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Aims
The Common Market Law Review is designed to function as a medium for the understanding and implementation of European Union Law within the Member States and elsewhere, and for the dissemination of legal thinking on European Union Law matters. It thus aims to meet the needs of both the academic and the practitioner. For practical reasons, English is used as the language of communication.

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Associate Editor: Alison McDonnell
Common Market Law Review
Europa Instituut
Steenschuur 25
2311 ES Leiden
The Netherlands
e-mail: a.m.mcdonnell@law.leidenuniv.nl
tel. + 31 71 5277549
fax + 31 71 5277600

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The Common Market Law Review is designed to function as a medium for the understanding and analysis of European Union Law, and for the dissemination of legal thinking on all matters of European Union Law. It thus aims to meet the needs of both the academic and the practitioner. For practical reasons, English is used as the language of communication.

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THE CONSTITUTIONAL IMPLICATIONS OF THE EUROPEAN RESPONSES TO THE FINANCIAL AND PUBLIC DEBT CRISIS

EDOARDO CHITI* and PEDRO GUSTAVO TEIXEIRA*

1. Introduction

The debate on the appropriate responses to the crisis is increasingly, and more directly than ever, calling into question the future of the European Union as a polity. This is a remarkable shift in perspective. Since autumn 2008, the financial and public debt crisis had been represented as a purely internal challenge to the smooth functioning of the institutional and legal framework of the internal market and the economic and monetary union (EMU). It was assumed that the path to overcome the crisis, or at least to attenuate its devastating impact, would basically consist of strictly applying or reforming the existing framework. Particularly in the last year, though, an increasing number of institutional and academic voices, which also reflect the ever more intense public debate, have explicitly pointed to the inherently political dimension of the crisis for the EU. Such voices have highlighted the manifold roots of the crisis and its related economic, social and political costs, and therefore argued that a long-term and sound response to the crisis cannot but imply a redefinition of the overall features of the European polity.

This emerging discussion is complex and articulated. Even if *mehr Europa* seems to be a shared objective, there are deep divergences on the precise meaning to be provided to this elusive formula, as well as on the institutional arrangements actually needed. The Commission President, José Manuel Barroso, for example, has recently argued that the enhancement of political integration within the EU is a necessary move to combat the crisis: such move would ultimately require a new treaty, and should lead not to a European superstate, but to "a democratic federation of nation-states that can tackle our common problems, through the sharing of sovereignty".[1] Moving from the

* LL.M. (UCL), Ph.D. (EUI), Professor of Administrative Law, University of La Tuscia, Italy.

* Institute for Law and Finance at the Goethe-Universität in Frankfurt am Main, and European Central Bank. The views expressed are those of the author and do no represent necessarily those of his institution.

1. See the account provided by the BBC at <www.bbc.co.uk/news/world-europe-19568781> (last visited 18 March 2013). See also the political speech "From war to peace: A European tale", Nobel Peace Prize Lecture on behalf of

same premise, others have suggested that not a federation of nation-states, but only the establishment of a federal European State, with its own set of democratically legitimated institutions, would provide the appropriate and long-term solution to the crisis. In his essay on The Crisis of the European Union, again, Jürgen Habermas has observed that a full response to the crisis cannot but imply the expansion of the current "bureaucratic executive federalism" into a transnational democracy: such transnational democracy, however, should not be structured in the constitutional model of a federal State, but should rather be shaped as a federation beyond the nation-state exploiting the "civilizing force of democratically enacted law" and a number of legal elements that are already present within the EU order and could be further developed.[2] In a different vein, the President of the European Central Bank (ECB) recognized at the end of August 2012 that "monetary union does entail a higher degree of joint decision-making", but argued that "those who claim only a full federation can be sustainable set the bar too high", and what is needed to achieve the ultimate goals for which the EU and the euro were founded is rather a "gradual and structured effort to complete EMU".[3]

The present paper does not engage directly in the emerging discussion on the future of the EU polity. Yet, it aims at providing an indirect contribution by pointing to an important aspect that is often overlooked or misrepresented in that debate,[4] namely that the European responses to the crisis since autumn 2008 have already set in motion a number of processes that are reshaping the EU polity. Therefore, the paper addresses two questions: (i) what are the specific processes that are impacting on the overall architecture of the EU, and (ii) what precise features of that construction are being affected. These are, we submit, relevant questions. The processes set in motion by the EU response to the crisis may condition the future development of the EU and should be taken into consideration in any realistic discussion on the possible reforms of the EU polity. If the European legal scholarship is interested in developing medium and long-term alternatives, it has to be aware of the complexity of such effort. And this also requires understanding whether and how the management of the crisis has already changed the EU polity in structural terms.

The structure of the paper is simple: the paper focuses on three main processes, which are examined one after the other, together with their possible

the European Union by Herman Van Rompuy, President of the European Council and José Manuel Durão Barroso, President of the European Commission, Oslo, 10 Dec. 2012.

2. Habermas, *The Crisis of the European Union. A Response* (Polity Press, 2012), *passim*.

3. Mario Draghi's article is available at <www.ecb.europa.eu/press/key/date/2012/html/sp120829.en.html> (last visited 18 March 2013).

4. See Ruffert, "The European debt crisis and European Union law", 48 CML Rev. (2011), 1777–1806.

implications on the EU polity. The first process corresponds to the emergence of a new EU method of action. In their attempts to organize a response to the crisis, the EU political actors have gradually set aside the Union method, formalized by the Treaty of Lisbon, and have begun to develop a different EU method of action. This is characterized by a minimization of the role of the Community channels and a reinforcement of intergovernmental instruments. This shift from one EU method of action to another, this paper argues, breaks with the historically rooted balance of voices within the EU, and it drives the EU in the direction of a specific form of intergovernmentalism (section 2). The second process is the legal evolution of EU action, which takes place both within and outside the Treaty. There has been a gradual, but clear, tendency to have recourse to legal and institutional arrangements that are not exclusively internal to the EU framework, but which are instead partly internal and partly external to the EU legal order. Such process affects the traditional features of the EU in many ways, the most apparent of which is opening the way to the legal and institutional autonomization of the EMU, and of the eurozone within the EMU, which endangers the legal and institutional unity of the EU (section 3). The third process is the partial and contradictory transformation of the EMU from a "community of benefits" to a "community of benefits and risk-sharing". Such development, it is argued, reshapes the traditional construction of the EMU and might prefigure a federal transformation of the EU, but it also raises functional and legitimacy issues (section 4). The main points of the analysis carried out in the previous sections are then summarized and clarified in section 5, where it is argued that the processes triggered by the EU responses to the crisis may be considered as constitutionally relevant developments. In the final part, we suggest that those processes are capable of undermining some of the prerequisites of the EU as a project oriented towards democratic constitutionalism (section 6).

2. The transformation of the EU method of action

2.1. *From the Union method to a reinforced form of intergovernmentalism*

In a famous speech given at the College of Europe in Bruges in November 2010, Angela Merkel called upon the EU political institutions and Member States to set aside old rivalries and to adopt a "new 'Union method'".[5] By

5. Speech by Federal Chancellor Angela Merkel at the opening ceremony of the 61st academic year of the College of Europe in Bruges on 2 Nov. 2010, available at <www.coleurope.eu/sites/default/files/speech-files/europakolleg_brugge_mitschrift_englisch_0.pdf> (last visited 18 March 2013).

referring to the Union method, the Federal Chancellor intended to relaunch the common political engagement necessary to tackle the "immense challenges facing Europe", as well as to stress that such challenges could be tackled only through "a combination of the community method and coordinated action by the Member States".

