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Abstract:

The Lisbon Treaty is the expression of several constitutional compromises. The compromise between different (supranational and intergovernmental) views of the Union, the compromise between member states engaged in building the Economic and Monetary Union (EMU) and those allowed to opt-out of it and the compromise, within the EMU, between a centralized approach to monetary policy and decentralized economic policies. The euro crisis has 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 formalized the separation of interests between EMU and opt-out member states. The voluntary coordination between national governments has brought to hierarchical inter-state relations in economic governance. The European Union has entered a constitutional conundrum. Two outcomes of the conundrum are thus considered: the renewal of an internal differentiated EU and the formation of different organizations, although the management of the conundrum through a muddling-through approach might emerge as the only viable strategy.

***Keywords**:*

Euro crisis, Lisbon Treaty, constitutional compromises, differentiation, treaty reform

Résumé :

Le traité de Lisbonne repose sur plusieurs compromis constitutionnels : un compromis entre différentes conceptions de l'Union (supranationale et inter-gouvernementale) ; un compromis entre les États membres prenant part à la construction de l'union économique et monétaire (UEM) et ceux qui n'y participent pas ; enfin un compromis, au sein de l'UEM, entre une approche centralisée de la politique monétaire et des politiques économiques décentralisées. La crise de l'Euro a mis en question l'enchevêtrement de ces compromis constitutionnels. L'équilibre entre les conceptions supranationale et intergouvernementale a été brisé au profit de la première. Dans le même temps, l'adoption de nouveaux traités intergouvernementaux a consacré la divergence d'intérêts entre les Etats membres de l'UEM et les autres. Le choix d'une coordination entre gouvernements nationaux a conduit à une hiérarchisation des relations interétatiques au sein de la gouvernance économique. La « boîte noire » constitutionnelle ainsi générée a eu deux conséquences au sein de l'Union Européenne (UE) : le renouveau d'une différenciation interne à l'UE, et la formation d'organisations divergentes. La seule stratégie envisageable pourrait bien alors consister en une gestion au cas par cas de la fameuse « boîte noire ».

Mots clés :

Crise européenne, traité de Lisbonne, compromis constitutionnels, différentiation, réforme du traité

Introduction

The euro crisis has radically called into question the constitutional system of the European Union (EU) as formalized by and in the 2009 Lisbon Treaty (Craig 2010), bringing the EU into a constitutional conundrum. The article will investigate the source of the conundrum for thus discussing its plausible outcomes. 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 intergovernmental union (in charge of those policies traditionally close 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 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.

To meet the existential challenges posed by the euro crisis (Menendez 2013), the EU, since 2010, has approved a panoply of new legislatives measures through the procedures established by the Lisbon Treaty, but a number of EU member states have also approved new intergovernmental treaties (the 2011 European Stability Mechanism or ESM, the 2012 Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, the so-called Fiscal Compact and, last but not least, the 2014 Single Resolution Fund or SRF negotiated in the context of the banking union) outside of the Lisbon Treaty, besides executive agreements (as the 2010 European Financial Stability Facility or EFSF and the 2011 Euro Plus Pact), binding only the signatory member states. These legislative measures, intergovernmental treaties and special purpose's agreements have upset the multi-layer structure of constitutional compromises. The EU has entered a true constitutional conundrum. Which might its plausible outcomes be?

Here, I will proceed as follows: In section 1, I will analyze the constitutional compromises that have structured the Lisbon Treaty, considered as the *sources* of the conundrum. In section 2, I will discuss the consequences of the euro crisis on the multi-layer structure of constitutional compromises, identified as the *features* of the institutional

and legal disorder emerged within and outside the EU. In section 3, I will thus consider the *outcomes* of the conundrum. Finally, I will draw some conclusions from the analysis.

