclaimed in the Nice Charter.[41]

The design of the Community, that arises from the purposes expressed in the *Maastricht* Treaty, does not appear to be that of a regional international organization with limited sectorial aims, but that of an Institution having a general character ("The Community shall have as its task [. . .] to promote throughout the Community a harmonious, balanced and sustainable development of economic activities, a high level of employment and of social protection, equality between men and women, sustainable and non-inflationary growth, a high degree of competitiveness and convergence of economic performance, a high level of protection and improvement of the quality of the environment, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States"—Art. 2 TEC) and with a vision of the Community of this type, the common policies and actions, that are the implementation instruments, do not restrict themselves to being justified only by the construction of the common market.

In conclusion, therefore, it may be stated that once the configuration of the community as a special-purpose body was set aside, the Community, like the modern federations, could be considered to be a "general-purpose body"; this definition was constantly confirmed by the way in which the sources of European

[37]Mangiameli (2008c).

[38]De Schutter (2004), pp. 81–117.

[39]Mangiameli (2012), pp. 21 ff.

[40]Mangiameli (2008d).

[41]Mangiameli (2008e), pp. 343 ss.

law operated, and also by the principle of prevalence of European law, acknowledged by the famous Costa v/Enel judgment of 15 July 1964 (Case C 6/64).[42]

4 The Constitutional Crisis, the Lisbon Treaty

Painstaking observers have pointed out that after Maastricht the European integration process started to decline: stances were taken, problematic issues were raised and strategic mistakes were made, and this was also because of the weaknesses inherent in the design of the Treaty that increased European powers, envisaged the future of the single currency, but suddenly left the European economic policy in the hands of the Member States under their direct coordination.[43]

Initially, the very principle of subsidiarity was questioned even before the entry into force of the Treaty, during the semester of the presidency of the United Kingdom (July–December 1992), and there were actually two European Council Meetings (Birmingham 16 October and Edinburgh 11–12 December) where the issue on the agenda was the excessive expansion of European powers because of the principle of subsidiarity.

Secondly, after the end of one of the most prestigious and longest presidencies that had contributed to shaping Europe—that of *Jacques Delors* in 1995—the Commission was chaired by *Jacques Santer* from Luxembourg who was swamped by a series of scandals before the end of his term.

And finally, the attempt to set right the drop in tone in the European dialogue through the White Paper on Governance (2001) and the Laeken Convention (2002/2003),[44] did not produce the hoped for effects, and so the Constitutional Treaty was not ratified (2004).

Now, the failure of that season—that everyone had pinned their hopes on because it was deemed that political integration could be achieved through constitutional integration[45]—was not caused by a mistake in theoretical evaluation because, to the contrary constitutional integration is actually the highest moment of political integration. Suffice it to consider the American experience and the signing of the 1787 Constitution where political integration was confirmed by constitutional integration; but this was not the case with the 2004 Constitutional Treaty.[46]

[42]See again Mangiameli (2008c).

[43]On this point see Amato (2014), pp. 11 ss.

[44]The *White Paper on European Governance* carries the date of 5 August 2001 and its deductions were the basis for the declaration of 15 December 2001 on the future of the European Union. The Convention took office on 15 March 2002.

[45]D'Atena (2009), pp. 191 ss.

[46]Starace (2006), pp. 9 ss.

The crisis in the ratification process of the 2004 Rome Treaty may have many explanations, nevertheless, the most appropriate, also in relation to the issue of the political integration of the European Union, arises from the fact that the entire process of the Convention with which the Treaty was formulated, lacked in constitutional substance not only because the Convention did not have the possibility of acting as a constituent assembly, but above all because there were centrifugal forces at work in its midst, like the idea of there being too much Europe and a return to the sovereignty of Member States, and even alternative projects to constitutional integration like the enlargement process that interfered with the works of the Convention itself. Consequently, right from the beginning, the whole affair appeared to be inadequate to being an additional step in political integration.

A true Constitution, substantiating European sovereignty, would presuppose an essence and contents that can conventionally be defined as "material constitution" or constitution in the substantial sense that should exist before the drafting of a formal text that can be called a "constitutional text" or constitution in the formal sense.[47]

The degree of political integration reached by the European Union, not merely in economic terms or in regard only to the market and its regulation, but in the social and above all political fields, depends on the dimension and evolution of the material constitution, although the definition of the latter, in an analytical rather than conceptual sense, may be very difficult and complex.

