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THE EURO CRISIS AND THE CONSTITUTIONAL DISORDER OF THE EUROPEAN UNION*

Sergio Fabbrini**

Abstract

The Lisbon Treaty is the outcome of several constitutional compromises. The compromise between the supranational and the intergovernmental views of the European Union (EU), the compromise between the member states engaged in building a European Monetary Union (EMU) and those allowed to opt-out from it and the compromise, within the EMU, between a centralized approach to monetary policy and decentralized economic, fiscal and budgetary policies, constrained however within the formalized rules of the Stability and Growth Pact (SGP). The euro crisis has called into question this multiple constitutional setting. The balance between supranational and intergovernmental views has been upset in favour of the former. The approval of new intergovernmental treaties has made crystal clear the separation of interests between the EMU and the opt-out member states (the United Kingdom in specific). The inefficacy of the voluntary coordination between national governments in dealing with the euro crisis has brought to an unprecedented centralization and judicialization in the governance of the common currency. In the constitutional disorder induced by the euro crisis the EU has assumed specific institutional, legal and ideological configurations.

1. Introduction

The euro crisis has radically called into question the constitutional system of the European Union (EU) as formalized by and in the Lisbon Treaty (entered into force on 1 December 2009). The EU constitutional system was based on a plurality of compromises. First, the compromise between a supranational union (in charge of single market's policies) and an intergovernmental union (in charge of the policies traditionally closed to national sovereignty, as the economic and financial policy and the foreign and security policy). Second, the compromise between the member states constituting the Economic and Monetary Union or EMU (that is the member states adopting the single currency, the euro, or engaged in meeting the macro-economic criteria for adopting it, the 'pre-ins') and member states retaining their own national currency (because allowed to opt-out from EMU, the so-called 'outs'). Third, the compromise, within the euro-area, between the centralization of monetary policy by a supranational institution (the European Central Bank or ECB) and the decentralization of economic, fiscal and budgetary poli-

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cies in the member states, subject to the voluntary coordination of their governments but constrained by specific macro-economic legalized rules.

These compromises were based on different rationales. The first was an *institutional* compromise finalized to define the basic regime's rules for dealing and solving collective problems. Through this compromise it was attempted to recompose two alternative views of political union, one stressing its supranational and the other its intergovernmental character. The second was a *political* compromise derived by the necessity to accommodate different views on economic and monetary integration, at their turn expression of different views of national sovereignty, consisting in letting few (but crucial) member states (as the United Kingdom or UK) not to be part of the EMU. The third was an *economic* compromise based on the necessity to conciliate contrasting economic principles, as the centralization of monetary policy in the ECB and the decentralization of economic, fiscal and budgetary policies in the member states of the euro-area. It was this latter compromise to reflect the *economic constitution*'s theory of German ordo-liberalism. In fact, the compromise consisted, on one side, in recognizing national discretion in economic, fiscal and budgetary policies and, on the other side, in delimiting national discretion through a pre-established legal framework ordering the management of those discrete policies. The Lisbon Treaty is the outcome of these multiple constitutional compromises. It has formalized a dual constitutional regime, expression of two different *political* views of the Union; it has accommodated a separation of interests between EMU countries and the economic and monetary regimes of other EU member states; it has combined centralization and voluntarism within EMU.

For meeting the challenges posed by financial markets' speculation, the EU has approved a panoply of new legislatives measures through the procedures established by the Lisbon Treaty, but a number of EU member states has also approved new intergovernmental treaties (the European Stability Mechanism or ESM and the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, the so-called Fiscal Compact) outside of the Lisbon Treaty, besides executive agreements (as the European Financial Stability Facility or EFSF and the Euro Plus Pact) binding only the signatory member states. In addition to the already established intergovernmental treaties, a new one is going to be approved in the context of the making of the banking union: the intergovernmental agreement for constituting the Single Resolution Fund (SRF), the financial engine of the Single Resolution Mechanism (SRM). These legislative measures, intergovernmental treaties and special purpose's agreements have upset the multi-layer structure of constitutional compromises institutionalized by the Lisbon Treaty. Within the ensued constitutional disorder, specific institutional, legal and ideological configurations have emerged within the EU.

The paper aims to identify those configurations. For doing that, I will proceed as follows. In section 2, I will discuss the first compromise between two different political interpretations (supranational and intergovernmental) of the EU emerged definitively with the Maastricht Treaty of 1992. In section 3, I will discuss the second compromise between the EMU member states (favoring a deeper integration in crucial policy's areas) and the member states that decide to remain outside of EMU. In section 4, I will discuss the compromise within the euro-area between monetary policy's centralization and decentralization in economic, fiscal and budgetary policies. In section 5, I will analyze the impact of the euro crisis on the multi-layer structure of constitutional compromises, showing how it has altered them. In section 6, I will identify the main contours of the new institutional, legal and ideological configurations emerging within and outside the EU. The Conclusion will finally bring home the arguments of the paper.

2. *The institutional compromise*

The Maastricht Treaty (1992) officially established that the economic and financial policy of the EU would be defined and regulated within a decision-making regime that was intergovernmental in nature. The Maastricht Treaty was necessarily conditioned by the historical context within which it was negotiated and then signed by the member states on 7 February 1992. Organized after the end of the Cold War, the intergovernmental conference held in Maastricht in 1991 had inevitably to deal with issues unconnected with the single market (Baun 1995-96). At that conference, it was accepted to bring those issues within the integration process, but on the condition that they should be strictly controlled by the member states' governments. Indeed, the Treaty introduced an institutional differentiation that promoted different decision-making methods for dealing with different policy areas. Three distinct pillars were created, organized according to different decision-making regimes.

