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POLICY DEPARTMENT **C**
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**What future(s) of
democratic governance
in Europe: learning from
the crisis**

WORKSHOP



DIRECTORATE GENERAL FOR INTERNAL POLICIES
POLICY DEPARTMENT C: CITIZENS' RIGHTS AND
CONSTITUTIONAL AFFAIRS

CONSTITUTIONAL AFFAIRS

What future(s) of democratic governance in Europe: learning from the crisis

Conclusions of a Workshop on the challenges of multi-
tier governance in the EU

Abstract

An interdisciplinary workshop of October 4, 2012, at the premises of the European Parliament developed a wide range of analysis of the present crisis and of ideas for meeting challenges of the financial crisis in the European Union. This contribution concludes on the experience of the workshop and summarizes the positions achieved and the future challenges with respect to the multi-tier governance with reference to the upcoming compendium of articles by the experts participating at the workshop.

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LIST OF ABBREVIATIONS

- CAP** Common Agricultural Policy
- ECJ** European Court of Justice
- ESM** European Stability Mechanism
- FT** Treaty on Stability, Coordination and Governance in the Economic and Monetary Union
- GFCC** German Federal Constitutional Court
- MEP** Member of the European Parliament
- MP** Member of Parliament
- TEU** Treaty on European Union
- TFEU** Treaty on the Functioning of the European Union
- TSCG** Treaty on Stability, Coordination and Governance

EXECUTIVE SUMMARY

Background: Challenges of crisis and democracy

The “sovereign” debt crisis in Europe is not over yet. It is shaking the European Union deeply, and questions extend from remedies to the immediate threat of breaking down of some of the Member States’ economies up to the much more general issue of how to ensure financial stability and economic growth through a democratic system of multi-tier governance in the EU. This does include a discussion on what lessons have to be learned from the crisis regarding key issues of economic integration in Europe as well as the democratic legitimacy of the policies led both at the national and European levels.

It is clear that none of the Member States can be compelled, under the Treaties, either to implement structural reforms and strict austerity policies, or to participate in rescue programs or financial stability mechanisms and to engage in other kinds of coordination including obligations like to establish a debt brake and a correction mechanism in their national constitutions. But it is similarly clear that none of the governments – and parliaments – having decided to act as they did took their decisions voluntarily. They all felt forced by the need to avoid bankruptcy and the risk of a breakdown of the financial system all together with catastrophic consequences. It became clear, finally, that in the EU, but even more so in the EMU, each of the national decisions on economic and fiscal policies – let alone administrative and taxation systems – can substantially impact other Member States. This is a problem of democracy and a problem of efficiency too.

The system established by the Treaty of Maastricht - keeping the mode of intergovernmental cooperation for the economic and fiscal policies of the Member States as a basis for the euro as a common currency with the ECB as a centralized governing body - has failed to provide a workable solution. The attempt to co-ordinate national economic policies and to ensure budgetary discipline throughout the Member States through the method of intergovernmentalism has failed. This form of executive federalism can neither ensure a sustainable basis for the euro, nor is it acceptable in terms of democratic legitimacy. The more the relevant decisions are taken by the ministers of finance and the more they are made binding in nature and give concrete guidance to not only governments but also to the budgetary authorities of the Member States, the less it appears to be acceptable that parliaments have no direct say on them. And without strict coordination, the spill-overs of autonomous national economic and fiscal policies are contrary to the idea of democracy too.

The financial crisis, thus, is a crisis of democracy. People seem to lose confidence in the European project, the legitimacy of which was based more upon the common dream of peace, stability and welfare and on the success in the implementation of its objectives, including the enlargement, than on elections, representation and accountability. With the achievement of peace and a high degree of welfare, with the present crisis and loss of confidence among the citizens of the Union, however, both, “political messianism” (*Weiler*) and output legitimacy (*Scharpf*) are no longer sufficient to legitimise the Union, so that not only institutional reforms are needed to ensure better political representation and more accountability but also a re-foundation and more clarity on the political missions of the Union, being an instrument for its citizens to ensure peace and liberty, to promote social solidarity and prosperity, and to meet the challenges of globalisation.

Responses: New EU policies and new arrangements for democracy

To meet the challenges to the euro and to the EU as a whole, the discussion at the workshop and the papers finalized and submitted subsequently developed an extraordinary richness of approaches and proposals the main thrust of which can be summarised in the following points:

- **"Repatriation"**: While the ESM and the Fiscal Treaty may contribute to provide for the necessary financial instruments to avoid bankruptcy of Member States in need, and they may help tightening the co-ordination of economic policies and the system of supervision and enforcement of fiscal discipline at the national level, a reform of the Treaties is needed for applying the community method including both, enhanced parliamentary control and full judicial review to economic and financial policies so to remedy to the structural asymmetry of the EMU: The EU must be turned into a real Economic and Fiscal Union with corresponding responsibilities of its institutions.
- **"Differentiated integration"** may continue to be a necessary tool for permitting progress in this field, and both modes – internal enhanced cooperation as well as the conclusion of international treaties among a coalition of willing – are acceptable for provisional regimes deepening integration, but the risks for the unity and the increasing complexity of the Union and the must be taken into account at each step. The same applies to proposals like for creating "enhanced cooperation zones", allowing "negative differentiation" or accepting partial membership. This complexity would make it increasingly difficult for the citizen, to take ownership of the Union as a democratic and transparent political organisation.
- **"Institutional differentiation"** may be considered as an inevitable consequence of the differentiated integration. This would mean that not the European Parliament, but only its members coming from the Member States participating in the fore-runners policy, e.g. the eurozone, would be allowed to vote in such matters. Though some advantages regarding the legitimacy of decision taken in this mode are visible, it would introduce national grouping in the institution, which is contrary to its political grouping, and it would deepen the divisions and might create barriers to entry for the outsiders. Informal arrangements of self-regulation within the European Parliament were considered, therefore, more appropriate to ensure the necessary degree of legitimacy even where the "outs" participate in the decision-making.
- **"Budgetary solidarity"** is the motto for proposals aiming at enhancing the financial capacities of the Union so to provide for resources allowing some compensation of different speeds of growth and, in particular, an insurance for Member States against shocks rather than distributive transfers or to establish a new budget stabilisation fund. This would involve a substantial increase of the EU budget to be financed by European taxes such as a corporate income tax. Also "automatic macroeconomic stabilizers", such as an unemployment insurance fund that works across borders, are among the proposals. The EU powers for implementing these ideas are yet to be created.
- **"Interparliamentary dialogue"**: Where relevant powers are conferred to the EU for binding decisions on a common framework and guidelines for national budgetary policies, to ensure the coherence required for the euro, when taxation becomes one of the powers of the EU and when insurance funds or even redistributive policies are among the instruments of the Union to enhance economic and social cohesion among the regions, a "parliamentarism of dialogue" must be organised among the national parliaments and the European Parliament. This could include

interparliamentary committees with decision-making powers in limited fields. A first step could be, wherever appropriate, to invite representatives of other parliaments to the discussions of each parliament with a view to make known and discuss each other's situation, policies and the interests.