Thus, there was no Constitution because there was no constitutional substance, and the integration process started to fade with what the European Council of Brussels (16–17 June 2005) called a "pause for reflection"; this lasted up until the Berlin declaration (27 March 2007) on the occasion of the 50th anniversary of the signing of the Treaty of Rome which then led to the Lisbon Treaty (approved on 13 December 2007 and entered into force on 1 December 2009).

However, the *Lisbon* Treaty, precisely for the way the integration process was going, brought into the European treaties all the contradictions that had emerged at the *Laeken* Convention. In particular, the belief that on the one hand that Europe had gone way ahead in regulating too many sectors and in such depth as to appreciably reduce the powers of the Member States; on the other hand, its character was strongly bureaucratic and incapable of prompting a feeling of belonging and identity by the citizens and peoples of the Member States.

Thus, the new Treaty was supposed to put limits to the expansion of European competences and reshape the institutional architecture in a way that would facilitate participation by the institutions of the Member States like the national Parliaments, the Regions and the local governments.

This vision, resulting from the feeling of an overbearing Europe and from the need to rebalance the situation by giving Member States more instruments for them to have their say in the life of the Union, is embodied precisely in the Lisbon Treaty

[47]See Blanke and Mangiameli (2006).

at a time when Europe, and in particular the Euro area, were in the grips of the crisis.[48]

A higher level of European integration would have been necessary at that point, capable of endowing the political dimension with a supranational decision-making process, also in support of the single currency. Instead, the new Treaty sought to meet the need for national power, thus restricting the competences of the Union and overly complicating the European legislative procedure and the system of legal sources of the Union.

However, it was not only this. Behind the failure of the constitutional Treaty and the drafting of the Lisbon Treaty instead, there was not only the idea of returning sovereignty to the Member States; the crisis in those years—that had in any case produced a long since desired outcome: the single currency conceived in 1970—had a direct impact on European citizens and in particular on the governments of the Member States.

The ruling class that had conceived and built Europe had disappeared, and their direct successors, who were still alive, had completed their political engagement, and people like *Nicolas Sarkozy* and *Angela Merkel* had little in common, from the standpoint of European thought, with personalities like *Robert Schuman, Konrad Adenauer* and *Alcide De Gasperi*, and like *Jean Monnet*, *Walter Hallstein* and *Altiero Spinelli*.

No matter how strange it may seem, the true crisis of those years was a crisis of people and of the pro-Europe sentiment; and it is not at all improper to introduce "sentiments" in an analysis of legal matters and, in particular, of constitutional law.

The "sentiment" of the political class contributes to shaping the temperament of the people, and the latter—as we have been taught by *Santi Romano*[49]—determine the constitutional events of a State, and in this case of a federation.

5 The Rifts Caused by the Economic Crisis

Hence, a politically weaker Europe emerged from Lisbon, notwithstanding the fact that—as pointed out earlier—in the European system there had already been an important economic and financial element since 2002, the expression of true sovereignty, namely the single currency.

The Lisbon Treaty brought to light the political and constitutional contradictions in the conditions of the Union and there are no doubts that this situation affected the way in which the European States reacted to the economic and financial crisis, both as a whole and individually through their actions within the European Institutions.

The crisis of the last few years, in fact, has itself shown the degree to which the beliefs present in the Laeken Convention were wrong, namely returning

[48]On this see Blanke and Mangiameli (2011).

[49]Romano (1928), p. 30.

sovereignty to the Member States to the detriment of the European Union, and enlargement of the Union instead of its deepening. Indeed, a stronger political integration would have enabled Europe to respond to the crisis in a more adequate manner in both economic and political terms, because the emphasis would not have been on the power of this or that Member State, or on the weakness of the sovereign debts of some Member States, but on an accomplished European democracy that was often invoked but then not always really wanted in practice.

The limits posed by the Lisbon Treaty, and the fact that the Heads of State and of Government of the Member States of the European Union lack a true European sentiment, led to wrong responses in institutional and political terms, and still today, they are preventing the EU from emerging from the crisis.

The governments of the Member States, once again, are not giving the Institutions of the European Union (the European Council, the Council, the Commission and Parliament), the right push towards political integration. And all this is well represented by the timing of the Commission's *Blueprint* of November 2012 (COM (2012) 777 final).[50]

The governments of the Member States have chosen the less desirable path in taking action against the economic and financial crisis, and the tiny hole from which water leaked in the European house, has become a gaping hole that is devastating the European politics of integration.