The homogeneous character of the supranational entity which emerged from the previous decades was altered through the formation of different institutional settings but yet within the same legal order. Indeed, since the Rome Treaties of 1957, the Union developed through the so-called 'Community method' (Dehousse 2011) based on the idea that decision-making power has to be shared between supranational institutions (as the Commission - with its monopoly of legislative initiative - and later the European Parliament or EP - become a true co-decisional legislature) and the intergovernmental institutions (represented by the Council of Ministers or Council - the other co-decisional legislature - and the informal European Council of the heads of state and government). In this method, the European Council was not considered to play an active role in the policy-making process. Rather it was considered a sort of court of last resort, the institution in charge of solving the 'intractable issues' emerging from the integration process. For managing the common and then single market policies, the policy-making process came to be structured around a triangular institutional framework with the Commission as the executive institution (protected by its monopoly of legislative initiative from member states' influence) and the Council and the EP as the bicameral legislature. The European Council was (considered to be) one of the Council's formations (Naurin and Wallace 2008), rather than an institution on its own right.

At the intergovernmental conference, this (old) supranational union was not considered to be the solution for dealing with the policies emerging with the end of the Cold War, because it did not recognize a sufficiently central role to national governments. For this reason, the member states choose an alternative constitutional model of integration for governing the policies traditionally closed to national sovereignty. Those policies were Europeanized but kept under the control of the collectivity of national governments (as represented by the Council and the European Council, with limited involvement of the supranational institutions as the Commission and EP). It was also established that, in those policies, integration would have to proceed through voluntary acts by national governments. Because in those policies integration could not take place through law, then the role of the European Court of Justice or ECJ (whose power was crucial for constituting the supranational constitution) came to be necessarily curtailed. The two constitutional models (the *old* supranational and the *new* intergovernmental), then formalized in the Maastricht Treaty, reflected two different views on how to manage a *political union* in Europe (Laursen and Vanhoonocker 1992). The two constitutional models consisted in two distinct decision-making regimes, a coexistence considered necessary for advancing the political integration of the continent.

This compromise was accepted by many supra-nationalists on the teleological assumption that the intergovernmental constitution would have been re-absorbed sooner or later by the supranational one 'because of the logic of things'. The Constitutional Treaty (CT), elaborated by the Brussels Convention in 2002-2003 and thus signed by the member states governments in Rome in 2004, seemed to confirm that assumption. Although the CT preserved the double constitution of the Maastricht Treaty, it nevertheless created the momentum that would have plausibly brought to the supranational overhauling of the EU. The defeat of the CT in the popular referendums held in France and in the Netherlands in 2005 interrupted the old supranational narrative, legitimizing on the contrary the alternative new intergovernmental narrative. The 2009 Lisbon Treaty abolished the pillars' structure formalized in the Maastricht Treaty, but it kept distinct the two different decision-making regimes. In the management of public policies linked to the internal market, the Lisbon Treaty prescribes a model of supranational federation where the decision-making power is *shared* by multiple institutions. Although it formally recognized for the first time the European Council as an executive organ inserted in the Union's institutional system, such a constitution was considered to sustain a system of government still characterized by the interplay among the three policy-making institutions substantiating the Community method (the Commission, the Council and the EP). At the same time, for policies that have traditionally been sensitive to national sovereignty (in our case, economic, fiscal and budgetary policies), the Lisbon Treaty prescribes a model of intergovernmental constitution with characteristics similar to a sort of 'federalism of governments'. Such a constitution sustains and justifies a system of governance, rather than a system of government, characterized by the *pooling* of decision-making power in the institutions, the European Council and the Council, representing the governments of the Union (on the Lisbon Treaty, see Craig 2010 and Piris 2010). Indeed, when the Lisbon Treaty was first conceived (2007) and then approved (2009), the European Council's executive role was viewed as necessary in these policies, not in those connected to the single market that was considered a reserved domain for the exercise of the executive role of the Commission.

When the financial crisis arrived to Europe, in coincidence with the entering into force of the Lisbon Treaty, not only there was in place an intergovernmental constitution for dealing with it, but there was also a general consensus that only national governments could find solutions for the financial turmoil. Since 2010, it has come to be believed that economic and monetary integration can develop only if controlled or governed by the national governments represented in the European Council by their leaders (coordinated by the now permanent president of that institution) and in the Council by their functional ministers (the Economic and Financial or ECOFIN Council in particular). It was not a surprise to hear the former French President Nicholas Sarkozy saying in his speech in Toulon on 1 December 2011: "the reform of Europe is not a march towards supra-nationality. (…) The crisis has pushed the heads of state and government to assume greater responsibility because ultimately they have the democratic legitimacy to take decisions. (…) The integration of Europe will go the intergovernmental way because Europe needs to make strategic political choices."

3. The political compromise

After having accepted the re-unification of Germany in 1990 and in order to keep the reunified Germany within a tighter framework, the Maastricht Treaty set also the criteria for launching an Economic and Monetary Union (or EMU) (Martin and Ross 2004). EMU consisted in a set of rules aimed at converging the economic policies of all the EU member states thus

creating the condition for the adoption and functioning of a single currency, to become the currency of the Union (Jabko 2006). Certainly the single currency project was not thrown together in the aftermath of the German reunification (Issing 2008). Indeed, it was largely defined by a 1988 *ad hoc* committee, chaired by the then president of the Commission Jacques Delors and constituted by the governors of the central banks of the then twelve member states. Already in the 1970s, after the collapse of the Bretton Woods currencies exchange system, projects and proposals for promoting a European monetary system were advanced and discussed. The Delors Report of 1988 was a solution in search for a problem. The problem arrived with the necessity to envelop a reunified Germany in a stronger European framework. Through the launch of the single currency project, it was assumed that a reunified Germany would continue to be a European Germany. Germany, in fact, was asked to give up the symbol of its own post-war economic resurgence, the *Deutsche Mark,* in order to be allowed to achieve the political end of that resurgence.

