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After the Euro Crisis: The President of Europe

A new paradigm for increasing legitimacy and effectiveness in the EU

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1. The euro crisis and the economic governance of the Lisbon Treaty

The euro crisis has placed a spotlight on the institutional system of the Lisbon Treaty for the management of fiscal and monetary policy. It would be unfair to say that the European Union has not reacted to the challenges posed by financial markets. The EU has approved two new treaties (the European Stability Mechanism and the so-called 'Fiscal Compact'), in addition to an exceptional number of legislative and regulatory measures. Each of them is, by itself, of great innovative significance, although incapable, individually, of securing the common currency. In the end, the decisions taken have turned out to arrive too late and to be too limited (relative to the quick pace and high stakes of the challenges posed by the financial markets).

Already with the Maastricht Treaty (1992) and later with the Lisbon Treaty (2009), it was 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 defeat of the Constitutional Treaty in the popular referendums held in France and in the Netherlands in 2005, strengthened the intergovernmental approach to the EU. As the former French President Nicholas Sarkozy said 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." One year earlier, on 2 November 2010, on the occasion of the opening ceremony of the 61th academic year of the College of Europe in Bruges, German Chancellor Angela Merkel clearly delivered her view that "the Lisbon Treaty has placed the institutional structure (of the EU) on a new foundation", to the point of making traditional distinctions between the "Community and the intergovernmental methods outdated". Indeed, she added, the EU is already functioning



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according to a “new Union method”, which consists of “coordinated action in a spirit of solidarity”. Thus, with the Merkozy leadership, it came to be believed that integration could 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. Furthermore, once the Union has started to take care of policies traditionally at the core of member states’ sovereignty (e.g. foreign, security, financial and fiscal policy, or electorally sensitive policies, such as employment or welfare), it seemed inevitable to promote, in those policies, an integrative model based on voluntary coordination by member states’ governments, a model necessarily free from supranational constraints. Indeed, this model was already institutionalised in the Maastricht Treaty, thus transferred in the Constitutional Treaty and then finally brought into the Lisbon Treaty.

The Lisbon Treaty has in fact institutionalised a double constitutional regime. In the management of public policies linked to the internal market (which are the majority of policies undertaken by the EU), the Lisbon Treaty prescribes a model of supranational constitution with characteristics that are similar to those of other democratic *unions of states*. Such a constitution sustains and justifies a system of government characterised by a *separation of powers* among the four institutions that participate in the decision-making process (a dual executive constituted by the European Council and the European Commission and a bicameral legislative branch constituted by the European Parliament and the Council). The European Council and the European Parliament have emerged as the strongest institutions of this constitutional setting. At the same time, for policies that have traditionally been sensitive to national sovereignty, the Lisbon Treaty prescribes a model of intergovernmental constitution with characteristics that are very similar to the model adopted by *associations of states*. Such a constitution sustains and justifies a system of governance, rather than a system of government, characterised by the control of decisions by and within the two institutions (the European Council and the Council) that represent the governments of the Union.

2. The outcome of the intergovernmental constitution

The euro crisis – which became worse in Europe at the same time that the Lisbon Treaty entered in force (1 December 2009) – has presented the first test of the crisis management capabilities of the intergovernmental approach. The result has been unsatisfactory. As provided under the Lisbon Treaty, the European Council has been the true decision-making centre for the policies adopted in response to the financial crisis, with the Commission playing a technical role. But this institutional set-up has not been able to overcome the three fundamental dilemmas of the integration process: the dilemma of veto power, the dilemma of enforcement of the agreements and the dilemma of decision-making legitimacy.

If integration is based on the voluntary coordination among national policies and unanimity in decision-making, it should not come as a surprise that this has enormously slowed down the response to the euro crisis. At the same time, the crisis could develop in the first place because the intergovernmental constitution did not prevent Greece from cheating on its commitments under the Stability and Growth Pact. Greece, in turn, was only following the bad example set by Germany and France, which similarly eschewed their obligations in 2003, without paying any cost for their non-compliance. It is hardly surprising that a small state



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would not respect commitments that bigger states have openly refused to respect. And, finally, the intergovernmental decision-making process, under conditions of existential crisis in the eurozone, has led to the emergence of a hierarchy within the European Council, with the creation of a German-French directorate in the financial policy of the Union, raising serious issues of legitimacy and accountability. Why should one be surprised that no one less than the outgoing president of the Euro Group would denounce such improper *directoire*?

