



After the Euro Crisis ***A New Paradigm on the Integration of Europe***

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ARENA Centre for European Studies
University of Oslo
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Abstract

The Lisbon Treaty is the outcome of several constitutional compromises. The compromise between different political (supranational and intergovernmental) views of the Union, 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. These compromises were considered the price to be paid for preserving the unitary character of the project of integration. The dominant paradigm was one Union for all. The euro crisis has dramatically called into question this multiple constitutional compromises. 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 voluntary coordination between national governments in dealing with the euro crisis has brought to the formation of a (German-French and then only German) *directoire* within the intergovernmental institutions. The European Union has entered a constitutional conundrum. A paradigm shift is required for escaping from it, based on the recognition of the end of the unitary project of integration. The historical challenge facing Europeans is to promote the integration of the continent in the context of a plurality of institutional and legal arrangements.

Key words

Banking Union - Economic Integration - Euro Crisis - European Monetary Union - Lisbon Treaty - Stability and Growth Pact

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 constitutional compromises. First, the compromise between a supranational union (in charge of single market policies) and an inter-governmental union (in charge of those policies traditionally closed to national sovereignty, such as, *inter alia*, the policies of the Economic and Monetary Union or EMU). Second, the compromise between EMU countries (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 they were allowed to opt-out from the 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 policies in the member states, subject to the voluntary coordination of their governments.

In order to meet the existential challenges posed by the euro crisis, the EU, since 2010, has approved a panoply of new legislative measures through the procedures established by the Lisbon Treaty, but a number of EU member states have also approved new intergovernmental treaties (the ESM, the Fiscal Compact, and the SRF in the context of the banking union)¹ outside of the Lisbon Treaty, besides executive agreements (EFSF² and the Euro Plus Pact), binding of course only the signatory member states. These legislative measures, intergovernmental treaties and special-purposes agreements have upset the multi-layer structure of constitutional compromises. The EU has entered a true constitutional conundrum. How to escape from it?

In order to answer this question, I will proceed as follows: In the second section, I will discuss the first compromise between two different political interpretations of the EU (the supranational and intergovernmental

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* Sergio Fabbrini is Director of the School of Government, and Professor of Political Science and International Relations, at the LUISS Guido Carli University of Rome.

¹ The European Stability Mechanism (ESM), the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, the so-called Fiscal Compact, and the Single Resolution Fund (SRF).

² The European Financial Stability Facility (EFSF).

interpretations) that emerged definitively with the Maastricht Treaty of 1992. In the third section, I will enter more in detail into EMU structure, discussing the compromise between EMU member states (favoring a deeper political integration) and the member states outside of the EMU (interpreting the EU as an economic community), but also the compromise within the euro-area between monetary centralization and economic decentralization of the EMU. In the fourth section, I will analyze the consequences of the euro crisis on the multi-layer structure of constitutional compromises, showing why the euro crisis has created a political disorder in Europe. In the fifth section, I will thus develop a new paradigm for thinking about the features of a new political order in Europe. I consider a paradigm a conceptual framework aimed to describe the reality object of investigation and to prescribe courses of action (or strategies) for coherently organizing that reality. Finally, I will draw some conclusions from the analysis.

The Maastricht's dual constitution

The Maastricht Treaty of 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 to deal inevitably with issues unconnected with the single market (Baun 1995/1996). For this reason, it was decided to bring those issues within the integration process, but on the condition that they should be strictly controlled by member state 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 thus altered through the formation of different institutional settings separate one from the other. 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, considered as one of the Council's configurations, - with the role

of defining the strategies of the Union). This supranational union was not considered the solution for solving the problems emerging with the end of the Cold War. In that historical context, the member states introduced 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 a limited involvement of the supranational institutions of the Commission and EP). It was also established that, in those policies, integration would have to proceed through political, more than legal, acts. Since integration could not take place through law in those policies, the role of the European Court of Justice (ECJ) – whose power was and has continued to be crucial in the supranational constitution – would have been curtailed. The two constitutional models, the old supranational and the new intergovernmental model, reflected two different views of the *political union* being promoted in Europe (Laursen and Vanhoonocker 1992). The Maastricht Treaty formalized the compromise between political supranationalism and political intergovernmentalism.