The Maastricht Treaty set out a plan to introduce EMU in three stages. On 1 January 1994 a European Monetary Institute was established as the forerunner of a new banking institution for controlling monetary policy. On 1 June 1998, this new institution, the European Central Bank (ECB), was created, tailored on the model of the *Deutsche Bundesbank.* On 31 December 1998 the conversion rates between the eleven participating national currencies and the euro were established. On 1 January 2002, the euro notes and coins started to circulate. The EMU was not merely a policy's project. Since its inception it had a political, not only economic, rationale (Dyson and Quaglia 2010). In fact, it was based on the compromise between the United Kingdom (UK) and Denmark, on one side, and the other member states, on the other. Although celebrated as the economic and monetary regime for all the EU member states, UK and Denmark were allowed to formally opt-out from the obligation to convert the national currency into the new single currency, regardless of their macro-economic conditions. D*e facto,* a third member state, Sweden, has been allowed to keep its own national currency, thanks to a biased algebraic calculation regularly showing its inability to fulfil the required macro-economic criteria. The three countries contributed with others in the 1960s to develop a project of economic cooperation, the European Free Trade Association (EFTA)[1] at its turn heir of the Free Trade Area (FTA), alternative to the project of economic integration started with the 1952 Paris Treaty and the 1957 Rome Treaties. Indeed, Denmark, after having rejected the Maastricht Treaty in a popular referendum hold in 1992, came finally to accept it through a new referendum hold on 1993 because of the so called Edinburgh Agreement of December 1992 which allowed the country to opt-out from the need to adopt the future single currency.

The Maastricht Treaty was a turning point also symbolically. The semantic change from European Economic Community (EEC) to European Union (as Treaty of the European Union or TEU), although inclusive of the Rome Treaty now called Treaty on the European Community (TEC regulating single market policies), signalled the deepening of the integration process. For accepting this qualitative leap of the latter, the member states still supporting the

[1] The European Free Trade Association (EFTA) was created in 1960 by seven countries as a looser alternative to the then European Economic Community (EEC). It was the heir of the Free Trade Area (FTA), a project pursued by the UK between 1956-58. The EFTA as a trade bloc was established by the Stockholm Convention held on 4 January 1960 in the Swedish capital. The founding members of EFTA were Austria, Denmark, Norway, Portugal, Sweden, Switzerland and the UK. During the 1960s these countries were often referred to as the Outer Seven, as opposed to the Inner Six of the then-EEC. Most of its membership has since joined the EEC, then EU. At the end of 2012, EFTA was constituted by four countries: Iceland, Norway, Switzerland and Liechtenstein.

vision of the EU as an *economic community* were thus allowed to opt-out from the most integrationist policies. It need to be said that the view of the EU as an economic community should not be confused with that of the EU as an economic union. In the EU, the concept of economic union emerged in connection with that of monetary union, both institutionalized with the EMU. On the contrary, by economic community the ex-EFTA countries meant the organization of the common market. If one assumes, with Balassa (1961), that regional economic integration advances through four basic stages (free trade area, customs union, common market and economic union), then the concept of economic community can be located between the second and the third phase, quite far from the fourth stage. The opt-clause was the price to be paid for preventing the ex-EFTA countries from obstructing the extension of the integration's process to policies traditionally closed to national sovereignty. The opting out from undesired legislation or treaty provisions gave those member states the right both not to participate in specific policy areas and not to be subject to a general jurisdiction in it.

The opting-out compromise has accompanied the process of integration from Maastricht to Lisbon and later. In addition to Denmark and UK opting out from adopting the euro, Protocol No. 30 of the Lisbon Treaty asserts (Art. 1) that the Charter of Fundamental Rights "does not extend the ability of the Court of Justice of the European Union…to find that the laws, regulations or administrative provisions, practices or action of Poland or of the UK are inconsistent with the fundamental rights, freedoms and principles that it reaffirms". The Czech Republic has joined the two member states in opting out from the Charter with the 2013 Treaty on the accession of Croatia. Regarding legislation, Denmark, Ireland and UK have opted out from policy regulation of the area of freedom, security and justice. Ireland and the UK have opted out from the Schengen agreement on the free circulation of persons within the Union[2]. Denmark has opted out from foreign and security policies. At the end of 2013, five member states had such opt-outs: Denmark (four opt-outs), Ireland (two opt-outs), Poland (one opt-out), Sweden (one opt-out, but only *de facto*) and the UK (four opt-outs), the Czech Republic (one opt-out ratified with the 2013 Treaty on the accession of Croatia).

The opting-out from adoption of the euro, however, had a special character: it formalized the existence of different economic constitutions. Notwithstanding what the Lisbon Treaty (TEU, Art. 3.4) re-asserted, namely that "the Union shall establish an economic and monetary union whose currency is the euro" or better that the euro is not an option but a requirement, UK and Denmark were left free of keeping their national currency. Formally, Lisbon Treaty (TFEU, Art 139.1) recognizes this possibility only to those member states that do not "fulfil the necessary conditions for the adoption of the euro (and for this reason they, *n.d.r.*) shall hereinafter be referred to as 'Member States with derogation'", or 'pre-ins' member states.