Far from introducing a genuine novelty in the European public discourse, as assumed by many commentators, the call for a "Union method" was fully coherent with the Lisbon Treaty. Indeed, the EU method of action encapsulated in the institutional architecture established by the Lisbon Treaty combines the traditional Community instruments with intergovernmental co-ordination. Community instruments, developed in over fifty years of functioning of the European Community, and relying on a peculiar interaction between supranational, multinational and intergovernmental institutions, are at the heart of the legislative process of the EU. Yet, recourse to Community instruments is certainly framed by intergovernmental coordination, which is prominent in the setting of the political agenda of the Union by the European Council. The use of such instruments is also subject to some exceptions in the EU policy sectors in which national governments have proved reluctant to fully accept the Community method, and also in sectors falling outside the EU competences, where coordination of national governments is the only possible method of action. Moreover, the Community method does not preclude a leading role of the Member States in the implementation of EU legislation and policies, solemnly confirmed by the Lisbon Treaty. In this context, the concept of a "Union method" might be taken as a short phrase to refer to the inter-dependence and interaction between Community and intergovernmental instruments within the EU, in the multiple and complex forms envisaged by the Lisbon Treaty.

Reality, however, has proved very different from the overall model envisaged by Lisbon and reasserted by Angela Merkel in her Bruges speech. The financial and public debt crisis, in fact, has not been dealt with by combining the Community method with intergovernmental cooperation in the forms laid down by the Lisbon Treaty. Rather, the EU responses to the crisis have been worked out mainly through mechanisms minimizing the role and function of the Community channels and based on a specific form of coordination of national governments. Amongst several examples, one may refer to the decision taken in May 2010 to provide bilateral loans to Greece to the amount of 80 billion euros;[6] the establishment, again in May 2010, of an European Financial Stability Facility (EFSF) and an European Financial

6. See the Statement by the Heads of State or Government of the Euro Area, 7 May 2010, available at <www.ec.europa.eu/commission_2010-2014/president/news/speeches-statements/pdf/114295.pdf> (last visited 18 March 2013).

Stabilization Mechanism (EFSM);[7] the international Treaty establishing the European Stability Mechanism (ESM); and the various decisions that, stitch by stitch, from 21 July 2011 to February 2012, have gradually knitted the political commitment to move towards a "Fiscal Stability Union" in the euro area, most notably the Treaty on Stability, Coordination and Governance in the EMU (TSCG).[8]

In all these cases, the EU responses to the crisis emerged out of negotiations that had taken place in intergovernmental contexts such as the meetings of the European Council, the informal meetings of the members of the European Council, the meetings of the heads of State or government of the euro area Member States (the so called Euro Summits), the sessions of the Ecofin and the Eurogroup. Moreover, a prominent role has been exercised by the Euro Summits, in which all major European decisions on the sovereign debt crisis have been shaped. Those meetings represent a peculiar intergovernmental context. They were launched by French President Sarkozy, who called the first meeting in Paris on 12 October 2008 – almost ten years since the introduction of the euro – to address the financial contagion in the euro area stemming from the fall of Lehman Brothers. The Euro Summits were consolidated in the next four years, but they are not formally envisaged by the Lisbon Treaty. They have taken place in the same composition as the European Council, and therefore with the participation of the President of the European Council and of the President of the Commission, but they have been restricted to the heads of State or government of EU Member States participating in the euro area. They assume the equal position of the Member States of the euro area, but they have been *de facto* dominated by a *directorium* of Member States. In the elaboration of the European responses to the crisis, thus, a crucial role has been played by an intergovernmental body composed only of the EU Member States

7. Conclusions of the Council – Economic and Financial Affairs of 9–10 May 2010, available at <www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ecofin/114324.pdf> (last visited 18 March 2013); and Council Regulation (EU) No 407/2010 of 11 May 2010 establishing a European Financial Stabilization Mechanism, O.J. 2010, L 118/1.

8. The main decisions have been taken with the Statement by the Heads of State or Government of the Euro Area and EU Institutions, 21 July 2011, available at <www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/123978.pdf> (last visited 18 March 2013); the Conclusions of the European Council of 23 Oct. 2011, the Statement by the EU Heads of State or Government at the informal meeting of members of the European Council of 26 Oct. 2011, the Statement by the Heads of State or Government of the Euro Area, the Euro Summit Statement of 26 Oct. 2011, all available at <www.european-council.europa.eu/council-meetings/conclusions> (last visited 18 March 2013); the Statement by the Euro Area Heads of State or Government, 9 Dec. 2011, available at <www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/126658.pdf> (last visited 18 March 2013); the Agreed Lines of Communication by the Euro Area Member States, 30 Jan. 2012, available at <www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/127633.pdf> (last visited 18 March 2013).

participating in the euro area, external to the Treaty institutional framework, interacting with other intergovernmental bodies and insulated from the possible influence of the non-intergovernmental EU political institutions.

This does not mean, of course, that the EU has not made use of the institutional channels of the Community method too. The reform of economic governance has been carried out also through the EU ordinary legislative procedure, which started on 29 September 2010 with a number of Commission proposals, notably the so called Six-Pack adopted in November 2011, which has reformed the Stability and Growth Pact (SGP) through several European Parliament and Council regulations.[9] Very recently, the Council and the Parliament agreed on the so-called Two-Pack proposals, which strengthen economic and budgetary surveillance and also incorporate some elements of the TSCG into Union law.[10] The channels and instruments of the Community method, however, have not been the default mode for crisis management. And when they have been activated, they have been often doubled by parallel negotiations in intergovernmental bodies capable of conditioning the interactions among the EU institutions within the ordinary legislative procedure. In this context, the somewhat overlapping roles of the President of the Council and of the Commission in putting forward proposals in economic governance and EMU may be noted. One may refer, for example, to the establishment by the President of the European Council, following the conclusions of the European Council of 25–26 March 2010, of a mainly intergovernmental "Task Force", called to present to the Council the measures needed to reach the objective of an improved crisis resolution framework and better budgetary discipline. That Task Force covered issues already addressed in the Commission's proposals of 29 September 2010; and its final report,

9. Regulation 1173/2011 of the European Parliament and of the Council of 16 Nov. 2011 on the effective enforcement of budgetary surveillance in the euro area, O.J. 2011, L 306/1; Regulation 1174/2011 of the European Parliament and of the Council of 16 Nov. 2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area, O.J. 2011, L 306/8; Regulation 1175/2011 of the European Parliament and of the Council, of 16 Nov. 2011, amending Council Regulation 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies, O.J. 2011, L 306/12; Regulation 1176/2011 of the European Parliament and of the Council of 16 Nov. 2011 on the prevention and correction of macroeconomic imbalances, O.J. 2011, L 306/25; Council Regulation 1177/2011 of 8 Nov. 2011 amending Regulation 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure, O.J. 2011, L 306/22.

10. The Two-Pack comprise two Regulations, which were proposed by the Commission in November 2011: Proposal for a Regulation on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area – COM(2011)821 final; and Proposal for a Regulation on the strengthening of economic and budgetary surveillance of Member States experiencing or threatened with serious difficulties with respect to their financial stability in the euro area, COM(2011)819 final.

endorsed by the European Council of 28–29 October 2010, has directly orientated the interactions among the Commission, the European Parliament and the Council within the ordinary legislative procedure.

2.2. *Implications: The redefinition of the traditional balance of voices*

The recourse to a method of action different from that envisaged by Lisbon in tackling the crisis is due to a multiplicity of factors. The main reasons were the political reluctance of national governments to overcome the crisis with the transfer of new competences to the supranational level, together with the necessity to have recourse to national funds and the consequent involvement of national parliaments. National constitutional courts, notably the German Constitutional Court, also played a considerable role in determining the boundaries of EU action, thus also conditioning the role of governments.[11] At the same time, it cannot be denied that the intergovernmental instances proved capable of working as fora for negotiations and have avoided a stalemate in the process of organizing a European response to the crisis.