The Lisbon Treaty abolished the structure of the pillars that had been formalized in the Maastricht Treaty, but it kept the two different decision-making regimes distinct. 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. Such a constitution sustains and justifies a system of government characterized by an interplay among the institutions that participate in the decision-making process (the Commission and the bicameral legislative branch constituted by the EP and the Council, with the European Council recognized as a formal executive institution of the Union for the first time). At the same time, for policies that have traditionally been sensitive to national sovereignty, in our case, economic and financial 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 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).

When the financial crisis struck Europe, at the same time as the Lisbon Treaty was entering into force, not only was there an intergovernmental constitution in place for dealing with it, but there was also a general consensus that only national governments could find solutions for the financial turmoil. It was

thus not a surprise to hear former French President Nicholas Sarkozy say 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.

(Sarkozy 2011)

The compromises at the basis of EMU

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 also set the criteria for launching the EMU (Martin and Ross 2004) as the policies' framework for supporting the project of a single currency (Jabko 2006). Certainly the project of the single currency was not thrown together in the aftermath of 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 into a stronger European framework. Through the launch of the common currency project, 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 the 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 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, euro notes and coins began to circulate. The EMU was not a policy as many others. Since its inception, it had a political, not merely an economic, rationale (Dyson and Quaglia 2010). In fact, it was based on the compromise between the United Kingdom (UK) and Denmark, and the other

member states. Although celebrated as the economic and monetary regime for all the EU member states, the UK and Denmark were allowed to formally opt-out of the obligation to convert their national currencies into the new common currency, regardless of their macro-economic conditions. *De 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),³ which was in turn heir to the Free Trade Area (FTA), the alternative project to the one begun with the 1952 Paris Treaty and the 1957 Rome Treaties. Indeed, Denmark, after having rejected the Maastricht Treaty in a popular referendum held in 1992, finally came to accept it through a new referendum held in 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 common currency.

The Maastricht Treaty was also a symbolic turning point. The semantic change from the European Economic Community (EEC) to the European Union, although inclusive of a pillar called the European Community (EC), signalled the deepening of the integration process. In exchange for accepting the qualitative leap of moving towards a Union, the member states interpreting integration as a process to create and preserve an *economic community*, not an economic union, were allowed to opt-out of the most integrationist policies⁴.

³ The European Free Trade Association (EFTA) was created in 1960 by seven countries as a looser alternative to the then European Economic Community established with the 1957 Rome Treaty. It was heir to the Free Trade Area (FTA), a project pursued by the UK between 1956 and 1958. 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 and then the EU. At the end of 2012, EFTA was constituted by four countries: Iceland, Norway, Switzerland and Liechtenstein.

⁴ The perspective of the EU as an economic community cannot be confused with that of the EU as an economic union. In the EU's history, the concept of economic union has been connected to monetary union, thus becoming a specific system of governance with the EMU. On the contrary, by economic community one has to understand the organization of the common market. Although the expression economic community is at the origin of the integration process (the 1957 Rome Treaty set up the European Economic Community, EEC, which became the first pillar of the European Community, EC, with the 1992 Maastricht Treaty), that expression has come to be interpreted as merely a 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, far

The opt-out clause was the price to be paid for preventing the ex-EFTA countries from obstructing the extension of the integration 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. In addition to Denmark and the UK opting out of adopting the euro, Protocol No. 30 of the Lisbon Treaty asserts (Art. 1) that the Charter of Fundamental Rights:

[D]oes 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 of the Charter with the 2013 Treaty on the accession of Croatia. Regarding legislation, Denmark, Ireland and the UK have opted out of policy regulation in 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 Union⁵. Denmark has opted out of foreign and security policies. At the end of 2013, five member states had these 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 by the 2013 Treaty of the Accession of Croatia).

The opting-out of the adoption of the euro had, however, a special character: it formalizes the existence of different economic constitutions. Notwithstanding

from the fourth stage. This is why the concept of economic union cannot be equated to the concept of economic community.