[2] The Schengen Agreement is a Treaty signed on 14 June 1985 in the town of Schengen in Luxembourg, by five of the then nine member states of the EU (then called the EEC). It was supplemented by the Convention implementing the Schengen Agreement five years later. The Agreement, Convention and rules were implemented in March 1995. Together these treaties created Europe's borderless Schengen area, which operates as a single area for international travel with external border controls for those travelling in and out of it, but with no or minimal internal border controls. The Schengen Agreements and the rules adopted under it were, for the EU members of the Agreement, entirely separate from the EU legal order until the 1997 Amsterdam Treaty, which incorporated them into the EU law. The borderless area created by the Schengen Agreements, at the end of 2012, consisted of 25 EU member states (Ireland and the UK having opted out to remain outside), In addition, four non-EU member states (Iceland, Liechtenstein, Norway, and Switzerland) are members of the borderless area, and three European micro-states (Monaco, San Marino, and the Vatican City) do not have any immigration controls with the Schengen countries.

This has never been the case for Denmark and UK. Thus, within the EU, different economic and monetary regimes came to coexist. Within the EMU, the regime of the euro-area member states (the 'ins') and the regimes of those member states not yet fulfilling the macro-economic criteria but engaged in meeting them (the 'pre-ins'). Outside the EMU, the monetary and economic regime of the member states self-excluded from the common currency (the 'outs'). The Lisbon Treaty has thus institutionalized in the same institutional and legal framework diverging economic and monetary interests, in the assumption that they would converge towards a shared goal of economic growth and monetary stability.

4. The economic compromise

There is a third compromise to consider, this time concerning the euro-area member states. This compromise consisted in combining centralization (of monetary policy) with decentralization (of the economic, budgetary and fiscal policies connected to the single currency), a combination that should however operate within pre-defined economic parameters endowed of a legal status. The monetary policy of the single currency was put under the control of a supranational institution, the ECB, but the other connected policies remained in member states' hands. Once it was accepted to set up a road map for achieving the single currency, it was adopted, for the *monetary side* of EMU, the German model of a strictly independent central bank pursuing a monetary policy exclusively anti-inflationary and, for the *economic side* of EMU, the intergovernmental model based on voluntary policies' coordination by member states' governments. At the core of this compromise there was the Stability and Growth Pact (Heipertz and Verdun 2010), constituted by a Resolution and two Council Regulations. The first regulation "on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies", known as the preventive arm, entered into force on 1 July 1998 and the second regulation "on speeding up and clarifying the implementation of the excessive deficit procedure", known as the dissuasive arm, entered into force on 1 January 1999. The SGP at its turn was justified by Art. 104.14 of the Treaty of European Community (TEC), part of the Maastricht Treaty, that "set out in the Protocol on the excessive deficit procedure" the conditions for ordering the coordination of national economic policies. The Protocol, thus become Protocol No. 12 of the Lisbon Treaty, establishes as reference value: 3% for the ratio of the planned or actual government deficit to gross domestic product at market prices and 60% for the ratio of government debt to gross domestic product at market prices. The SGP and the Excessive Deficit Procedure (EDP) Protocol epitomized the German ordo-liberal idea (elaborated in the 1930s by the Friburg School, Young 2012) of an economic constitution structured around pre-established (and not negotiable) legal rules.

Thus, although the member states can pursue their own policies, they were expected to do that within budgetary parameters (defining the ratio of public deficit and debt to GDP), formalized as proper statutory rules. However, although expected to be respected, those statutory rules showed not to be sufficiently binding. Indeed, in 2003, Germany and France did not keep their budgetary parameters (in particular the one regarding the deficit) within the prescribed limits. In this case, TEC, Art. 104.5 prescribed that "If the Commission considers that an excessive deficit in a Member State exists or may occur, the Commission shall address an opinion to the Council". Indeed, the Commission submitted a report to the ECOFIN Council, proposing of opening the EDP for the two member states. However, TEC, Art. 104.6 added also that "The Council shall, acting by a qualified majority on a recommendation

from the Commission, and having considered any observations which the Member State concerned may wish to make, decide after an overall assessment whether an excessive deficit exists". And the Council voted against the Commission's proposal to open an EDP against both Germany and France. Under the pressures of the small member states, the Commission thus appealed the ECJ against the Council's decision. In July 2004, the ECJ declared that the ECOFIN Council was indeed authorized by the TEC to hold the EDP in abeyance by not adopting a Commission's recommendation to start a EDP. It thus became clear that the SGP, although appeared to be a celebration of rules and quasi-automatic procedures, could not challenge national discretion, in particular that of the larger member states. The ECJ decision did not settle the problem. Immediately afterword, the Commission and the member states started a process of revision of the legal texts of the SGP, that is of the economic constitution of EMU. This process was concluded in March 2005 through strengthening of the SGP's procedural rules, with a clarification of the EDP and the imposition of common rules on the making of national fiscal policies. However, "the legal nature of the Pact was not substantially altered" (Heipertz and Verdun 2010: 2).