- ***"Politicisation of the Commission"***: Competences in the field of economic and fiscal policies, taxation etc. touch among the most relevant individual concerns of the citizen. Latest at that stage of European integration the recognition of the political role of the Commission and the need for more direct impact of the European elections on the policies led by the Commission are necessary. Political party families should present to the electorate their common candidate for the office of the President of the Commission, and the candidate of the group with the highest support EU-wide should be elected and nominated as the President of the Commission. If this person would simultaneously hold the office of the President of the European Council, the EU would have a personal face, and this double-hatted President would, with both offices, be accountable to the European Parliament. A similar procedure could be applied also for the other members of the Commission, with each party family presenting their top candidate for this office in each Member State.

INTRODUCTION

The European Union is in a deep crisis, and the risk of a breakdown of the system is high. In response to the challenges of unbearable sovereign debt and economic recession in some of the Member States people tend to see a solution in a sort of political retreat, e.g. the withdrawal or even expulsion of some Member States from the monetary union, some consider the virtues of the right to withdraw from the Union altogether under Article 50 TEU as *ultima ratio* for preserving national sovereignty and the right to fully benefit from their proper policies and economic achievements. This reflex of retreating oneself to home in case of danger, however, is the wrong way in a political community where no one can survive on his or her own. Each individual is condemned to live in a community and depends from others; to withdraw from the community would amount to suicide. Similarly, states are interdependent, nowadays, to such an extent that the claim of national sovereignty has lost meaning. After centuries of wars in Europe the European Community was established to ensure survival of the peoples of Europe, politically and economically, and the challenges of globalization do not allow our governments further to continue playing "sovereign", particularly not in times of crisis.

As Miguel Maduro brilliantly sets out in his paper,¹ the financial crisis in the Union is basically a crisis of democracy: "The crisis makes clear our interdependence but also our failure to internalize its consequences", he explains, and therefore "this failure is a democratic failure". It is particularly, but not only, as he says, "the interdependence generated by the euro" which resulted in the financial problems of the countries having lead "irresponsible fiscal policies", becoming a "problem for all". He presents this "as a democratic problem since the interest of the latter Member States are not taken into account in the former Member States' democratic processes". The same is true, particularly in a monetary union, for enhanced austerity policies on one Member State with the aim to become more competitive and no regard given to the consequences of this policy for those who have not taken similar measures. But also where not national policies but markets are taken as being the source of the crisis, he shows, the conditions under which they could benefit from the euro amounted to a "form of transnational democratic externalities imposed on states. Or, in other words, capital movements can be presented as having a profound impact inside a state without being subject to its democratic control". His conclusion, insofar, is that the Union's failure to solve the crisis is "imputable to the diffuse character of its political authority and its excessive reliance on national politics... The real EU democratic deficit is the absence of European politics". The crisis, thus, shows that the problem of the EU indeed is a problem of democratic governance. As a result, there seems to be a need for further political integration and new powers at the European level, instead of what Jürgen Habermas rightly criticises as undemocratic forms of "executive federalism" and an intransparent domination by the European Council.² He argues that the crisis is "primarily due to an inadequate institutional underpinning of the common currency", the "systemic problem" of the euro, he says, requires "a systemic answer".³

¹ Miguel Poiares Maduro, A New Governance for the European Union and the euro: Democracy and Justice, in the upcoming compendium.

² Jürgen Habermas, Zur Verfassung Europas. Ein Essay, 2011, p. 81. On this line see also Vivian Schmidt, EU Differentiated Integration and the Role of the EU Political Economy, in the upcoming compendium, stating „that leaving the bulk of decision-making to the intergovernmental bargaining of the European Council and EU Summits—however crucial this may be in the heat of the crisis—is actually the least democratic of processes“.

³ Jürgen Habermas, Only deeper European Integration can save the eurozone, The Guardian, 9 August 2012, at: <http://blog.daum.net/thesun-isnew-eachday/707> (last visit 26 Nov. 2012).

With a view of finding ways for reforming the EU system of governance to become more democratic and more efficient in times of an on-going fiscal and economic crisis the Committee for Constitutional Affairs of the European Parliament has invited a number of scholars of European law, politics and economics to present their ideas and discuss with the Members of the European Parliament and their staff. On the basis of their written outlines and oral presentation an extremely stimulating workshop addressed a great series of fundamental questions on options available for responding to the financial crises and ideas for a possible reform of the European Union system of multi-tier governance. "Multi-tier" was understood here as including both, the relationship of national and European institutions and the diverse forms of differentiated integration.

This introduction to the present volume is simultaneously developing some conclusions from the workshop. The take-away from the rich debate at the workshop cannot be a simple summary nor is it possible to give an objective and complete account doing justice both to the important ideas discussed during the workshop and further developed, following this discussion, in the written contributions collected in this volume. The following lines concentrate on five selected key questions of primary concern for the future of Europe: An evaluation of the present policies for finding a sustainable way out of the crisis (1.), the particular issue of creating special euro-groups within the institutions of the Union (2.), the need for new powers to be conferred upon the EU institutions (3.) the question of how to enhance democratic legitimacy in the Union (4.) and the proposal to open up a new public discourse upon new visions and missions for the European Union (5.).

1. PRESENT POLICIES - A WAY OUT OF THE CRISIS?

The first key issue was an analysis of the present policies developed for facing the financial crisis. While the discussion of the entire workshop was devoted in some way to the options for finding solutions for the imminent problems, the discussion started specifically with an evaluation of the ESM and the Fiscal Treaty concluded earlier this year (2.1.). It then took a particular focus on the compliance of the ESM with the bail-out-clause of Article 125 TFEU (2.2.) before the participants examined the underlying concept of intergovernmental cooperation with sanction mechanisms (2.3.).

1.1. The ESM and the Fiscal Treaty: Differentiation in the EU?

Most participants expressed their view that the ESM and the Fiscal Treaty (FT) are necessary tools for keeping the euro-System functioning notwithstanding strong challenges and threats coming from unforeseeable financial markets. Though the negotiations of these international treaties were led under great time pressure and with little public discussion or parliamentary consultation, they were not considered, as such, a threat particularly to the role and responsibilities of the European Parliament. Much will depend on the actual practices when the system is to start working. Article 13 FT allows a dialogue with the European Parliament as well as a substantial involvement of the national parliaments of the participating Member States. It will depend upon the effective operation of what could become a real "interparliamentary dialogue", and of the effective cooperation of the governments with the parliaments before it will be possible to assess to what extent this parliamentary involvement makes a difference. The new system, at least was considered more as an opportunity for parliaments than as threat. It will, thus, be important for the parliaments in the coming months, to effectively use these "windows of democracy".