⁵The 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 EU law. 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.

what the Lisbon Treaty (Treaty on the European Union, Art. 3, point 4) re-asserted, namely that ‘the Union shall establish an economic and monetary union whose currency is the euro’, the UK and Denmark were allowed to keep their national currency. Formally, the Lisbon Treaty (Treaty on the Functioning of the European Union, Art 139, point 1) recognizes this possibility only for those member states that do not ‘fulfil the necessary conditions for the adoption of the euro [and for this reason they] shall hereinafter be referred to as ‘Member States with derogation’’, or ‘pre-ins’. This has never been the case for Denmark and UK. Thus, different economic and monetary regimes came to coexist in the same project of integration. Within the EMU, there were the regimes 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 legal framework diverging economic and monetary interests, with the assumption that they would converge towards a shared goal of economic growth and monetary stability.

There is a third constitutional compromise to consider, this time concerning the euro-area member states. This compromise consisted of combining centralization of monetary policy with decentralization of the economic, budgetary and fiscal policies connected to the common currency. The monetary policy of the common currency was put under the control of a federal independent institution, the ECB, but the other connected policies remained in the hands of member states. Once the process of setting up a road map for achieving the common currency was accepted, the German request of a strictly independent central bank pursuing an exclusively anti-inflationary monetary policy was accepted for the *monetary side* of the EMU and, for the *economic side* of the EMU, an intergovernmental model based on the voluntary coordination of policies by member state governments was chosen, as required by the French government. At the core of this compromise, there was the Stability and Growth Pact (Heipertz and Verdun 2010), constituted by a Resolution, two Council Regulations and the Excessive Deficit Procedure Protocol approved in July 1997. 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.

Although this compromise recognized the possibility by the member states to pursue their own policies, they had to do that however within macro-economic parameters (defining the ratio of public deficit and debt to GDP), formalized as proper statutory rules. The principle of voluntary coordination between national governments was thus celebrated, but that voluntary coordination had to be regulated by macro-economic rules that only the national governments could determine (as a collective in the ECOFIN Council) whether they have or have not been respected by one of them. There was no legal imposition on the behaviour of national governments by any of the supranational institutions (the Commission and the ECJ in particular). Through voluntary intergovernmental coordination, it was possible to keep the economic, fiscal and budgetary policies decentralized, thus preventing the formation of a supranational authority and the allocation of supranational resources (as an autonomous Union's budget independent from the transfer of money by member states) for managing those policies.

In conclusion, the panoply of constitutional compromises was the price to be paid to keep on board member states with different views on the finality of the integration process. Those compromises substantiated the paradigm of the *unitary* character of the project of integration. In accordance with that paradigm, the role of the various compromises was to accommodate different needs and perspectives, on the assumption that they would not become mutually incompatible. From Maastricht to Lisbon, the EU developed as an *internally* differentiated political system (Dyson and Sepos 2010) able to accommodate member states with different views on the finalities of the integration process and different speeds for pursuing them (Piris 2012). With the approval of the Lisbon Treaty, it was generally thought that those constitutional compromises would finally be consolidated. The teleological narrative of a common fate for all European states seems to have found finally its celebration.

The euro crisis and the constitutional disorder

The financial crisis has not, however, vindicated that narrative. Indeed, it has upset the complex structure of compromises built within the Treaty. First, it upset the equilibrium between the supranational and intergovernmental constitutions. As provided by the Lisbon Treaty (Foiret and Rittelmeyer 2014), the European Council has become the true decision-making center for the policies adopted in response to the financial crisis, in particular the meetings of the heads of state and governments of the euro-area formalized as the Euro Summit by the Fiscal Compact. Because the financial agenda has engulfed EU policy-making, the European Council, now finally led by a permanent president (Closa 2012), has become the true decision-maker (De Scoutete

2011; Eggermont 2012), not just an institution limiting itself to define the general aims of the integration process. Given the structure of economic governance set up in the Treaty, the Commission has come to play an administrative role, transforming the policy's indications of the European Council in technical proposals. The more the crisis has deepened, the more the European Council has extended its executive role to other crucial policies of the EU. If it is true that the Commission was the Union's executive when EU policies centered on the single market (Page 1997), this is no longer the case with the shift of the center-stage of the policies in the direction of euro stability. This does not mean that the Commission has become irrelevant. Indeed, because intergovernmental cooperation has not been able to overcome fundamental dilemmas of collective actions (Fabbrini S. 2013a), the governmental leaders of the European Council have had to resort to the Commission. Legislative measures (the European Semester, the 'Six Pack', the 'Two Pack') and new intergovernmental treaties have indeed increased the functional role of the Commission (and even of the ECJ but also of the domestic constitutional courts; Fabbrini, F. 2014) in monitoring member states behavior regarding their respect and enforcement of intergovernmental decisions.