As Joerges (2013:9) stresses, "EMU was understood as a political project, albeit one that was to be shielded strictly from the influence of daily politics, and entrusted to the medium of law instead, and a strictly politically independent institution", thus adding that this "economic constitution with the material and institutional substitution of legal rules for politics was…nothing less than a *sine qua non* for German participation within EMU". The policy-making model emerged from the economic constitution of EMU has been subsequently conceptualized by several scholars (Heritier and Rhodes 2010; Kohler-Koch and Rittberger 2006; Caporaso and Wittenbrinck 2006) as new modes of governance and it included the open method of coordination, benchmarking, mainstreaming, peer review. These modes of governance function through the voluntary coordination between the governments, coordination thus regulated by macro-economic rules that only the national governments can decide (as a collective in the ECOFIN Council) whether they are respected or not by one of them. Thus, on one side, there was the formalization of parameters within which policy's coordination should develop, on the other side there was the recognition that only national governments could decide (coordinating in Brussels' intergovernmental institutions) how to deal with those of them not respecting the agreed parameters. No direct supranational imposition on national governments' behaviour was envisaged by any of the supranational institutions (the Commission and ECJ in particular). Through the voluntary intergovernmental coordination, it was possible to keep decentralized the economic, fiscal and budgetary policies, preventing the formation of a supranational authority and the allocation of supranational resources (as an autonomous Union's budget independent from member states' transfer of money) for managing those policies. In a speech given on 2 November 2010[3], Chancellor Merkel conceptualized this economic constitution as follows: "the Lisbon Treaty has placed the institutional structure (of the EU) on a new foundation", to the point of making out-dated the traditional distinctions between "Community and intergovernmental methods". Thus adding that the EU is already functioning according to a "new Union method", which consists of "coordinated action in a spirit of solidarity".

In short, the panoply of constitutional compromises was the price to be paid for keeping on balance different institutional, political and economic interests and views on the EU, thus preserving the *unitary* character of the integration's project. The role of the various

[3] Opening ceremony of the 61th academic year of the College of Europe in Bruges.

compromises was to accommodate different needs and perspectives, on the assumption they would not become reciprocally incompatible. The systemic condition for the preservation of these multiple constitutional balancing acts resided in the equilibrium between the interests and the views supporting the one and the other side of the forces stipulating the compromise. Indeed, from Maastricht to Lisbon, the EU developed as a political system internally highly differentiated (Dyson and Sepos 2010), able to accommodate member states interpreting differently the integration process and its finality. With the approval of the Lisbon Treaty it was generally thought that those constitutional compromises would finally find their consolidation. Facts have not followed expectations.

5. The euro crisis and the constitutional disorder

5.1. Implications on the institutional compromise

The financial crisis – which impacted on the EU and EMU at the same time the Lisbon Treaty entered in force– has upset the complex structure of compromises built within the Treaty. The euro crisis has dissolved the ambiguity of an EU based on the coexistence of different decision-making regimes; it has called into question the coexistence of member states interested only in organizing economic cooperation within a common market and member states moving (or obliged to move) 'towards a genuine economic and monetary union' (as per the title of the Report submitted by the four presidents of the European Council, the Commission, the Euro Group, the European Central Bank to the meeting of the European Council on 5 December 2012) as a step for achieving a more effective and legitimate economic governance of EMU. But the crisis has also disrupted the coexistence of contradictory principles in the function of the EMU, as voluntary coordination in economic policy between member states and statutory regulation of that coordination through highly formalized macro-economic and judicial rules. Let's consider these implications at the level of the three compromises.

First, the euro crisis has upset the equilibrium between the supranational and intergovernmental constitution. As provided by the Lisbon Treaty (Closa 2012), the European Council has become the true decision-making center for the policies adopted in response to the financial crisis. Because the *financial agenda* has engulfed the EU policy-making, the European Council, with its permanent president, has become the true decision-maker (De Scoutheete 2011; Eggermont 2012), not just an institution limiting itself to define the general aims of the integration process. In those strategic policies (and in the EMU specifically), the Commission has come to play a more limited executive role, transforming and implementing the policy's indications of the European Council in technical proposals. More the crisis has deepened and more the European Council has extended its *executive*'s role to other crucial policies of the EU, influencing the exercise of the Commission's power of legislative initiative. If it is true that the Commission was the exclusive Union's executive when the EU policies' centered around the single market (Page 1997), this is no longer the case with the shift of the policies' center-stage in the direction of euro stability and economic governance. Of course the Commission has not become irrelevant. Indeed, because intergovernmental coordination has not been able to overcome fundamental dilemmas of collective actions (as the veto, enforcement, compliance and legitimacy dilemmas, Fabbrini S. 2013), the governmental leaders of the European Council have had to resort to the Commission for dealing with those dilemmas.

Using an over-simplified picture of the policy-making process structured around three basic phases (elaboration, decision-making and implementation), one might argue that the Commission has become (in the EMU policies) the exclusive actor in the third phase, it has played a minor role in the second, and it has lost its traditional role in the first phase. In the first two phases, it has been the European Council (and in particular the meetings of heads of state and government of the euro-area called as Euro Summit by the Fiscal Compact) to have played the crucial role. Moreover, also regarding the EP, there are signs of a significant political down-sizing. It is true that many legislative measures were adopted through either the ordinary or the special legislative procedures that recognize a decision-making or consultative role to the EP, but it is also true that the deepening of the euro crisis has led to new treaties that do not recognize the EP as a policy-making actor. Certainly, it was difficult to identify a role for the EP (which represents *the citizens of the EU*) in new organizations set up by not all the member states of the EU (Hefftler and Wessels 2013). In short, in the aftermath of the financial crisis, a re-structuring of the balance between the supranational and the intergovernmental constitutional regimes in favor of the latter has taken place. With the euro crisis, the decision-making barycenter has moved towards the relation between the European Council (and the Euro Summit) and the ECOFIN Council (and the Euro Group of the economic and financial ministers of the euro-area member states), rather than towards the relation between the Commission and the EP (as it was during the Delors' years of building the single market, between 1985-1994).