Today everyone agrees that greater solidarity in Europe's intervention with Greece would have cost the Member States less and would have been more effective for Greece and for Europe.[51]

The response did not embody a rethinking of the principles that made the European Union weak and unable to take on political responsibility, but to the contrary, it followed the tracks of the principles that did not allow it to implement policies for re-launching the economy. The asymmetries in the distribution of political decision-making power between the Institutions and the Member States have increased as a result of the application of the instruments that were created to fight the crisis.

The Council of 16–17 December 2010 decided to revise Art. 136 TFEU by adding a paragraph that was to constitute the legal basis of the *European Stability Mechanism* and of the *Fiscal Compact*. The Decision of the European Council of 25 March 2011 (2011/199/EU) completed this amendment of the TFEU,[52] the ESM Treaty was signed on 2 February 2012 and it entered into force in September that same year, after a pronouncement of the Constitutional Court by *Karlsruhe*

[50]"A blueprint for a deep and genuine economic and monetary union Launching a European Debate".

[51]On this refer to Grasso (2015).

[52]Art. 136.3 TFEU "*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*.".

(12 September 2012). The *Fiscal Compact* was stipulated 1 month later, on 2 March 2012 and it entered into force on 1 January 2013.[53]

The Fiscal Compact, just like the *European Stability Mechanism*, is a treaty *a latere* of the European Treaties; it addresses, to some extent, the European Institutions (and in particular the Commission and the Court of Justice), but the international obligations it creates are external to the European legal order proper,[54] notwithstanding the fact that rules on the management of state deficits are included in the treaties and a specific protocol (no 12) is dedicated to this issue.

These Treaties affect the issue of the distribution of common decision-making power among Member States. They determine a surrender of sovereignty, because of the economic crisis, but in no way do they clarify who actually manages the share of political power that the States yield under such Agreements, nor what type of evolution can be expected for the European Union.[55]

Here, besides the asymmetries in political decision-making powers, caused by the European institutional system, there also seems to be a certain scattering of sovereignty that casts shadows over the European horizon and complicates it further.

In demanding more transparency (even only in the accounts), the European Union needs an advancement of European democracy, while at the moment the European democratic horizon is moving further and further away, and this prompts subversive movements within the Member States against the Euro and against the European Union itself. This front was put to the test in the 2014 European Parliamentary elections.

It must be pointed out further, that with the Fiscal Compact a considerable share of sovereignty—the part concerning the budget of the State—is shared, not to transpose the "*rule of a balanced budget*" in each national legal order, through binding, permanent and preferably constitutional provisions, but rather by envisaging the introduction of automatic redressing clauses, by envisaging a system of penalties that are activated when the rules on deficits and debt containment are not complied with, and by adopting constraining actions against individual Member States that fail to comply.

The question that arises here is what common benefits do countries get in return, or, what federal progress is there for the Member States that accept to sacrifice a part of their sovereignty?

The crux of the issue here is not the debts of some States, like Italy, that would certainly require major containment and control measures, even without the Fiscal Compact, because the debt is actually preventing growth and is getting in the way of public spending policies. The crucial point is whether the Fiscal Compact actually does represent a step forward in Europe's economic policy compared to what

[53]On this refer to Mangiameli (2013b).

[54]See Art. 3 of the *Fiscal Compact* Treaty: "*The Contracting Parties shall apply the rules set out in this paragraph in addition and without prejudice to their obligations under European Union law*".

[55]Rivosecchi (2011).

happens in the Federal States or in legal orders that operate according to a federal structure.

Indeed, it is not clear how we can deem it acceptable to sacrifice such an important part of national sovereignty, like autonomy in state budget matters, without a corresponding increase in the powers of the common European institutions such as to strengthen the European management of economic policy.

Thus, the absence of a European body that governs the economic policy poses the problem of understanding who it is that takes on the sovereignty that is yielded by the Member States.

These are crucial questions if one considers that balancing the budgets and the progressive reduction in the stock of debt are not capable of ensuring the re-launching of the European economy on the one hand, and respect for institutional rules that necessarily characterize an accomplished European democracy, on the other.

The truth is that if individual (and given) Member States are denied the possibility of having recourse to debt to fund their economic recovery, the sole true alternative would be that of building up a sustainable European economic growth plan. This would require also an increase in the size of the European budget, up to at least 2 % of the GDP of the European Union. Moreover, the European budget would have to be funded with own resources and be managed by a European Treasury. Finally, the implementation of these measures would endow the European Union with real fiscal powers.