The ESM and the FT have been challenged before the ECJ for violating the bail-out clause, duplicating and altering primary law as well as the Sixpack and illegally empowering institutions of the EU for monitoring and enforcement of the agreements.⁴ Bruno de Witte discusses the arguments in a clear and convincing manner concluding that, finally, there is no breach of European law.⁵ Yet, these international agreements were regarded as both insufficient and only acceptable as transitional instruments. Andrew Duff made clear: "We need a powerful treasury of the EU". The "sunset-clause" in Article 16 FT therefore plays an important role, and its "repatriation" was considered to remain a fundamental task and objective for the future. Accordingly, the Community method was found necessary to be applied also in this area, a method Renaud Dehousse has positively evaluated too. In his view also "the responses to the Eurozone crisis have shown once more that delegation of powers to supranational institutions is near unavoidable when governments intend to reinforce their cooperation in a lasting manner".⁶

Jean-Victor Louis stresses that the existing structures are unable to achieve the objectives of economic governance in the EU. He talks about an "anarchic differentiation" and a "kind of fragmented government equivalent to a lack of a true government" to be remedied.⁷ It is important, for him, to make the economic part of the EMU commensurate to the monetary union. New institutional devices would therefore be necessary. A centralised banking supervision could be based upon 127 (6) TFEU, but: establishing a "Banking Union, at its final stage, includes elements of Fiscal Union, and Fiscal Union goes hand in hand with more Economic Union and it includes and needs, more Political Union."⁸ With a view to the existing reluctance of the UK, he considers flexible solutions within and outside the Treaties but also addresses the limits both under European and national constitutional law, in particular the German Federal Constitutional Court (GFCC). He finally emphasises that the euro needs a representation at the global scene, particularly in standard setting boards prefiguring EU legislation, like the Basel Commission. Article 138 TFEU should be applied and the defence of the general interest should be combined with the experience of national institutions, including for initiating a reform of IMF to become an oversight organ with more powers.

The international treaties concluded to ensure the further functioning of the euro-system can be understood as a form of differentiated integration, and Janis Emmanouilidis argues that this does not necessarily mean fragmentation of the Union. For him "the experience of the last decades has repeatedly proven that closer cooperation between Member States has, at the end of the day, been a (strong) catalyst for a deepening of EU integration".⁹ With the necessary degree of openness and flexibility the risks of disintegration can be kept under control, and differentiated integration may even allow for appropriate progress. Preference is given to differentiation within the Treaties as opposed to outside of them, though the latter have proven some utility too, and the new ESM and FT in his view "largely adhered to the above-mentioned notion of an intergovernmental avant-garde".¹⁰ With the new concept of "negative differentiation" he discusses ways of partial exit from the EU taking the form either of "association (plus)" or of "partial membership".¹¹ In the absence of new provisions for differentiation by provisions for a partial exit, proposed by Gian Luigi

⁴ ECJ Case C-370/12 - *Pringle*.

⁵ Bruno de Witte, *European Stability Mechanism and Treaty on Stability, Coordination and Governance: Role of the EU Institutions and Consistency with the EU Legal Order*, in the upcoming compendium

⁶ Renaud Dehousse, *Is the 'Community Method' Still Relevant?*, in the upcoming compendium

⁷ Jean-Victor Louis, *Institutional Dilemmas of the Economic and Monetary Union*, in the upcoming compendium

⁸ *Ibid.*,

⁹ Janis Emmanouilidis, *Which lessons to draw from the past and current use of differentiated integration?*, in the upcoming compendium

¹⁰ *Ibid.*, p.

¹¹ *Ibid.*, p.

Tosato,¹² an agreement negotiated under Article 50 (2) TEU could have similar effects: Differentiated integration could so be considered as an opportunity for developing new „forms of belonging“ beneath the level, as he says, „of full membership or even of ‚negative integration‘ due to the voluntary withdrawal of Member States from the EU“.¹³

It is clear, however, that every form of differentiated integration, be it positive or negative, by means of international treaties or within the Treaties as an enhanced cooperation, adds to the complexity of the Union. It was noted that this may threaten the legitimacy and even the functioning of the Union and its institutions. This is true, in particular, if new institutions are created along with differentiation: As Renaud Dehousse states: “At a time of widespread mistrust in political institutions, it is important for the public to understand who is in charge and accountable for what the Union does, or fails to do. The proliferation of institutional fora, each with their own rules, tends to undermine the transparency of decision-making”.¹⁴ Wolfgang Wessels emphasises that “for the EP like for national parliaments the complexity of multi-tier governance has considerably increased the difficulties to play an adequate role vis-à-vis the strong multi-level players of the executive branch of government”.¹⁵ Also the ideas of introducing „a form of ‚enhanced cooperation‘ at primary law (Treaty) level“, or even “an exit-clause for flexible initiatives” put forward by Tosato,¹⁶ as challenging as they may look for facilitating further steps of flexible integration, would not necessarily lead to more transparency of the Union and understanding of its functioning by the citizens.

Given the great diversity of the Member States in their economic constitution, their different growth models, labour markets etc. up to their systems of taxation, Vivian Schmidt submits that „applying one-size-fits-all solutions cannot possibly work. Her idea to create new „enhanced cooperation zones“, assembling diverse groups of Member States with similar conditions with regard to specific features work more closely together could certainly help to promote differentiated integration.¹⁷ The complexity of the Union, though, would not be reduced.

1.2. Article 125 and the Amendment of Article 136 TFEU

A very specific, but by no means a minor issue was the question whether or not the new instruments can be made operational before the amendment of Article 136 TFEU is in force. All the Member States of the EU have to ratify this amendment, although it was adopted following the simplified amendment procedure under Article 48 (3) TEU. Doubts existed with regard to Britain, but Prime Minister Cameron seems to have expressed his willingness to take care of rapid ratification. And Britain should not have reasons to block the entry into force of the amendment, as it does not have directly effects upon non-euro Member States. The question is rather whether or not the amendment was necessary at all, with a view to ensure compliance of the ESM or its application with the bail-out-clause of Article 125 TFEU. A reference of the Irish Supreme Court to the ECJ in the Pringle-case on this and other questions of compliance of the ESM and the FT with EU law was pending before the ECJ.¹⁸ Bruno de Witte finds that the concerns are unfounded, at least after Article 136 (3)

¹² Gian Luigi Tosato, New institutional solutions for multi-tier governance?, in the upcoming compendium

¹³ Emmanoulidis (note 9)

¹⁴ Dehousse (note 6)

¹⁵ Wolfgang Wessels, National Parliaments and the EP in Multi-tier Governance: In Search for an Optimal Multi-level Parliamentary Architecture. Analysis, Assessment Advice, in the upcoming compendium

¹⁶ Tosato (note 12),

¹⁷ Schmidt (note 2), mentioning examples like „enhanced labor mobility zones“, „public service zones“, „immigration zones“ and also „fiscal policy zones“.

¹⁸ ECJ Case C-370/12, judgment of 27 Nov. 2012 - *Pringle*.

TFEU will be in force,¹⁹ but the question regarding Article 125 TFEU is of a broader reach. The view of a majority of commentators is that Article 125 TFEU actually prohibits all kinds of financial support to a euro-State having difficulties to pay her debts. They argue that the complete system of the EMU is based upon not only national competence for fiscal policies, but also for its flip side: full responsibility of the Member States for their policies.

Yet, another possible interpretation of the provision should not be lost of minds, even if the new Article 136 (3) TFEU will settle the question at least for the future: Article 125 TFEU is not applicable to specific measures such as mentioned in the new Article 136 (3) TFEU: Indeed, the case that financial difficulties in one Member State could amount to a substantial threat for the euro as a whole was not taken into account when the system was established. Talking about the telos of Article 125 TFEU, it was, therefore, not to bind the hands of the other Member States or the Union to take the necessary action in order to ensure the functioning of the euro in a case of a general crisis. The basic idea of Article 125 TFEU to ensure fiscal discipline by making each euro-country responsible alone for her national budgetary policy and its consequences is also met if the provision is interpreted more narrowly: as excluding the expectation of creditors that the EU or any other Member State are held liable by them for debts of one Member State or that they might assume its commitments. This is, actually, the wording of the provision, and it should primarily be understood as a warning: If creditors lend money to a euro-country, this country alone can be held liable to pay the money back, even though it is a euro-country. Nothing in the text of Article 125 TFEU excludes that other Member States – or a new institution created by the euro-countries like the ESM – provides voluntarily credits, guarantees or even direct financial assistance to a fellow euro-country in trouble. There is no reason to believe that Member States creating the EMU excluded measures aiming at rescuing the euro in case of need, or any help among euro-states, if this help proved to be the only way to rescue the common currency - while help to non-euro-countries as well as for third states is allowed?