Whatever the explanations may be, the move from the Union method to a new form of intergovernmentalism in the management of the crisis is far from neutral. While this certainly leads to significant progress in integration, for example in constraining national sovereignty over budgetary matters, it does not involve the reinforcement of the role of all EU institutions. By strengthening the intergovernmental voice in the EU decision-making process, indeed, this move reduces the relevance of the general interest of the Union, whose promotion is assigned by the Lisbon Treaty to the Commission. Furthermore, it also affects the democratic legitimization provided, in the framework of the Union method, by the involvement of the European Parliament. The shift from one EU method of action to another, in other terms, redefines the specific balance of supranational, multinational and intergovernmental voices formalized by the Lisbon Treaty. It breaks with a well-rooted historical tradition, as the balance of voices encapsulated in the EU institutional architecture has been gradually developed throughout fifty years of European history. It develops a peculiar form of inter-governmentalism, relying more and more on the interactions of a multiplicity of intergovernmental institutions, allowing differences in their composition (plenary or restricted to the euro area Member States).

11. On this influence see e.g. Cassese, "L'Unione europea e il guinzaglio tedesco", (2009) *Giornale di diritto amministrativo*, 1003–1007, where it was argued that the judgment of 30 June 2009 would condition both the German and European attitude towards the European integration process, encouraging diffidence and hostility to its further development. See e.g. Chiti, "Le risposte alla crisi della finanza pubblica e il riequilibrio dei poteri nell'Unione", (2011) *Giornale di diritto amministrativo*, 311–315.

The redefinition of the traditional balance of voices is a process that has developed out of the succession of European responses to the financial and public debt crisis. Although not a general phenomenon, identifiable in all sectors of EU competence, it is highly relevant for the EU as a whole, as it directly affects and modifies, within the scope of a fundamental sector of EU action, one distinguishing feature of the traditional structural constitution of the EU.

3. Within and outside the Treaty

3.1. *The development of composite legal and institutional arrangements*

In their attempts to tackle the crisis, the Member States have also consolidated a tendency to resort to legal and institutional arrangements that are not purely internal to the EU framework, but that combine EU law instruments with public international law instruments.

Many of the EU responses to the crisis are clearly internal to the EU legal framework. This is the case for the setting up of the new European supervisory authorities as EU agencies, established by EU legislative acts and called to co-ordinate the relevant national supervisors within a "European System of Financial Supervision".[12] Other examples include the already mentioned reform of the SGP by the Six Pack,[13] and the revision of Article 136 TFEU to

12. The process of reform of the European architecture for financial supervision was triggered, as it is well known, by the final Report of the de Larosière Group set up by the Commission in November 2008. That Report, published in February 2009, put forward a number of proposals to the Commission on the future of European financial regulation and supervision; available at <www.ec.europa.eu/internal_market/finances/docs/de_larosiere_report_en.pdf> (last visited 18 March 2013). As for the institutional architecture, it envisaged the reinforcement of the co-operation and co-ordination among national supervisory authorities, through the establishment of new European supervisory authorities. The three European Supervisory Authorities were established in late 2010; see Regulations 1092/2010 and 1096/2010 (concerning the European Systemic Risk Board), Regulations 1093/2010 (European Banking Authority), 1094/2010 (European Insurance and Occupational Pensions Authority), 1095/2010 (European Securities and Markets Authority), all in O.J. 2010, L 331/1-119. On this development, see Teixeira, "The regulation of the European financial market after the crisis", in della Posta and Talani (Eds.), *Europe and the Financial Crisis*, (Palgrave Macmillan, 2011), 9–27; Verhelst, *Renewed Financial Supervision in Europe – Final or Transitory?*, Royal Institute for International Relations Egmont Paper No. 44 (Gent, 2011); Recine and Teixeira, *The new financial stability architecture in the EU*, available at <www.ssrn.com/abstract=1509304> (last visited 17 March 2013); and van Meerten and Ottow, "The proposals for the European supervisory authorities: The right (legal) way forward?", 1 *Tijdschrift voor Financieel Recht* (2010), 5–16.

13. Regulation, cited *supra* note 9.

allow the euro area members to establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole.[14] Very recently, there was the recourse to the special legislative procedure of Article 127(6) TFEU to establish a Single Supervisory Mechanism (SSM) by entrusting banking supervision tasks to the ECB, which constitutes a transfer of national competences to a European institution which is without precedent since the introduction of the euro.[15]

In several other instances, though, the EU has opted for legal and institutional arrangements partly within and partly outside to the EU legal framework. Among others, one may refer to the Euro Plus Pact, which was adopted on 11 March 2011 as an international agreement among the heads of State or government of the euro area, together with six non euro area Member States, and subsequently incorporated in the EU legal order as an Annex to the Conclusions of the European Council of 24–25 March 2011.[16]

A further example is provided by the decision taken in May 2010 to provide financial assistance to Greece. Due to the lack of a crisis resolution mechanism in the EMU, and the constraints posed by the no bail-out principle established in Article 125 TFEU, the European rescue package took the form of an international agreement between Greece, the euro area countries and the International Monetary Fund (IMF) envisaging a collection of bilateral loans, complemented by the IMF, and communicated by the heads of State or Government of the euro area on 7 May 2010.[17] A subsequent Council decision, addressed to Greece and taken in the context of the Greek deficit proceedings, substantially endorsed that agreement and laid down EU provisions coordinated with its contents.[18]

A third example – and the most complex – is that of the "Stability Union" gradually established from July 2011 to the spring of 2012. Indeed, its regulation results from a peculiar combination of different legal materials: on the one hand, sources internal to the EU legal order, such as TFEU provisions

14. European Council Decision of 25 March 2011 amending Art. 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro (2011/199/EU), O.J. 2011, L91/1.

15. COM(2012)511 final, and COM(2012)512 final.

16. The conclusions of the European Council of 24–25 March 2011 are available at <www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/120296.pdf> (last visited 18 March 2013).

17. See the Statement of the heads of State or Government of the Euro area, 7 May 2010, available at <www.ec.europa.eu/commission_2010-2014/president/news/speeches-statements/pdf/114295.pdf> (last visited 18 March 2013).

18. Council Decision (2010/320/EU) of 10 May 2010 addressed to Greece with a view to reinforcing and deepening fiscal surveillance and giving notice to Greece to take measures for the deficit reduction judged necessary to remedy the situation of excessive deficit, in O.J. 2010, L 45/6.

(for example, Arts. 121, 126 and 136, and Protocol No. 12) and EU legislative acts (for example, the regulations composing the Six Pack); on the other hand, sources external to the EU Treaty framework, such as the intergovernmental agreement on a "new fiscal compact" – the TSCG – and the ESM Treaty. The new Stability Union is not only established by legal sources partly internal and partly external to the EU legal order. It is also a variable geometry regulatory framework, as not all EU Member States participate simultaneously in its various components. For example, 17 of the 27 EU Member States participate in the euro area, in the European Financial Stability Facility (EFSF) and in the ESM Treaty, but 27 Member States participate in the EFSM, 23 Member States have agreed the Euro Plus Pact, and 25 countries have signed the TSCG. At the institutional level, moreover, the economic governance of the EU now relies on a complex of multiple institutions, both internal and external to the EU framework, partially overlapping and acting in different compositions.