1. The constitutional compromises of the Lisbon Treaty

The Maastricht's dual constitutional models

The 1992 Maastricht Treaty 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 (IGC) held in Maastricht in 1991 had to deal inevitably with issues unconnected with the single market (Baun 1995-96). In that IGC, 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. Thus, 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 that emerged from the previous decades was thus altered through the formation of different institutional settings separate one from the other. In fact, 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 long-term strategies of the Union, Eggermont 2012). 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 close 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 or 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 ones) 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 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 continues to prescribe a constitutional model where the decision-making power is *shared* by multiple institutions through the Community method. 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 where decision-making power is *pooled* in the institutions, the European Council and the Council, representing the governments of the Union. The European Council, recognized for the first time as a formal institution of the Union led by a permanent president, is the collegial political executive of the Union (Fabbrini S. 2013).

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 for dealing with economic policy, but there was also a general consensus that only national governments could find solutions for the financial turmoil. As the former French President Nicholas Sarkozy said in a 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.”

The compromises between monetary regimes

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' regime 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 it was thought that a reunified Germany would continue to be a European Germany.

The EMU was thus a policy regime with a political, not merely an economic, rationale (Dyson and Quaglia 2010). To promote it, a compromise had however to be made with member states (as the United Kingdom or UK and then Denmark) willing to preserve their national currency. 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. 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 of the need to adopt the future common currency. *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)[1], which

[1] The European Free Trade Association (EFTA) was created in 1960 by seven countries as a looser alternative to the then European Economic Community (EEC) established with the 1957 Rome Treaty. It was heir to the Free Trade Area (FTA), a project pursued by the UK between 1956-58. The EFTA as a trade bloc was established by the Stockholm Convention held on 4 January 1960 in the Swedish capital. The founding members of EFTA were Austria, Denmark, Norway, Portugal, Sweden, Switzerland and the UK. During the 1960s, these countries were often referred to as the Outer Seven, as opposed to the Inner Six of the then-EEC. Most of its membership has since joined the EEC and then the EU. At the end of 2012, EFTA was constituted by four countries: Iceland, Norway, Switzerland and Liechtenstein.

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.

The Maastricht Treaty was indeed 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 thus allowed to opt-out of the most integrationist policies[2]. The opting out of 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. Since Maastricht, the opting-out compromise has accompanied the process of integration. In addition to Denmark and the UK opting out of adopting the euro, UK and Poland have opted-out of the Charter of Fundamental Rights. 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 of the Schengen agreement on the free circulation of persons within the EU. Denmark has opted out of foreign and security policies. At the end of 2013, six member states had these opt-outs: UK (four opt-outs), Denmark (four opt-outs), Ireland (two opt-outs), Poland (one opt-out), the Czech Republic (one opt-out) and Sweden (one opt-out, but only *de facto*).

The opting-out of the adoption of the euro had, however, a special character: it formalized the existence of different economic constitutions within the EU (Joerges 2014), notwithstanding what the Lisbon Treaty (TEU, Art. 3.4) re-asserted, namely that “the Union shall establish an economic and monetary union whose currency is the euro”. Formally,

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

the Lisbon Treaty (TFEU, Art 139.1) recognizes this possibility only to those member states that do not "fulfil the necessary conditions for the adoption of the euro (and for this reason they, *n.d.r.*) shall hereinafter be referred to as 'Member States with derogation'", or 'pre-ins.' 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.

The compromise between centralization and decentralization

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 (Touri and Touri 2014, p. 26-27). At the core of this compromise there was the assumption that intergovernmental decision-making, based on unanimity's criteria, would make possible, for France, to balance the influence of Germany (become the bigger country, demographically and economically, with the 1990 reunification). This compromise was thus institutionalized through the Stability and Growth Pact or SGP (Heipertz and Verdun 2010), constituted by a Resolution, two Council Regulations and the Excessive Deficit Procedure (EDP) Protocol added to the Maastricht Treaty. The first regulation, "on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic

policies," entered into force on 1 July 1998 and the second regulation, "on speeding up and clarifying the implementation of the excessive deficit procedure," on 1 January 1999. The SGP was based on Art. 104.14 of the Treaty of European Community (TEC), part of the Maastricht Treaty, that "set out in the Protocol on the excessive deficit procedure" the conditions for ordering the coordination of national economic policies. The SGP and the Excessive Deficit Procedure (EDP) Protocol epitomized the German ordo-liberal idea of an economic constitution structured around pre-established legal rules (an idea elaborated since the 1930s by the so called Friburg School, Young 2012).