The question is not an academic one, it is relevant for earlier actions undertaken to rescue Greece and Ireland, and it might remain relevant if the entry into force of Article 136 (3) TFEU takes longer as it may be possible to wait until further action might be necessary to be taken under the ESM. Even if the ECJ has, meanwhile, ruled that the ESM is not in conflict with Article 125 TFEU and that the entry into force of Article 136 (3) TFEU is not a precondition for legally ratifying the ESM,²⁰ the question might, finally, come up again in the proceedings at the German Federal Constitutional Court on the constitutional complaints against the ratification of the ESM and the FT.

1.3. Cooperation, Sanctions and the Community Method

Similarly the legality of certain provisions and the proper functioning of the ESM and the FT was addressed (2.3.1.). The need for “repatiation”, thus subjecting the FT to the Community method as soon as possible was felt to be an inevitable conclusion (2.3.2.).

1.3.1. Legal questions on the ESM and the FT

Is it possible to include the European Court of Justice, the European Commission and the European Parliament in the system of the ESM and the FT and, thus, confer them new tasks and powers? Article 13 (2) TEU seems to be clear, as it states that „each institution shall act within the limits of the powers conferred to it in the Treaties...“. Bruno de Witte argues

¹⁹ Bruno De Witte, *European Stability Mechanism and Treaty on Stability, Coordination and Governance: Role of the EU Institutions and Consistency with the EU Legal Order*, in the upcoming compendium

²⁰ ECJ Case C-370/12, judgment of 27 Nov. 2012 – *Pringle*, paras. 129-143, 183-185.

that this provision does not exclude giving the institutions new tasks, as long as no new powers are conferred to them. Yet, it seems to be an open question whether this distinction works and whether the functions of monitoring and control, negotiating of the conditionality for grants and the supervision of their implementation within the framework of the ESM and the FT do not involve powers the Commission did not have so far. No real decision-making power is involved in most of the tasks conferred to the Commission. This is one of the reasons, the ECJ has judged in the recent the Pringle-case the new tasks entrusted to the Commission to be in conformity with the Treaties and the jurisprudence of the Court.²¹ But the case does deal with the Financial Treaty. Article 3 (2) FT imposes the Contracting Parties to establish a correction mechanism „on the basis of common principles to be proposed by the European Commission, concerning in particular the nature, size and time-frame of the corrective action to be undertaken...“. It is difficult to say that this does not involve not some power for setting standards with quite binding effects, given that, in particular, the respect of these standards is subject under Article 8 FT to the control of the Commission and, finally, by the ECJ.

With regard to Article 273 TFEU the new tasks for ECJ to decide upon disputes on the application of the ESM and the FT seems to involve less striking problems. With regard to the function of the ECJ in the framework of the ESM the Court has taken the view that Article 273 TFEU perfectly covers the reference to the Court.²² In contrast, the analogy established in Article 8 FT to the powers of ECJ under Article 260 TFEU – if really used in practice, what some consider unrealistic – could well be beyond what can be considered under Article 273 TFEU as “jurisdiction in any dispute between Member States which relates to the subject matter of the Treaties...“. The question, whether or not concerns of the Commission or another Member State regarding the proper implementation of the duty to provide, at a constitutional level, for a debt brake and a correction mechanism by one Member State really relates closely enough to the subject matter of the EU-Treaties – and not to the Financial Treaty only – was not discussed. It will, finally, be for the ECJ to establish whether or not, and to what degree, it finds itself to have jurisdiction on these issues.

This addresses the concerns of Roberto Galtieri, MEP, raising the question if the ESM and the FT are really an effective solution, really binding. Are the sanctions binding? If the sanction to be imposed in analogy to Article 160 TFEU would be illegal, the FT would be meaningless.

1.3.2. Repatriation or the application of the Community method

There was a strong belief that the solution found by the conclusion of the Financial Treaty among 25 Member States is insufficient and not acceptable to be a permanent solution. As Jan-Claude Piris stated, there is consensus that the Eurozone needs to be turned into a real Economic and Fiscal Union. The revision-clause of Article 16 (1) FT, therefore, is taken very seriously. Due to the upcoming elections in many important Member States, it seems, however, not realistic to hope for meaningful progress on this issue before spring 2015, as Andrew Duff said, „there is no way to grapple these issues before“ this date. How to manage the transitional problems? Yet, the process of reflection on how the Treaties would have to be adapted has already started – as the present workshop clearly shows. It might be wise considering, in addition to any top down initiative taken by the Presidents of the institutions and their sherpas, to encourage a bottom-up process through a structured discourse in the civil society on local, regional and national levels.

²¹ ECJ Case C-370/12, judgment of 27 Nov. 2012 – *Pringle*, paras. 158-161.

²² ECJ Case C-370/12, judgment of 27 Nov. 2012 – *Pringle*, paras. 170-176.

2. EURO-GROUPS WITHIN THE EU INSTITUTIONS

Differentiated integration has proved to be a pragmatic and useful device for achieving progress of integration in times where unanimity among the Member states cannot be achieved. As Janis A. Emmanouilidis argues, differentiated integration has provided strategic opportunities as catalyst for deepening integration: For him, multispeed Europe is a reality. Nevertheless, there was consensus that a two-tier Europe or a two-speed Europe is not an option. Differentiated integration should not create barriers to entry, not entail special institutions nor split institutions according to “ins” and “outs”.

The issue of differentiated integration and coordinated action of some Member States under international agreements was also discussed as an issue of democratic legitimacy. Jean-Victor Louis only raises the question of a “euro-Committee” in the EP, while Renaud Dehousse strongly recommends it to be considered.²³ Louis questions the capacity of national parliaments to adequately exercise control over common European financial issues.²⁴ Wolfgang Wessels observes “considerable variations of parliamentary involvement in areas of multi-tier integration”. He concludes “that the role of parliaments has generally decreased in procedures of the differentiated integration”.²⁵

This question was discussed in particular regarding the eurozone. Is it desirable and wise to introduce provisions under which issues regarding the eurozone are decided only among those Member States whose currency is the euro? Is it legitimate for the Court of Justice, the Commission and the European Parliament to take position on matters related to the eurozone without such a distinction? Could members of these institutions with an origin from countries with another currency not put at risk the functioning of the euro when they are allowed to participate in the decision-making regarding euro-policies? What if this other currency is competing with the euro? Many views on this question have been developed. Most participants agreed that specialized euro-groups in institutions other than the Council are difficult to imagine without a formal amendment of the Treaties. Inter-institutional agreements or some self-regulation within the European Parliament, however, were held acceptable to a limited extent by some discussants.