3.2. *Implications: The autonomization of the EMU*

The recourse to solutions partly within and partly outside the EU framework may be seen as the result of contingent circumstances, rather than as an articulated and shared political option of the leaders of the Member States. It has provided governments a certain flexibility in crisis response, by allowing the euro countries and other Member States to take decisions when this had proved impossible or it had been considered excessively complex within the EU framework. At the European Council meeting of December 2011, for example, the agreement among the eurozone and other willing countries on an intergovernmental treaty outside the EU legal framework, was only one of the three legal options discussed by the leaders to achieve a "closer fiscal union". The other options were the replacement of Protocol No. 12 on the excessive budget procedure, proposed by the President of the European Council in the name of speed and efficiency, and the revision of the Lisbon Treaty, through the ordinary or simplified revision procedure contained in Article 48 TEU, supported by France and Germany. If the option of an intergovernmental treaty outside the EU legal framework was finally chosen, it was because of the contingent dynamics of the negotiations within the European Council between the UK, on the one side, and Germany and France, on the other, and the choice of the UK, after the failure of the negotiations, to veto any possibility of amending the existing EU Treaties.[19]

19. For an account see Editorial Comments, "Some thoughts concerning the Draft Treaty on a Reinforced Economic Union", 49 CML Rev. (2012), 1–14, at 1–2 and 13–14; de Witte, "Treaty games – Law as instrument and as constraint in the euro crisis policy", in Allen, Carletti and Simonelli (Eds.), *Governance for the Eurozone. Integration or Disintegration?*, (FIC Press,

From the legal point of view, notwithstanding the many doubts expressed by the European legal scholarship, the recourse to composite arrangements may be considered, in principle, a legitimate option. Agreements between some EU Member States are a well-established practice allowed by EU law, subject to the principle of supremacy of EU law over conflicting provisions in the agreements and provided that they do not concern matters falling within the EU's exclusive competence,[20] as indirectly confirmed by the Court of Justice with regard to the ESM Treaty in the *Pringle* case.[21] This type of agreement may also provide for certain tasks to be accomplished by EU institutions.[22]

In our perspective, the recourse to composite arrangements is relevant mainly for its implications. One of them is particularly prominent. It consists in the legal and institutional differentiation of the EMU from the EU as a whole, as well as, within the EMU itself, in the differentiation of the euro countries from the other EMU members.

Until the sovereign debt crisis, indeed, the EMU had been designed and implemented as a multi-speed project, allowing a differentiation between euro countries and countries that have not yet adopted the euro as their currency, but nevertheless inclusive and mandatory for all EU Member States, except for the United Kingdom and Denmark. Moreover, the EMU was constructed in such a way to harmoniously fit within the institutional framework of the EU, as is shown, for example, by the fact that no new institutions were necessary other than the ECB.

2012), pp. 139–160, in particular at 152 et seq.; Hyvärinen, "Opening Statements", in Kocharov (Ed.), *Another Legal Monster? An EUI Debate on the Fiscal Compact Treaty*, EUI Working Paper LAW 2012/09, 8.

20. For an articulation of this argument see in particular de Witte, "European Stability Mechanism and Treaty on stability, coordination and governance: role of the EU institutions and consistency with EU legal order", paper presented at the workshop Challenges for multi-tier governance in the EU, European Parliament, 4 Oct. 2012, available at <www.europarl.europa.eu/document/activities/cont/201210/20121003ATT52863/20121003ATT52863EN.pdf> (last visited 18 March 2013), § 3; id., op. cit. *supra* note 19, 154 et seq. On the relevance of the constraints of EU primary law over treaties among Member States agreed outside the EU framework see Ziller, "The reform of the political and economic architecture of the eurozone's governance. A legal perspective", in Allen, Carletti and Simonelli, op. cit. *supra* note 19, pp. 115–138, at 135, where the author observes that international treaties such as the TSCG cannot set aside the boundaries laid down by the Lisbon Treaty, which can be modified only through a reform of the Lisbon Treaty itself.

21. Case C-370/12, *Thomas Pringle* v. *Government of Ireland, Ireland,* judgment of 27 Nov. 2012, nyr.; on this case, Borger, "The ESM and the European Court's predicament in Pringle", (2013) *German Law Journal*, 113–140; and Van Malleghem, "*Pringle*: A paradigm shift in the European Union's monetary constitution", ibid., 141–168.

22. See Joined Cases C-181/91 & C-248/91, *European Parliament* v. *Council and Commission*, [1993] ECR I-3685. See also Court of Justice, Case C-316/91, *Parliament* v. *Council*, [1994] ECR I-625.

The way the EU has responded to the crisis, however, has challenged these assumptions. The new composite framework of the EMU, partly within and partly outside the EU legal order, has created the pre-conditions for a potential mismatch between the EU and the EMU institutional dynamics, which now relies on a multiplicity of bodies, both internal and external to the EU order, partly different from those governing the internal market project and the other fields of EU action. Moreover, it has accentuated the distinction between the euro area countries and the other EMU members, not only because it has envisaged that the two groups of States participate in partly different sets of rules, but also and above all because it has provided the eurozone countries with a legal and institutional context favourable to the deepening and broadening of their integration, also thanks to the possibilities offered by recourse to international public law instruments.

It should be also pointed out that the differentiation of EMU within the EU does not only derive from the recourse to composite arrangements, but is also triggered by instruments internal to the EU framework. The conferral of banking supervision tasks on the ECB, for instance, was made on the basis of Article 127(6) TFEU, which is a provision with a dual nature, relating both to the EMU and to the single market in banking services. Since, however, the ECB's jurisdiction is limited to the euro area, the Member States from outside could only be associated to the ECB's banking supervision competences through bilateral agreements on "close cooperation". The setting-up of a single resolution mechanism to complement the SSM, as announced at the December 2012 European Council, would further intensify such differentiation since it encroaches even more deeply into national sovereignty. The autonomization of the EMU, therefore, takes place even with regard to areas of the single market, which as a result is likely to integrate more deeply than outside the euro area.

A further force towards the differentiation of EMU within the EU may be the Van Rompuy Report "Towards a Genuine Economic and Monetary Union", which was presented at the December 2012 European Council.[23] Its roadmap for completing EMU envisages three stages towards deeper integration in the areas of fiscal governance, coordination of economic and structural policies, including taxation and employment, as well as the single market in banking services. Even though it aims at addressing the arrangements required to strengthen EMU, it certainly provides a vision of the

23. *Towards a Genuine Economic and Monetary Union*, Report by the President of the European Council in close collaboration with the President of the European Commission, the President of the Eurogroup, and the President of the ECB, 5 Dec. 2012, available at <www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/134069.pdf> (last visited 18 March 2013).

political and economic integration of the EU which is not conceivable without the EMU. The Report also puts some (limited) emphasis on the need for democratic legitimacy and accountability, but the main novelty is arguing for the involvement of national parliaments alongside the European Parliament. As a new instrument of integration, the Report also puts forward the concept of "contractual arrangements" between Member States and the EU institutions on economic policies. These contracts would be inter-governmental in nature but "embedded in the EU governance framework". The Commission shadowed this Report with its own "blueprint", where it pleaded for the deepening of the EMU to be made within the institutional and legal framework of the Treaty, rather than through an expansion of intergovernmental action.[24] Encouragingly, the Conclusions of the European Council of 13 and 14 December 2012 repeat the Commission's statement.[25]

3.3. *The challenge to the legal and institutional unity of the EU*

Pointing to the autonomization of the EMU is of particular importance because this process may have the effect of weakening the legal and institutional unity of the EU.

The history of European integration, of course, provides a rich variety of instances of institutional and functional differentiation within the EU.[26] Moreover, the constitutional nature of the EU may be said to be inherently pluralist.[27] At the same time, however, the EU has experienced a gradual

24. COM(2012)777, final/2, "A blueprint for a deep and genuine Economic and Monetary Union: Launching the European Debate*"*, especially at 13–14 and 35–36.