At the same time, the EP has been left in a sort of institutional limbo. More precisely, it has been marginalized. 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 (Heffttler and Wessels 2013). Thus, in the aftermath of the financial crisis, a re-structuring of the equilibrium between supranational and intergovernmental constitutional regimes in favor of the latter has taken place. With the euro crisis, the decision-making barycenter has moved toward 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 toward the relation between the Commission and the EP, as it was during the Delors' years of building the single market, between 1985-1994.

Also the compromise between the UK (and more in general the ex-EFTA area) 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 chose to resort to international treaties for neutralizing the veto threatened by the UK government. In order to prevent future veto threats, those treaties set up new organizations where unanimity is no longer needed for decision taking. The Fiscal Compact has even established (Title VI, Art. 14, point 2) that, to enter 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. Moreover, the Commission's intervention on a contracting party that disrespects 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). Furthermore the Fiscal Compact requires the contracting parties to introduce the balanced-budget rule at the constitutional level (or equivalent), thus limiting also from within the domestic system the possibilities for non-compliance.

The formation of new legal orders outside the Lisbon Treaty, although not incompatible with the latter (De Witte 2012), necessarily calls into question the constitutional compromise between the EMU and the opt-out member states, the UK in particular. With the Fiscal Compact, the large majority of member states will come to coordinate their economic, fiscal and budgetary policies, leaving on the margin only the 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 of intergovernmental agreement) between the euro area member states and several non-euro area ones (as Denmark, Poland, Lithuania, Bulgaria, Romania and Latvia, that entered the euro-area on 1 January 2014) aimed to foster stronger economic policy coordination between them. The new organization set up by the Fiscal Compact has made evident the distinction of interests between the euro-area and the opt-out member states. 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 out member states informed only later about their content (Ludlow 2011).

Finally, the third compromise, between a centralized monetary policy and nationalized 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. 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 (in coherence with the *ordo-liberal* economic tradition elaborated already in the 1930s by the Freiburg School; Young 2012), but also an increase

in technocratic intrusion of the Commission on the indebted member states' economic policies. Financial aid to member states that are unable to respect those requirements has been accompanied by rules of conditionality that have led to the downsizing of their decision-making autonomy. National discretion has been unevenly restructured, with the debtor member states becoming 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 the European Council president, the financial strategy for dealing with the crisis came to be decided by Berlin and Paris and then approved by the intergovernmental institution as such. The growing German unilateral leadership of the European Council has led to an unprecedented split between northern and southern member states within the euro-area.

If the euro was adopted in the first place for preserving a European Germany, the euro crisis has brought about the opposite effect, that is, the emergence of a German Europe. Instead of giving the euro-area an autonomous budget and legitimate political authority for dealing with the crisis, the outcome has been a convoluted imposition of rules aimed at preventing any political debate on the policies to pursue. The assumption that it would have been possible to govern the common currency through the logic of voluntary policy coordination has been dramatically unmasked by the euro crisis. The new intergovernmental treaties have weakened an integration process based on Union laws (regulations and directives, in particular) approved through the interplay of executive and legislative institutions. Integration through law is not an aseptic process. It has involved, or it might imply, the politicization of the issues concerned, also because the EP has gradually become a co-decider of those issues. The new intergovernmental treaties are instead based on rules and not laws, decided only by the representatives of national governments, excluding the EP from any impact on their content. Intergovernmentalism has thus brought to the de-politicization of the decision-making process concerning the EMU. Politics has been substituted by macro-economic and judicial rules, whose respect is supervised by technocratic bodies unaccountable, directly or indirectly, to European voters.

After the euro crisis: a new paradigm on integrating Europe

If the euro crisis has brought the EU into a constitutional conundrum, is it possible and how to escape from it? If one remains within the paradigm of a unitary process of integration, then the escaping strategy will have necessarily

the features of a rationalization of the *status quo*. Indeed I would call it the *muddling-through* strategy. Its aim is to preserve the dual constitutional nature of the Lisbon Treaty, albeit fine-tuned on the basis of the measures introduced to manage the euro crisis, and thus to look for pragmatic adaptations between the various intergovernmental treaties. This core of this strategy would however consist in the acceleration of the transposition of the main new treaty (the Fiscal Compact) into the legal system formalised by the Lisbon Treaty. Indeed, the Fiscal Compact (Art. 16) declares that:

[W]ithin 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 already happened with the Schengen Agreement].