Judging legitimacy is a difficult issue in this respect. All seems to depend upon, first, to what extent questions related to the euro can be separated from the general interest of the EU and, second, whom the members of the ECJ, the Commission or the European Parliament are representing. As a matter of principle, only the Council is an institution whose members are representing national interests. The loyalty-rule for the others is different: The law, in particular European law, is what the ECJ is bound to defend (Article 19 (1) TEU). For the members of the Commission which „shall promote the general interest of the Union“ (Article 17 (1) TEU) and shall be „completely independent“, Article 17 (3) TEU makes clear that their „general competence and European commitment“ is key, and that they must be persons „whose independence is beyond doubt“. They are working for the interest of the Union, and not of particular Member States.

Even the members of the European Parliament are not supposed to represent national interests, though people tend to see, as Renaud Dehousse stated, their deputies in the EP as representing certain territories.²⁶ They have strong domestic connections indeed. The argument was well founded in the past by the provisions of the Treaty on the European

²³ Dehousse (note 6), „MEPs are largely perceived as national representatives, and it is unlikely that governments from “in” and “out” countries will accept that people elected in other countries may have a meaningful role in decisions affecting their interests. If the consolidated Eurozone is to be endowed with a strong parliamentary branch, the European Parliament would therefore be well advised to reconsider its position“.

²⁴ Louis (note 7).,

²⁵ Wessels (note 15),

²⁶ Dehousse (note 6),

Parliament, stating that its deputies represented the peoples of the Member States. But it has been changed: As Articles 10 (2) and 14 (2) TEU now emphasise, Members of the European Parliament shall represent the citizens of the Unions. This provision is not about particular individuals, regions or Member States, but means the citizens of the Union as a collective, similar to what is „the people“ in Member States. Accordingly, Article 10 (4) TEU refers to the parties at the European level contributing to expressing „the will of citizens of the Union“. Finally, Article 3 (4) TEU together with Articles 119 to 144 TFEU make clear that the establishment and the functioning of the EMU and, in particular, the common currency, is one of the objectives of the Treaties and therefore defined as of common interest of the EU, and not a matter for the euro-countries only.

Though there are limited perspectives for all Member States to become part of the eurozone in a foreseeable future, a clear preference was expressed in the workshop for keeping the option open and not to deepen the split between euro- and non-euro Member States by the formation of specialized euro-groups within the institutions. Elmar Brok pointed out that the European monetary policy is not a policy of the euro-countries only, but a policy of the EU as a whole. If the aim is to avoid a fragmentation of the Union, any possible solution requires not only a high degree of loyalty of non-euro members in the institutions regarding the common objectives of the EMU, its proper functioning and the participation of all Member States, but also due respect of the „outs“ regarding the vested interests of the euro-countries for a prosperous euro, to the benefit of all.

Another solution, mentioned by Jean-Claude Piris, would be a new body of representatives of national parliaments with new powers of co-decision in the areas covered by the cooperation of euro-countries in the fields of economic and fiscal policies. Like for an analogy to the COSAC specialized in this field, or a joint parliamentary committee with 34 members, there was little support, however, for such new specialised institutions in the EU, as Jo Leinen said. Mixed parliamentary committees with only some members of each parliament do not provide legitimacy. In addition, Wolfgang Wessels pointed out that members of parliaments are reluctant to participate in such committees if they have no power to take relevant decisions: „In spite of many declarations parliamentarians draw no real benefits from these forms of dialogue as they produce no binding results. Thus even flexible fine-tuned procedures will not overcome major reasons for the irrelevance of a multi-level parliamentary cooperation.²⁷“

Absent formal treaty amendments there seems to be a general feeling, instead, to consider informal arrangements of „self-regulation“ (Elmar Brok) particularly within the European Parliament for avoiding risks for the functioning and the legitimacy of decisions regarding the eurozone, on the one side, and for ensuring the openness of the eurozone for all „outs“ to join as provided for in the Treaties, on the other.

3. NEW POWERS FOR THE EU IN ECONOMIC AND FISCAL POLICIES

The diverse measures taken at the EU level for addressing the financial crisis have generally been welcomed, particularly such legislative acts like the Six-pack and the proposed two-pack, but also the ESM and the FT as a first, provisional step. It was clear, however, that new responsibilities and powers for economic and fiscal policies have to be conferred to the Union in order to achieve a workable and stable framework for the already centralized monetary policy (1.) Concerns, however, have been expressed with regard to

²⁷ Wessels (note 15),

the necessary limits of such new European competences and the respect of the budgetary autonomy of the Member States, which many believe is key for national sovereignty (2.). A solution could be Union powers for setting binding parameters for national budgetary policies in the form of benchmarks and corridors as required for the stability of the euro and enhanced growth Union-wide, margins within which each Member State would continue to take its decisions autonomously (3.). For the exercise of such Union powers certain mechanisms were considered in order to include the national Parliaments in the processes of decision-making at the EU level (4.).

3.1. EU economic and fiscal policies and an increased budget

The success of the European Union and the Community method, as compared to traditional modes of international cooperation, can be explained as a result of the decision to establish supra-national legislative powers, exercised by supra-national institutions with inclusive and democratically controlled procedures, subject to the rule of law and to effective judicial review. It was surprising, yet, that for ensuring an efficient economic fiscal political framework for the common currency governments believed that intergovernmental coordination and cooperation in economic and fiscal policies following the traditional mode of international cooperation would be an appropriate solution. And it was not less erroneous to believe that control and sanction mechanisms based upon expected reactions of the financial markets, in the case of failures of Member States and violations of the common discipline, or upon intergovernmental decision-making would be effective. Practice and the financial crisis have demonstrated that markets follow their own rationale, and that Member States of a Union diplomatically resist shaming and sanctioning one-another. The intergovernmental approach does not work, and to agree upon closer cooperation is not a solution to the structural problem of the EMU. More European solutions, therefore, need to be found, and have been discussed at the workshop.

One set of proposals was introduced by Vivian Schmidt to restart the European economy: Project bonds should be considered for stimulating infrastructure investments; re-allocation of existing resources to stimulate growth could be achieved by a reform of the structural funds and a reform of the CAP “beginning with a cap on big outlays to rich farmers—through the equivalent of a ‘millionaires’ tax” would allow using parts of that budget “for a poverty alleviation scheme for all citizens”;²⁸ and “automatic macroeconomic stabilizers”, she says, “need to be added to ensure that where Eurozone member-states no longer had the capacity to protect the welfare of their own citizens, the EU would kick in”, including “an unemployment insurance fund that worked across borders plus a EU employment agency to facilitate cross-border movement”.²⁹ Part of this is not possible without amending the Treaties, however.

Consequently, the necessary conclusion reflected also in Article 16 FT is that new powers must be conferred to the European Union for the design and implementation of an economic and fiscal policy at the European level. Given the fact that budget is one of the key areas of national sovereignty (Jean Claude Piriš) there are clear political limits to such a step. New EU powers, therefore, can be accepted only in so far as required for establishing legally binding rules as necessary to avoid Member States’ economies drifting apart to an extent that the common currency cannot be sustained. Complementary to such new powers, there seems to be a need for a substantive increase of the financial resources of the EU to be used for an enhanced and reformed cohesion policy and – where need be –

²⁸ See also the critique of Iain Begg, Budgetary Solidarity in a multi-tiered Union, in the upcoming compendium on CAP: „the spending is not that well-targeted, insofar as rich farmers or landowners effectively receive substantial transfers ».