25. The European Council Conclusions state that "[t]he process of completing EMU will build on the EU's institutional and legal framework. It will be open and transparent towards Member States not using the single currency. Throughout the process the integrity of the Single Market will be fully respected, including in the different legislative proposals which will be made." European Council Conclusions EUCO 205/12, 14 December 2012, at para 4

26. The continuity between the past practices of differentiated integration and the current developments within the Eurozone is highlighted by several authors: see e.g. Piris, *It is Time for the Euro Area to Develop Further Closer Cooperation Among its Members*, Jean Monnet Working Paper 05/11, 24 et seq., available at <www.JeanMonnetProgram.org> (last visited 18 March 2013); Laffan, "European Union and the Eurozone: How to Coexist?", in Allen, Carletti and Simonelli, op. cit. *supra* note 19, pp. 173–187; Emmanouilidis, "Which lessons to draw from the past and current differentiated integration?", paper presented at the workshop Challenges for multi-tier governance in the EU, European Parliament, 4 Oct. 2012, available at <www.europarl.europa.eu/document/activities/cont/201210/20121003ATT52863/20121003ATT52863EN.pdf> (last visited 18 March 2013).

27. As is argued, notwithstanding the diversity of views and approaches, by all main theories on the legal nature of the EU; for an account of those theories, and the presentation of a new "theory of constitutional synthesis", see Fossum and Menéndez, *The Constitution's Gift. A Constitutional Theory for a Democratic European Union*, (Rowman & Littlefield Publishers, 2011), p. 69 et seq. In the Italian legal scholarship, the plural nature of the EU has been

process of legal and institutional unification, developing a set of instruments aimed at framing the various ramifications of the European integration project, managing their inevitable tensions and conflicts, and integrating all the various sub-systems in a unitary legal and institutional construction.[28]

The process of autonomization of the EMU, and of the eurozone within the EMU, presents a number of challenges to this unitary construction. First, as has been already observed, the euro area Member States have developed a legal route towards deeper and broader policy co-ordination among themselves, which may drive them to develop their own economic and social policies and laws, irrespective of any common platform provided by the EU. Second, as for the EMU, its new composite regulation is not simply an exercise in differentiation within the context of a unitary framework. It is a legal and institutional framework that may directly conflict or be inconsistent with the EU framework. Admittedly, some of the possible tensions and incoherencies between the EMU and EU frameworks are tackled by the most recent responses, such as the TSCG and the SSM, which envisage a number of operational mechanisms aimed at facilitating and making more harmonious the relationships between the euro area and the EU frameworks.[29] The ability of such mechanisms to unify the EMU and EU, though, cannot be taken for granted and needs to be tested on the ground. The possibility of conflicts between EMU law and EU substantive and institutional law is indirectly testified by the abovementioned *Pringle* case,[30] which shows that the

particularly highlighted by Cassese, "L'Unione europea come organizzazione pubblica composita", (2000) *Rivista italiana di diritto pubblico comunitario*, 987–992; id., "Che tipo di potere è l'Unione europea?", in id., *Lo spazio giuridico globale* (Laterza, 2003), p. 55 et seq.; and by della Cananea, *L'Unione europea. Un ordinamento composito* (Laterza, 2003).

28. The gradual process of legal unification of the EU order has been reconstructed in particular by von Bogdandy, "Founding principles of EU law: A theoretical and doctrinal sketch", 16 ELJ (2010), 95–111, 108 et seq.; id., *I principi fondamentali dell'Unione europea. Un contributo allo sviluppo del costituzionalismo europeo*, (Editoriale Scientifica, 2011), p. 58 et seq. In the same vein, but using partially different arguments, Curtin and Dekker, "The European Union from Maastricht to Lisbon: Institutional and legal unity out of the shadows", in Craig and De Búrca (Eds.), *The Evolution of EU Law*, 2d ed. (Oxford, 2011), pp. 155–185.

29. Indeed, Art. 2 of the TSCG, in regulating the "consistency" of the new Treaty with EU law, requires the contracting parties to apply and interpret the TSCG "in conformity with" the EU Treaties and EU law, and to apply it "insofar as it is compatible with" the EU Treaties and EU law. On the institutional side, Art. 12 aims at rationalizing the relationships between the Euro Summit meetings, on the one side, and the European Council, the Commission and the European Parliament, on the other. And Art. 8, which gives the ECJ jurisdiction to assess whether national governments have failed to transpose the balanced budget rule within their own legal systems as required by the TSCG, may be considered as justified under EU law by Art. 273 TFEU, according to which the Court of Justice shall have jurisdiction in any dispute between Member States which relates to the subject matter of the Treaties if the dispute is submitted to it under a special agreement between the parties.

30. Cited *supra* note 21.

coherence between EMU law and EU substantive and institutional law is a contested issue, giving raise to judicial litigation and requiring to be settled by the Court of Justice. The inconsistencies, instead, may be illustrated by the different degree of development of the mechanisms of legitimization in the EMU and in the EU. For example, the ESM is a "properly constitutional mechanism", but its legal status and some of its fundamental rules seem "unable to meet the challenges raised by such an ambitious program", given the lack of "any of the accountability tools that are usually made available in the structure of European Union agencies".[31]

4. The changing EMU

4.1. *The uncertain evolution of the EMU from a "community of benefits" to a "community of risk-sharing"*

The main arguments thus far are, first, that, in order to respond to the financial and public debt crisis, the EU political actors have gradually developed an EU method of action different from that formalized in the Lisbon Treaty, and, second, that they have consolidated a tendency to have recourse to legal and institutional arrangements combining EU law instruments with international public law instruments. The shift from the Union method to a new EU method of action within the scope of the EMU, it has been argued, represents a break with the historically rooted balance of voices within the EU, and it develops a specific form of intergovernmentalism. Recourse to institutional and legal arrangements within and outside the EU framework tends to jeopardize the constitutional principle of legal and institutional unity developed by the EU legal order throughout its historical evolution. One should now add that the European responses to the crisis have also triggered a third process, consisting in a partial and contradictory transformation of the EMU from a "community of mutual benefits" to a "community of mutual benefits and risk-sharing".[32]

31. Maduro, de Witte and Kumm, "The euro crisis and the democratic governance of the euro: Legal and political issues of a fiscal crisis", in Maduro, de Witte and Kumm, (Eds.), *The Democratic Governance of the Euro*, RSCAS PP 2012/08 (Badia Fiesolana, 2012), 3–11, at 10–11; for a more complacent reading, see Napolitano, "The European Stability Mechanism: A constitutional authority in disguise", ibid., 45–46. On the accountability tools made available in the structure of the EU agencies, see Chiti, "L'accountability delle reti di autorità amministrative dell'Unione europea", (2012) *Rivista italiana di diritto pubblico comunitario*, 29–84.

32. This formula was previously used in Chiti, Menéndez and Teixeira, "The European Rescue of the European Union", in Chiti, Menéndez and Teixeira, *The European Rescue of the European Union? The Existential Crisis of the European Political Project*, Arena Report No. 3/12 and Recon Report No. 19, 2012, 391–427, 422 et seq.

In the traditional construction of the EU economic constitution, which has dominated the process of European integration, it was assumed that private actors and Member States could benefit by the new economic opportunities deriving from the expansion of business activities, market liberalization, free circulation of capital and the establishment of a single monetary policy within the EU legal order. Yet, Member States were not called to share the risks inherent to the projects of the internal market and of the EMU. Reflecting the utopian promise of permanent economic and financial growth encapsulated in the original architecture of the EU economic constitution, EU law did not traditionally provide legal and institutional instruments to mutualize among Member States the potential costs of economic imbalances and disturbances.[33]

EU institutions could not rely, when the crisis exploded, on any emergency mechanisms implying burden sharing among Member States to address the amplification of contagion of the financial crisis within the internal market. Analogously, EU institutions could not rely on any mechanism or provision to tackle the sovereign debt crisis. That was an intentional choice, deriving from the establishment of a monetary union not accompanied by a fiscal union. It was based, on the one hand, on the assumption that burden-sharing mechanisms would be in conflict with the fiscal sovereignty of Member States, which maintained the exclusive power to decide whether and how to deploy taxpayers' funds in a crisis situation. On the other hand, it was based on the optimistic expectation that the lack of crisis resolution mechanisms, together with the commitments made in the SGP, would operate as an incentive for fiscal discipline and would make the emergence of a public debt crisis unlikely or impossible. Burden-sharing among Member States within the EMU, moreover, was expressly prohibited by Article 125 TFEU, preventing the Union or any Member State from being liable for or assuming the commitments of another Member State.