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 the UK will be required. An unlikely outcome, given that the Treaty's clauses would continue to affect London's financial district negatively, as it would have done at the moment of its opposition to the Lisbon Treaty's amendment.

If the strength of this strategy lies in the effort to reconstitute a unified legal order for the EU, it, nevertheless, has significant weaknesses. The conflict of interests between the no euro-area and the euro-area member states cannot be easily recomposed in a unitary legal order. The need for deeper integration in EMU policies will make the continuance of a common legal and institutional order unlikely. At the same time, the dissatisfaction at the management of financial policy cannot be silenced with the confirmation of its intergovernmental decision-making regime. Intergovernmental decision-making has not been as effective as the situation required, nor have its outcomes had the necessary democratic legitimacy for being accepted by the affected citizens. Recourse to the enhanced cooperation clause cannot help either, if it concerns a set of systemic (economic, fiscal, budgetary) policies regarding a monetary union of 18 member states (as of 1 January 2014), not just a specific limited program. The main weakness of the *muddling-through* strategy is conceptual: it assumes the euro crisis as business as usual, a crisis as many others in the past of the integration process, a crisis that has not altered the basic inter-institutional and legal relations within the Union.

If the euro crisis has not been a business as usual, then an alternative strategy should therefore be considered. Indeed I would call it the *reform* strategy. It

should be based on a new paradigm that recognizes the structural transformation induced by the euro crisis in Europe, for thus prescribing the necessary course of action for giving order to that transformation. The euro crisis has shown that the coexistence of different unions within the EU has become increasingly untenable. The economic community perspective of the opt-out member states is in contrast with the need of an increasing integration of the euro-area in order to manage current and prevent future financial crises. It is necessary to recognise the systemic distinction which has emerged between the EU of the single market and the EU of the single currency, in order to redefine a new institutional setting where both can function without reciprocally contrasting each other. The no euro-area and the euro-area member states are already separate, institutionally and legally. The EMU has created an institutional setting structured around the Euro Summit, the Euro Group, the commissioner for the euro and a discussion has started within the EP on how to distinguish, in deliberations concerning EMU policies, MEPs elected in no euro-area and euro-area member states. At the same time the Fiscal Compact and the other intergovernmental treaties have created a new legal order for the euro-area, although segmented within itself and overlapping with the legal order of the Lisbon Treaty.

The new paradigm should recognize that the dual constitution of the Lisbon Treaty is no longer a viable solution for the EU's dilemmas. In the context of the euro crisis, the dualism of the Lisbon Treaty has triggered a convoluted and unaccountable decision-making regime that has downsized the supranational institutions, obfuscating both the legitimacy and effectiveness of the EU. It would then be necessary to recompose intergovernmental and supranational perspectives in a new institutional architecture for the euro area (plus) member states. Although both perspectives have recognised political integration as a necessity, however, each one has tended to downplay the systemic justification of the other. For supranationalists, the path to political integration should be controlled by the EP and the Commission, with national governments playing a co-decisional role in the legislative process through the Council, but a notary role in the executive process through the European Council. The European Council should become, as it was in the past, one of the formations of the legislative Council rather than an executive institution in its own right, while executive power should be exclusively allocated to the Commission, whose composition has to reflect the results of the elections for the EP. For intergovernmentalists, on the contrary, the path to political integration should be controlled by the national governments organised in the European Council and the Council, with the Commission playing mainly an implementing role of the decisions taken by those institutions and the EP circumscribed to playing a subsidiary legislative role. Here, the EP should be

integrated, if not substituted, by representatives of national parliaments, thus forming a new institutional area where the decisions of the national governments will be monitored and controlled by an institutional configuration of representatives of national and European legislatures. Intergovernmental institutions should be balanced by inter-parliamentary institutions. This expectation however, has been deluded by the facts. The euro crisis has shown that the executive power of the European Council is largely unaccountable to both the EP and domestic parliaments (Crum 2013).