5.2. Implications on the political compromise

Also the compromise between the UK (and more in general the ex-EFTA countries) and the EMU member states has been upset by the euro crisis. The two new Treaties (ESM and Fiscal Compact) were established outside the legal order of the Lisbon Treaty because of the difficulties encountered by the intergovernmental constitution in solving the veto dilemma. The objectives that were set out under those Treaties could have been attained through an amendment to the Lisbon Treaty (or even through secondary EU law). However, the euro-area leaders choose to resort to international treaties for neutralizing the veto threatened by the UK government. Indeed, for preventing future veto's threats, those treaties set up new organizations where unanimity is no longer necessary for taking decisions.

The formation of new legal orders outside the Lisbon Treaty, although not incompatible with the latter (De Witte 2012), calls necessarily into question the constitutional compromise between the EMU and the opt-outs member states, the UK in particular. With the Fiscal Compact, the large majority of the member states will come to coordinate their economic, fiscal and budgetary policies, leaving on the margin the only UK (the Czech Republic, which refused to sign the Treaty in 2011, is now reexamining its position). Moreover, the UK is also outside of the Euro Plus Pact, a political commitment (a sort if intergovernmental agreement) between the euro-area member states and several no euro-area ones (as Denmark, Poland, Lithuania, Bulgaria, Romania and Latvia, the latter thus become member of the euro-area on 1 January 2014) aimed to foster stronger economic policy coordination between them. Certainly, the Fiscal Compact declares (Art. 16) that "within five years at most following the entry into force of this Treaty, on the basis of an assessment of the experience with its implementation, the necessary steps shall be taken, (…), with the aim of incorporating the substance of this Treaty into the legal framework of the European Union", as it already happened with the Schengen Agreement. The assumption being that the integration process

would come to be regulated again by a single legal framework, with functional internal differentiations concerning specific policies.

However, for this incorporation to take place, the consent of UK will be required. An unlikely outcome, given that the Treaty's clauses would continue to affect negatively London's financial district, as it would have done at the moment of its opposition to the Lisbon Treaty's amendment. Indeed, the UK and the EMU member states have come to acknowledge that their economic and monetary interests diverge. The view of the EU as an economic community has shown to be incompatible with the need to govern the euro. The new organization set up by the Fiscal Compact has made evident this reality. The most crucial decisions have been taken in the meetings of the governmental leaders of the member states adopting the euro (Euro Summit), with the pre-ins and the outs member states informed only later about their content. The coexistence of interests between the euro-area and the opt-out member states has been further weakened by the formation of a banking union within EMU, as a set of rules and institutions distinct from the European Banking Authority (EBA) established on 1 January 2011 with the mission of increasing transparency in the financial system of the EU at large. Interesting enough, while EBA was located in London, the new institutions of the banking union have been set up in Frankfurt, within the ECB or connected with it. The banking union, inaugurated throughout 2013, represented the preliminary step (through the separation of the intermingling of national banks and sovereign debt) for creating the condition of a stable currency area. According to the Report by the four presidents of 5 December 2012, a banking union should consist of a Single Supervisory Mechanism (SSM), a Single Resolution Mechanism (SRM) and a Deposit Guarantee Mechanism (DGM). The same Report added also that the integrated financial framework (the banking union) should thus be followed by an integrated budgetary framework, then an integrated economic policy framework and finally by a new institutional framework able to guarantee a better democratic legitimacy and accountability to the EMU.

Considering the banking union's project, it should be notice that it makes no references to EBA and its regulatory scope. After a contrasted debate, the European Council (and the Euro Summit leaders in particular) agreed to set up, under the ECB monitoring, a SSM for the main systemic banks, but authorized to intervene also on the other banks should national supervisory authorities prove unable to exercise their role. The SSM entered into force in November 2013. Following that, in the second part of 2013 a discussion took place within the European Council to set up the second pillar of a banking union, the SRM. This discussion arrived at a general draft agreement on the SRM in the December European Council. According to press report No. 564 of the Council (the institution that prepared the deliberation of the European Council) of 18 December 2013, the agreement consisted of "a draft regulation on the SRM, and a decision by euro-area member states committing them to negotiate, by 1 March 2014, an intergovernmental agreement on the functioning of the SRM", through the formation of a Single Resolution Fund (SRF). The draft agreement included "arrangement for the transfer of national contributions to the fund and their progressive mutualisation over a 10-year transitional period". The draft regulation provided for a single dispute resolution board with broad powers in cases of banking disputes. The board would consist of an executive director, four full-time appointed members and the representatives of the national resolution authorities of all the participating countries, which are euro-area (plus) member states. The board can take decisions, unless the Council objects and calls for change. In short, even in the crucial financial sector, the regulatory framework and the

correspondent decision-making bodies of the two groups of member states have come to be organized by two separate institutional and legal orders.