All this is on the horizon of the European Union but is still quite far off given its political weakness vis-a-vis the Member States or for the strong political force that some States exercise, either directly by controlling the "General Directorates" of the Commission, or indirectly, by determining the content of the European legal acts that are favourable to them right from the pre-negotiation phase of those very acts.

In conclusion, the Fiscal Compact has produced deep divides between the Member States that go to the detriment of the European Union.

There have always been many rifts in the European system, but during the crisis not only have they deepened, but they have actually become the expression of the selfish will of not wanting to find solutions, so much so as to start discussions on the nature of the European system as a federal system and on the equilibrium built up among the Member States in the course of more than half a century of history in common.

Also the adoption of monitoring mechanisms, of the "European Semester", with their *ex ante* control, maintain the principles of the Fiscal Compact intact and offer once again a vision of the European Union that is impoverished in its political capacity.

What is Europe doing for its economic recovery?

While countercyclical policies are not possible for Europe, the Institutions are limiting themselves to obliging States to comply with given parameters that do not allow for recovery and growth.

This is fuelling the anti-Europe sentiment of citizens and, in the attempt to curb the anti-Europe political forces like the *Front Nazional*, *Alternative für Deutschland*, the *United Kingdom Independence Party*, the *Partij voor de Vrijheid*, and also the Lega and the 5-Star Movement, it is triggering the negative sentiment of the governments of Member States against the European Institutions.

During the last 10 years, therefore, the vision of Europe that has prevailed is characterized by a weakness of the public European sphere and of the socio-political elements such as to undermine a positive identity of the European Union. The Member States that are responsible for this situation have squandered that precious quality that characterizes them, namely their sovereignty, without redirecting it to the European level, and they do not seem to have developed a common strategy to solve the crisis of the European integration process.[56]

Behind the politics of Member State governments that seems to be focussed on protest, European governance managed by the Commission and by the bureaucracy in Brussels, without adequate legal foundations in the European Treaties, is causing the decline of the Continent: of the European Union and Member States alike.

6 The Sovereignty of the Member States and Recovering the Meaning of the European Union

The legal limits of the surveillance framework and the role taken on by the Commission in this phase are issues that have been dealt with elsewhere.[57] Here, instead, the focus is on sovereignty and it is pointed out that European events are an evident sign of the fact that the political push towards integration is becoming weaker and people seem to be forgetting the reasons why efforts were ever made to build a united Europe.

The representatives of the governments of the Member States cannot think that the European question can be reduced merely to an economic one and that we can overcome the crisis by means of budget measures. They cannot expect to be able to transform Europe into a common market without a political soul, also because the market has always been only a means for integration and not the ultimate goal.

Jacques Delors used to say: "*nobody can fall in love with the single market*". The famous representative of the European left referred to the need to accompany the creation of the single market, whose peak was the Euro, with a common social policy; but the phrase perfectly reflects the need to give the European Union a foundation that would not merely be economic. This is the sentiment that animated the European political construction right from the beginning, although it has not yet fully developed into federal integration.

[56]For further information refer to Mangiameli (2013a).

[57]Mangiameli (2013b, 2015).

To understand how to react, we must ask two straight questions: first, what pact was entered into in 1957 and then confirmed again with all the mentioned limits in the Lisbon Treaty? And then, if the governments of the Member States are the "Masters of the Treaties" (*die Herren der Verträge*),[58] what should their conduct be after signing such pacts?

The question rotates around the supreme power that we call "sovereignty" and its characteristics, that are not power in its absolute connotation, above compliance with the law—as was said earlier—but the ability of the States to relate to each other within a common legal-institutional framework, for which sovereignty runs up against limits within the relationship established by law and limits posed by questions of content that do not enable it to act neither against the law nor in any other direction.

The legal-institutional framework was established by the Treaties and there are no doubts that, thanks to the latter, the Member States have preserved their sovereignty unscathed; this is inferred clearly from Art. 48 TEU according to which any innovation in European law has always depended and still depends on the will of the Member States.

The rules of the Treaties can be modified only through a decision of the Member States,[59] the amendments may serve either to "increase or decrease the competences conferred on the Union in the Treaties" and require unanimity and, above all, "the amendments shall enter into force after being ratified by all the Member States in accordance with their respective constitutional requirements".