Each of the two perspectives on the political union is unilateral and unrealistic. In fact, a union of historically established and powerful states cannot prosper without institutionalising an important decision-making role for their governments. At the same time, established supranational institutions independent from those states are necessary not only to make intergovernmental negotiation possible, but also to guarantee the effectiveness and legitimacy of the Union's democratic process. It is thus necessary to think to a euro-based political union (a *euro/union*) able to recompose and balance intergovernmental and supranational institutions and interests. In established democratic unions of states, as the United States and Switzerland, only the institutional logic of the *separation of powers* has been able to guarantee that balance (Fabbrini, S. 2010). This means to institutionalize the quadrilateral decision-making system of a dual executive and a bicameral legislature, recognizing to each institution an independent source of legitimacy and power. Contrary to the model of a parliamentary union where the EP is the only legitimate institution to form and dissolve the Commission as the executive power (Fabbrini, S. 2013b), separation of powers implies a pluralistic institutional system for balancing asymmetrical inter-state relations. In a separation-of-powers system, none of the institutions requires the confidence of the other for operating, although all are reciprocally interconnected. Elected by different constituencies or through inter-institutional negotiation – as in the case of the Commission – each of the institutions in the decision-making quadrangle can increase its effectiveness without subtracting anything from the others. At the same time, those capabilities would be supported by a multiplicity of legitimacies. In the dual executive, there would be a combination of the legitimacy of both the president of the European Council, stemming from a larger basis than national leaders, and the president and commissioners of the Commission, stemming from the European Council and the EP. Simultaneously, in the bicameral legislature, there would be the combination of the legitimacy of both the Council, stemming from national elections and the EP, stemming from European elections.

The Lisbon Treaty might continue to provide the legal basis for the single market, although deprived of those parts concerned with the policies (such as monetary, financial, economic, fiscal, budgetary, foreign, security, defence, employment, welfare, *inter alia*) unconnected to it. Probably, in doing that, it might be possible to revise some unnecessary regulatory constraints on specific issues, as requested by the opt-out member states (the UK in particular). At the same time, the euro-area member states should define a political compact for setting up a new organization (among many, see Lamond 2013). A political compact that should have the features of a basic treaty specifying the values and aims of the union, the competences and resources allocated to the supranational and national levels of the union, the separation-of-powers architecture to organize its functioning at the supranational level, the power of the judiciary in protecting citizens' rights and member states' prerogatives. It is a political union similar to the federation of nation states because it shares the latter's 'philosophy', expressed by Jacques Delors in his speech on 6 July 2012, of creating a union through '*un bon compromis entre la méthode communautaire et la méthode intergouvernementale*' (Delors 2012).

These distinct institutional and legal orders should thus find robust bridges to connect with each other in common market policies. It should be necessary to specify the modalities for the functioning of a common market aggregating the member states of the euro/political union with the other European states. The common market, not the euro/political union, might be open to those European states (in the North of the Continent or in the Balkans) or semi-European states (such as Turkey or other countries at the fringe of Europe), provided that they meet precise macroeconomic and micro-institutional conditions. The necessity to close the various eras of bleak European inter-state and infra-state wars transformed the enlargement into a project that has dramatically increased the divergences within the EU. It is time for the internal differentiation to be transformed in an *external* differentiation of organizations and purposes. Both the single market cooperation and the euro/political union should be open to new members, although the threshold for entering the former will be necessarily lower than that for becoming part of the latter.

In order to escape from the constitutional conundrum entered by the EU, three steps should thus be taken. First, it is necessary to *separate* the member states interested only in a merely economic cooperation (the no euro-area member states) and the member states already involved in a process of deeper integration. Second, it is necessary to straighten the latter process, *recomposing* supranational and intergovernmental institutions within an original model of separation of powers: A model able to neutralize the intrusive, hierarchical and technocratic effects which have emerged in the euro-area. Third, it is

necessary to *connect* the various states interested only to participate to an economic community and those engaged in constituting a euro/political union through a flexible agreement aimed at preserving and regulating the policies of the single market⁶. In short: separate, recompose, connect. The euro/political union requires a basic treaty (or fundamental law) not only celebrating the normative principles that have created the union, but also defining the necessary institutional conditions to make it functioning within the constraints of asymmetry and differences between its constituent members. The common market, instead, needs a functional text or inter-states agreement specifying the rules, organs and procedures for regulating it, solving the disputes and for guaranteeing the respect of basic values by their participants.