The responses provided by the EU to the financial and public debt crisis have partially moved away from this traditional construction. The possibility of a mutualization among Member States of the costs connected to economic imbalances within the EMU was first admitted in May 2010 with the establishment of two mechanisms for financial assistance – the EFSF and the EFSM. Risk-sharing has since then become a component of the new Stability Union, whose discipline implies, among other things, a gradual limitation of

33. This belief was described in a phrase coined by Majone as "the culture of total optimism" that dominated the moves towards further European integration over the years until the crisis; see <www.euroacademia.eu/wordpress/wp-content/uploads/papers/december/Giandomenico_Majone-Monetary_Union_and_the_Politicization_of_Europe.pdf> (last visited 18 March 2013).

the fiscal sovereignty of the Member States, the commitment of Member States participating in the TSCG to introduce rules on a balanced budget (the "debt brakes") at constitutional level or equivalent by the end of 2012, and, in the medium-term, the development of a fiscal capacity for EMU which would enable fiscal redistribution within the context of a hardened economic governance, as envisaged in the Van Rompuy Report and the Commission's blueprint for a genuine EMU.

This is a potentially profound transformation of the overall rationale of the EMU. It implies the strengthening of both solidarity and loyalty among Member States. Solidarity, because Member States are called to participate, at certain conditions and according to the procedures established by the new composite "Stability Union Law", in a common rescue mechanism and to address directly the possible liquidity problems of some of the participating States. Loyalty, because Member States may benefit from the intervention of the collective mechanism only provided that they have taken virtuous and co-operative behaviour *vis-à-vis* the other Member States and the EU institutions, as defined by the conditionality in the provision of financial assistance.[34] The original EMU as a community of benefits gradually turns into a more complex community with some forms of risk-sharing mechanisms, with a gradual removal of the fiscal sovereignty of Member States, and oriented to the values of solidarity and loyalty among Member States.

This transformation, however, is far from well accomplished. The existing mechanisms for financial assistance represent only a first step in the direction of the mutualization among Member States of the costs connected to economic imbalances within the EMU, and should be followed and complemented by other and more advanced instruments of public debt mutualization, for instance, the issuance of common public debt as envisaged

34. These developments, moreover, have been accompanied by the gradual elaboration by the ECB of new instruments of monetary policy, such as the Outright Monetary Transactions (OMTs), which require conditionality and imply the involvement of the EFSF/ESM. The programme was worked out by the Governing Council of the ECB on 6 Sept. 2012; see Press Release – Technical features of Outright Monetary Transactions, 6 September 2012 and Monthly Bulletin – Editorial, 13 Sept. 2012. For a survey of the various steps through which the ECB has developed its current monetary policy, see Drudi, Durré and Mongelli, "The interplay of economic reforms and monetary policy: The case of the eurozone", 50 JCMS (2012), 881–898; and Napolitano and Perassi, "La Banca Centrale Europea e gli interventi per la stabilizzazione finanziaria: Una nuova frontiera della politica monetaria?" in Amato and Gualtieri (Eds.), *Le istituzioni europee alla prova della crisi*, (Passigli, 2013, forthcoming). For an overview of the previous context, see Krauskopf and Steven, "The institutional framework of the European Central Bank: Legal issues in the first ten years of its existence", 46 CML Rev. (2009), 1143–1175.

by the Commission's blueprint for EMU.[35] The limitation of the fiscal sovereignty of the Member States, indeed, has not been accompanied either by the provision of a genuine EU fiscal competence or by the establishment of new EU institutions, such as an EU fiscal authority. The new economic governance, instead, will operate through rules-based mechanisms of automatic co-ordination and convergence of economic policies, under the surveillance of Council and Commission. In addition to this, the solidarity that is at the core of the new EMU governance is conditioned by a structural divide, one between countries that are destined to act in the next years as creditor countries, on the one side, and the countries that occupy the position of debtor countries, on the other. A more negative reading would suggest that this will increase political inequality within the EU; a positive interpretation would be that it represents a transitional stage of undesirable political equilibria towards a more sustainable path in European integration, on the basis of irrevocable and strengthened cohesion.

4.2. *The departure from the traditional paradigm of the EU economic constitution*

Similarly to the developments observed in the previous sections, the ongoing transformation of the EMU from a community of mutual benefits to a community of risk sharing may also affect the overall features of the EU.

Though partial and contradictory, indeed, the transformation of the EMU brings with it a revision of the traditional paradigm of the EU economic constitution. That paradigm was based on a combination of expected economic and financial growth, intentional rejection of burden-sharing mechanisms, and respect of national fiscal sovereignty. The original construction of the EMU encapsulated that paradigm by combining a federal monetary policy, national fiscal policies, and governance instruments aggregating national preferences. The latest legal and institutional developments revise that construction to the extent that they envisage some forms of mutualization of costs and a number of constraints on the fiscal sovereignty of the Member States in a hardened economic governance.

This is a significant development. It breaks, within the context of the EMU, with a consolidated narrative of the function and structure of the EU economic constitution. Moreover, it might have an influence also beyond the boundaries of the EMU, opening the way to a re-discussion of the traditional paradigm of a community of mutual benefits in other sectors of EU action, starting with the

35. For a short account of these further instruments of mutualization of public debt among the Member States, see Micossi and Peirce, "L'ESM e i debiti sovrani dei paesi dell'eurozona", in Amato and Gualtieri, op. cit. *supra* note 34.

internal market, whose overall rationale might be reshaped in such a way to introduce burden-sharing mechanisms and to limit national fiscal sovereignty. The future ability of the ESM to directly recapitalize banking institutions and the envisaged European banking resolution mechanism are already elements in that direction.[36]

It is also a highly problematic development. This for one main reason, which is that the increasing involvement of the EU executive power in fiscal matters takes place mainly through quasi-automatic procedures, so that the erosion of national fiscal sovereignty is not accompanied by the emergence of a genuine political action at the EU level. In the transfer from the national to the EU level, in other terms, fiscal matters have been depoliticized and insulated from the realm of politics. This might be seen as a merely temporary feature of an ongoing process of federalization of the EMU. Nonetheless, it raises the uneasy and troubling issue of the legitimacy of the new instruments for EU action, which impose particular limitations on the fiscal sovereignty of democratic countries without being on their turn based on clear new mechanisms of democratic legitimation. The legitimacy issue, moreover, is aggravated by the *de facto* division between creditor and debtor Member States, which would need to be mediated by democratically legitimated EU political institutions. And it is destined to become even more urgent with the advancement of fiscal integration. This is explicitly recognized by the Van Rompuy Report and the Commission's blueprint for a genuine EMU, as well as the Conclusions of the 13/14 December 2012 European Council. However, there are several nuances among these three documents, ranging from the Commission's support for the European Parliament to the elevation of national parliaments by the European Council, thus reflecting the pivotal tension between the EU method and intergovernmentalism.[37]

5. Constitutionally relevant processes

It has been argued thus far that the European responses to the crisis since autumn 2008 have triggered three main processes capable of reshaping a number of distinguishing features of the EU as a polity.