From this standpoint the difference between the ordinary and the simplified revision procedure, introduced by the Lisbon Treaty, is important for determining the scope of each procedure, but it does not count very much from the substantial standpoint, because, also for the simplified procedure, the European Council deliberates unanimously and the "decision enters into force only after approval by the Member States in accordance with their constitutional requirements".

Now, there are no rules or principles in the Treaty that are excluded from the revision procedure. One might say that formally there are no limits to the revision of the Treaties. A conclusion that is undoubtedly in line with the circumstance that—as in the case of international law—there are no restraints arising from a treaty that cannot be undone, even only unilaterally in some cases.

But in actual fact, in the name of the principles of international law and of the statement whereby States are the "Masters of the Treaties", can there ever be any such thing as a Treaty where the European system is quashed or where the principles of the European system are overturned?

[58]See Ipsen (1972), p. 101 e p. 211, who points out that "die Mitgliedstaaten haben damit als Subjekte des Völkerrechts und als Vertragsstaaten im Sinne des Völkerrechts gehandelt und sind folglich grundsätzlich den allgemeinen Regeln des Völkerrechts unterstellt".

[59]Art. 48, (4), TEU, "A conference of representatives of the governments of the Member States shall be convened by the President of the Council for the purpose of determining by common accord the amendments to be made to the Treaties".

Undoubtedly, a total revision of the rules of the Treaties is also possible (and perhaps sooner or later this will happen), but such a possibility can never quash the pact that was signed in 1957 by the Member States whereby the Community was founded and that was firmly confirmed by the Treaties. The provisions of the Treaties would not allow this, nor would it be allowed by the sovereignty of the States.

Unless they operate outside the fundamental decision that instituted European cooperation starting from 1951, the States that contributed to the integration process cannot act to reinstate the *ius belli* and go from European law, again, to international law. This would be a decision of fact and not a decision based on law. A similar situation could come about if several Member States were to jointly claim the withdrawal clause (Art. 50 TEU), which—after the referendum of June 2016—might soon be applied by the United Kingdom.[60]

The withdrawal clause envisages that the European Treaties be replaced by a treaty of international law that regulates, from the outside, the relationship between the withdrawing State and the European Union. However, where many member states, and not just one, were to simultaneously ask to leave, the European Union law would be reduced from a general order to an economic cooperation arrangement under international law. Indeed, the Member States that, acting together, were to demand withdrawal from the Union, would assert their full sovereignty in foreign policy and defense, as well as in economic and monetary policy, and would have to comply with the obligations deriving from the international conventions to which they are parties. However, such conduct would not come under Art. 50 TEU, and—as already mentioned—it would represent a decision of fact and not a decision based on law, and would hence undermine the very existence of the European Union.[61]

In this connection it is necessary to understand whether the constraints on Member States deriving from the Treaties in favour of a supranational system—based on Ipsen's phrase that the States are the "Masters of the Treaties"—may truly be nullified without considering such act to be subversive.

If one reflects on the issue from this standpoint, one realizes that the States, based on the commitments they made together, may act only in the positive: that is to say they may act to "carry forward the process for the creation of a closer union among the peoples of Europe" and take "additional steps (...) in order to further European integration", in other terms build up a European order as has been done, and not regress or question the integration achieved thus far.

[60] Art. 50 TEU foresees that (par. 2) "A Member State which decides to withdraw shall notify the European Council of its intention" and that "In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, *setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union*" (on the right of withdrawal s. Wyrozumska (2013), and Puglia (2014) and (par. 3) "The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, 2 years after the notification referred to in paragraph 2".

[61] See also, Mangiameli (2016), pp. 11 ff.

Consequently, to avoid deepening further certain constitutional rifts in the European system, if they were to actually claim national sovereignty, the States would not enjoy the freedom that is typical of international negotiations and that truly characterizes international law; this means that the expression "the States are the Masters of the Treaties" means (and perhaps has always meant) that only the national governments can revise the European treaties (and now, under Art. 48 TEU, also the European Institutions and national Parliaments can participate in the revision), but in this case their actions will represent the expression not of a sovereign State but of a competence from among the competences conferred by European law (*rectius*: by the Treaties themselves). The further consequence of this is obviously that the European Union's legal source of self-legitimation and sovereignty would lie in the Treaties and in its legal order.

In other words, we would need to acknowledge that when the governments of Member States of the European Union act within the order of the latter using their greatest power—whether it be to develop and define the general political orientation of the Union, or to revise the treaties—they are not acting as representatives of the States that are claiming their sovereignty, but as bodies that are performing the functions of the Union in the interest of the Union.