5.3. The implications on the economic compromise

Also the third compromise (between a centralized monetary policy and decentralized economic policies) has not held up in the course of the euro crisis. Constrained by the intergovernmental constitution, the voluntary coordination of national policies has been unrelentingly challenged by its internal dilemmas. Voluntary coordination has shown to be incompatible with the respect of legal parameters, as required by the ordo-liberal theory. Thus, the Fiscal Compact has established (Title VI, Art. 14.2) that, for entering into force, it requires the approval of 12 out of the then 17 euro-area member states (and out of the then 25 member states) signing it. Similarly, the disciplining powers of third institutions (like the Commission and the ECJ) have been strengthened. The Commission's intervention on the contracting party disrespecting the agreement is now quasi-automatic, an automaticity that can be neutralized only by a reversed qualified majority of the financial ministers of the signatory member states (Fiscal Compact, Art. 17). The negative experience of 2003 was acknowledged. Furthermore the Fiscal Compact has required the contracting parties to introduce at the constitutional level (or equivalent) the balanced-budget rule, thus limiting also from within the domestic system the possibilities for non-compliance. The new legislative measures (European Semester, 'Six Pack', 'Two Pack') have increased both the supervisory role of the Commission in monitoring *ex-ante* member states' behavior regarding their respect of the legal parameters and the sanctioning role of the Commission in activating *ex-post* the EDP.

The new treaties, however, raise crucial constitutional problems. If recourse to the ECJ is justifiable by the Lisbon Treaty itself, the same cannot be said for the power given to the Commission to intervene automatically with respect to the non-complaint contracting party. Not only is the Commission constituted of commissioners proposed by member states not adhering to those treaties (UK and Czech Republic), but above all the Commission is an institution representing the collective interest of a different organization. Moreover, the two treaties exclude from the policymaking process the EP, the institution that represents the voters who will be directly affected by the intergovernmental decisions. The answer to those difficulties has been a further judicialization of the governance of the euro-area, through the formalization of stricter macro-economic and budgetary rules to be respected by the signatory states. The financial aid to member states unable to respect those rules has been accompanied by conditionality's rules that have brought to the downsizing of their decision-making autonomy. National independence has been unevenly restructured, with the debtor member states become less autonomous than the creditor member states for their inability to control the externalities of their policies.

Within the European Council (and the Euro Summit), a decision-making hierarchy has emerged under the form of a German-French (and then only German) directorate of the financial policy of the Union. With the coordination of the Brussels office of European Council's president, the financial strategy for dealing with the crisis came to be dictated by Berlin and Paris agreeing not only on the strategic goals but also on the policies to achieve them. The German-French *directoire,* and then the growing German unilateral leadership of the euro-area, have brought to an unprecedented split between Northern and Southern member states. If the euro was adopted in the first place for preserving a European Germany, the crisis of the euro has brought to its opposite, that is to the emergence of a German Europe.

In the effort to conciliate contradictory principle of economic governance, namely voluntary coordination and statutory definition of the perimeters of that coordination, the German *directoire* has ended up in imposing a convoluted system of rules aimed at preventing political discretion on the policies to pursue (in coherence with the ordo-liberal theory). The assumption that, through the logic of voluntary policy coordination, it would have been possible to govern the single currency has been thus dramatically unmasked by the euro crisis. The German *directoire* was not properly congenial with "the spirit of solidarity" celebrated by Angela Merkel in her 2 November 2010 speech.

6. Institutional processes and legal configurations

What is emerging from the euro crisis is a Union different from the one celebrated by and in the Lisbon Treaty. New institutional, legal and ideological configurations have emerged, although they are far from being consolidated. First, it is a EU characterized more and more by the intergovernmental logic (De Schoutheete and Micossi 2013). It is *intergovernmental union*, an organization where the decision-making barycenter is located in the relations between the European Council and the Council, or better in the relations between the Euro Summit and the Euro Group. This intergovernmental union should not be confused with the economic community claimed or aimed by the UK and the ex-EFTA countries. Not only because it is a political union based on the recognition of the need to increase the Europeanization of economic, fiscal and budgetary policies (something ex-EFTA countries would never recognize), but also because it is a political union controlled by the Brussels' intergovernmental institutions (not by each national government deciding autonomously the strategy to pursue). It is also a political union quite different from the old supranational union, with the Commission as a linchpin, emerged historically around the common/single market policies.

Thus, contrary to the economic community's perspective, in the intergovernmental union the decision-making power resides in the intergovernmental institutions of the European Council (and Euro Summit) and Council (and Euro Group), not in the single national governments (cooperating, more than coordinating, between them). At the same time, contrary to the old supranationalism, in the intergovernmental union emerged with the euro crisis the Commission, the ECJ and the EP play a limited decision-making role. The Commission and the ECJ are considered necessary instruments for guaranteeing the respect of the decisions taken by the intergovernmental institutions, but they are no longer (the Commission in particular) the engine of the policy-making process. This new institutional configuration does not imply the disappearance of the old supranationalism from the EU. In many common market's policies, decisions are taken under the impulse of the Commission's proposals and through the co-decisional legislative power of the EP and the Council. However, the Union's political processes are characterized more and more by the intergovernmental logic and are dominated by the intergovernmental institutions. If one accepts Crum (2012)'s assumption, namely that the EU by its own nature may oscillate between the model of 'parliamentary federalism' and the model of 'executive federalism', then it is plausible to assert that the euro crisis has brought to the affirmation of the latter, although in the form of 'federalism of member states' governments'. One should also consider whether this outcome has been inevitable given the features of the alternative model of 'parliamentary federalism'. The latter, which envisages a decision-making barycenter structured around the relation between the Commission and the EP, could not be easily accepted by national governments

representing states with strong roots in their societies, cultures and histories, considered by their citizens a bulwark of democratic legitimacy. The intergovernmental union has thus appeared to be a realistic project for dealing with the complexity of the euro-governance 'here and now', whereas the parliamentary union has been at least perceived as a long-term political project unconnected to the 'here and now' issues.