²⁹ Schmidt (note 2),

specific interventions to allow investment and stimulate growth in certain Member States or regions. Iain Begg explains that in the EU “the absence of sufficient fiscal capacity is an obstacle to a more substantial role for the EU (or euro area) level in either macroeconomic stabilisation or solidarity policies”.³⁰ Having discussed three options for “a fresh approach to solidarity” - some pooling of stabilisation capacity, a separate fiscal capacity for the euro area, and a new euro area fiscal capacity to raise revenue, i.e. by a corporate income tax³¹ - he concludes “that a wide-ranging debate about budgetary solidarity is needed, both in the EU as a whole and in the euro area”.³²

The problem is how to ensure solidarity on a mutual basis, with responsibility including for help and reforms on both sides, and – as discussed by Begg – to avoid moral hazard and increasing cleavages among the Member States.³³ There would be little support, at least in Germany, for what is called a “transfer-Union”, where the taxpayer of some Member States would pay for unforeseeable debts of other, in particular if the latter fails to implement deep structural reforms as needed to cope with its problems. If it is true that the European Union already is a „transfer-Union“ to some extent today, it seems to be similarly true, nevertheless, that a substantial increase of such transfers is imperative for keeping the Union economically, socially and politically together. For Mattias Kumm it is important to see the real dimensions: Member States have invested six times the volume of the ESM when they intervened for salvaging their banks. This enormous transfer from public to private sector (financed by loans from the private sector), for him, was among the reasons for the financial crisis.³⁴ In his view it should be a responsibility for the EU to ensure that not private banks but the ECB is the lender of last resort for Member States.³⁵ And, he argues, with the common currency and the guarantee of free flow of capital the EU has taken a responsibility for some of the reasons of the crisis so that it is “plausible to allocate financial public sector risks resulting from financial sector failings with the European level. The costs of bank-bailouts are to a significant extent the result of genuinely European risks, for which it would be appropriate to hold the European Union as a whole accountable”.³⁶

From the German experience of the „horizontal financial compensation“ in the federal state Kumm draws the conclusion that a transfer system would work only if payments are not directly made from one state to the other; instead, to be accepted, they need to be financed through European own resources. The funds collected by European taxes should than be reallocated by common democratically legitimate decision.³⁷ Accordingly, also Vivian Schmidt discusses several kinds of „market generated taxes“ to be levied at the European level in order to feed a EU budget so to ensure that the EU is not any longer perceived as a „transfer union“ in which „one or more member states paid for the rest”.³⁸

Schmidt proposes that the necessary funds should be raised by “new revenue streams” such as a financial transaction tax, a “transborder transaction tax”, or a “solidarity tax”.³⁹ For Begg a promising solution “to fund new fiscal capacity” would be a corporate income tax.⁴⁰ Miguel Maduro suggests that an increased European budget alimented by such

³⁰ Begg (note 28)

³¹ Begg (note 28), „Extrapolating from current national yields, the potential revenue from such a tax – wholly assigned to the euro area level – is at least 2% of GDP. This would comfortably exceed the estimates of what is needed for a limited stabilisation capacity and could also be a source of tax backing for more elaborate crisis resolution funds.

³² Begg (note 28) et seq., with „constraints and challenges“ discussed *ibid.*, et seq. On moral hazard see also *ibid.*,

³³ Begg (note 28)

³⁴ Mattias Kumm, *Democratic Challenges Arising from the Eurocrisis: What kind of a constitutional crisis is Europe in an what should be done about it?*, in the upcoming compendium

³⁵ Kumm (note 34).

³⁶ *Ibid.*, .

³⁷ *Ibid.*,.

³⁸ Schmidt (note 2),

³⁹ *Ibid.*

⁴⁰ Begg (note 28)

taxation for transactions who particularly benefit from the freedoms the EU, for economic activities with substantial external effects across borders or activities which Member States could not individually regulate or tax, should allow even replacing the current regime of loans including the ESM for resolving the financial crisis by an "EU budget stabilization fund" established to provide collateral for debt to be issued by states with difficulties in accessing financial markets, provided they agree an adjustment program with the Union.⁴¹ Taxes he considers as appropriate would include, beside a financial transaction tax as the "paramount example", a European corporate tax or a tax on corporate shareholders or a carbon emission tax.⁴²

European taxation would mean that the system is of general application throughout the EU. But how could this be made politically acceptable. Elmar Brok made clear that if such a tax is applicable only for a limited number of Member States, it could not easily be conceptualized to feed the general budget of the EU. However, if it were collected for a special fund, it would be difficult to find adequate democratic solutions for administering it; would it be possible to allow non-participating countries to benefit from it, without again facing the political difficulties of a transfer-union? If differentiated budgeting in the EU is the solution with the effect of differentiating also solidarity mechanisms, this may accentuate, as Iain Begg submits, „cleavages between groups of Member States, undermining the unity of the EU".⁴³ For the present decade, in his view, the most promising answer is to concentrate on developing mechanisms that can offer budgetary solidarity as insurance against shocks, rather than distributive transfers.⁴⁴

3.2. National budgetary autonomy: A question of sovereignty?

The key of national sovereignty, as many say, is the budgetary autonomy of the national parliaments. This was stated very clearly in the jurisprudence of the German Federal Constitutional Court, namely in the judgments on the Treaty of Lisbon, on the Greek umbrella and recently on the ESM/FT. The national parliaments must remain „the masters of their own budgets".

„A necessary condition for the safeguarding of political latitude in the sense of the core of identity of the constitution (Article 20 (1) and (2), Article 79 (3) of the Basic Law) is that the budget legislature makes its decisions on revenue and expenditure free of other-directedness on the part of the bodies and of other Member States of the European Union and remains permanently "the master of its decisions" (see BVerfGE 129, 124 <179-180>)".⁴⁵

This was also referred to during the discussion at the workshop, and it seems to be clear that questioning the budgetary autonomy of the Member States or replacing their authority on economic and fiscal policies by Union powers would not be acceptable neither by this Court nor by the Member States at large.

On the other hand, questions may be raised regarding to the real extent of national budgetary autonomy in the present system. Legal constraints result from the provisions of

⁴¹ Maduro (note 1), Similarly Kumm (note 34). „Genuinely European resources, best raised from taxes or levies that burdens actors and transactions that are profiting financially from the internal market (e.g. shareholders, corporations, transactions with strong cross-border dimensions like certain financial transactions), appropriately connect regulatory responsibility with financial accountability". It is questionable, however, if such a system would not run counter the idea of market freedoms and internal market, as particularly the use of these freedoms would be « punished » by such kind of taxes.

⁴² Maduro (note 1),

⁴³ Begg (note 28)

⁴⁴ Begg (note 28)

⁴⁵ GFCC case 2 BvR 1390/12 of 12.9.2012 - ESM, para. 197, see: http://www.bverfg.de/entscheidungen/rs20120912_2bvr139012en.html.