In short, escaping from the EU conundrum requires the surrender of the unitary and expanding project of integration, without sacrificing its main achievement, i.e. the common market. It requires recognition of the *multiple unions* that have accompanied and constrained the development of the integration process. The future of an integrated Europe will be based on a pluralism of institutional and legal arrangements, organizationally distinct and at the same time reciprocally connected. The future political order of Europe (Olsen 2007) will be based on multiple unions. The debate on how to organize and connect multiple unions should finally begin. The deep divisions on the *finalité* of the process of integration can no longer be masked by the deception of the unitary and expanding Union. Ambiguity has become an enemy of an integrated Europe. It is risky to assume that the common market can be better guaranteed by obstructing a more coherent integration of the euro-area. The potential incapability of the euro-area member states to deal with the systemic challenges of economic and financial instability would impact negatively on the very viability of the common market itself. It is also risky to assume that no euro-area member states will converge, sooner or later, with the euro-area member states, because this expectation reduces the efficacy through which the two groups of member states should have to deal with those challenges. At the same time, a euro/political union unable to

⁶ In a speech given to the Nordic-Baltic Ambassadors, Lord Owen (2011) proposed to set up a Non Euro Group (NEG) whose 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) for a realist analysis of the implications, for the UK, of a 'genuine economic and monetary union'.

recognise a proper role in the decision-making system to both member state governments and their citizens, thus combining them in a separation of powers architecture, will not have a real chance of overcoming the paralysing contrast between supranational and intergovernmental views and interests. The euro crisis has created the need to look to a new perspective on the EU's future.

Conclusion

The paper has shown why the euro crisis has brought the EU to a constitutional conundrum. The EU has been institutionalized on the basis of multiple compromises that were finally formalized in the 2009 Lisbon Treaty. Three compromises in particular have had a constitutional character. The first has been the compromise between member states holding different political views on the EU, the supranational and the intergovernmental. The second compromise has been between the member states constituting the EMU as a political project and those opting out from it. The third compromise has been within EMU between member states claiming centralization in monetary policy and member states claiming decentralization in economic policy. These compromises have been the expression of the unitary project of integration. Since Paris in 1952 and Rome in 1957, the process of integration has been considered an inclusive and unitary project, within which different views on the finality of integration and different speeds on pursuing them could and should be accommodated. A sort of teleological narrative has supported this project, assuming that its end-process would have been a continent integrated within a single institutional and legal framework.

The euro crisis has called into question these multiple compromises, and the paradigm that has justified them. In order to face the euro crisis, the euro-area (plus) member states of EMU have had to introduce legislative measures and to adopt intergovernmental treaties that have questioned the compromise with the opt-out member states. An institutional and legal separation has taken place between the no euro-area and the euro-area member states. The euro crisis has also called into question the balance between supranational and intergovernmental institutions. The financial agenda has increased dramatically the power of the intergovernmental institutions of the European Council and the Council, at detriment of the role of the Commission, the EP and the same ECJ; an increase of power that has been criticized for its inconsistency and lack of democratic legitimacy. Finally, the euro crisis has shown that the compromise between monetary policy's centralization and economic policy's decentralization has ended in generating a convoluted system of economic governance dominated by the interests and views of

bigger member states of the euro-area. At the end of the day, the euro crisis has falsified the dominant paradigm of the unitary nature of the process of integration.

The paper has thus argued in favour of an alternative paradigm based on the recognition of the structurally differentiated nature of the process of integration. The different unions emerged within the EU and within Europe should find an external differentiated representation. The formula 'one fits all' can no longer work. Based on this paradigm, it is thus possible to devise a strategy for separating the euro-area and the no euro-area member states, letting them to pursue their different aims and perspectives. Then, it is necessary to organize the euro-area according to a model of political union based on separation of powers and inter-institutional balancing, thus recomposing the supranational and intergovernmental interests and views antagonized by the euro crisis. Finally, it is indispensable to connect the member states of the various unions in the common market project, enlarging it also to other European or semi-European states. The construction of a new political order in Europe requires the exercise of political leadership at the highest level as statesmen are expected to do. The Europe looming *after the euro crisis* will continue to be integrated if it will accept the idea of being externally differentiated.

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