Second, the EU emerging from the euro crisis is centered more and more around the euro-area. It is a *euro union,* because the crucial decisions concern the viability of EMU and the governance of the single currency. The Commission's proposal for 'Completing the Single Market' submitted on 1 January 2014 (which follows Single Market Act I of 2011 and Single Market Act II of 2012) was aimed to rebalance the policy's focus (and also the relation between the Commission and the European Council). Nevertheless, with the multiplication of treaties, the EU has gone beyond the paradigm of *differentiated integration within the same legal order* that helped to accommodate the various needs of its participants within a *unitary* project. A new legal configuration has emerged from the crisis characterized by a plurality of distinct and separate legal orders. Internal differentiation (to the Lisbon Treaty) has become an external differentiation (to the Lisbon Treaty). From the legal differentiation has derived also an institutional differentiation, with the formation of new institutional settings within the Fiscal Compact or the ESM or SRF that include exclusively euro-area plus member states. The euro crisis has been a litmus test for the unitary paradigm. From the crisis has emerged a Union divide on its finalities, more than on the different speeds in participating to its institutionalization. The formation of different legal orders has manifested the existence of *more than one union*, rather than of *more than one speed,* within the EU (Piris 2012). In particular the distance between the euro-area member states and UK has grown. The preservation and then the reorganization of the euro-area has required the adoption of measures at odds with the interests of other currency areas within the Union. Indeed, it was the British prime minister to recognize this distance, probably more than many prime ministers of the euro-area member states. On 23 January 2013, David Cameron said: "The European Treaty commits the member states to lay the foundation of an ever closer union among the peoples of Europe (…). We understand and respect the rights of others to maintain their commitment to this goal. But for Britain – and perhaps for others – it is not the objective". This structural separation of interests between the euro-area member states and the member states not adopting the single currency has raised the challenge of how to accommodate those different areas of member states in a common market[4].

Third, the EU emerging from the euro crisis is a *de-politicized union*. Its operation are constrained by rules (more than laws) guarded by non-political bodies (from the Commission to the panoply of specialized committees and boards and agencies). It is a *judicialized* and *technocratic union.* In order to deal with the dilemmas of collective action in an intergovernmental-euro union, it has been dramatically increased the number of *ex ante* and *ex post* measures of control on domestic budgetary and fiscal policies. These measures have been decided by the national heads of state and government meeting in the intergovernmental institutions, in the absence of any significant political control from the EP.

[4] In a speech given to the Nordic-Baltic Ambassadors, Lord Owen (2011) proposed to set up a Non Euro Group (NEG) whose (11) members, chaired by the president of the European Council, "would be able to adjust their currency exchanges rates…to establish their own corporation tax levels, their own fiscal regimes and their own monetary policy governed by their own central bank". This would reflect "an existing reality that there are at present two groupings in relation to currency management within the EU – an informal Euro Group and informal Non Euro Group. (…) The EU is a mixture of the intergovernmental and the supranational. The mix will probably evolve in both directions…". See also House of Lords (2014).

However, in order to promote the compliance with those measures, in a policy's model still based on voluntary coordination, the national governments, under the German leadership, have transformed the policy-making process in a judicial and technocratic process, with the Commission and the ECJ asked to play the watchdog's role. The net result of this transformation has been an unprecedented intrusive intervention in the debtor euro area member states by non-political institutions, on behalf of the intergovernmental institutions, under the direction of the creditor euro-area member states, Germany *in primis.* Such technocratic and judicial intrusion in the budgetary and fiscal policies of the member states seem paradoxical. In fact, no other proper federal unions could have ever accepted such a degree of decision-making intrusion of the federal centre on the federated states (Fabbrini F. 2013). However, once the model pursued is that of the 'federalism of governments', then it is not unsurprising that governments of the stronger member states have ended up in being much more influential than the governments of the weaker ones. Under the ideological predominance of ordo-liberal paradigm, the euro-area has been Germanized: a positive outcome with regard to the imposition of a responsible approach to the management of domestic fiscal resources, much less positive with regard to the functioning of the EMU at large. In short, the ordo-liberal paradigm has tended to substitute politics with rules (Habermas 2012). The necessary work of Union's politicians in mediating between the different interests of the member states, an activity that would have required the control of an autonomous fiscal capacity by the Union's institutions (Maduro 2012), has been downsized in favour of an approach that circumscribes political discretion with a long list of detailed rules prescribing specific behaviour by the member states' politicians. Thus a set of economic and political ideas emerged in Germany in the 1930s has become the core of the ideological configuration characterizing the 2010s EMU. At their turn, the success of the ordo-liberal paradigm has created the normative framework for justifying and supporting the ascendancy of German hegemony within the EU at large.

7. Conclusion

The paper has argued that the euro crisis has called into question the multiple compromises celebrated by the Lisbon Treaty, compromises pursued for preserving the unitary legal and institutional nature of the integration process. The euro crisis has upset the balance between the old supranationalism and the new intergovernmentalism. The unitary legal order that accommodated the euro-area and opt-out member states has been fragmented by the approval of new intergovernmental treaties with their own specific institutional settings. The attempt to conciliate national discretion in economic policy and supranational non-discretionary monetary policy has failed either under the challenges of collective action's dilemmas in condition of crisis. The weakening of the Lisbon Treaty's compromises has brought to new institutional, legal and ideological configurations. These configurations are far from being consolidated. They have come to intertwine with previously established institutional and legal orders, creating a highly complex and contradictory system of relations within and outside the EU. It is an open question how to escape from this constitutional conundrum. Probably, it requires the surrender of the unitary and expanding project of integration, without sacrificing its main achievement, i.e. the single market.

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