However, the SGP did not work as expected. In 2003, Germany and France did not keep their budgetary parameters (in particular regarding the deficit) within the prescribed limits. In this case, TEC, Art. 104.5 prescribed that "If the Commission considers that an excessive deficit in a Member State exists or may occur, the Commission shall address an opinion to the Council". The Commission submitted a report to the Council of economic and financial ministers (ECOFIN Council), proposing the start of the EDP for Germany and France. TEC, Art. 104.6 added, however, that "the Council shall, acting by a qualified majority on a recommendation from the Commission, and having considered any observations which the Member State concerned may wish to make, decide after an overall assessment whether an excessive deficit exists". The Council, in fact, voted against the Commission's proposal. Under pressure from small member states, the Commission then appealed to the ECJ against the Council's decision. In July 2004, the ECJ declared that the ECOFIN Council was authorized by the TEC to hold the EDP in abeyance for not adopting a Commission recommendation to start an EDP against a member state (if it decides to do that). It thus became clear that the SGP, although it appeared to be a celebration of rules independent from political discretion, could not challenge the will of national governments, in particular that of the larger member states. Notwithstanding the 2005 reform of the SGP procedural rules, "the legal nature of the Pact was not substantially altered" (Heipertz and Verdun 2010, p. 2). The economic constitution of the EMU continued to exclude any imposition on the behaviour of national governments by the supranational institutions (the Commission and the ECJ in particular).

In conclusion, this panoply of constitutional 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 organization (Leuffen, Rittberger and Schimmelfennig 2013; Dyson and Sepos 2010; Anderson and Sitter 2006), able to accommodate member states with both different views on the finalities of the integration process and different speeds in pursuing them (Piris 2012). The literature (Warleigh-Lack 2013) has defined the former as 'concentric circles' differentiation and the latter as 'multi-speed' differentiation. With the approval of the Lisbon Treaty, it was 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.

2. The euro crisis and the constitutional conundrum

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 and its president have emerged as the true decision-makers (Curtin 2014; De Scoutheete 2011), not just an institution limiting itself to define the general aims of the integration process or to solve the most intricate inter-state issues. 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. 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. 2013), 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. Indeed the Commission has become very intrusive in national policies.

At the same time, the EP has been left in a sort of institutional limbo (Crum 2013). 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. 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) (Puetter 2012), at detriment of the Community method of taking decisions.

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 (the 2011 ESM and the 2012 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 the Fiscal Compact in particular could have been attained through an amendment to the Lisbon Treaty. However, the euro-area leaders chose to resort to international treaties for neutralizing the veto threatened by the UK government. At the same time, for promoting a fiscal union, the euro-area governmental leaders decided not to recur to enhanced cooperation because that would have given the Commission and the EP a voice in the project. In any case, 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. 14.2) 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.

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 2011 Euro Plus Pact, a political commitment (a sort of intergovernmental agreement) between the euro-area member states and several

no euro-area ones (as Denmark, Poland, Lithuania, Bulgaria, Romania and Latvia – the latter thus 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 (indeed, the conflict) 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 and ministers of the member states adopting the euro (Euro Summit and the Euro Group), with the pre-ins and the out member states only informed about their content (see various Eurocomment's reports).