The two new Treaties are the outcome of the difficulties encountered by the intergovernmental constitution in the management of financial policy. The objectives that were set out under those Treaties could have been attained activating a mechanism (like strengthened cooperation) already established in the Lisbon Treaty. Moreover, the legislative decisions of the so-called 'Six Pack', approved in November 2011, had already defined the policy measures required for strengthening the Stability and Growth Pact. However, the eurozone leaders have decided to make use of two international treaties out of the Union framework not only to neutralise the veto of the UK government but also to overcome the dilemmas of the intergovernmental approach. For example, unanimity is no longer necessary for the Fiscal Compact to enter into force (thus reducing the veto power of each contracting party). Similarly, the powers of third institutions (like the Commission and the European Court of Justice) have been strengthened. Their intervention *vis-à-vis* the contracting party that disrespects the agreement is now quasi-automatic, although this automaticity might be neutralised by a reverse majority of the financial ministers of the ECOFIN. Furthermore the Treaty requires the contracting parties to introduce at the constitutional level (or equivalent) the balanced-budget rule, thus also limiting from within the domestic system the possibilities for non-compliance.

These are important innovations for dealing with the veto and non-compliance dilemmas. However, they also raise new political problems, especially if the new treaties will not be approved by all of the signatory states. Moreover, 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. Indeed, in the Commission there are some European Commissioners who were nominated by member states that have not adhered to those treaties. It is true that the commissioners should not have any formal relationship of accountability with their own member state. But it is also true that a Commission made up of one commissioner per member state has ended up reflecting not only European but also national preferences or sensibilities. While it is questionable that those innovations will generate effective decisions, it is certain that they will not make decisions more legitimate. In fact, the two treaties exclude from the policy-making process the European Parliament, the institution that represents the voters who will be directly affected by the intergovernmental decisions.

Moreover, the intergovernmental method celebrated by the two treaties will expose the decisions taken to the pressure of the largest and strongest contracting parties (as has happened during the euro crisis). With the result that the citizens of the other contracting parties will come to be *de facto* governed by leaders they had never the chance to elect. Again, why should one be surprised by the fact that Greek citizens protest against the German Chancellor's policies rather than those of the EU authorities - thus deepening the divide between Europeans? Indeed, the intergovernmental approach is meeting a growing opposition in many EU member states. It remains to be seen whether the election of François

Hollande as President of France in May 2012 signals the beginning of a new political cycle characterised by new ideas on the institutional future of the EU. Should that happen, this paper aims to contribute to the debate on those new ideas.

3. The institutional challenge: Effectiveness and legitimacy

The management of the euro crisis, and the new treaties that have emerged from it, show that an intergovernmental EU cannot satisfy the basic requirements of effectiveness and legitimacy. Even if it is perhaps a shared view that it is possible to meet those requirements only by extending the supranational logic to intergovernmental domains, there are still different strategies that might be pursued to move into a supranational framework. One traditional strategy has argued that it is necessary to '*parliamentarise*' the EU. The Commission should be brought back to the centre of the EU system (from which it has been excluded during the euro crisis) and, along with it, the role of the European Parliament should be strengthened as the one institution that confers political legitimacy (through its power to approve or dismiss the Commission) to the Union's executive. The main political parties should propose, on the occasion of the next elections of the European Parliament in 2014, their respective candidate for President of the Commission, transforming those elections into the arena for politicising the policies of the EU. At that point, the task of the European Council and its President would simply be to formalise a decision made by voters and institutionalised by their parliamentary representatives. The EU would have its government (the Commission), capable of acting effectively. At the same time, being the expression of parliamentary elections, the Commission and its President would have the legitimacy to act on behalf of the majority of European voters.

Although this strategy is clear and familiar, is it also plausible? My answer is negative, empirically and normatively. Empirically, at least since the Maastricht Treaty, the Union has gone in a direction incongruent with the parliamentary model. The European Parliament has strengthened itself as institution, but such reinforcement has not implied a parliamentarisation of the Union. The more the European Parliament has increased its powers, the stronger has become the European Council. Although the Lisbon Treaty gives the European Parliament the right to elect the Commission's president, in reality it is the European Council that selects the candidate for the office, leaving the European Parliament little choice but to approve him/her. This predicament makes groundless the claim that the European Parliament should play a central role in deciding the European executive.

Normatively, the Union cannot become of a federal parliamentary system because it is based on states (and their citizens) that are asymmetrically correlated. The normative puzzle the EU has to resolve (in order to survive and consolidate itself) is as follows: How to keep together in a single political system member states with millions of inhabitants and member states with a few hundred thousands of inhabitants. Turning the EU into a parliamentary system means transforming the European Parliament into the institution with the exclusive prerogative 'to form a government'. But if that is so, then the voters of the larger member states will have a much greater weight in determining the outcome than the voters of the smaller member states. Unless, of course, the elections are run on a transnational basis which would require (first) that the main divisions within all member states are between the same parties and (second) that those divisions are politically homogeneous. But this is not the case, nor could it be. In a Union of states, in addition to partisan cleavages, the divisions between

member states and regional areas are the most significant. Furthermore, the different historical national experiences make it improbable that right and left mean the same thing in all the member states, especially when dealing with the constitutive issues of the process of integration.