Articles 121 to 126 TFEU as well as from the Union legislation adopted for strengthening the Growth and Stability Pact. The Two-Pack, when adopted, will introduce further limits for the discretion of the Member States in the relevant policies. What is more important, however, is the spill-over of each policy-decision taken at the national level in economic, fiscal and even social and employment policies in each of the Member States on the others. Strict austerity policies over years in one Member State may put the economies of others under stress. Extensive public spending financed by credits in one Member State, on the other hand, may have the result of exercising enormous pressure on parliaments of other Member States to – involuntarily – agree on grants in an unknown dimension for salvaging the euro. This is not budgetary „autonomy“. The budgetary autonomy of national parliaments, many people are dreaming of and continue to defend, is already lost.

What is at stake is to design an institutional framework for ensuring effective but shared autonomy by establishing common rules under which it is possible to get control of the external effects of national economic and fiscal policies. Parliaments, in accepting such mechanisms, would not lose powers, but in fact regain some of the autonomy lost. And this would, finally, remedy the real democratic deficit.⁴⁶ If the citizens of one Member State are affected by the spill-over of decisions in another without having any influence on their framing, we face a problem of democracy. As can be seen very drastically in Greece, Ireland and Spain, also the consequences of a national policy, expressed in terms of conditionality of any assistance within the eurozone, can be felt to be not democratic at all. There are good reasons, thus, for considering remedies to this unsustainable situation. Competitive federalism is not a solution at least within the eurozone. Only a common policy seems to be a democratic way ahead.

3.3. European parameters as a framework for budgetary autonomy

The question how the constitutional framework of a common European economic and fiscal policy should look like is yet to be resolved. It is clear that the Commission should play a major role in the preparation of legislative acts and in the supervision of the implementation, while the European Parliament and the Council (euro-group) would take the decisions, with the Court of Justice ensuring judicial review and deciding, where appropriate, on sanctions. The Economic and Social Committee (Article 300 TFEU) could play a major advisory role regarding general questions, while it would be for the Economic and Financial Committee (Article 134 TFEU) to ensure coherence of the operational part of the Union policies also with the monetary policy of the ECB.

In substance, the new provisions could build upon Articles 9 to 11 FT. Action at the Union level must be limited to lay down common objectives to be met, in line with more general principles and guidelines. It may include setting up corridors within which public spending might be allocated to the diverse sectors, and seek for a coherent allocation of Union resources in order to stimulate or complement national policies.

Banking supervision, as presently envisaged to be established as a new task for the ECB, may be a first step towards a banking union, as part of an economic union. Together with the establishment of a centralised deposit guarantee and a privately financed banking resolution fund it will have to be embedded in the common economic and fiscal policy. As Louis states: “Banking Union, at its final stage, includes elements of Fiscal Union, and Fiscal Union goes hand in hand with more Economic Union and it includes and needs, more Political Union.”⁴⁷

⁴⁶ Maduro (note 1),

⁴⁷ Louis (note 7),.

3.4. National parliaments and the EU decision-making processes

Where questions of national budgets are decided upon, it seems to be difficult to do this without an enhanced involvement of the national parliaments. Wolfgang Wessels discusses the various options of such arrangements. His conclusion, however, is that none of the options is satisfying. Instead he finds a solution in a dialogue-model: "In a coordinated division of labour, parliaments of both levels should jointly exercise a comprehensive participation in the ex-ante preparation and an ex-post scrutiny and control. This model is based on a strategy of a multi-level alliance or coalition of parliaments vis-à-vis power seeking executives in the European Council".⁴⁸ Article 13 FT already provides for the establishment of a conference of representatives of the relevant committees for the European Parliament and the national parliaments „in order to discuss budgetary policies and other issues covered by the Treaty“. Very strong reservations were made, however, regarding any such new bodies without real powers. Members of parliaments would not find it to be of value to spend their time for discussing without relevant decision-making. COSAC was not considered to be model for resolving the problem of legitimacy.

It is necessary, therefore, to integrate close parliamentary interaction into the existing institutional setting with a view to include the European dimension of the national policies in the national discourse, and vice versa, to open up the minds of the decision-makers at the European level for specific national problems. This aim could be achieved by the participation of national members of parliament in the work of the budgetary committees of the European Parliament, and by the participation of members of this committee in the actual work and discussions of the budgetary committees of the national parliaments. Such openness and inclusion would support mutual understanding, but also allow for a more qualified control the national parliaments are exercising on their ministers in the Council. It seems to be a step further, when Andrea Manzella proposed to make the European Parliament a centre of parliamentary networks, or of interparliamentary committees with real decision-making powers as part of a new constitutional architecture of the Union: "Without this parliamentarism of dialogue, of monitoring and of cooperation between the European Parliament and national parliaments, the current European governance really would resemble to an intergovernmental alliance that like a steel cage falls on European society, forcing it to find an alternative road, without the breeze and the hopes of constitutionalism."⁴⁹

4. DEMOCRATIC LEGITIMACY IN THE EUROPEAN UNION

Far beyond the issue of economic and financial competences at the Union level the question of democratic legitimacy in the European Union is still pending. In some respect, as Joseph H.H. Weiler pointed out, the Union is a "democracy without the people", and there is no "demos" at the European level indeed.⁵⁰ He made clear that there is no real representation nor accountability; people have no real political choice when called to elections, and even if a specific policy – like the Lisbon Process 2012 or the climate change policy, Copenhagen summit – was a complete failure, there is no person to be thrown out and replaced, through elections, by a better political leader. Given the lack of a "demos", people in one country would not understand why they should agree to bail out another country or accept

⁴⁸ Wessels (note 15),

⁴⁹ Andrea Manzella, Is the EP legitimate as a parliamentary body in EU multi-tier governance?, in the upcoming compendium

⁵⁰ Joseph H. H. Weiler, Democracy without the People: The Crisis of European Legitimacy "own resources", in the upcoming compendium et seq.

substantial financial transfers to other countries. Thus, the question of democratic legitimacy reveals to be fundamental for any future solution also to the financial crisis in the EU.⁵¹ Input legitimacy, thus, appears to be marginal and the democratic deficit is built into the very structure of the EU governance model. Output legitimacy, for Weiler is not an appropriate criterion, and what is remaining, to him, is political messianism: "In political messianism, the justification for action and its mobilising force, derive not from process, as in classical democracy, or from result and success, but from the ideal pursued, the destiny to be achieved, the 'Promised Land' waiting at the end of the road. Indeed, in messianic visions the end always trumps the means". And he sees European integration as "a political messianic venture par excellence".⁵² Given the present failures and crisis, however, even this is not a sufficient source of legitimacy any more. Weiler, thus, concludes, that "the politicization of the Union which will be the key to capturing convincing political legitimacy.

A number of ideas on these issues, have been tabled at the workshop, and they are worthwhile to be considered further in the discussion.

4.1. Party-groups' candidate for a double-hatted President

It is an old idea that each party group represented in the European Parliament should present one top-candidate in the European elections for the office of the president of the Commission as well as a specific political program, so to allow the electorate a real political choice. But the idea seems to get new momentum, and Miguel Poires Maduro and Matthias Kumm⁵³ are explaining why they deserve further consideration. Maduro is going so far as to propose "'transforming' elections to the European Parliament into an electoral competition for the government of Europe".⁵⁴ If it is true, that the Commission's president has not much power to implement his or her program, in particular, when the political colour of the majority of the ministers in the Council is the opposite, the real political power of the Commission is not sufficiently evaluated. The Commission's president is already strong when he/she has the support of European Parliament. It is the Commission, still, who has the quasi-monopoly for making proposals for European legislation. And the Commission's President can channel his or her political ideas and initiatives through the preparation of, and his participation in the discussions of the European Council. With the expertise and competence of the Commission's services, composed of highly qualified and committed European civil servants with origin, culture and knowledge from all Member States, the President disposes of an exceptional manpower for elaborating his strategies and policies. Yet, the president's office could be strengthened further by merging it with the office of the president of the European Council. The EU, with a "double-hatted" President, elected and scrutinised by the European Parliament, would be given a face, and a success or failure of certain European policies could more easily be attributed to a person who is politically accountable and may be re-elected or replaced after the next elections.