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 drastic reduction of intergovernmental discretion and its substitution with automatic rules. For instance, in the Fiscal Compact, the Commission's intervention on a contracting party that disrespects the agreement has now become quasi-automatic, an automaticity that can be neutralized only by a reverse qualified majority (RQM) of the financial ministers of the signatory member states (Fiscal Compact, Art. 17). Indeed, RQM was already introduced in the Six Pack in 2011, a set of legislative measures aimed to strengthen SGP, in particular Council Regulation (EU) No 1177/2011. Furthermore, governmental discretion has been constrained also at the domestic level. In fact, the Fiscal Compact has required 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 2003 experience has been learned.

These measures have brought to the 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). Financial aid to member states 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 become evident under the form of a German-French (and then only German) directorate of the economic policy of EMU. A

policy thus implemented and monitored by the Commission. The German hegemony of EMU, however, has led to a diffuse resentment in the southern euro-area member states.

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 in the EMU. That emergence has been supported by the acceptance, in official statements, of the interpretation of the crisis (i.e., due to fiscal profligacy of the south) and of the policies to pursue for dealing with it (i.e., fiscal austerity) derived from the ordo-liberal argument. In any case, 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. Upsetting the structure of multiple compromises of the Lisbon Treaty, the euro crisis has brought the EU into a proper constitutional conundrum.

3. How to escape from the constitutional conundrum?

If we define as constitutional conundrum a situation where the reconstitution of the past is not a viable option, but the path towards the future is unclear, then two outcomes of the conundrum might be considered. Both would result from the strategic behaviour of crucial political actors. I would call the first as the *internal differentiation* outcome. It would consist in the reconstruction of the unitary order of the Lisbon Treaty, albeit internally differentiated on the basis of the measures introduced to manage the euro crisis. The action of the EP during the elaboration of the Fiscal Compact, aimed to formalize a clear deadline for bringing it back to the Lisbon Treaty (European Parliament 2012; Kreilinger 2012), constitutes the epitome of the strategy pursuing this outcome. In fact, the Fiscal Compact declares (Art. 16) that “within five years at most following the entry into force of this Treaty, on the basis of an assessment of the experience with its implementation, the necessary steps shall be taken (…), with the aim of incorporating the substance of this Treaty into the legal framework of the European Union,” as already happened with the Schengen Agreement. This strategy became the official position of the Barroso Commission (2009-2014) and was supported by the main European political parties during the EP elections of 22-25 May 2014. Rather than a multi-speed Europe, this options implies the institutionalization of a EU based on concentric circles, with different clusters of member states participating permanently to different policy regimes with different degree of integration. The teleological expectation of a multi-speed EU, with all the member states

moving towards the same end but at different speed, is substituted by a EU based on structural or permanent differentiations. What matters is the re-construction of a legally unitary union whose internal policy differentiations will be sewed up by the main political actor. As Leuffen (2013, p. 5) stated, “differentiated integration (is) a political program”.

If the strength of this strategy lies in the effort to reconstitute a unified legal order for the EU, it has nevertheless significant weaknesses. The Fiscal Compact certainly calls for its re-incorporation in the Lisbon Treaty, however, for this re-incorporation to take place, the consent of the UK will be once again required. An unlikely outcome, given that the Fiscal Compact clauses would continue to affect London’s financial district negatively, as it would have done at the moment of the UK opposition to the Lisbon Treaty’s amendment. The alternative would be to transform the Fiscal Compact in an enhanced cooperation within the Lisbon Treaty, but this would require the initiative of the Commission and the approval of the EP, conditions disliked by few euro-area member state governments. More in general, the conflict of interests between the no euro-area and the euro-area member states could not be easily kept within a unitary legal order. The need for deeper integration in EMU policies would strain tremendously the common legal and institutional order (as it is happening with the banking union). As the House of Lords (2014: 3-4) recognized, “the Eurozone is on the road towards greater integration. The implication for the UK are immense”. The outcome of the EP elections of 22-25 May 2014 in UK, with the UK Independent Party become the first party with more than 28% of the popular vote, shows that any step towards more integration within the legal framework of the Lisbon Treaty might trigger a definitive rift against the EU in that country. A similar outcome would emerge in Denmark as well, where, at the same EP elections, the anti-European Danish People’s Party became the first party with roughly 27% of the popular vote.