4. The Union as a separation of powers

But if this is so, is there an alternative paradigm for making the supranational EU more effective and legitimate? My answer is positive. The supranational EU has become *de facto* a system of separation of powers because the latter is much more congruent with the need to accommodate the asymmetries and differences between its member states. The asymmetries in capabilities and population combined with the differences in culture and language have encouraged the institutionalisation of a decision-making system that diffuses the exercise of decision-making power amongst institutions rather than concentrating it in only one institution (the European Parliament). Certainly, institutional ambiguities have been preserved, rendering in some respects the separation between executive and legislative institutions opaque. It is sufficient to recall that the General Secretary of the Council (a legislative institution) functions as a supportive structure of the European Council (an executive institution). Or that the High Representative for foreign and security affairs (who, as Vice-President of the Commission, is an executive officer) presides over the Council of Foreign Affairs (which is a configuration of the legislative Council, although it has a permanent chair while the other Council's configurations are chaired by the various ministers of the member states holding the six-month rotating presidency of the Union). Notwithstanding these ambiguities, the supranational EU has institutionalised a bicameral legislature, constituted by the Council and the European Parliament.

At the same time, the Union has established a dual executive in the European Council and the Commission, with the two respective presidents representing a two-faced Janus. The institutionalisation, with the Lisbon Treaty, of the European Council has been a key condition to advance the integration process in sensitive policies. With the election of the permanent president of the European Council, the latter has irreversibly been transformed into a decision-making institution. With the *de facto* recognition of the Charter of Rights as the third Treaty constituting (with the Treaty on the European Union and the Treaty on the Functioning of the European Union) the Lisbon Treaty, the judicial review powers of the ECJ have seen strengthened. The euro crisis has thus accelerated the transformation of the European Council into an executive institution. However, the euro crisis has also shown that the president of the European Council might be unfairly exposed to excessive pressure by the heads of state and governments of the larger member states. How can one neutralise that pressure?

If one recognises that the European Council has come to embody the political head of the Union, then, rather than trying to hide or hinder such evolution, it might be more rational to reform the process of selection of its president so as to make its role more effective and legitimate. The effectiveness of the European Council's president would have been stronger (compared to that demonstrated during the euro crisis), if he had benefited from greater decision autonomy with respect to the heads of state and government (especially of Germany and France) who make up the European Council. At the same time, the Commission and its president could have exercised a greater influence if their institutional

role had been constitutionally linked to the other head of the executive, the European Council's president. Thus, in order to avoid new *directoires* in the future, it would be necessary, firstly, to enlarge the election base of the president of the European Council and, secondly, to turn the European Commission into the true support structure of the European Council (instead of the Secretary General of the Council). This might raise fears, on the part of the Commission, that it would be dominated by the heads of state and government of the European Council. But the reverse might also be true, with the Commission able to influence the work of the European Council much more, also because of its more structured organisation. Indeed, in a dual executive, the logic of competition and the logic of cooperation may find an equilibrium point.

5. Towards the president of the Union

If one wants to increase the decision-making autonomy of the president of the European Council from the members of the latter, then it is necessary to give him/her a legitimacy base distinct from them. Of course, in a union of asymmetrical states, it would be unacceptable to promote the direct election of the president by the European voters, for the same reason that it would be unacceptable to give the European Parliament the power 'to form the government'. Any direct election would favour the larger member states to the detriment of the smaller ones. For this reason, the strategy to pursue could be to constitute an *electoral college* through which to reduce the effects of member states' asymmetries.

Here is my proposal. The heads of state or government of the European Council would select two candidates for the position of the institution's president, on the basis of both national and partisan evaluations. The two candidates would then be subject to the vote of presidential electors organised into national electoral colleges. Such colleges could be constituted of representatives of national parliaments, whose composition would reflect the majorities and minorities of national legislatures. The number of presidential electors for each individual member state would be based on population weights, *with a correction favouring small and medium vis-à-vis larger member states*. The two candidates will carry out their electoral campaigns presenting their programmes to the national parliaments of the member states, and inevitably to the latter's publics. The candidate elected president of the European Council will be the one receiving a majority (inevitably absolute in this case) of the votes of the presidential electors in the various national electoral colleges. In this way, the European Council maintains its selection power, but loses its election power. The election power is assigned to national parliaments, thus making the president of the European Council relatively independent from the heads of state and government who constitute that institution. The European Parliament should not play any role in the process because of the need to preserve the institutional separation of powers between executive and legislative institutions at the EU level. The European Council would continue to meet periodically, as prescribed under the Lisbon Treaty, with the purpose of discussing the policy strategies defined by the president. It would also be necessary that the European Council would be re-named European Presidency, thus avoiding misunderstanding with the Council (legislative body) and at the same time underlying its institutional function (executive body).