To maintain the European order, they *must* act in accordance with the form it has taken on, albeit with amendments as may be required.

Indeed, we must not forget that the European Treaties with which the Community was established at first and then the Union, are somewhat different from all other international Treaties in that they do not restrict themselves to regulating relationships between States, but they give rise to a supranational body that, while it had a functional nature in the past in that it was addressed to creating merely a common market, has not taken on a *general* character, and moreover it is characterized by an unlimited duration of the treaty itself (Art. 53 TEU).

The very application of European law is not subject to the application of the general rules of international law but to those of the European order,[62] even in the case where the deliberations of the Council are to be taken unanimously and not with a majority vote. Indeed, as has been authoritatively pointed out, "even if federal deliberations are formed through unanimous votes by all the members (...), and nobody can be beaten through votes, there is an essential difference between a federal deliberation and a unanimous deliberation of an international conference, since a federal deliberation does not need any special ratification by the individual States, but it is constitutionally (...) and directly binding on each Member State".[63]

In other words, the 1957 pact which underlies European collaboration, obliges the Member States, that have retained full sovereignty, not to react to European acts according to the principles of international law, but only in the ways and terms

[62]Edward (2002), pp. 215 ss.

[63]Schmitt (1981), p. 502.

envisaged by the Treaties, that is to say according to European law, and disputes are thus to be put before the Court of Justice.[64]

This configuration of the relationships between Member States and the Union within the framework being described here cannot prove to be without effects in respect of the provisions of the Treaties. In particular, if it is true that the Member States can act only within the regulatory framework of the Treaties, the latter are configured not only as the founding act of their participation, but above all as the content of participation itself.

If the sovereignty of Member States is integrated into the European order to which they are parties, and the Institutions of the European Union do not meet the needs that governments deem to be necessary to emerge from the crisis, there is no point in protesting against the Institutions.

They are the sovereigns of Europe. Therefore, they need to take action to make the common Institutions work in a positive manner for the European citizens.

Thus, what can and what should the Member States do in practice in the situation in which they have found themselves because of the crisis?

The economic and financial crisis has caused a strategic crisis in Europe. The States must use their sovereignty in a decisive manner to recover the meaning of the European Union.

It is evident that in a favourable economic cycle, the interdependence of Member States is the source of greater prosperity, whereas in difficult periods it entails a sharing of the risks which are to be accompanied by the sharing of responsibilities. This sharing can be accountable only if it is capable of producing a political decision that is conducive to economic recovery and to growth; otherwise the sharing—as is currently happening—will turn into more depression without any way out and, hence, from the institutional point of view, it will undermine confidence in the common Institutions, and jeopardize the European integration process.

The signs of this political fragility have already emerged and the theme that is constantly being debated is political union among the Member States of the EU, and of the Euro-zone in particular; in other words, the theme is the distribution of political decision-making power between the Institutions and the Member States and among the Institutions themselves: in a nutshell it is the question of federalism and of European democracy that awaits an adequate response.

[64]In this regard see Art. 259 TFEU "A Member State which considers that another Member State has failed to fulfil an obligation under the Treaties may bring the matter before the Court of Justice of the European Union".

7 Emerging from the European Crisis: Democracy and Federalism

The question of European democracy has become so evident that it could not escape the attention of the Member States that convened in the European Council. Thus, at the session of 28–29 June 2012, the need emerged to go "*Towards an Authentic Economic and Monetary Union*", founded on "four essential constitutive elements": an integrated financial framework, an integrated budget framework, an integrated economic policy framework and the strengthening of democratic legitimacy and responsibility.

This European Council was followed by the proposal by the Commission that was disclosed at the end of November 2012, in the document entitled: *A Blueprint for a Deep and Genuine Economic and Monetary Union. Launching a European Debate*.[65]

Now, the document mentioned is truly important because it shows a clear perception of the Commission, but also of the other Institutions that in the last year have developed responses to the crisis, according to which the European Union needs to be reformed to continue to exist, and it must become more democratic and politically more significant than the very National States that support it.