36. The commitment to the direct recapitalization of banks was made at the June 2012 Euro Summit, and repeated at the 13/14 Dec. 2012 European Council. See European Council Conclusions EUCO 205/12, 14 Dec. 2012, at paras.10 and 11.

37. The Conclusions of the 13/14 Dec. 2012 European Council request the European Parliament and national parliaments to "determine together the organization and promotion of a conference of their representatives to discuss EMU related issues". European Council Conclusions EUCO 205/12, 14 Dec. 2012, at para 14.

The first process concerns the decision-making procedures and the institutions through which the EU political actors have worked out the measures aimed at tackling the financial and sovereign debt crisis. It consists in the gradual setting aside of the Union method and the parallel development and consolidation of a different EU method of action, characterized by a minimization of the role of the Community channels and a reinforcement of intergovernmental instruments.

Given the multiplicity of opinions expressed in the scientific and institutional debate on this point, it is perhaps not superfluous to clarify that this observation does not refer to the way the new economic governance functions, which is sometimes said to be based on intergovernmental arrangements.[38] It refers, instead, to the institutional channels through which the EU political actors have attempted to organize an EU response to the crisis, including the reform of economic governance. The point made in section 2 is also different from the statement, very common in the European legal and political scholarship, that the EU responses to the crisis have determined a move from the Community method established by the Lisbon Treaty to a new Union method, promoted by Angela Merkel and strongly intergovernmental in nature. First, the Lisbon Treaty does not really envisage a Community method, but a method of action combining traditional Community instruments and intergovernmental co-ordination. Second, the method of action developed by the EU political actors in their attempts to organize a response to the crisis, can be characterized as intergovernmental only provided that it is clarified that intergovernmentalism has been developed in the specific form of negotiations among national governments carried out in multiple intergovernmental institutions, but strongly influenced by the orientations taken by the Euro Summits. If a modification of the EU method of action has taken place, therefore, this has not implied a move from a Community to a Union method, but a shift from the Union method to a method reinforcing in a peculiar way the intergovernmental instruments.

The second process concerns the measures that were adopted, rather than the procedures and institutions for their elaboration. It consists in the increasing tendency to address a EU problem such as the crisis through legal and institutional arrangements that are not strictly internal to the EU framework, but that are partly internal and partly external to the EU legal order.

Most observers and scholars have focused on two specific aspects of this development, namely the functional rationale for establishing international

38. See e.g. Rossi, "'Fiscal Compact' e Trattato sul Meccanismo di Stabilità: aspetti istituzionali e conseguenze dell'integrazione differenziata nell'UE", (2012) *Il Diritto dell'Unione europea*, 293–307, at 299 et seq.

agreements and their lawfulness under EU law. From our point of view, though, recourse to composite arrangements, within and outside the EU framework, is an important development mainly because it may lead to the legal and institutional differentiation of the EMU from the EU as a whole, as well as, within the EMU itself, to the differentiation of the euro countries from the other EMU members. Indeed, the new EMU is governed by a set of bodies, both internal and external to the EU order, partly different from those governing the internal market and other fields of EU action. This breaks the traditional construction of the EMU as a policy field designed in such a way to harmoniously fit within the institutional framework of the EU, and it opens the way to a potential mismatch between the EU and the EMU institutional framework. Moreover, the new composite regulation of the EMU strengthens the differentiation between euro and non-euro countries, by providing the eurozone States a legal and institutional context favourable to the deepening and broadening of their reciprocal co-ordination, because of the possibilities offered by recourse to international public law instruments.

The third and final process consists in the partial and contradictory transformation of the EMU from a "community of mutual benefits" to a "community of benefits and risk-sharing". The responses provided by the EU to the financial and public debt crisis have gradually admitted the possibility of a mutualization among Member States of the costs connected to economic imbalances within the EMU, eroded the fiscal sovereignty of Member States, and oriented the EMU to the values of solidarity and loyalty among its Member States. At the same time, however, the limitation of the fiscal sovereignty of the Member States has not been accompanied by the development of a genuine EU fiscal competence at the EU level; and the structural divide between creditor countries and debtor countries may undermine the emergence of real practices of solidarity and thus of further sustainable political and economic integration.

Admittedly, these processes do not give a full account of all the transformations of the EU polity triggered by the responses provided by the EU itself to the financial and public debt crisis. Yet, they may be said to be major elements of the "game of forces" set in motion by the EU attempts to tackle the crisis, at least in the sense that they directly affect and modify certain distinguishing features of the traditional structural constitution of the EU.

The shift from one EU method of action to another, in particular, redefines, within the scope of the EMU, the balance of supranational, multinational and intergovernmental voices emerged in a fifty years long historical process and formalized by the Lisbon Treaty. It does so by strengthening in a peculiar way the intergovernmental voice in the EU decision-making process and by

reducing the relevance of the supranational and multinational voices expressed, respectively, by the Commission and the European Parliament. Also recourse to composite arrangements may be said to directly challenge a distinguishing feature of the EU polity: this is the case of the legal and institutional unity of the EU, which is weakened by the differentiation of the EMU from the EU as a whole. Finally, the gradual evolution of the EMU from a community of benefits into a more complex community of benefits and risks, represents a substantial departure from the traditional paradigm of the EU economic constitution. The EMU developments revise that paradigm within the specific context of the EMU, by envisaging some forms of mutualization of costs and a number of constraints on the fiscal sovereignty of the Member States. Yet, they might also prefigure a revision of the traditional paradigm of a community of benefits in other sectors of EU action, starting with the single market, whose overall rationale might be reshaped in such a way to introduce burden-sharing mechanisms and to limit national fiscal sovereignty.[39]

These observations suggest that the processes triggered by the EU responses to the crisis are constitutionally relevant processes, directly affecting the distinguishing features of the traditional construction of the EU polity. The financial and public debt crisis has perhaps opened the way to a genuine constitutional season, in the sense that "the cunning of economic (un)reason has placed the question of the future of Europe back on the political agenda",[40] and it has become clear that a proper response to the crisis implies a radical rediscussion of the European project. Yet, the responses to the crisis provided by the EU political actors in the last four years have already set in motion a number of processes challenging the EU polity.

6. Towards the decline of the EU as a project oriented towards democratic constitutionalism?

Whether the developments reconstructed in this paper are positive or negative for the EU polity is, of course, a matter of which yardstick one takes. For

39. The no-bail out clause in Art. 125 of the Treaty encapsulates the concept of the EU single market and the EMU as a "community of benefits", where all can share the increased economic opportunities from the expansion of business activities, the pooling of financial resources, and a single monetary policy. However, it is prohibited to share the associated and increased risks, since this would affect fiscal sovereignty and could give rise to moral hazard problems in the lack of legally binding enforcement of prudent economic behaviour by Member States. This also explains the lack of a genuine European response to the financial crisis, once it erupted in Europe after the collapse of Lehman Brothers.

40. Habermas, op. cit. *supra* note 2, p. 5.

example, if the standard is simply that of further integration as a value *per se*, as seems to be the case for a great part of the European legal scholarship, the processes triggered by the EU responses to the financial and public debt crisis may be considered as positive developments. They demonstrate the efforts of the EU to adjust its institutional setting in such a way to tackle the financial and public debt crisis, and to bring about growth of competences and further integration among the Member States. If assessed by reference to the normative standard of the European social and democratic *Rechtsstaat*, instead, the ongoing processes cannot but represent a failure of the EU project, given the potential undermining of the democratic quality of EU decision-making that they bring about, the loss of coherence of the EU legal system, and the rise of executive, depoliticized federalism within the EMU.