At the same time, a concentric circles differentiation would leave untouched the intergovernmental logic of EMU, whose decisions have lacked the necessary democratic legitimacy for being accepted by the affected citizens of the southern euro-area member states. The dissatisfaction at the management of financial policy in the latter member states cannot be silenced with the confirmation of their intergovernmental source. In Greece, in the EP elections of 22-25 May 2014, the party most critical of the policies for dealing with the euro crisis, Syriza, became the first party of the country with 27% of popular vote. To increase the role of national parliaments in the differentiated regime of economic governance (Chalmers 2013), although desirable (Grencross 2014), will not

solve the structural legitimacy deficit of the intergovernmental method. Legitimacy for decisions taken at the supranational level should come from supranational institutions, in our case the EP. However, not only the EP has been excluded from EMU's main decisions, but its inclusion is constitutionally questionable (Hefftler and Wessels 2013). In fact, because the EP "shall be composed of representatives of the Union's citizens" (TEU, Art. 14.2), not of representatives of member state citizens, it would extremely controversial to separate (in its internal deliberative process) representatives coming from no euro-area and euro-area member states, thus allowing only the latter to have a say on the decisions taken by euro-area institutions (Euro Summit and Euro Group). Finally, a concentric circles EU would leave intact also the technocratic (ordo-liberal) order of EMU with its institutionalized bias in favour of the economic interests and cultural values of the northern and creditor euro-area member states.

If one assumes instead that the euro crisis has irreversibly altered the constitutional bases of the EU, then an alternative outcome should be considered. I would call it as the *external differentiation* outcome. In this case, a treaty reform strategy would be necessary in order to distinguish, legally and institutionally, the organization of a common market and the institutionalization of a euro-based political union. The necessity of strengthening the EMU and moving it towards a political end has been recurrently raised by several governments or national ministers of the euro-area. For instance, the Westerwelle Groups of 12 foreign ministers[3] assessed, in a Final Report made public on 17 September 2012, that, in order to give EMU "full democratic legitimacy and accountability", "the possibility of treaty reform" cannot be excluded. This strategy has been elaborated by several think-tanks or intellectual groups although pursuing different institutional perspectives (CEPS 2014; Group Eiffel Europe 2014; Spinelli Group and Bertelsmann Stigtung 2013; De Scoutheete and Micossi 2013; Lamond 2013). The necessity of a euro-political union has been discussed also by scholars (Keleman 2014; Somek 2013). The external differentiation outcome would formalize the separation already taken place between the euro-area and no euro-area member states. A separation that will further increase with the completion of the banking union in the course of being negotiated between the euro-area

[3] The Future of Europe Group, known as Westerwelle Group because promoted by the then German foreign minister, was constituted by the foreign ministers of Austria, Belgium, Denmark, France, Italy, Germany, Luxembourg, the Netherlands, Poland, Portugal and Spain.

member states (a banking union institutionally connected to the ECB in Frankfurt and distinct from the European Banking Authority located in London).