The *incipit* of the document, that expresses the idea that an *authentic economic and monetary union* needs to be completed, specifies that—"the EMU is unique among modern monetary unions in that it combines a centralised monetary policy with decentralised responsibility for most economic policies, albeit subject to constraints as regards national budgetary policies. Unlike other monetary unions, there is no centralised fiscal policy function and no centralised fiscal capacity (federal budget)".[66]

The amendments hypothesized to adjust the European Treaties to the degree of financial responsibility ("the further sharing of financial prerogatives commands a commensurate political integration") that the European Institutions are requested to provide are knowingly anchored to the transfer of sovereignty by Member States ("the level of democratic responsibility must be commensurate with the degree of sovereignty transferred from Member States to the European Union") and with the attribution of "responsibility to the level at which the executive decision at hand is taken, considering also the level impacted by such decision". This means that if a decision comes under the responsibility of the EU, it is up to the Institutions but, if the decision has an impact on Member States, it cannot ignore the opinion of each Member State.

As a consequence, from the standpoint of the reform, initially "the European Parliament has the precise role of ensuring the democratic legitimacy of all the

[65]European Commission, *Blueprint for a Deep and Genuine Economic and Monetary Union. Starting the European debate*, COM(2012) 777 final/2, 30.11.2012.

[66]European Commission, *Blueprint for an economic and monetary union*, *cit*., 2, in the text "fiscal" means "related to the budget".

decisions taken at the level of the Union, in particular the decisions by the Commission".

Moreover, with reference to the legitimation processes, it is stated that the community method and not the intergovernmental method should be the way the Institutions operate, especially the coordination of the economic policies: it is no coincidence that the ESM is questioned ("it is not clear where the responsibility lies vis-a-vis Parliament of a European intergovernmental level that seeks to influence the economic policies of individual Member States of the Euro zone").

Finally, it is hoped that the ordinary legislative procedure may become the rule, superseding what happened with the Lisbon Treaty which does envisage the ordinary procedure (joint decision-making by Parliament and the Council), but there are so many exceptions in favour of the special legislative procedure led by the Council that the ordinary legislative procedure is merely residual.[67]

To this we may add that, through incorporation into the Treaties, the ESM should be put under the control of Parliament and any amendment to the Treaty should entail the strengthening of the democratic responsibility of the ECB in its capacity as supervisory authority over the banks.

The document seems to lay the basis for a European fiscal (budget) policy funded with own resources resulting from a European tax and for the creation "of a structure similar to a Treasury" of the EUM within the Commission", to "set the political direction and increase democratic responsibility", so that the Union is put in a condition to withstand any future economic crisis. It would also have the capacity to issue bonds that would "endow the governments with new means to fund their debt, and offer savers and financial institutes the opportunity of safe and liquid investments and an integrated bonds market in the Euro zone that is comparable, in terms of dimension and liquidity, with the bonds market in U.S. dollars".[68]

The document also focuses on the need to "facilitate the creation of a real European political arena", not only through the establishment of by-laws for political parties deriving from the adoption of a body of rules, but also by having parties indicate the candidates to the presidency of the Commission, as occurred in the European elections of 2014. It is also worth mentioning the possibility of "a series of pragmatic measures that can be implemented within the framework of electoral rules of the Union that are currently in force".

The role of national Parliaments is somewhat overshadowed: on the one hand it is stated that they will continue "to be critical for the legitimacy of the work done by the Member States when sitting in the European Council and in the Council and for the implementation of economic and budget policies at national level, albeit subject to greater coordination at the level of the Union"; however, on the other hand it is observed that the role of Parliaments and "Interparliamentary cooperation as such does not, however, ensure democratic legitimacy to EU decisions that can be ensured only by a representative parliamentary assembly with voting rights. In

[67]In practice, however, there is a considerable increase in the use of the ordinary procedure.

[68]In this regard see Bergonzini (2013), pp. 201 ss.

this sense, the European Parliament is and remains the only parliamentary assembly of the Union and of the euro".

The only point that is not dealt with, and that would deserve being treated, is that of a better division of powers at the level of the Institutions and with reference to the positioning of the Council of the EU; but, perhaps, it would mean expecting too much in a document of the European Commission.

The document tends to go beyond the asymmetries of the European system and it formulates a more advanced structure of European sovereignty with unprecedented economic capacity. In this sense it could express a more integrated level of collaboration and solidarity among Member States and could constitute another step—albeit problem-ridden—towards an accomplished democracy "of European citizens" and a parliamentarization of the European political system.

However, the limit to the whole project is the time horizon for implementing it. Indeed, the *Blueprint* comprises three deadlines: the first is the strengthening of the oversight policy currently under way (an 18-month period); the second concerns the possibility of creating a truly autonomous fiscal capacity of the MEU to uphold the implementation of the political choices deriving from greater coordination (a 5 year horizon); and finally, the third, a long-term deadline, beyond 2020, envisaging "the progressive pooling of sovereignty and thus responsibility as well as solidarity competencies to the European level" and "the establishment of an autonomous euro area budget".