Between the loose goal of further integration and the high bar of the social and democratic *Rechtsstaat*, it is perhaps reasonable to assess the current developments in the light of a simple understanding of the EU as a project oriented towards democratic constitutionalism. Admittedly, this understanding of the European project leaves unanswered the question of the appropriate democratic and constitutional framing of the EU, as well as the issue of the final shape that the EU should take. Yet, it puts the search for a constitutional democracy at the heart of the EU project, on the assumption that the vocation towards democratic constitutionalism is both inherent to the historical development of the EU and a normative, counter-factual ideal that should orientate the EU future evolution.

When assessed against this yardstick, the legal and institutional developments that have been reconstructed in this paper look alarming. The EU responses to the crisis may be certainly considered as efforts to adjust the EU machinery to changing circumstances. One cannot blame the EU for failing to act or defending the status quo: the transformation of the EU method of action, the establishment of composite arrangements, within and outside the EU framework, the attempt to turn the EMU into a community of risk-sharing, responded to the need to react to new challenges and to adapt the EU in such a way to tackle the exceptional and unexpected events of the financial and public debt crisis. These also represented a reaction to the failure of the soft governance arrangements of EMU and the single market, which became untenable once "hard" decisions had to be taken to address the crisis. The EU attempts to adjust to the crisis, however, have reshaped the EU machinery in such a way to threaten some of the prerequisites of a democratically and constitutionally oriented polity. This occurs for three main reasons.

First, the processes recalled in the previous pages seem to give place to a "game of forces" that may ultimately lead to a de-institutionalization of the

EU. The shift from one EU method of action to another in organizing an EU response to the crisis, promotes a specific form of intergovernmentalism, dominated by the eurozone intergovernmental bodies, as the main mode for political action within the EMU. Recourse to composite arrangements, partly within and partly outside the EU framework, sets the legal conditions for the fragmentation of the EU in a number of legally and institutionally autonomous sub-organizations. And the ongoing transformation of the EMU from a community of mutual benefits to a community of risk-sharing, drives the EMU towards a depoliticized federalism based on a structural asymmetry between creditor and debtor Member States. These three forces are hardly compatible with each other, as they reflect partially diverging, and even competing, functional visions and normative understandings of the European integration project. For example, embryonic and contradictory as it may be in its current depoliticized and asymmetric form, the process of federalization of the EMU makes full sense only within the context of a legally and institutionally unitary EU, operating not only through intergovernmental institutions but also through supranational and multinational institutions, and relying on fully developed mechanisms of democratic legitimization. Moreover, one of these forces – fragmentation – might be disruptive. If EU institutions prove unable to manage the ever growing diversity and to counter the centrifugal force of the euro area, the eurozone countries might deepen and broaden their cooperation irrespectively of any common platform provided by the EU. This might ultimately lead to a loss of coherence of the overall EU system and to the parallel emergence of a number of autonomous, self-sufficient organizations. Of course, this process of de-institutionalization of the EU is far from automatic. It is, however, a possible unintended effect of the EU responses to the crisis.

Second, the EU responses to the crisis have exhausted the main democratic legitimacy sources of the EU polity. This is due to at least the following three factors. The first is that the framework of the EU and the EMU relied to a large part on soft governance arrangements, which avoided any federal transfer of competences while creating sufficient indistinctness between national and European competences to foster integration. The low level of juridification of these arrangements implied that they were very loosely enforced at the European level. In turn, this led to a political ambiguity that escaped to a large extent serious challenges of democratic legitimacy. Soft governance did not give rise to hard decisions interfering with national sovereignty or with a direct tangible impact on citizen-votes. Once the responses to the crisis ended the political ambiguity by enforcing compliance of Member States with the EU framework, it became clear that there was an insufficient constitutional underpinning to the legal and institutional change required to rescue the EU,

and, in particular, the EMU. This was further exacerbated by the fact that the responses to the crisis affected the boundaries of fiscal sovereignty both of creditor and debtor countries. As a result, national governments, national parliaments, constitutional courts, academia and public opinion widely questioned the future of Europe as a polity.

The second factor is the consequence of the first. The democratic legitimacy of European integration, whose persistent deficit had not been really solved by the Lisbon Treaty, has been significantly weakened by the rise of intergovernmentalism. As Member States became increasingly constrained in their attempts to preserve integration, they increasingly relied on intergovernmentalism rather than Community instruments. Attempting to change the Treaty, for instance, seemed hardly realistic in a time of crisis and wide contestation of European policies. Most fundamental measures aimed at tackling the crisis, in other terms, were then being introduced through legal and institutional channels that escaped the EU framework and its democratic control. Moreover, they have not been able to internalize the rationale of democratic decision-making within the EU, as the constraints over the national fiscal sovereignty of democratic countries is not accompanied by the emergence at the EU level of a genuine political action by democratically accountable EU institutions.

The third factor is that the co-existence of the decision-making processes of the Union method and intergovernmentalism with a multiplicity of EU configurations will lead to an inevitable attrition that will further hinder the effectiveness of the EU institutions. The relative dependence of the Commission on the agenda set by the European Council is one of the signals. This will further reduce the perception of rationality of the European project among Member States and their citizens, which in turn also destabilizes the process of democratic legitimization of the EU.

Third, the developments reconstructed in this paper might undermine the already fragile social embeddedness of EU institutions. The paradigm of the "community of benefits" implied that European integration would proceed as long as the Member States and their citizens would increase their respective influence and thereby the benefits from participating in the EU and EMU. This was also helped by the soft governance framework, which only implied benefits through participation and no explicit costs. Now, the transition towards the mutualization of risks and costs of integration does not present immediately apparent short-term benefits. This is one of the reasons why the "politics of fear" – if the euro fails, the EU as a whole will fail – often emerges as one of the main arguments.[41] For the first time ever in European integration,

41. On this point, see in particular Weiler, "Editorial: Integration through fear", 23 EJIL (2012), 1–5.

there is the threat that a move towards deeper integration and surrender of national sovereignty is justified as a "state of exception."[42]

The recourse to a method of EU action based upon intergovernmentalism and dominated by the focus on the sustainability of EMU is, however, not destined to underpin a smooth transition. It tends to set aside the role of EU institutions in exercising their respective competences within a democratic framework based on EU law in favour of power-based intergovernmental relations. This may actually weaken Member States since it limits their respective scope of action and rights within the EU framework, thus reducing their political benefits. Moreover, the autonomization of EMU, while it reinforces compliance of euro Member States, may relax it across the EU as a whole. The euro area Member States will be increasingly locked-in and committed to integration, but the political and economic benefits for the other Member States will be less apparent, thus increasing the incentives for selective exit from EU rules.[43] This is why, necessarily, the interests of EMU will have more and more precedence over wider areas of integration, most notably the single market. The transition to a new stage of integration based on risk-sharing and fear of failure – and no longer on more benefits – is therefore likely to occur without the EU preserving and reinforcing the social foundation that is indispensable to any form of constitutionally and democratically oriented polity.

This paper ends where a further question arises. If the analysis carried out in the previous pages is correct, and the EU responses to the crisis may be therefore said to have introduced a number of problematic changes to the EU polity, in what ways do such changes impact on the possible reform of the EU polity as a way out of the crisis? While leaving this question unanswered, we simply observe that a great deal of the ongoing discussion on the future of the EU polity, as well as of the related macro- and micro-proposals of institutional reform, does not really incorporate an understanding of the ways in which crisis management by the EU has already operated as a vehicle for constitutional change. This is a major shortcoming, which the European legal scholarship could and should tackle, by engaging directly in a critical exercise on the present and future of the EU project.

42. See Joerges, "The European economic constitution in crisis: Between 'state of exception' and 'constitutional moment'", in Maduro, de Witte and Kumm, op. cit. *supra* note 31, 39–44, at 42.

43. See Editorial Comments, cited *supra* note 19, particularly at 11–12, which express similar concerns regarding the risk that the EMU distances itself from the rest of the EU.

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