4.2. Commissioners' candidates on top of national electoral lists

In each of the Member States, each party campaigning for European elections should, as suggested by Vivian Schmidt, present her candidate for the office of a Commissioner at the head of its national electoral list.⁵⁵ The top-candidate of the party winning the election

⁵¹ Ibid., passim.

⁵² Weiler (note 50),

⁵³ Maduro (note 1), et seq.; Kumm (note 34). arguing for a « genuine competition for a European government »

⁵⁴ Maduro (note 1),

⁵⁵ Schmidt (note 2),

should be proposed under Article 17 (7) subpara. 2 TEU by his government for being appointed as a member of the Commission. Again, this would lead to more visibility and allow choices on persons and programs and enhance legitimacy and – at the next elections – accountability of the Members of the Commission. Schmidt explains that not only the president's election by the European Parliament would “ensure that the elections themselves would help bring real (left/right) political debate back into the EU policymaking process, thereby helping gradually to politicize the EU” and that they would “serve as a first step to ensuring that the Commission gained a kind of democratic legitimacy of its own as initiator and implementer of EU legislation...”, and “by tying the Commission more directly to the EP through its election, it would become more accountable to the EP politically, and thereby expected to reorient EU policies in conformity with the EP electoral majority”.⁵⁶

4.3. The European Parliaments' powers in future politics

Apart from the Commission, the real powers and political influence of the European Parliament needs to be made more explicit. The economic dialogue established by the Six-Pack as well as, in particular, a strong involvement in the European semester present great opportunities for promoting democratic control in areas of high political sensitivity. With new powers of the EU in the area of taxation, banking supervision and a rescue fund for bank failures, but more importantly with European competences in the field of economic and fiscal policies, the European Parliament should become the place where policies with considerable impact on the daily life of citizens will be (co-)decided.

With such new fields of responsibility the European Parliament will attract more attention of the citizens, as its policies are becoming more relevant for the citizen, and more “salient”, as Andrew Moravcsik would say.⁵⁷ Political choices among parties participating in the elections will become possible and relevant, having an impact upon the policies led at the European level. As Matthias Kumm stresses, though neither the European Parliament nor the Commission played a substantial role in the decision-making regarding the financial crisis, and there were “no cross-national debates about alternative futures for Europe”, with the Six-pack, the ESM and the FT the Commission gains considerable powers to intervene in budgetary processes of Member States”.⁵⁸ The need for enhanced legitimacy of the Commission therefore seems to be an important issue on the European political agenda.

4.4. The European dimension of the national parliaments' work

As suggested above, particularly in the field of economic and fiscal policies, the European role and responsibility also of the national parliaments should be made more explicit. It is important already now, though underestimated. If the national parliaments, as Article 10 TEU seems to imply, are one of the two sources of legitimacy, if not the primary source, as the GFCC suggests,⁵⁹ they are acting as European Parliaments, and people should be more conscious of this responsibility. They have to guide and control their respective ministers in the Council, but they are also implementing the directives decided at the European level. Regarding budgetary policies within a European framework it should be for them not only to participate directly in the “economic dialogue” or indirectly through their ministers in the drafting of the rules and guidelines to be taken account of when national budgets are

⁵⁶ Ibid.

⁵⁷ Andrew Moravcsik, In Defence of the ‚Democratic Deficit‘. Reassessing Legitimacy in the European Union, in: JCMS (2002), p. 603, at 615 et seq., see: <http://www.princeton.edu/~amoravcs/library/deficit.pdf>

⁵⁸ Kumm (note 34). P. 16 et seq.

⁵⁹ GFCC, judgment of 12 October 1993, 2 BvR 2134 – Maastricht, BVerfGE 89, 155 at 185 et seq.; similarly: GFCC, judgment of 30 June 2009, 2 BvE 2/08 et al. – Lissabon, BVerfGE 123, 267 at 368: „additional independent source of democratic legitimation“, see: http://www.bverfg.de/entscheidungen/es20090630_2bve000208en.html.

adopted, but also engage in an interparliamentary dialogue so to understand and take account of European as well as each-others particular needs and interests when determining the priorities of national economic and fiscal policies.⁶⁰ The idea of Maduro to organize a “state of the Union” speech and discussion regularly in each of the national parliaments⁶¹ would add to enhancing mutual understanding among political elites at the two levels of governance in the Union.

5. NEW VISIONS AND MISSIONS FOR THE EU

If the legitimacy of European politics and action in the first periods was founded much more upon the successful progress of integration (output legitimacy) and guided by the visions of a united and peaceful Union of the peoples of Europe, Joseph H.H. Weiler talked about “political messianism”,⁶² it is difficult to find acceptance for it in times of crisis, an imminent failure of the EMU and where the original narratives for the benefits of integration have lost their particular value. As it seems to result from the discussions, there is a need to open a broad public discourse upon what the European Union is standing for, why people should commit themselves to keep it running and develop it further. There is a need for a new political messianism.

Clear preferences were expressed for unity, as opposed to any forms of a multi-speed, cherry-picking or differentiated Europe, the complexity of which would exclude understanding and support of the Union by the people. Instead, there is a need for unity to be completed and developed so to allow the citizens of the Union to participate, through their institutions at the European level, in the proactive shaping of globalization, a process which otherwise would just expose them and their states to pressures making democratic self-determination difficult. There is a need for having strong common institutions for a Europe the relative influence of which at the global level is continuously diminishing. This should allow the Union, in particular, to regain political control on the financial markets instead of believing that the financial markets would fix problems in the EMU by sanctioning Member States who are found violating the commonly agreed standards of budgetary discipline.

Rather than striving for an ideological unity of a demos, it is perhaps this insight in the utility of common institutions and policies to pursue objectives which are beyond reach for the individual Member States, and awareness for the need also to constrain national autonomy with a view to gain new opportunities for democratically legitimate action at the Union level in so far as individual policies of one country would adversely affect the legitimate interests of the citizens of others, what might progressively lead to the establishment of the necessary link of solidarity among the citizens of the Union and of a common European identity, the fundament of effective democracy.

⁶⁰ See Manzella (note 49),

⁶¹ Maduro (note 1),

⁶² Weiler (note 50),

REFERENCES

- Jürgen Habermas, *Zur Verfassung Europas. Ein Essay*, 2011.
- Jürgen Habermas, Only deeper European Integration can save the eurozone, *The Guardian*, 9 August 2012, at: <http://blog.daum.net/thesun-isnew-eachday/707> (last visit 26 Nov. 2012).
- Andrew Moravcsik, In Defence of the 'Democratic Deficit'. Reassessing Legitimacy in the European Union, in: *JCMS* (2002), p. 603, at 615 et seq., see: <http://www.princeton.edu/~amoravcs/library/deficit.pdf>

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