This approach has been rightly criticized by *Jürgen Habermas* who states:

> The obvious aim is to postpone a revision of the treaties to the very end. The Commission accords the expansion of steering capacities priority in the short and the medium term over a corresponding enlargement of the basis of legitimation. Thus the ultimate democratization is presented as a promise like a light at the end of the tunnel. *Supranational democracy remains the declared long-term goal on paper. But postponing democracy is a rather dangerous move*. [our italics]. If the economic constraints by the markets happily meet the flexibility of a free-floating European technocracy, there arises the immediate risk that the gradual unification process which is planned for, but not by the people, will grind to a halt before the proclaimed goal of rebalancing the executive and the parliamentary branches is reached. Uncoupled from democratically enacted law and without feedback from the pressing dynamics of a mobilized political public sphere and civil society, political management lacks the impulse and the strength to contain and redirect the profit-oriented imperatives of investment capital into socially compatible channels. As we can observe already to-day, the authorities would more and more yield to the neoliberal pattern of politics. A technocracy without democratic roots would not have the motivation to accord sufficient weight to the demands of the electorate for a just distribution of income and property, for status security, public services, and collective goods when these conflicted with the systemic demands for competitiveness and economic growth.[69]

To this interesting comment we might add that, also as a result of the delays in the institutional design, the European system is already in conditions of great difficulty as emerged in the 2014 elections of the European Parliament. Indeed, the European citizens today are united by a Euro-skeptical mind-set that picked up

[69]Habermas (2013).

momentum in all the Member States during the crisis, albeit with motivations that differ from country to country.

If we want to offset this tendency, the European political class (to be clear: all the heads of state and of government) must immediately make a joint effort, because we cannot save the euro through painful and expensive measures, without giving European citizens an authentically democratic policy. The principle stating that there should be "more Europe" cannot be the antidote to prevent the abandonment of the Euro, but rather the criterion for shaping the European people.

The first point that is to be questioned, therefore, is the method prospected by the Commission, which postpones political integration into the future. It may be stated that in the *Blueprint* the Commission once again follows in the footsteps of Monnet's incremental method, but this is the problem. The economic crisis has shown that political integration can no longer be postponed, and the incremental method has exhausted its ability to advance integration. The only alternative to rapid action being taken in the direction of the construction of an accomplished European democracy is the dissolution of the single currency and of the European Union itself.

European democracy will be the outcome of the actions taken by the governments of Member States and we expect them to make the choice of giving the European Union federal foundations, of reforming the Institutions, thus giving life to an authentic bicameral Parliament with general representation and territorial representation of the States, with a joint government and with a common fiscal policy. Also sovereign debts are to be placed under a single administration, without this meaning that any country can live off of the more virtuous countries, but merely that ways are to be found to remedy the indebtedness of certain countries without preventing or delaying common growth. Finally, the policies that are more typical of a federation, like foreign security and defense policy, as well as energy policy, for which so far the EU has taken limited steps, are to be placed entirely under the aegis of the European government.

It is evident that this project will not be welcomed by the 28 States that make up the Union; suffice it to think of the special position of Poland or of the United Kingdom. However, it is necessary to immediately stop this languid and uncertain stage in the integration process where the European Union is reduced to being a mere container of States, which is seen by some to be on the brink of failure[70] while others suggest some reactions as a last chance.[71]

Therefore what is required is a hard core of States, possibly belonging to the Euro zone, that take on responsibility also through a Treaty based on stronger cooperation, according to the provisions of Art. 20 TEU, and give life to the first European federal body.

It is a task of governments to bring together the brains of the Member States to look into this model in all its details. The scholars of European constitutional law

[70]Fischer (2014).

[71]Giscard d'Estaing (2014).

have the task of offering the right contributions to bringing about European federalism.

The European integration process has advanced in time and has kept many of the promises made in the 1957 preamble, further strengthened by the 1993 preamble, but the political unity of the Old Continent has not yet been reached and its absence weighs like a huge and heavy boulder that reveals its unbearable weight at this very point in time when Europe is in the grips of the economic crisis.

The political unity of Europe was written in the preambles to the Treaties as a promise made to the future generations of Europe. It is now time to bring it to fruition.

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