The operational link between the president of the European Council and the European Commission and its president should be strengthened, transforming the latter into the true operational branch of the former. The European Council's president and the Commission

should meet on a regular (weekly) basis. It would be the Commission's duty, rather than the General Secretary of the Council's, to prepare the periodical meetings of the European Council and to structure its deliberations. The General Secretary of the Council would support the activities of the member state holding the rotating presidency and more in general the legislative activity of the Council. The procedure for the nomination and formation of the Commission's president and commissioners should remain the same, with the European Council's president proposing (with the consent of the majority of the latter's members) the candidates for those roles and the European Parliament to give its 'advice and consent'. Moreover, the Council might also be included in this process (i.e. regarding the approval of commissioners proposed for foreign and security policy or financial policy), once the need to make it a properly legislative institution, thus separated from the European Council, is duly recognised.

The role of the Commission should remain what it is: a powerful civil service organisation operating in the European interest. The Commission should formally maintain the monopoly of legislative initiative in all policy matters (and not only in the policies connected to the single market and now decided according to the so-called Community method), although politically it will have to share this function with the European Council's president. The model of separation of powers would lead to a redefinition, but not the abrogation, of the Community method. In the dual executive, there would be a combination of two legitimacies: i) the legitimacy stemming from national parliaments for the president of the European Council, and ii) the legitimacy stemming from the European Parliament for the president of the Commission. One might assume that the broader legitimacy of the president of the European Council will make him/her the political head of the executive, with the president of the European Commission leading its technical arm.

The European Parliament should become what it is already, namely a legislative institution whose main role is to check and balance the dual executive, but not to 'form the government'. It should be the constitutional duty of the European Parliament and the Council, under its specific configurations, to oversee the dual executive. Thanks to the separation between legislative and executive institutions, the activity of the bicameral legislature will not be constrained by the need to guarantee its political support to the 'government'. Indeed, legislatures are much more powerful in systems of separation rather than fusion of powers. An executive organizationally structured by the Commission and politically directed by the president of the European Council would be more effective and legitimate. However, this strengthening of the executive power would require an adequate supervision and balancing action from the legislative power. In this regard, it might be helpful to go back to a proposal that emerged from the Brussels Constitutional Convention of 2002-03, that is to differentiate the policies on which each legislative institution will have a pre-eminent role in oversight, leaving to the Council the control of those policies that are particularly sensitive to the member states (e.g. foreign, security and financial policies) and the rest to the European Parliament.

6. The constitutional challenge: How many treaties?

With the multiplication of treaties, it would be also necessary to open a debate to discuss whether the Union should preserve a unitary character or whether it should institutionally differentiate itself. There are two strategies to follow. The first strategy would be that of



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accelerating the transposition of the new treaties (especially the Fiscal Compact) into the EU legal system. Once the main objective has been reached (that of making the signatory states introduce, through constitutional or equivalent means, the golden rule of balanced budgets), the Fiscal Compact should become part of the Lisbon Treaty, assuming the characteristics of a constitutionalised enhanced cooperation not unlike that attained with the Schengen Treaty. The integration process would be regulated by a single legal framework, with functional internal differentiations relative to specific policies. This strategy has the merit of keeping the Union together, but also has the fault of keeping the integration process at the minimum common denominator. This might increase the dissatisfaction towards the Union from those who would seek more integration, without conquering the consensus of those asking for less. Furthermore, if not reformed, an intergovernmental Fiscal Compact, included into the Lisbon Treaty, would end up strengthening the latter's intergovernmental component constitution, thus preserving the situation that made crisis management wholly unsatisfactory.

The second strategy would be to build on the institutional differentiation introduced by the new treaties, notably the Fiscal Compact. The reform proposals that I have outlined might be applied to the latter treaty, supranationalising it through the separation-of-powers architecture described earlier: namely by changing the election procedure for the president of the Euro Summit; by deepening the cooperation between the latter and the Commission; by redefining the Euro Group as a legislative institution; by strengthening the balancing powers of the European Parliament over the dual executive. In this manner, two different European polities would be constituted, both with supranational character but with different aims: the economic Europe and the political Europe. With the latter clearly structured according to the logic of separation of powers in order to better guarantee effectiveness and legitimacy to its decisions.