However, to formalize this separation, and preserving at the same time the frame of a common market, would meet formidable legal and political hurdles. As Calliess (2014, p. 21) noticed: “The Fiscal Compact made interesting steps into a special governance of the Eurozone outside the EU-Treaty. It is a first step into a new institutional arrangement between a possible Euro-Treaty and the EU. (However)…its institutional design is not up to the tasks that need to be done in a Fiscal and Economic Union”. The process of moving in direction of a euro-political union will be inevitably contrasted in crucial member states as France, where in the EP elections of 22-25 May 2014 a sovereignist reaction to the EU emerged with the spectacular success of the National Front become the first party of the country with 25% of the votes. A euro-political union without France would be unthinkable. The same EP elections showed a growing dissatisfaction towards the EU also in other euro-area member states of the south, from Spain and Portugal (where the main pro-EU parties performed quite poorly) to Italy (where the extraordinary success of the pro-EU Democratic party that got more than 40% of the popular vote was balanced by 1/3 of voters supporting a panoply of anti-EU parties, from the 5 Stars Movement to the Northern League). A distinct euro-political union would not tame, *per se*, the intergovernmental pressure triggered by the euro crisis, unless it finds ways for recomposing supranational and intergovernmental logics into a new institutional architecture presiding over all union’s policies. At the same time, a euro-political union will have to neutralize the invasive and technocratic effects of a governance’s model conditioned by the ordo-liberal paradigm. If it has to be a political union, then it has to rely mainly on electoral politics, not technocratic or judicial rules, for defining its economic policies. This would also prevent, or obstruct, the formation of permanent hierarchies and majorities in its decision-making process.

If the strength of this strategy relies on the recognition of the legal and institutional changes that have already taken place and on the potentialities of giving a proper constitutional identity to the euro-political union, nevertheless this strategy has also evident weaknesses. To carve out a euro-political union from the current EU, without jeopardizing the common market framework or even without risking of activating a re-nationalization thrust in many member states, would require a formidable political leadership, in both EU institutions and member states, that cannot be artificially crafted. At the same time, the definition of the new institutional architecture of the euro-political union would require a

constitutional moment that is not at the door, it is difficult to predict and it is even scared by crucial euro-area member states (as France). Finally, it would be extremely problematic to recompose the intergovernmental and supranational logics in the same institutional architecture after a long period of contrast between them. Because both outcome would meet powerful hurdles, then it does not seem improper to consider a third outcome, the fine-tuning of the *status quo*. In this case, the constitutional conundrum will come to be pragmatically managed according to a muddling-through approach aimed to smooth the more evident dysfunctional aspects of the constitutional disorder.

Conclusion

The article has shown why the euro crisis has brought the EU into 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 had a constitutional character. The first was the compromise between member states holding different political views on the EU, the supranational and the intergovernmental. The second compromise was between the member states constituting the EMU as a political project and those opting out of it. The third compromise was within EMU between member states claiming centralization in monetary policy and member states claiming decentralization in economic policy. These compromises made possible the pursuit of the unitary project of integration. Since Paris in 1952 and Rome in 1957, the process of integration has been considered an inclusive and expanding 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. 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. Finally, the euro crisis has transformed the compromise between monetary policy's centralization and economic policy's decentralization not only in a convoluted system of economic governance, but also in a system of economic governance dominated by the interests and views of the bigger and creditor member state of the euro-area. The crucial role played by the European Council has fostered the hegemony of Germany, whose influence on EMU has however lacked the necessary democratic legitimacy for the non-German publics.

The article has thus considered two outcomes of the constitutional conundrum created by the euro crisis. The internal differentiation outcome aims to solve the constitutional disorder of the EU re-constituting the unitary character of its legal and institutional framework. The epitome of this strategy would be the repatriation of the Fiscal Compact back to the Lisbon Treaty legal framework. This outcome would imply the formation of a renewed EU based on concentric circles of member states participating permanently to different policy regimes. The external differentiation outcome, instead, aims to escape from the EU conundrum through the formalization of legally and institutionally distinct organizations, thus promoting a euro-political union as a separate organization from the common market organization. In this case, 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. Both strategies would have to deal with dramatically intricate legal, institutional and political issues. Both would require the exercise of political leadership at the highest level. The future political order of Europe (Olsen 2007) will thus depend on whether to reconstitute a unitary organization although internally differentiated or to formalize externally differentiated organizations although connected in the framework of a common market. However, given the hurdles waiting both outcomes, a more pragmatic solution might emerge for managing the constitutional conundrum *via* a muddling-through strategy aimed to neutralize the most dysfunctional aspects of the constitutional disorder.

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